



COPY

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE, JR.
Governor

TELEPHONE 304-348-2616

January 8, 1986

Henry E. Wood, III, Esquire
James F. Wallington, Esquire
Suite 1030, One Valley Square
Charleston, WV 25301

Larry W. Blalock, Esquire
Charles Q. Gage, Esquire
Jackson, Kelly, Holt & O'Farrell
P. O. Box 553
Charleston, WV 25322

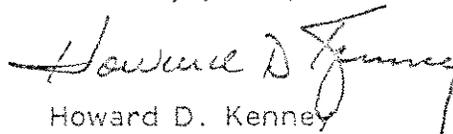
RE: Frymier V FMC Corporation/REP 72-85

Dear Mr. Wood and Mr. Blalock:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Frymier V FMC Corporation/REP-72-85.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,



Howard D. Kenney
Executive Director

HDK/kpv

Enclosure
CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

RECEIVED

DEC 17 1985

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

W.V. HUMAN RIGHTS COMM.

TERESA FRYMIER,

Complainant,

vs.

Docket No.: REP-72-85

FMC CORPORATION,

Respondent.

ORDER

On the 11th day of December, 1985, the Commission reviewed the Findings of Fact, Conclusions of Law and Final Decision of Hearing Examiner Marjorie Martorella. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own, with the exceptions set forth below.

The Commission hereby amends the Findings of Fact, Conclusions of Law and Final Decision as follows: by inserting into the last paragraph on page 8 after the figure \$34,957.83 the phrase "plus pre-judgment interest on that amount at ten percent (10%) per annum from July 2, 1984 to August 8, 1985, the final date of the hearing on this matter;" and by deleting the phrase "that each party be required to bear its own costs and attorneys fees" and substituting therefor the phrase "that the respondent shall pay the complainant's reasonable attorney fees after determination of same by the Commission based on a voucher to be submitted by complainant's attorney specifying and justifying his

fee request."

It is hereby ORDERED that the Hearing Examiner's Findings of Fact, Conclusions of Law and Final Decision be attached hereto and made a part of this Order, a copy of which shall be sent by Certified Mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 19 day of Dec., 1985.

Respectfully Submitted,



CHAIR/VICE-CHAIR
West Virginia Human
Rights Commission

*Approved
RES 11/6/85*

WEST VIRGINIA SUPREME COURT OF APPEALS FOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION

RECEIVED

TERESA FRYMIER,

NOV 12 1985

Complainant,

vs.

CASE NO. REP-72-85
W.V. HUMAN RIGHTS COMM.
J.P.

FMC CORPORATION,

Respondent.

FINAL DECISION

This matter was heard on June 14th, 15th, and 26th and August 7th and 8th, 1985, pursuant to a notice dated March 8, 1985. The complainant, Teresa Frymier, appeared in person and by her counsel, Henry E. Wood and James Wallington, and the respondent by its counsel, Larry W. Blalock and Charles O. Gage. The complainant testified on behalf of herself and Wayne Patterson, Henry C. Baily, and Synthia J. Welch were called as witnesses in her behalf. The following persons appeared and testified on behalf of the respondent: David Dick, Victor Carroll, James Duffield, Hal Turley, Robert Reed, and Kenneth W. Scarberry.

The issues presented are whether the respondent discharged the complainant from employment in reprisal for complainant's action in filing verbal complaints, written grievances and ultimately, a Human Rights charge alleging sex discrimination; and, whether the discharge was discriminatorily motivated on the basis of complainant's social relationship with a black male.

FINDINGS OF FACT

Upon full consideration of all the evidence, exhibits, and stipulations of the parties, and for reasons outlined on pages 31 through 38 of the record of proceedings on August 8, 1985, the Hearing Examiner finds as follows:

1. Complainant, Teresa Frymier, was discharged from her janitorial position with respondent, FMC Corporation, on or about July 2, 1984.

2. The incident precipitating Ms. Frymier's discharge involved Ms. Frymier's leaving FMC's South Charleston plant on June 26, 1984, during her shift, for a period of approximately 2 hours and 10 minutes and traveling to a house located on 9th Avenue in South Charleston, West Virginia.

3. Unbeknownst to Ms. Frymier, when she exited the plant, Industrial Relations Manager, David Dick, and Materials Manager, Victor Carroll, were conducting a surveillance operation on her, which was planned and executed as a result of an anonymous "tip", with the knowledge and approval of the plant manager.

4. The surveillance of Ms. Frymier was precipitated in part by previous relations between Ms. Frymier and FMC which involved her filing grievances and complaints involving charges of discrimination.

5. The surveillance conducted on Ms. Frymier by

Management on June 26, 1984, incidentally disclosed other instances of employees leaving the plant without permission. Five employees received discipline, but only Ms. Frymier was discharged.

6. Ms. Frymier had been employed at FMC beginning November 10, 1975. Beginning approximately March of 1983, series of disputes arose between Ms. Frymier and the company which culminated in her filing verbal complaints, written grievances, and ultimately a Human Rights Commission charge alleging discrimination.

7. Prior to the incident precipitating Ms. Frymier's discharge, Ms. Frymier received discipline based on events occurring April 26, 1983, when Ms. Frymier was charged with being out of her work area, with unauthorized possession of company property, and engaging in unauthorized use of company's equipment. Ms. Frymier also received a 3 day suspension relating to events occurring August 8, 1983, when she was charged with not reporting to her assigned job and performing no work for a four and half hour period.

8. In discharging Ms. Frymier, the employer followed its own written policy.

9. In applying the written policy as to other employees, however, the company consistently treated the same offenses, that in Ms. Frymier's discipline history led to her

discharge, as either minor offenses or no offense at all.

10. Larry Loftus, an employee, was absent from the plant on the evening of June 26, 1984, and the employer never ascertained his whereabouts or the reason for his absence. Management considered Mr. Loftus to have a "spotty record". Mr. Loftus received a three day suspension. Employee Synthia Welch, on or about August 15, 1982, went home for lunch without a pass, fell asleep, and was absent for four hours. She received a three day suspension.

11. At the time of the incident which precipitated Ms. Frymier's discharge, there was no clear understanding on the part of janitorial employees at FMC as to whether janitors were included among those employees who were permitted to leave the plant for their lunch break. Some janitorial employees customarily elected to leave the plant for their lunch break and the employer did not communicate to employees that this conduct was prohibited.

12. Subsequent to the surveillance on June 26, 1984, and investigation thereafter, management concluded that there was an apparent "run-amuck" situation in the plant with people being out at their leisure.

13. When confronted with her conduct on June 26, 1984, Ms. Frymier lied.

14. Subsequent to Ms. Frymier's discharge, she "helped

out" at a business, Sunlite Seafood, owned by a friend. For this assistance she received no wages or salary. Ms. Frymier performed the same duties prior to discharge at FMC at Sunlite Seafood as she performed after her discharge.

15. Notwithstanding her assisting at Sunlite Seafood, Ms. Frymier remained available for other paid employment and looked for work.

16. Subsequent to her discharge, at least part of Ms. Frymier's meals were provided by Wayne Patterson, the owner of Sunlite Seafood. Mr. Patterson's providing meals for Ms. Frymier was motivated by the social relationship rather than as payment for services performed by Ms. Frymier at Sunlite Seafood. Mr. Patterson paid Ms. Frymier's car insurance on a one time basis after her discharge, but not as compensation for Ms. Frymier's services at Sunlite Seafood.

17. After Ms. Frymier's discharge, Mr. Patterson furnished her with approximately \$20 per month for gasoline for her car by permitting her to use his credit card. The purchases of gasoline on a regular basis is outside a normal social relationship or friendship, and was in return for services Ms. Frymier performed to assist Mr. Patterson at Sunlite Seafood.

18. Ms. Frymier's discharge by the employer was not motivated by her social relationship or association with Wayne

Patterson, a black male.

19. Pursuant to the stipulations of the parties, the Hearing Examiner finds that Ms. Frymier would have been laid off from her job at FMC on September, 16, 1985.

20. Ms. Frymier's gross back pay between the date of her discharge and her stipulated lay off on September 16, 1985 totals \$29,405.43.

21. Ms. Frymier's projected overtime pay during the period between her discharge and her stipulated lay off would have totalled \$8,426.16.

CONCLUSIONS OF LAW

1. FMC is an employer within the meaning of the Human Rights Act and the complainant, Teresa Frymier, was, at the time of incident at issue here, an employee within the meaning of that act.

2. By virtue of the findings of fact contained in paragraphs 1 through 12 above, the Hearing Examiner finds ample evidence of disparate treatment of Teresa Frymier as opposed to other employees who had not filed grievances and complaints alleging sex discrimination and, therefore, the Hearing Examiner finds that Teresa Frymier has established a prima facie case of discrimination.

3. The employer has not met its burden in establishing a nondiscriminatory basis for the discharge.

However, evidence presented by the employer will support a nondiscriminatory basis for a suspension in excess of the three or five day suspension given other employees.

4. Ms. Frymier's discharge by the employer was motivated in reprisal for her previous acts in filing a verbal complaint, written grievances, and ultimately, a Human Rights Commission charge alleging sex discrimination.

5. Ms. Frymier had a clear legal right to make verbal complaints, written grievances, and a Human Rights Commission complaint alleging sex discrimination.

6. Ms. Frymier's being absent from work for a period of two hours and ten minutes justified discipline.

7. Ms. Frymier's lying when confronted with her actions on June 26, 1984, will justify a more severe discipline than meted out to other employees for similar offenses. However, lying to an employer under this set of circumstances does not justify discharge.

8. Had Ms. Frymier not filed complaints and grievances alleging discriminatory policy and practices on part of the employer, she would have received and the record justifies a suspension of 30 days without pay.

9. The record reveals no credible evidence that Ms. Frymier's discharge was because of her social relationship with Wayne Patterson, a black male, and consequently, that

portion of her charge is dismissed.

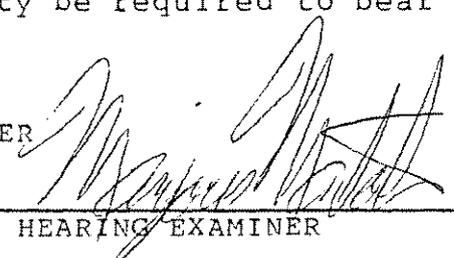
10. The record does not provide a basis for an award to Ms. Frymier based on humiliation and embarrassment.

11. The \$20.00 per month in gasoline received by Ms. Frymier in return for services at Sunlite Seafood constitutes mitigation of the damages in this case.

THEREFORE, the Hearing Examiner recommends to the Human Rights Commission that it find in favor of the complainant; that the complainant be awarded back pay and overtime pay as stipulated by the parties, less pay attributable to a 30 day suspension and less \$20 per month remuneration from casual employment at Sunlite Seafood, for a total award of \$34,957.83; that it find and order that complainant is entitled to all retroactive seniority and benefits due to the unlawful termination of employment; that it find and order that the complainant is entitled to the benefit of any severance package or other arrangement provided like workers through agreement between FMC and Ms. Frymier's union; that FMC be ordered to cease and desist from engaging in acts of reprisal under the West Virginia Human Rights Act; and that this case be closed and that each party be required to bear its own costs and attorneys' fees.

Date: November 1, 1985

ENTER


HEARING EXAMINER

SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA



PAUL CRABTREE
ADMINISTRATIVE DIRECTOR

ADMINISTRATIVE OFFICE
E-402 STATE CAPITOL
CHARLESTON 25305
304/348-0145

November 8, 1985

RECEIVED

NOV 12 1985

W.V. HUMAN RIGHTS COMM.

gsg

Mr. Howard D. Kenney
Executive Director
W. Va. Human Rights Commission
215 Professional Building
1036 Quarrier Street
Charleston, West Virginia 25301

Re: Frymier v. FMC Corporation
REP 72-85

Dear Mr. Kenney:

Transmitted herewith is the file in the above-mentioned matter along with the Findings of Fact and Conclusions of Law submitted by the Hearing Examiner. I have reviewed these Findings and feel they are now ready for review by the Commission.

If you have any questions, please feel free to call.

Sincerely,

Paul R. Stone

Paul R. Stone
Chief Administrative Law Judge

PRS/lad

Encs.

cc: Marjorie Martorella, Hearing Examiner

CERTIFICATE OF SERVICE

I, Paul R. Stone, hereby certify that I have
this 8th day of ^{NOV. 1985} ~~October~~, 1985, mailed a true copy
of the documents named in the attached letter by depositing
said documents in the United States mail in envelopes
properly addressed to the following persons:

Teresa Frymier
2765 Washington Avenue
St. Albans, WV 25177

✓ Henry E. Wood, III, Esquire
James F. Wallington, Esquire
Suite 1030, One Valley Square
Charleston, WV 25301

FMC Corporation
P.O. Box 8127
South Charleston, WV 25303

✓ Larry W. Blalock, Esquire
Charles Q. Gage, Esquire
Jackson, Kelly, Holt & O'Farrell
P.O. Box 553
Charleston, WV 25322

Paul R. Stone