



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Quewanncoi C. Stephens
Executive Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

November 29, 1993

Ira Gangopadhyay
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WV Dept. of Human Services
Beckley Area 25
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Mary C. Buchmelter
Deputy Attorney General
812 Quarrier St.
Charleston, WV 25301

Re: Gangopadhyay v. WV Dept. of Human Services
ENO-422-84 & EANC-423-84

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before a administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,

A handwritten signature in cursive script that reads "Gail Ferguson/mst".

Gail Ferguson
Administrative Law Judge

GE/mst

Enclosure

cc: Glenda S. Gooden, Legal Unit Manager

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

IRA GANGOPADHYAY,

Complainant,

v.

DOCKET NUMBER(S): ENO-422-84
EANC-423-84

WEST VIRGINIA DEPARTMENT
OF HUMAN SERVICES/AREA 25,

Respondent.

ADMINISTRATIVE LAW JUDGE'S FINAL DECISION

Public hearings, in the above-captioned matters, were convened on December 21, 1992 and April 15, 1993 respectively, in Kanawha County, Charleston, West Virginia, before Administrative Law Judge Gail Ferguson. Briefs were filed with the undersigned through October 4, 1993.

The complainant, Ira Gangopadhyay, appeared in person and by counsel, Deputy Attorney General Mary C. Buchmelter. The respondent, West Virginia Department of Human Services/Area 25, appeared by its representative Jack L. Tanner, Administrator of the Department's Beckley Area Office, and by counsel, Deputy Attorney General Thomas W. Woodward.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings,

conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

FINDINGS OF FACT

1. The complainant, Ira Gangopadhyay, is a female who was born in Benaras, India.

2. Complainant has an undergraduate degree with three majors: one in zoology, one in geography and one in home economics.

3. After obtaining her undergraduate degree, complainant was awarded a master's degree in geography from Benaras Hindu University in Benaras, India.

4. Subsequent to obtaining her first master's degree in 1966, complainant was awarded a scholarship to the Indian Institute of Technology to study for a master's degree in regional planning (MRP), which she completed in 1968.

5. While studying for that degree, complainant taught college in Agra, India. She was then awarded a Collinwood Scholarship to

attend McGill University in Canada to enter a Ph.D. program in social culture and geography. In conjunction with this scholarship, she was sent to Guyana, South America for eight months to do a social and cultural study of ethnic race relations.

6. Complainant did not complete the Ph.D. program. Instead, she married and with her husband came to the United States.

7. After arriving in Charleston, West Virginia, in June 1974, complainant began her career as a volunteer programmer with the University for Action program. She was, at that time, working toward a master's degree in social work under the direction of Chairperson Daniel Rubenstein of West Virginia University School of Social Work. As part of her practicum she provided psychosocial services to elderly residents in nursing homes and personal care homes in Kanawha County. She also participated in assisting the West Virginia Legislature in enacting the licensing and regulatory requirements for social workers.

8. After completing all academic requirements and field placement training, complainant was hired by the Beckley Area Office of the Department of Welfare (now Department of Health and Human Services) as a job developer with the Work Incentive Program (WIN). This program was instituted to obtain employment for indigent recipients. Complainant's job was to go into the community and develop jobs, arrange job interviews, and place clients in the job with support services so that they could remain on the job permanently. The goal of the program was to have recipients eventually removed from the public assistance roll. Complainant held that position until approximately December 1976.

9. In May of 1977, the complainant was awarded a master in social work degree.

10. From approximately July 1977 to November 1978, complainant worked as a family service counselor and medicaid area review team worker for the Department of Human Services. In that capacity, she worked with families in crisis. That position involved intervention with families who had a multitude of problems and were in critical need of various resources from the agency and the community. A major goal of that program was to ensure that the interests and welfare of children were protected.

11. In 1978, complainant left that position and went on maternity leave. Her daughter was born prematurely with medical complications. Subsequently, she had another child and she stayed home from 1978 to 1982 to take care of them.

12. In mid-1982, complainant began to seek employment. She looked for openings and read newspaper advertisements. She also would routinely call her former colleagues at the Department of Welfare to find out if there were any openings.

13. On September 20, 1983, the complainant went to the office of Jack Tanner, Administrator of the Beckley, Area 25 Office of the West Virginia Department of Health and Human Resources (hereinafter Department), where she submitted a resume and expressed an interest in any position that may be available.

14. Mr. Tanner spoke briefly with the complainant and advised her that he would take her resume into consideration if any positions became available.

15. On October 26, 1983, the complainant contacted Mr. James Cooper, Coordinating Social Services Supervisor of the Beckley Area 25 office, after hearing of a possible opening in the Department from former co-workers.

16. Mr. Cooper advised the complainant of a possible opening in the Protective Services Unit.

17. The complainant then spoke with Mr. Tanner who advised her that a position in the Protective Services Unit was open and that he would "keep her in mind" for the opening.

18. Shortly thereafter, the complainant called Mr. Tanner again and asked if he would be willing to interview her. Mr. Tanner told her that he had interviewed a few people, but was noncommittal about an interview for her.

19. Complainant waited a few more days to see if she would receive a call. When she heard nothing, she approached her state Senator from Raleigh County, Ted Stacy, and requested his assistance in obtaining an interview. At that time, she also handed him a copy of her resume. Mr. Stacy said he would see what he could do.

20. On or about November 15, 1983, Mr. Stacy sent complainant a note saying that he had talked to Mr. Tanner and that Mr. Tanner would be calling her for an interview. On November 21, Mr. Tanner called complainant and informed her that her interview would be on November 28 at 1:30 p.m. at his office.

21. During complainant's interview on November 28, Mr. Tanner questioned complainant about her educational background. In response, the complainant explained her academic history, her degrees from India and her latest degree from West Virginia University.

22. At one point, Mr. Tanner asked complainant how she got into the social work profession. Complainant explained to him her contact with Dr. Rubenstein and how his influence caused her to become enthusiastic about social work.

23. Mr. Tanner then asked complainant whether her clients could understand her clearly. He wanted to know if her accent was a problem and if she had a problem communicating with people. The complainant responded that she tried to speak clearly and in proper English.

24. Mr. Tanner then told complainant that this position involved work with attorneys. The complainant explained that she had gone to court before on behalf of clients and had worked with some attorneys.

25. Mr. Tanner then asked her why she was so suspicious about getting a fair chance at the job process. Complainant explained to him that, although she was experienced and had been trying to call the office, no one would give her an interview.

26. According to the complainant, Mr. Tanner told her that he was a professional person and knew who could and could not do the job. When complainant asked further what the yardstick of the selection process was, Mr. Tanner told her that education and experience were incidental and that it would be a very personal choice.

27. The complainant, expressing her feelings that she was not being given serious consideration for the position, explained to Mr. Tanner that she had felt compelled to seek intervention through Senator Ted Stacy to obtain the interview.

28. At this point, according to the complainant, Mr. Tanner stood up from his chair. His face was red, and he shouted at her, "Ms. Gango, you are overly expressive and overly aggressive." He then told her that he wanted someone who would present a more "harmonious" picture. Before complainant could respond, he aborted the interview process and came across to the edge of his desk and stood there. When complainant got up and took her jacket from the chair, Tanner said, "You know your way out, don't you?" Mr. Tanner denies making these remarks or becoming agitated.

29. The position available was a Social Worker II position, that of a social worker in the Child Protective Services Unit. Respondent's job description stated that the employees is expected to bring "social casework knowledge and experience to the job. The description section labeled Required Knowledge Skills and Abilities sets forth the kind of qualifications required for this position:

"Knowledge of social work theory, casework methods...knowledge of human behavior and behavioral services";

"Ability to learn to assess emotional states, behavioral indications, family dynamics and overt signs of abuse";

"Ability to learn to evaluate the social, emotional and financial problems within the family that may be contributing to an abusive situation"; and

"Ability to formulate client services and treatment plans."

The respondent's minimum training and experience requirement mandated that the successful candidate, "be eligible for licensure as a social worker, graduate social worker or certified social worker by the West Virginia Board of Social Work Examiners.

30. According to respondent, abused and/or neglected children are often returned to their homes, and therefore the Protective Services Worker must protect the child and prepare them to deal with the family when they return.

31. On December 1, the respondent advised the complainant by correspondence that she was not selected for the position of Protective Service Worker.

32. Instead of the complainant the respondent hired Douglas Dyer for the position of protective service worker. Mr. Dyer is a white male, born in the United States.

33. Mr. Dyer was hired for the position of protective service worker, according to the respondent, because of his significant experience and the close correlation of that experience with the requirements of the position.

34. At the time he was hired, Mr. Dyer had not acquired an undergraduate degree but had completed sixty credit hours which encompassed core requirements for a degree in social work.

35. Prior to 1979, Mr. Dyer had worked with the Home Products Division of General Electric Credit Corporation for three years; he was a sales agent for New York Life Insurance Company from 1975 to 1976; and he was a salesman for New River Supply Company from 1974 to 1979.

36. From July 1979 until November 1984 the period which encompassed Mr. Dyer's most recent employment, he had served as full-time house parent or certified child care worker at the Beckley-based group home part of Davis Stuart, Inc.

37. Mr. Dyer's duties while at the Davis Stuart Group Home included being fully in charge of the home which kept, at a maximum, six troubled young men, all of whom were placed in the home by court order because of abuse/neglect or criminal behavior and who needed normalization.

38. In his capacity as child care worker, Mr. Dyer worked with protective service workers and conducted group and individual counseling at Davis Stuart Home. More complicated problems were dealt with by experienced counselors and social workers.

39. Carol McAllister who has twenty years experience in social and psychological service testified that complainant's prior experience while both were employed by respondent's Family and Children Services Unit required that they conduct many investigations regarding abused and neglected children and that they provide long-term and short-term counseling and evaluation.

40. After being denied this position, complainant continued to seek employment. In October 1985, complainant was hired as a Social Services Worker IV with the Department of Health in Charleston with the Health Facility Licensure and Certification Program. She was hired at a salary of \$18,600 per year. However, the position required extensive travel expenses and child care expenses since it involved overnight trips.

41. Mr. Dyer remained in the position until 1987 and then moved on to a position as a juvenile probation officer without attaining his undergraduate degree.

42. The complainant testified to the humiliation and hurt she suffered as a result of respondent's refusal to hire her. She

testified that she became so depressed that she did not talk to people. The event so traumatized her that she became withdrawn at other interviews in an attempt to not be considered too aggressive.

43. As set forth in appendix A, the complainant is entitled to back pay benefits and interest to the end of March, 1993 of \$51,763.62.

44. The lost back pay is based on what the complainant's average monthly earnings would have been if she had been hired as a child protective service worker by the respondent.

45. The mitigation is based upon the complainant's actual earnings during the period in question.

46. The total back pay for each month during the period is the difference between what the complainant would have earned if she would have been hired as a child protective service worker with the respondent and what she actually earned.

47. Interest earnings are calculated on a monthly basis. 10% APR divided by 12 months equals .8333% monthly interest. Monthly interest for each month is applied to the balance as of the previous month.

48. Although at hearing and shortly prior to hearing, complainant was represented by the Civil Rights Division of the Attorney General's Office, originally the complainant was represented by private counsel. The complainant is entitled to reasonable attorney fees.

49. The complainant's attorney reasonably expended 32.8 hours as set forth in his itemized fee affidavit attached as appendix B.

50. An hourly rate of \$150.00 is reasonable for the legal services rendered by complainant's attorney as supported by the fee affidavit.

B.

DISCUSSION

The West Virginia Human Rights Act prohibits discrimination in "terms, conditions or privileges of employment." West Virginia Code §5-11-3(h), as amended, defines the terms "discriminate" or "discrimination" to mean, in relevant part, "to exclude from, or fail or refuse to extend to, a person equal opportunities because of...national origin [or] ancestry,...."

The seminal case on the issue of national origin discrimination is West Virginia Institute of Technology v. West Virginia Human Rights Commission and Zavareei, 383 S.E.2d 490 (1989), which held that in regard to Title VII of the Civil Rights Act of 1964, the term "national origin" refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came. The West Virginia Supreme Court of Appeals in Zavareei held that that definition is valid under the West Virginia Human Rights Act.

In Zavareei, the Court used its previously formulated general test for a prima facie case of disparate treatment in employment discrimination. That test was first promulgated by the Court in Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (1986).

In Conaway, the Court discussed the test for measuring the complainant's prima facie case. In order to meet his burden, "the

plaintiff must offer proof of the following: (1) that the plaintiff is a member of a protected class; (2) that the employer made an adverse decision concerning the plaintiff; [and that] (3) but for the plaintiff's protected status, the adverse decision would not have been made." Conaway, 358 S.E.2d 423, Syll. pt. 3.

In Conaway, as well as subsequent cases, the Court has stated that the prima facie burden is not meant to be onerous, and when discussing the "but for" burden (inexplicably inserted into the prima facie burden), the Court has consistently stated that this may be shown in a variety of ways.

Also in Conaway, the Court reiterated language from McDonnell Douglas Corp. v. Green, 411 U.S. 792, (1973), speaking to the type of evidence required to make a prima facie case of disparate treatment discrimination. The Court stated that:

because discrimination is essentially an element of the mind, there will normally be very little, if any, direct evidence available. What is required of the complainant is to show some circumstantial evidence which would sufficiently link the employer's decision and the complainant's status as a member of a protected class so as to give rise to an inference that the employment-related decision was based upon an unlawful discriminatory criterion. Conaway 358 S.E.2d at 429-30.

Clearly, the complainant has established all three elements of her prima facie burden. It is undisputed that complainant is female and that she was born in India. It is also undisputed that the respondent made an adverse decision concerning the complainant in that she was not selected for an available position for which she was qualified and someone else was selected.

The complainant also established the third prong of the Conaway prima facie requirement. Complainant testified at length about the conversation she had during and before her interview with Jack Tanner, area administrator of respondent's Raleigh County office. Although a vacancy existed with the respondent, and notwithstanding the fact that complainant had previously worked for the respondent and had called consistently inquiring about openings, she was not informed of the opening.

Moreover, the complainant felt compelled to contact her State Senator, Ted Stacy, and asked him to intervene in her behalf and secure an interview for her with Mr. Tanner.

During that interview, complainant testified, Mr. Tanner asked her why she was suspicious of whether or not she was getting a fair chance at the job process. Complainant explained what she had to go through to even obtain an interview including intervention by Mr. Stacy. It was then that Mr. Tanner told her he was going to select someone who would "depict a harmonious picture of his administration and department policy." As complainant attempted to respond to Tanner's concerns, he became extremely angry, jumped out of his seat and screamed at her, "You are overly aggressive, you're overly expressive." He then ordered her to find her own way out of the office.

The comments about complainant's accent and expressiveness and aggressiveness more than constitute the "but for" link part of her prima facie burden. Further, as such, they constitute direct evidence and affect the ultimate burdens of proof.

Once the complainant has presented her prima facie case, it is incumbent upon the respondent to rebut it by the presentation of credible evidence showing "a legitimate and nondiscriminatory reason for the employment-related decision in question which is sufficient to overcome the inference of discriminatory intent." Mingo County Equal Opportunity Council v. WV Human Rights Commission, 376 S.E.2d 134 Syll. pt. 2 (1988).

Respondent's articulated defense is that it hired the more qualified individual. Respondent does not deny that complainant is qualified. Rather, it asserts, the person hired, Douglas Dyer, was more qualified. Even a cursory examination of the evidence lends pretext to this position.

The third and final step in the proof of alleged disparate treatment discrimination is that the complainant will prevail if the complainant shows "by a preponderance of the evidence that the facially legitimate reason given by the employer for the employment-related decision is merely a pretext for a discriminatory motive." Shepherdstown Volunteer Fire Dept. v. WV Human Rights Commission, 309 S.E.2d 342 (1983); WV Institute of Technology v. WV Human Rights Commission and Zavareei, supra; Mingo County Equal Opportunity Council, supra.

After marrying and moving to the United States, complainant worked for the University for Action in Charleston, West Virginia. She was a volunteer programmer while working toward a graduate degree in social work. She obtained her masters in social work degree from West Virginia University while she was working for the respondent as a family service counselor and medical area review team worker. Her

duties in that position involved working extensively with families in crisis. The position also involved intervention with families with a multitude of problems and families in critical need of resources. The goal of the worker in that position was to keep families together and protect the interests and welfare of the child. Complainant worked in this position from 1975 to November 1978.

Previous to that position, she also worked for the respondent in the Work Incentive (WIN) Program. The objective in that unit was to help clients who were job ready to go into the community and find employment. The WIN worker would arrange for interviews, place clients on the job and give them supportive services to help them to remain on the job and off the assistance rolls. Complainant held that position from approximately July 1975 to December 1976.

Complainant left the employ of the respondent in 1978. She gave birth prematurely to her daughter who had some medical complications. She had another baby, and from 1978 to 1982 she stayed home and took care of two small children.

It was with this educational and employment background that complainant applied for the position of Social Worker II with the Child Protective Services Unit with the Department in November 1983.

Instead of complainant, the department hired Douglas Dyer, an American male, for the position of Social Service Worker. The Department asserts that Mr. Dyer was more qualified than complainant. Mr. Dyer's resume, submitted with his application, demonstrates the major difference between his background and complainant's. Not only does Mr. Dyer not possess the extensive

educational credentials that complainant possesses, Mr. Dyer had not even acquired an undergraduate degree.

Mr. Dyer's employment history, although not to be underscored, does not compare with that of the complainant. He worked with the Home Products Division of General Electric Credit Corporation for three years; he was a sales agent for New York Life Insurance Company from 1975 to 1976; and he was a salesman for New River Supply Company from 1974 to 1979. The respondent relies heavily on the employment Mr. Dyer held from July 1979 until November 1984--the time of the interview for the position in question. During that period, Mr. Dyer served as a house parent at the Beckley-based group home, part of Davis Stuart, Inc. It is this position which the respondent asserts overcomes the disparity of education and professional experience between Mr. Dyer and complainant. It is undisputed that nothing else in Mr. Dyer's work or educational experience impressed the respondent like Mr. Dyer's four years as a child care worker in this group home. It has become the respondent's position that this house parent position "qualified" Dyer beyond complainant's three masters degrees, including a master's in social work, and her previous four years experience with the respondent.

The Davis Stuart Group Home kept, at a maximum, six troubled young men with various and assorted problems. Mr. Dyer's position at the group home was not at all analogous to the Child Protective Services Worker position. Although Mr. Dyer's recitation of the work he did at Davis Stuart and in subsequent positions constituted worthy deeds, it could not have at that time "qualified" him for the social

worker position any more than any other worker there or parent of children.

The position sought by both complainant and Mr. Dyer was a Social Worker II position, that of Social Worker in the Child Protective Services Unit. Only one of those applicants was a social worker. Complainant's master's degree in social work and previous experience with the respondent imminently qualified her for the position.

Respondent's job description for Protective Services Worker Trainee^{1/} provides further enlightenment. Under the section labeled Nature of the Work, the job description states that the employee is expected to bring "social casework knowledge and experience to the job," but cautions that an employee in this classification will virtually be in a training capacity for approximately one year and that indicates the primary function is to receive training in the "specialized techniques" of protective service casework. Further, the section labeled Required Knowledge, Skills and Abilities sets forth the kind of qualifications required for this position:

"Knowledge of social work theory, casework methods...knowledge of human behavior and behavioral services";

"Ability to learn to assess emotional states, behavioral indications, family dynamics and overt signs of abuse";

^{1/}There was much testimony about whether the position denied complainant and granted to Mr. Dyer was an entry level position or a position as "trainee." In Mr. Dyer's one year evaluation, he is listed as a "trainee," and the job description lists "trainee" as the classification.

"Ability to learn to evaluate the social, emotional and financial problems within the family that may be contributing to an abusive situation"; and

"Ability to formulate client services and treatment plans."

Even if it could be argued that the complainant and Mr. Dyer were comparably matched given their respective prior job experiences, there can be no question that the complainant alone met respondent's minimum training and experience requirement which mandated that the successful candidate, "be eligible for licensure as a social worker, graduate social worker or certified social worker by the West Virginia Board of Social Work Examiners

In assessing previous experience, it is most critical to look at it in relation to the position sought. All of Mr. Dyer's testimony involving his previous position at the Davis Stuart Group Home indicates that it was a day-to-day, "hands on" position involving adolescent males who had either been adjudicated delinquent, or who, for some reason, had been removed from their homes and placed in a group home setting. Staff were required to provide a normal day-to-day setting for troubled youth needing "normalization." In this situation, a house parent would need to "be there" for young men experiencing troubled adolescence. More complicated problems were dealt with by experienced counselors and social workers. Mr. Dyer, obviously, was qualified to provide the necessary services in the group home setting, especially since his wife shared duties.

Moreover, as corroborated by respondent's witness Harry Burgess

the Child Protective Services Unit Social Work, in comparison, was a position more "emotionally removed" and required an experienced, educated professional.

In addition to her own compelling testimony, complainant brought on as witnesses Carol McAllister, who worked previously with her in the Family and Children's Services Unit, and Barbara Miller and John Russell, who worked subsequently with her in the administrative position she now holds. The testimony of both Mr. Russell and Ms. Miller leaves no doubt that complainant could have performed the duties required in the Child Protective Services Unit. The work she now does is, in fact, supervisory to that position.

The testimony of Ms. McAllister who had 20 years experience in social service and psychological services illustrates the experience that complainant received in the Family and Children's Services Unit. Ms. McAllister testified that they conducted many investigations regarding abused and neglected children. She testified that they provided both short-term and long-term counseling involving analysis of problems and implementation of resolutions. Ms. McAllister testified that she had opportunity to observe complainant as she performed her duties in the Family Services Unit. She characterized her as an "excellent" employee. What is ironic is that this information was available to the respondent had they desired it. It appears as if they never checked with complainant's former co-workers.

Respondent's witnesses were James Cooper, Douglas Dyer, Jack Tanner, Harry Burgess and Joe Smith. Mr. Cooper testified that at relevant time he was employed by the respondent as Coordinator of

Social Services and that Jack Tanner was his supervisor. He stated that the duties of a Protective Services Worker were to investigate complaints of child neglect and abuse. He testified that a person with a master's degree in social work would be qualified for a position as a Protective Services Worker.

Mr. Cooper's testimony about the interview process with complainant for the position of Protective Services Worker was not helpful. He did not remember having a telephone conversation with complainant. Mr. Cooper also had problems remembering why Mr. Tanner would have interviewed complainant when Tanner usually delegated that responsibility. Cooper could not remember, as well, whether or not he made any recommendation to Tanner regarding who would be the appropriate person for the Protective Services Worker position. All of these instances of failed memory took place during direct examination. The balance of Mr. Cooper's testimony on direct was regarding the experience gained as a worker in the WIN program versus the "work done by someone at Davis Stuart Group Home." The respondent also brought on Douglas Dyer as a witness. Mr. Dyer is the person actually hired for the position. Although Mr. Dyer was a credible witness and a person who obviously grew into the position that was awarded him, nothing in Mr. Dyer's testimony indicates that he possessed qualifications comparable to the complainant.

Mr. Burgess testified concerning the differences and similarities between the experience of both candidates and the job in question as previously alluded to. Mr. Smith's testimony was about Civil Service. Although there was much speculation about where Mr. Dyer scored on the Civil Service roster (respondent maintains he was

number 1 on the roster), no document was produced to enlighten the court. Also, it was undisputed that complainant, because of her prior experience with the respondent, did not have to be listed on the roster.

Mr. Smith also testified concerning a policy which he believed the respondent had in effect at that time regarding minority hiring. It was his testimony that in order to refuse to hire a minority, some justification had to be asserted. Neither the policy nor any document indicating that Smith reviewed the respondent's refusal to hire complainant was submitted.

The contrast between Mr. Tanner and complainant was striking. Whereas complainant testified with certainty, Mr. Tanner equivocated. Obviously of major input in this matter and a critical event is the interview of complainant conducted by Mr. Tanner on November 28. However, not to be underscored is respondent's treatment of complainant before the interview, which clearly indicates an animus against the complainant. Complainant's testimony was that she was desperately trying to re-enter the workforce after the birth of her two children. She kept up contact with her former co-workers with the respondent to see if there were any openings. She testified that she called Mr. Tanner's office on or about September 19 to find out if he would be in the office. On the 20th of September, she testified, she went to his office and handed him a resume telling him that she would be interested in any position that he might have. Mr. Tanner told her that he would consider her and give her a call should any position open up.

About a month later, complainant testified, a colleague called and told her that a position was opening. The complainant called Mr. Cooper, who transferred her to Mr. Tanner. Mr. Tanner verified that a position was open and said, once more, that he would keep her in mind. Complainant waited, but still was not called for an interview. She stated that on November 7 she called Mr. Tanner again and requested an interview. Mr. Tanner was noncommittal and gave no assurance that he would call her for an interview. After waiting a few more days, complainant approached her State Senator, Ted Stacy, and requested his help in securing an interview. On November 15, Mr. Stacy sent complainant a note informing her that he had indeed spoken with Mr. Tanner and that Mr. Tanner had agreed to interview her. On November 21, Mr. Tanner called complainant to set up an interview. It was at this interview that the disputed conversation occurred.

The complainant testified credibly about the events of that conversation. She testified that Mr. Tanner questioned her about her accent, became angry and shouted at her, telling her that she was "too aggressive and too expressive" and stated he wanted someone who would project a harmonious picture.

Mr. Tanner's version of this interview is different. Mr. Tanner testified that he could not remember how complainant obtained an interview. He also testified that he could not remember getting a telephone call from Senator Ted Stacy. Mr. Tanner did not remember calling complainant for interview. He also did not remember how many people he interviewed for the position. Mr. Tanner did, however, remember questioning complainant about her ability to "communicate" with people. Mr. Tanner testified in answer to the court's inquiry:

- Q. Did you ask her, in the course of your interview, whether, in fact, she had a problem communicating with people?
- A. I think that I did. I think that there was some conversation about that.
- Q. Why would you ask her if it wasn't significant?
- A. Well, I honestly don't know for sure. I don't know that it wasn't significant. I think my recollection was that, from my conversation and my interview with her, I was satisfied that it was not a problem. I think there could be times when someone would have a severe language barrier that would prevent them from being effective. I did not detect that in my interview with complainant and my conversation with her.

Although Mr. Tanner maintained that complainant's accent and communications skills and gender did not have anything to do with his decision not to hire her, the overwhelming totality of the evidence suggests the contrary.

Complainant's testimony has convinced the Court that respondent's line of questioning about complainant's foreign accent and ability to communication and respondent's statement about her aggressiveness and assertiveness were non-job related and manifested a bias against the complainant based on her national origin and gender.

A word on credibility. Given the conflict in testimony, an assessment and determination must be made of who is more credible. Factors courts have traditionally considered are:

(1) whether the testimony is internally consistent, (2) the demeanor of the individuals while testifying, and (3) which testimony is better supported by the record. Maturo v. National Graphics, Inc., 722 F.Supp. 916 (D. Conn. 1989).

In the instant case, having observed the complainant's demeanor, particularly her candor, sincerity and consistency while testifying when compared with that of Mr. Tanner's, which indicates selective recall and evasiveness, the inescapable conclusion is that the complainant is more credible.

Finally, a party's testimony at trial should demonstrate an ability to remember and recount incidents at issue. Daniels v. Essex Group, Inc., 740 F. Supp. 553, 556 (N.D. Ind. 1990) (a race case in which the court found plaintiff's testimony more credible than defendant's because its manager had difficulty remembering when incidents occurred and could have easily completely forgotten incidents which he found to be insignificant as a white supervisor); see also, Sasser v. Averitt Express, Inc., 839 S.W.2d 422, 427 (Tenn, Ct. App. 1992); and United States v. Allen, 736 F.Supp. 917, 920 (N.D. Ill. 1990). Jack Tanner's failure to remember significant events, such as Senator Stacy's telephone call, should seriously affect his credibility.

In conclusion, the complainant has established her prima facie case and establishes by a preponderance of the evidence that respondent's defense is pretextual thus proving her ultimate burden. The respondent tried every possible way of denying complainant an interview. When she obtained the intercession of Senator Stacy and received an interview, she was humiliated by questions about her accent and told she was too aggressive and too expressive, words which strongly indicate that as a woman, and a woman of another culture, she should be more subdued. The ultimate humiliation for complainant was not only being denied a position for which she held

every qualification, but being told that a man who was hired was more qualified, even though her education and experience were far superior.

C.

CONCLUSIONS OF LAW

1. The complainant, Ira Gangopadhyay, is an individual claiming to be aggrieved by an unlawful discriminatory practice, and is a proper complainant for the purposes of the Virginia Human Rights Act, WV Code §5-11-10.

2. The respondent, West Virginia Department of Human Services/Area 25, is and was at all times relevant hereto, an employer as defined by WV Code §5-11-3(a).

3. The complaint in this matter was timely filed in accordance with WV Code §5-11-10.

4. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of the complaint.

5. The complainant has established a prima facie case of national origin and sex discrimination in that it is undisputed that she is female and that she was born in India. It is also undisputed that the respondent made an adverse decision concerning the complainant in that she was not selected for an available position for which she was qualified, and another individual, a male not subject to a similar national origin who is not a member of a protected class, was selected. The comments made by the respondent's agent regarding complainant's accent and expressiveness and

aggressiveness more than constitute the "but for" link necessary to meet the prima facie burden.

6. The respondent's articulated nondiscriminatory reason for complainant's termination, that it hired the more qualified person for the position, has been shown by the complainant to be pretextual.

D.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby ORDERED as follows:

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of receipt of this decision, the respondent shall pay to the complainant back pay in the amount of \$51,763.62 plus additional accrued interest.

3. Within 31 days of receipt of this decision, the respondent shall pay to the complainant attorney fees and costs in the amount of \$3,653.00.

4. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of \$2,950.00 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

5. The respondent shall pay ten percent per annum interest on all monetary relief until it is paid.

6. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Legal Unit Manager, Glenda S. Gooden, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so ORDERED.

Entered this 29 day of November, 1993.

WV HUMAN RIGHTS COMMISSION

BY *Gail Ferguson*
GAIL FERGUSON
ADMINISTRATIVE LAW JUDGE