

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE: 304 348-7616

February 14, 1986

ARCH A. MOORE, JR.
Governor

Gene Simmons, Esquire
830 Tenth Avenue
Marlinton, WV 24954

Pat A. Nichols, Esquire
Box 201
Parsons, WV 26287

COPY

RE: Anger Hobart v Marion Partnership, dba Snowshoe Base, EA-452-85

Dear Mr. Simmons and Mr. Nichols:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Hobart v Marion Partnership, dba Snowshoe Base, EA-452-85.

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/jcp

Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

AGNES HOBART,

Complainant,

vs.

Docket No. EA-452-85A

MARION PARTNERSHIP,
dba Snowshoe Base,

Respondent.

RECEIVED

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W.V. HUMAN RIGHTS COMM.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing was convened for this matter on October 8, 1985, in Marlinton, West Virginia. The complaint was filed on April 4, 1985. The notice of hearing was served on May 21, 1985. A Status Conference was held on July 8, 1985. Subsequent to the hearing, respondent submitted a written brief and proposed findings of fact. Complainant has failed to submit a brief, proposed findings of fact, or a petition for attorney's fees.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

CONTENTIONS OF THE PARTIES

Complainant contends that respondent discriminated against her on the basis of her age by failing to recall her from layoff. Respondent maintains that no employee who worked at the hotels at both the top and the bottom of the mountain were reemployed subsequent to the general layoff on January 2, 1985.

FINDINGS OF FACT

Based upon a preponderance of the evidence, the Hearing Examiner has made the following findings of fact:

1. Complainant was 51 years of age at the time of the hearing herein.
2. Complainant was employed by Quality Hotels and Resorts, Inc. at the Snowshoe Resort. Complainant worked at the Mountain Lodge, which is located at the top of the mountain, and at the Inn at Snowshoe, which is located at the bottom of the mountain.
3. Quality Hotels and Resorts, Inc. had management contracts to manage the following three properties at the Snowshoe Resort: The Mountain Lodge, The Inn at Snowshoe, and Silver Creek Resort.
4. Complainant along with all other maids at the three hotels managed by Quality Resorts and Hotels Inc. was laid off on January 2, 1985.
5. The Inn at Snowshoe terminated its management Contract with Quality Hotels and Resorts, Inc. on January 6, 1985.
6. The Inn at Snowshoe hired Westfall as manager of the property. Westfall had previously been employed as the head of the accounting department of the Inn at Snowshoe for

Quality Hotels and Resorts, Inc.

7. Westfall hired Castle as head of housekeeping. Castle had previously been a maid employed by Quality Hotels and Resorts, Inc.

8. In December 1984, Castle made a statement to Berry, another maid, that she would never hire any maid who was forty years old or older because they are too slow. Castle had made an identical statement to Queen, another maid. Later Castle made a similar statement to complainant.

9. Starting on approximately January 7, 1985, the Inn at Snowshoe hired maids. Among the maids offered employment were the following: Ryder, who was 26 or 27 years of age, and Mace, who was 26 or 27 years of age. Castle had recommended that Ryder and Mace be hired. Ryder accepted the employment.

10. Complainant called the Inn at Snowshoe after January 7, 1985 and prior to January 29, 1985 concerning the possibility of her being reemployed. Complainant was told there were no openings for maids.

11. Berry, who was 48 years old at the time of hearing, called the Inn at Snowshoe between January 7, 1985 and January 29, 1985 concerning the possibility of her being reemployed. Berry was told there were no openings for maids.

12. Ryder had worked at both the Mountain Lodge and at the Inn at Snowshoe prior to January 2, 1985.

13. The Inn at Snowshoe never rehired Complainant, Berry, or Queen.

14. On January 29, 1985, Complainant was rehired by the Mountain Lodge as a maid.

15. If Complainant had been employed by the Inn at Snowshoe from January 7, 1985 to January 29, 1985, she would have earned \$480.00.

CONCLUSIONS OF LAW

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

2. Marion Partnership, dba Snowshoe Base, and the Inn at Snowshoe are employers as defined by the West Virginia Code, § 5-11-3(d), and are subject to the provisions of the Human Rights Act.

3. Complainant has established a prima facie case of discriminatory failure to recall from layoff.

4. Complainant has shown that the reason articulated by respondent for failing to recall complainant from layoff is pretextual.

5. Respondent discriminated against complainant on the basis of her age in violation of West Virginia Code § 5-11-9(a) by failing to recall her from layoff.

Discussion of Conclusions

In fair employment, disparate treatment cases, the initial burden is upon the complainant to establish a prima facie case of discrimination. Shepherdstown Volunteer Fire v. West Virginia Human Rights Commission 309 S.E.2d 342, 352-353 (W. Va. 1983); McDonnell-Douglas Corporation v.

Green 411 U.S. 792 (1973). If the complainant makes out a prima facie case, respondent is required to offer or articulate a legitimate nondiscriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunteer Fire Department., supra; McDonnell Douglas, supra. If respondent articulates such a reason, complainant must show that such reason is pretextual. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra.

In the instant case, complainant has made out a prima facie case of discriminatory failure to recall. Complainant has proven that she is 51 years of age ; that she was laid off from her employment on January 2, 1985; that the head of housekeeping at the Inn of Snowshoe had previously made a statement that she would not hire maids who were 40 years of age or older because they are too slow; and that two younger maids, Ryder and Mace, were offered employment by the Inn at Snowshoe on approximately January 7, 1985. Such facts are sufficient to establish a prima facie case of discrimination because, if otherwise unexplained, they raise an inference of discrimination. Furnco Construction Company v. Waters 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981).

Respondent has articulated a legitimate nondiscriminatory reason for its action in not rehiring complainant. Specifically, respondent produced testimony that it did not rehire at the Inn at Showshoe any employee who had previously worked at both the Mountain Lodge at the top of the hill and at the Inn at Snowshoe which is located at the bottom of the mountain.

Respondent's manager testified that the reason for the policy was that there had been some security problems between the two hotels, including the loss of reservation data and similar items.

Complainant had demonstrated that the reason articulated by respondent for failing to recall her is pretextual. The testimony of complainant and her witness is more credible than the testimony of respondent's witness because of their demeanor. Moreover, the testimony of Westfall, respondent's only witness, is seriously impaired by an inconsistency. Despite Westfall's testimony that no employee who had worked at both the top and the bottom of the hill had been reemployed subsequent to the general layoff, it was clear that one of the maids who had been reemployed, Ryder, had in fact had been previously employed at both the top and the bottom of the mountain. Moreover, the evidence reveals that when complainant and Berry made inquiries about their employment status at the Inn at Snowshoe, they were informed that there were no openings for maids. In fact, the Inn at Snowshoe did begin hiring maids beginning approximately January 7, 1985. The fact that both complainant and Berry were given misinformation with regard to the availability of work for maids strongly suggest that the security problem cited by respondent was not the real reason for the failure of respondent to reemploy complainant. Moreover, the testimony of Westfall was impaired by a poor memory with regard to important details such as complainant had ever told him of Castle's statement.

Respondent argues that because Castle was not employed by the Inn at Snowshoe at the time when she made the statement that maids who were 40 years old or more were too slow, the Inn at Snowshoe is not the proper respondent. The legal significance of Ms. Castle's statement, however, is not the fact it was made, but, rather, that it was implemented. It was the Inn at Snowshoe that hired Castle as head of housekeeping. While in that supervisory position of the Inn at Snowshoe, Castle acted upon her prejudice against employees who are 40 years of age or more. The fair employment laws express a preference for individual evaluation; employers are to measure employees who are 40 years or older on their merits and not their age. *Western Airlines, Inc. v. Criswell*, _____ U.S. _____ 105 S.Ct. 2717, 86 L.Ed.2d 321, 338/339 (June 17, 1985). It is Castle's actions as head of housekeeping in not hiring older maids because she feared they would be too slow pursuant to a stereo typical way of thinking about older employees, and not Castle's previous statement, that constitutes the violation of the Human Rights Act.

DETERMINATION

The preponderance of the evidence in this matter sustains the complaint.

PROPOSED ORDER

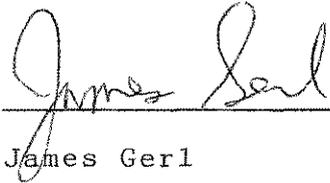
In view of the foregoing, the hearing examiner recommends the following:

1. That the complaint of Agnes Hobart, Docket No. EA-452-85A be sustained.

2. That respondent The Inn at Snowshoe pay to complainant a sum equal to \$480.00 as back pay.

3. That respondent The Inn at Snowshoe be ordered to cease and desist from discriminating against individuals on the basis of their age in employment decisions.

4. That respondent The Inn at Snowshoe be ordered to report to the Commission, within 90 days of the entry of its Order the steps it has taken to comply with the order.



James Gerl

Hearing Examiner

ENTERED: December 9, 1985

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served
the foregoing PROPOSED ORDER AND DECISION
by placing true and correct copies thereof in the United States
Mail, postage prepaid, addressed to the following:

Gene Simmons
820 Tenth Ave.
Marlinton, W.V.

Pat A. Nichols
Nichols & Nichols
P.O. Box 201
Parsons, W.V. 26287

on this 14th day of December, 1985.



James Gerl