

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ALFRED HACKLEY

Complainant,

v.

Docket No. ER-237-78

WEST VIRGINIA  
DEPARTMENT OF HIGHWAYS

Respondent.

FINDINGS OF FACT  
CONCLUSIONS OF LAW AND ORDER

I  
PROCEEDINGS

This case came on for hearing before Hearing Examiner Emily A. Spieler on September 24, 1982, at the State Capitol Complex, Charleston, West Virginia, and was continued on March 15, 1983, at the home of William E. Moore, a disabled witness. The Complainant appeared in person and was represented by Assistant Attorney General Eunice Green, who also represented the Human Rights Commission. The Respondent appeared by its counsel, Frank S. Curia. The parties agreed to waive the presence of a Hearing Commissioner.

On December 29, 1977, the Complainant filed a verified complaint alleging that the Respondent, West Virginia Department of Highways, had discriminated against him on the basis of race by demoting him from a foreman classification. The Human Rights Commission issued a letter of determination finding probable cause to believe that the Human Rights Act had been violated on April 5, 1979.

On August 20, 1982, the Human Rights Commission by Howard D. Kenney, Executive Director, served written notice of public hearing upon the parties pursuant to W.Va. Code §5-11-10. The Respondent filed a timely answer denying any illegal acts of racially based discrimination and raising as a defense the claim that the Human Rights Commission lacked jurisdiction over the Department of Highways. On August 26, 1982, pursuant to §7.10 of the Administrative Regulations of the Human Rights Commission, a prehearing order was entered by Hearing Examiner Emily A. Spieler. The prehearing conference was held September 15, 1982, pursuant to §7.09 of the Administrative Regulations, at which the Complainant and Human Rights Commission were represented by Assistant Attorney General Eunice Green, and the Respondent appeared by its counsel, Frank S. Curia. The matters determined at the prehearing conference were summarized by the Hearing Examiner in a prehearing order which was read into the record at public hearing. (Tr. I-4-11).

Complainant and Respondent had full opportunity at public hearing to call witnesses and present evidence relevant to this complaint. The Complainant offered the testimony of Loyd Drake, a foreman for the Department of Highways until May 27, 1977; William Moore, Kanawha County Maintenance Supervisor and supervisor in Heavy Maintenance until his retirement in 1976; and Alfred Hackley, the Complainant. The Respondent called as its witnesses Joe Deneault, currently assistant director of the maintenance division in the central office of Respondent, and Marlin Davis, currently maintenance engineer, District 1, West Virginia Department of Highways.

At the time of the prehearing conference, the hearing examiner learned that the Complainant in this matter filed a second complaint charging the Respondent with reprisal under the West Virginia Human Rights Act, alleging therein that harassment by the Respondent after the demotion, which is the subject of this complaint, might force him to quit his job. The Human Rights Commission did not find probable cause to believe the Human Rights Act had been violated on this second complaint. As indicated at the commencement of the public hearing, the hearing examiner found that the second complaint was fully adjudicated, in view of the fact that the Complainant failed to exercise his administrative appeal in order to challenge the failure to find probable cause, and that therefore the second complaint acts as res judicata regarding whether the Complainant's decision to quit his job in February of 1978 constituted a constructive discharge in violation of the Human Rights Act. These issues are addressed in the Findings of Fact and Conclusions of Law set forth below.

After full consideration of the testimony, evidence, and arguments of counsel, the hearing examiner recommends that the Commission make the Findings of Fact and Conclusions of Law set forth herein.

## II ISSUES

The issues presented for resolution in this matter are:

1. Did the Respondent, West Virginia Department of Highways discriminate against the Complainant illegally on the basis of race by demoting him from a foreman to a craftsman position on December 1, 1977?

2. If the Respondent did so discriminate, what is the appropriate remedy?

III  
FINDINGS OF FACT

1. Respondent, West Virginia Department of Highways, is responsible for road maintenance in the State of West Virginia. Routine maintenance is performed by routine maintenance divisions in each county. Heavy maintenance detachments are more centralized and are responsible for correcting major problems in the roads. Kanawha County and the Heavy Maintenance Detachment were both separate organizations of District I of the Department of Highways (I-51-52).
2. During the time relevant to this complaint, Joseph P. Deneault was, initially, County Superintendent in Kanawha County for routine maintenance, and then assistant maintenance engineer and supervisor in District 1, Heavy Maintenance Detachment, starting in late 1976 or early 1977. William Moore preceded Deneault as supervisor both of Kanawha County routine maintenance and of District 1 of the Heavy Maintenance Detachment. Lloyd Drake was a foreman in heavy maintenance in 1976 until his retirement on May 27, 1977. Marlin Davis has been Maintenance Engineer in District 1 since 1973. Deneault, Moore, Drake and Davis are all white males. (Tr. I-16, 50-51, 57, 66, 78, 85, II-4, 5, 9-10).
3. The Complainant, Alfred Hackley, a black male, was hired by the Respondent in 1973. (Tr. I-30). He worked for Kanawha County routine maintenance under Moore and was promoted by Moore to a

Foreman II classification on September 1, 1974. Hackley transferred into the Heavy Maintenance Detachment, District 1, retaining his foreman classification on July 2, 1976. He was demoted to a Craftsman II classification on December 1, 1977, and quit his employment with Respondent on February 16, 1978. (Compl. Ex. 4; Resp. Ex. 1, 4; Tr. 1-5, 30, 39, 53).

4. In general, a Department of Highways foreman is responsible for supervising a crew of men, keeping time sheets and inventory, and generally making sure that equipment is operated properly and safely. (Resp. Ex. 6; Tr. 1-39-40, 57, 63-64, 82). Foremen in general were not responsible for operating the equipment, but rather were responsible for making sure that operators ran the equipment properly and safely. In the Heavy Maintenance Detachment, it was an asset but not a requirement for a foreman to be able to operate the heavy equipment run by his crew. (1-56-57, 11-10). A foreman, according to Deneault, had to be able to run the equipment or had to have enough experience around it to evaluate properly the people performing the operations. (1-57, 63-64).
5. Moore, Hackley's supervisor until his retirement in 1976, testified that Hackley supervised crews and did a good job as foreman. (Tr. 12). This corroborated Hackley's own testimony. (Tr. 1-38). Moore promoted Hackley to foreman, giving the following written justification for the promotion: "Is qualified and has been acting foreman [sic]. This employee is performing the duties of a Foreman II and will continue to perform them." (Compl. Ex. 4).

Moore was not familiar with Hackley's job performance after he left his employment with the Respondent in October 1976. (Tr. 11-8).

6. Deneault replaced Moore as Hackley's supervisor in Kanawha County after Moore transferred to District 1, Heavy Maintenance Detachment. Hackley was transferred from Kanawha County to District 1 Heavy Maintenance in 1976 because Deneault was dissatisfied with his work. (Tr. 1-57-58, 77-78). No reason was given on the personnel change form for this transfer (Resp. Ex. 4).
7. Deneault followed Hackley into Heavy Maintenance, District 1. At the time of Deneault's transfer, Hackley, according to Deneault, may have been performing foreman's duties. (Tr. 1-67).
8. After Deneault transferred into Heavy Maintenance, Hackley was never put in charge of a large project. Rather he was only assigned small jobs. (Tr. 1-82). Hackley was the only foreman during this period in District 1 who was never assigned to supervise a major job. (Tr. 1-83). Hackley did perform as an assistant to the foreman on a job, and performed certain foreman functions including keeping time sheets and inventory, ensuring availability of equipment, and directing part of the job. (Tr. 1-39-41). He performed the duties assigned to him very adequately. (Tr. 1-64-65).
9. No written evaluations by Hackley's supervisors indicated any problem with Hackley's job performance. As noted in Paragraph 5, the form used for his promotion in 1976 indicated he performed well. His evaluation for the period January 1, 1977, through September 16, 1977, shows his level of performance as "good" in

all categories and said: "This employee is dependable on assignments, has good public relations, and does a good job on his assignments, relating to small jobs." (Compl. Ex. 5).

10. Davis wrote at the bottom of the 1977 evaluation form, "I would rate fair." (Compl. Ex. 5). Davis observed Hackley on the job approximately twice a month. In his testimony, Davis indicated that his reason for rating Hackley as fair was that he was not doing a foreman's job of supervising a crew. Davis did not know what Hackley was assigned to do, nor was he responsible for Hackley's assignments. (Tr. 1-87-89, 90-92, 95-97).
11. Due to state-wide reorganization, employees were transferred into District 1 from a state-wide heavy maintenance unit in 1977. Deneault felt that these transfers created a surplus of supervisory personnel, because there were sometimes two or three foremen on a job. (Tr. 1-53-55, 79-80). Deneault was not directed to eliminate anyone from supervisory jobs. (Tr. 1-81). Two supervisors in Heavy Maintenance District 1, were demoted at that time: Alfred Hackley and Denver Duff, a Construction Superintendent. (Compl. Ex. 2, Tr. 1-74-75).
12. Denver Duff, a white male, was demoted to Craftsman II. The justification for the demotion on the reclassification form was as follows: "Mr Denver Duff, Construction Superintendent II, has not shown that he is capable of exercising the judgment required of this position or of assuming the responsibility that this position carries with it." (Resp. Ex. 2). There had been problems with Duff's performance prior to this demotion. (Tr. 1-61).

13. The explanation given on the reclassification form by Deneault for Hackley's demotion was as follows: "Mr. Alfred Hackley, Foreman II is not currently or expected to be used as a foreman in HMD. He has not shown the ability to properly perform the duties of a foreman. At present he is used to get parts, supplies, fuel, and other minor tasks. He is not capable of operating heavy equipment. I recommend that he be reclassified to a position more suitable to the duties that he is performing." (Resp. Ex. 1).
14. The decisions to demote were made by Deneault based wholly upon his subjective evaluation and judgment. (Tr. I-75-76, 83).
15. Hackley was the only foreman involuntarily demoted without specific cause at this time. (Compl. Ex. 2; Tr. I-74-75). As noted above, Hackley was not given the opportunity by Deneault to direct crews and generally play a full supervisory role on major projects.
16. Hackley knew how to operate some, but not all, equipment used in Heavy Maintenance. However, whenever given the opportunity to do so, Hackley made sure that the equipment of his crew was maintained and running properly. (Tr. I-43, 46-47, II-7, 10).
17. Hackley was the only black person employed by the Department of Highways in District 1. He was the only black foreman employed by the Department of Highways in District 1 or Kanawha County. (Compl. Ex. 3: Tr. I-5, 35-36, 63, 76). Deneault never recommended any black employees for promotion to supervisory positions. (Tr. I-72-73).

18. Deneault had animus toward Hackley from the time that he supervised him in routine maintenance in Kanawha County. Deneault was the only supervisor or Department of Highways employee who was critical of Hackley's work prior to his transfer to Heavy Maintenance. He was Hackley's supervisor in Heavy Maintenance, and disagreed with the evaluation performed by Hackley's immediate supervisors in September 1977. Deneault could offer no plausible explanation for his on-going dissatisfaction with Hackley's work. Hackley's failure to perform more extensive foreman functions was the direct result of Deneault's own failure to assign such functions to him. Considering all of the evidence and the credibility of the witnesses, we find that Deneault's explanation for deciding to demote to be pretextual.
19. Hackley filed a complaint with the Human Rights Commission alleging that he was being forced to quit his job as a result of harassment and illegal reprisal by the Respondent. (Commission's Ex. 1). The Human Rights Commission did not find that there was probable cause to believe that this charge was true, and the charge was dismissed.
20. Hackley failed to show that he quit his job in February 1978 as a direct result of his demotion on December 1, 1977, nor did he show that his termination amounted to a constructive discharge. We therefore find that he voluntarily quit his employment with Respondent on February 16, 1978. (Tr. 1-35).
21. As a result of his demotion, Hackley's wages were reduced from \$4.81 to \$4.07 per hour. He was therefore paid \$0.74 per hour

less than he would have been paid as foreman from December 1, 1977, to the time he quit. As a result, for the 604 regular and 7 overtime hours for which he was paid, he lost \$455 in wages. Looking at the most equivalent person employed as a foreman during this period of time (12/1/77 - 2/15/78), we find that Hackley would have worked an additional 53 overtime hours, representing a loss of \$382. Therefore, the Complainant lost a total of \$837 in wages, representing the difference between his actual wages and the full wages he would have earned as a foreman. (Resp. Ex. 1, 5, 7; Tr. 11-18).

22. Hackley further suffered emotional harm as a result of his demotion, but he continued to do roadwork for the Respondent until he quit his job voluntarily.

#### IV CONCLUSIONS OF LAW

1. At all times referred to herein the Respondent, West Virginia Department of Highways, is and has been an employer within the meaning of Section 3(d), Article 11, Chapter 5 of the Code of West Virginia.
2. At all times referred to herein the Complainant, Alfred Hackley, was a citizen and resident of the State of West Virginia, and is a person within the meaning of Section 3(a), Article 11, Chapter 5 of the Code of West Virginia.
3. On December 29, 1977, the Complainant filed a verified complaint alleging that the Respondent had engaged in one or more discri-

minatory practices against him as an individual by demoting him from a supervisory to an hourly position on December 1, 1977, in violation of Section 9, Article 11, Chapter 5 of the Code of West Virginia. No continuing violation was alleged therein.

4. The complaint in this matter was timely filed within 90 days of an alleged act of discrimination.
5. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to Sections 8, 9 and 10, Article 11, Chapter 5 of the Code of West Virginia.
6. On February 1, 1978, the Complainant filed a second complaint against the Respondent alleging harassment and reprisal against him in violation of Section 9, Article 11, Chapter 5 of the Code of West Virginia. The West Virginia Human Rights Commission did not find probable cause to believe that the Human Rights Act had been violated under this complaint, and dismissed it. No appeal was taken regarding this dismissal. The final adjudication of the second complaint acts as res judicata regarding issues of harassment, reprisal, and constructive discharge, unless the Complainant can show that he was forced to quit as a direct result of the decision to demote on December 1, 1977. The Complainant failed to make this showing.
7. To prevail, the Complainant must prove by a preponderance of the evidence that race was a factor in the decision of the Respondent to demote him on December 1, 1977. This Commission has consistently followed the lead of the federal courts in holding that a complainant may prove his prima facie case inferentially or through

the presentation of direct evidence of discrimination, or through a combination of evidence. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973); Texas Department of Community Affairs, v. Burdine, \_\_\_\_ U.S. \_\_\_\_, 101 S. Ct. 1089 (1981).

8. Complainant made an initial prima facie showing that the Respondent discriminated against him on the basis of race by demonstrating that he was a black male; that he was capable of performing his work as foreman; that he was demoted to a non-supervisory position. The supervisor responsible for his demotion evidenced a predisposition and racial animus against Complainant because he is black.
9. Once the Complainant has established a prima facie case of discrimination, the burden shifts to the employer to rebut the presumption of discrimination by articulating a legitimate nondiscriminatory reason or reasons for its actions. The employer need not prove the legitimate nondiscriminatory reason but must only articulate it. Texas Department of Community Affairs v. Burdine, 101 S. Ct. at 1094; Furnco Construction v. Waters, 438 U.S. 567 (1978). Respondent did articulate legitimate nondiscriminatory bases for its decision to demote the Complainant. Respondent maintains that the decision to demote Complainant was based upon the fact that there was a surplus of supervisors in District 1 due to Heavy Maintenance reorganization in the state; that based upon qualifications, Hackley was chosen for demotion due to his inability to direct crews and operate heavy equipment; and that a white supervisor was also demoted at that same time.

10. Once the Respondent has articulated a legitimate nondiscriminatory reason for its action, the Complainant must show by a preponderance of the evidence that the discriminatory reason more likely than not motivated the Respondent, or that the Respondent's explanation is unworthy of credence or pretextual. Based upon the entire record before us we find that the Complainant has met this burden of proof. We base this conclusion upon the following considerations. The Complainant's supervisor until October 1976 felt that his work was of high quality, as did his immediate supervisor in 1977. We found the testimony of William Moore and Lloyd Drake wholly credible. The Complainant never received any written evaluations indicating inadequacy in his job performance. Nevertheless, Joseph Deneault consistently felt in sharp contrast, that the Complainant's work was inadequate, and failed to assign him work equivalent with his designated position. Deneault held this opinion of Hackley's performance from long before the time that Moore retired from his employment with the Respondent. Hackley was the only black foreman, the only foreman not assigned full supervisory functions, and the only foreman selected for demotion on December 1, 1977. Hackley admittedly could not operate all heavy equipment. However, Deneault himself agreed that general familiarity with the equipment, and not operating ability, would be sufficient. Deneault consistently treated Hackley differently from other supervisors, who were white. All decisions made by Deneault were admittedly entirely subjective and without any objective basis. In dealing with problems of discrimination,

the courts and this Commission look with suspicion upon subjective supervisory evaluations and decisions made by members of groups not protected by the human rights laws, particularly when they impact adversely on members of protected groups. Based upon a full evaluation of all the evidence and the overall credibility of the witnesses, we find that Deneault's reliance upon Hackley's inability to operate heavy equipment was mere pretext for a decision to demote based, in whole or in part, upon illegal racial animus.

11. The Respondent unlawfully discriminated against the Complainant on the basis of race in violation of the West Virginia Human Rights Act, Article 11, Chapter 5 of the Code of West Virginia.
12. No pattern or practice of discrimination by Respondent with regard to black employees has been alleged or proven.
13. The Complainant is entitled to monetary relief in the form of back pay and mental anguish and humiliation damages. W. Va. Code §5-11-10; State Human Rights Commission v. Pearlman Realty Agency, 211 S.E. 2d 349 (W.Va. 1975). The Complainant would have earned an additional \$837 from December 1, 1977 to the time he quit, had he not been demoted. Because he quit his job voluntarily, he is not entitled to back pay relief after the date he quit, nor is he entitled to reinstatement. He did further suffer emotional harm as a result of the demotion, and should be compensated in the additional amount of \$1,000.00.

V  
ORDER

Therefore, pursuant to the above Findings of Fact and Conclusions of Law, it is hereby ORDERED as follows:

1. The Respondent is hereby permanently ordered to cease and desist from engaging in employment practices that discriminate against the Complainant and all other persons on account of their race.
2. Respondent shall direct a statement to all of its officials and supervisory personnel emphasizing the importance of its non-discriminatory employment policy with regard to race, advising them that such officials and supervisory personnel will be held strictly accountable for the effectiveness of such policy, and directing them to take all necessary steps to fully implement this policy.
3. The Respondent is hereby ordered to pay to the Complainant, Alfred Hackley, the sum of \$1,287.22 representing back pay, in the amount of \$837.00 plus 8% interest compounded annually on that amount from December 1977 to July 1, 1983 as computed below.

December 1, 1977	\$837.00
8% Interest	66.96
December 1, 1978	903.96
8% Interest	72.32
December 1, 1979	976.28
8% Interest	78.10
December 1, 1980	1,054.38
8% Interest	84.35
December 1, 1981	1,138.73
8% Interest	91.10

December 1, 1982	1,229.83
8% Interest	
= 98.39 X .583333	
= 7/12 = .583333	57.39
July 1, 1983	<u>1,287.22</u>

4. The Respondent is further ordered to pay to the Complainant, Alfred Hackley, the sum of \$1,000.00 representing mental anguish and humiliation suffered by the Complainant because of Respondent's discriminatory conduct.
5. Respondent shall comply with the Commission's Order within thirty days form receipt of this Order by submitting to the Commission a check for \$2,287.22 made payable to Alfred Hackley.

It is so ORDERED, entered this 25 day of August, 1983.

Enter:



Russell Van Cleve  
Chairperson

ON BEHALF OF THE WEST  
VIRGINIA HUMAN RIGHTS  
COMMISSION