



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

August 20, 1987

Betty Hatcher
212 Alameda St.
St. Albans, WV 25177

Kanawha Valley Regional Trans-
portation Authority
P.O. Box 1188
1550 4th Ave.
Charleston, WV 25312

Cheryl Wolfe, Esq.
Jackson, Kelly, Holt & O'Farrell
P.O. Box 553
Charleston, WV 25322

Tom Hindes
Deputy Attorney General
812 Quarrier St.
Charleston, WV 25301

RE: Hatcher v. Kanawha Valley Regional Transportation Authority
EA-511-86

Dear Parties:

Herewith, please find the final order of the WV Human Rights Commission in the above-styled and numbered case.

Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective April 1, 1987, any party adversely affected by this final order may file a petition for review with the supreme court of appeals within 30 days of receipt of this final order.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard D. Kenney".
Howard D. Kenney
Executive Director

HDK/mst
Enclosures

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE

AMENDED AND EFFECTIVE
AS OF APRIL 1, 1987

Enr. H. B. 2638]

8

116 this article.

§5-11-11. Appeal and enforcement of commission orders.

1 (a) From any final order of the commission, an
2 application for review may be prosecuted by either
3 party to the supreme court of appeals within thirty days
4 from the receipt thereof by the filing of a petition
5 therefor to such court against the commission and the
6 adverse party as respondents, and the clerk of such
7 court shall notify each of the respondents and the
8 commission of the filing of such petition. The commis-
9 sion shall, within ten days after receipt of such notice,
10 file with the clerk of the court the record of the
11 proceedings had before it, including all the evidence.
12 The court or any judge thereof in vacation may
13 thereupon determine whether or not a review shall be
14 granted. And if granted to a nonresident of this state,
15 he shall be required to execute and file with the clerk
16 before such order or review shall become effective, a
17 bond, with security to be approved by the clerk,
18 conditioned to perform any judgment which may be
19 awarded against him thereon. The commission may
20 certify to the court and request its decision of any
21 question of law arising upon the record, and withhold
22 its further proceeding in the case, pending the decision
23 of court on the certified question, or until notice that the
24 court has declined to docket the same. If a review be
25 granted or the certified question be docketed for
26 hearing, the clerk shall notify the board and the parties
27 litigant or their attorneys and the commission of the fact
28 by mail. If a review be granted or the certified question
29 docketed, the case shall be heard by the court in the
30 manner provided for other cases.

31 The appeal procedure contained in this subsection
32 shall be the exclusive means of review, notwithstanding
33 the provisions of chapter twenty-nine-a of this code:
34 *Provided*. That such exclusive means of review shall not
35 apply to any case wherein an appeal or a petition for
36 enforcement of a cease and desist order has been filed
37 with a circuit court of this state prior to the first day
38 of April, one thousand nine hundred eighty-seven.

39 (b) In the event that any person shall fail to obey a
40 final order of the commission within thirty days after
41 receipt of the same, or, if applicable, within thirty days
42 after a final order of the supreme court of appeals, a
43 party or the commission may seek an order from the
44 circuit court for its enforcement. Such proceeding shall
45 be initiated by the filing of a petition in said court, and
46 served upon the respondent in the manner provided by
47 law for the service of summons in civil actions; a hearing
48 shall be held on such petition within sixty days of the
49 date of service. The court may grant appropriate
50 temporary relief, and shall make and enter upon the
51 pleadings, testimony and proceedings such order as is
52 necessary to enforce the order of the commission or
53 supreme court of appeals.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

BETTY HATCHER,

Complainant,

v.

DOCKET NO. EA-511-86

KANAWHA VALLEY REGIONAL
TRANSPORTATION AUTHORITY,

Respondent.

FINAL ORDER

On the 12th day of August, 1987, the Commission reviewed the amended recommended findings of fact and conclusions of law of Hearing Examiner, Theodore R. Dues, Jr., dated June 23, 1987. After consideration of the aforementioned, and exceptions thereto filed by the respondent, the Commission does hereby adopt said recommended findings of fact and conclusions of law as its own.

It is hereby ORDERED that the Hearing Examiner's findings of fact and conclusions of law be attached hereto and made a part of this order.

It is further ORDERED as follows:

1. The complaint of Betty Hatcher is sustained.
2. Respondent shall cease and desist from discrimination in employment decisions based upon age in violation of WV Code 5-11-1 et. seq.
3. The respondent shall unconditionally offer immediate reinstatement to the complainant into a position of info operator/general office receptionist.
4. The respondent shall pay complainant a sum equal to the wages she would have earned but for respondent's unlawful con-

duct. Such aggregate amount calculated for the period commencing March 15, 1986, to the date of the Hearing Examiner's decision is \$7,847.56 (\$8,062.56 less two weeks wages of \$157.00). For each two weeks thereafter until the complainant is reinstated an additional \$447.92 gross pay shall be added to the sum. Respondent shall also pay complainant interest on the total dollar amount of backpay at the statutory rate of 10%.

5. The respondent shall pay to the complainant \$5,000.00 as compensatory damages for complainant's emotional and mental distress caused by respondent's unlawful conduct.

It is finally ORDERED that respondent provide to the Commission proof of compliance with the Commission's final order within 35 days of service of said final order by copies of cancelled checks, affidavits or other means calculated to provide such proof.

By this final 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 final order and that they have the right to judicial review.

Entered this 19th day of August, 1987.

RESPECTFULLY SUBMITTED,

BY Betty A. Hamblen
CHAIR/VICE CHAIR
WV HUMAN RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

BETTY HATCHER,

Complainant,

v.

Docket No. EA-511-86

KANAWHA VALLEY REGIONAL
TRANSPORTATION AUTHORITY,

Respondent.

**EXAMINER'S RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

This matter matured for public hearing on the 27th and 28th day of October, 1986. The hearing was held at 405 Capitol Street, Daniel Boone Building, Fourth Floor Conference Room, Charleston, West Virginia. The hearing panel on each day consisted of Theodore R. Dues, Jr., Hearing Examiner and Betty Hamilton, Hearing Commissioner.

The Complainant appeared in person and by her counsel, Sharon Mullens and Heidi A. Kossuth. The Respondent appeared by its counsel, Cheryl Wolfe and by its representative, Kathy Clarke.

After a review of the record, any exhibits admitted in evidence, any stipulations entered into by the parties, any matters for which the Examiner took judicial notice during the proceedings, assessing the credibility of the witnesses and weighting the evidence in consideration of the same, the Examiner makes the following findings of fact and conclusions of law. To the extent that these findings and conclusions are generally

consistent to any proposed findings of fact and conclusions of law submitted by the parties, the same are adopted by the Examiner, and conversely, to the extent the same are inconsistent to the findings and conclusions, the same are rejected.

PROPOSED FINDINGS OF FACT

1. On August 16, 1982, Complainant, Betty Hatcher, was hired by Kanawha Valley Regional Transportation Authority (hereinafter KVRTA) as an information operator and held that position until November 21, 1983.

2. On November 21, 1983, after being asked by her supervisor, Complainant became general office receptionist.

3. Upon becoming the general office receptionist, Complainant was subject to scrutiny different than that of her co-workers. Complainant's supervisors, Kimberly Green and Kathy Clark, kept a separate personnel file on Complainant only. No other office employee had a separate file, recording errors kept by supervisors.

4. Betty Hatcher is 54 years old, she was 53 at the time of her lay-off from KVRTA.

5. Prior to working for KVRTA, Ms. Hatcher had been a secretary at other businesses. She holds certifications in word processing and accounting from Garnett Career Center.

6. Upon taking the general office receptionist, Kimberly Green became Complainant's supervisor.

7. Complainant was given a 60-day training period for the position of general office receptionist. Complainant

- completed the 60-day training period.

8. Kimberly Green said Complainant was doing fine and catching on during her training period.

9. In May, 1984, Kimberly Green left KVRTA and Kathy Clark became Complainant's immediate supervisor.

10. Complainant was treated differently than the younger office workers.

11. Complainant was given a disciplinary memo whenever she was late for work. Other office employees were not treated similarly for lateness.

12. Kathy Clark, Cherie Taylor and Marty Busch Alston, all younger employees, under the age of 40, were not disciplined for being late for work.

13. Kimberly Green told the Complainant that she kept a separate performance file about Complainant.

14. Kathy Clark informed Complainant that Complainant would start "with a clean slate" under her supervision.

15. The separate personnel file about Complainant's performance was the only separate file kept on office personnel, by either Ms. Green and/or Ms. Clark.

16. The standard of scrutiny applied to Complainant's work performance was stricter than that applied to her co-workers.

17. Complainant corrected various deficiencies in her work whenever they were brought to her attention.

18. Complainant's typing was regularly reviewed while the typing of her co-workers was not.

19. Following Complainant's layoff, Cherie Taylor, a younger employee, replaced Complainant and performs substantially all of Complainant's former duties.

20. On February 20, 1986, Complainant was informed by Kathy Clark and Milton Back that she was laid off due to poor economic conditions.

21. When informed of her layoff, Complainant asked if she could return to the telephone operator position. She was informed by Ms. Clark and Mr. Back that she could not because they preferred Cherie Taylor, a younger, less-senior employee.

22. Complainant is currently laid off from KVRTA.

23. Complainant was told that she would have to change her work schedule and work as the information operator on Saturdays. Complainant believes she was required to work Saturdays because she was 53 and did not have small children. Preferential treatment was afforded Cherie Taylor a younger, less senior employee.

24. Complainant earned a net salary of approximately \$325.00 every two weeks.

25. Complainant was laid off on February 18, 1986, and was paid through March 15, 1986.

26. Complainant has sought employment for seven months. She has worked only two weeks since her layoff at Alford Termite Control. She received \$157.50 gross wages for each week she worked at Alford Termite.

27. Complainant seeks back wages and restoration to her position as information operator/general office receptionist.

28. Complainant seeks incidental damages for aggravation and torment. She has had difficulty sleeping since her layoff.

29. Complainant was subject to discriminatory treatment due to her age.

30. Complainant received written directives from her supervisor concerning her performance which contained the same types of errors for which Complainant was reprimanded. (See Respondent's Exhibit 1.)

31. Non-office staff, particularly Richard Ashworth, stated that Betty Hatcher's work was satisfactory. Complainant typed for Mr. Ashworth.

32. Cherie Taylor typed for Mr. Ashworth. Mr. Ashworth found Ms. Taylor's typing satisfactory but she, like Ms. Hatcher, made typing errors.

33. KVRTA utilizes a seniority system for its salaried office staff in offering jobs and resolving vacation scheduling conflicts.

DISCUSSION

The evidence in this matter, as is true in most instances where litigation occurs, is diametrically conflicting on the ultimate issue in this case. However, the testimony of the Complainant was most credible. It is apparent that the Respondent's employee staff is younger than the Complainant and has tighter bond amongst themselves to the exclusion of the Complainant. Although the social relationships resulting in the bond shared by most of the employees other than the Complainant

was not determinative of any unlawful conduct leading to the findings of discrimination in this case, the bonding of those employees did serve as a conduit which fostered the problems which ultimately lead to the Complainant's disparate treatment.

Given this perspective, it is of no surprise that the Complainant's work was justifiably viewed by her to be more heavily scrutinized than other employees. In fact, the Respondent was incapable of rebutting the fact that a previous supervisor of the Complainant kept a separate file on the Complainant which was not kept for any other employee then employed. Although the Complainant's new supervisor assured the Complainant that she was starting with a clean slate, the credible evidence of record indicates that the environment did not change very much as far as the Complainant's treatment. This is especially true since a nonoffice staff employee, Richard Ashworth, had the opportunity to have both the Complainant and the Complainant's replacement perform typing for him and it was his opinion that both persons made mistakes in typing that required some corrections. This evidence clearly diminishes the significance of the Respondent's witnessess testimony of "isolated" poor performance pertaining to the Complainant.

The evidence is just as clear that no other individual was reprimanded for tardiness nor the addressing personal business on company time. In fact, it was the normal practice of the employees for the Respondent for the time relevant to the matter alleged in the complaint, to have one employee leave the building at lunch to bring back lunch for themselves and other

employees that were working. In this type of a situation, persons leaving the building may or may not have been conducting personal business at a time that they shouldn't have. However more importantly, the evidence was general at best as to what amount of time it would take such an employee to place, obtain and return with the luncheon orders of his/her coworkers and still allowing adequate time for him/her to eat their own lunch. Surely, it is not the contention of the Respondent that the employee forfeits the ability to perform personal business on his/her lunch hour merely because they have been requested to pick up food for coworkers who elected to remain at the building during the lunch hour. It is the Examiner's position that to challenge the conduct on this issue as reflected in the record would result in such a warped result.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the parties and the subject matter herein.
2. As in all cases, the Complainant has the burden of proving a *prima facie* showing that her age was a determining factor in her layoff from KVRTA. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
3. Complainant is a "person" within the meaning of the West Virginia Human Rights Act. W.Va. Code § 5-11-3(a).
4. The Respondent is an "employer" within the meaning of the West Virginia Human Rights Act. W.Va. Code § 5-11-3(d).
5. It is the public policy of the State of West Virginia

to provide all of its citizens equal opportunity in employment. Equal opportunity in the area of employment is hereby described to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or handicap. W. Va. Code § 5-11-2.

6. On the 20th day of April, 1986, Complainant filed a complaint with the West Virginia Human Rights Commission, Docket Number EA-511-86, alleging that Respondent had engaged in unlawful discriminatory practices prohibited by law.

7. Age discrimination is proven by a four point standard adopted by both federal and state courts. McDonnell-Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1917 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981). This scheme requires the Complainant to meet prescribed criteria to establish a prima facie case. The four point test for analysis of the prima facie case set forth is the case law states: (1) the Complainant must be a member of the protected class; pursuant to West Virginia Code 5-11-3(q) in the instant case, between the ages of 40 and 65, (2) Complainant must be qualified to perform the job he seeks, (3) the Complainant must be adversely affected by the Respondent's employment decision and (4) there must be a causal connection between the Complainant's age and the adverse action.

8. Complainant has established a prima facie case. Complainant is a member of the protected class as she was 53 years of age at the time of her lay-off from KRTVA. Secondly, Complainant was qualified to perform both the position of general

office receptionist and the position of information operator as she had performed both jobs for Respondent. Thirdly, Complainant was adversely affected by Respondent's decision to "eliminate" the general office receptionist position. And finally, Complainant was laid-off based upon her supervisor's established discriminatory practice of applying stricter scrutiny to Complainant's work than to the work of other office staff members. More particularly, Complainant's supervisor kept a separate personnel file outlining Complainant's performance deficiencies. No such file was kept concerning any of Complainant's co-workers. Consequently, Complainant was laid-off while Cherie Taylor, a younger, less senior employee was retained in the position of information operator.

9. Complainant was continually subjected to discriminatory and less favorable treatment by her supervisors during her tenure at KVRTA. Complainant was the only office employee who received personal memo's concerning her tardiness. Complainant was counseled and criticized on a regular basis. Two of Complainant's former supervisors kept a personnel file outlining only Complainant's mistakes and deficiencies while all other office employees were immune from such scrutiny. Both Kimberly Green and Kathy Clark stated that they kept a separate file on the Complainant. No basis for comparison to the performance of other employees could be made since similar files were not kept on other employees.

10. Once Complainant has established a prima facie case the burden shifts to Respondent to articulate some legitimate,

non-discriminatory reason for Complainant's treatment.

Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E.2d 342 (W.Va. 1983). This is but a burden of producing evidence to rebut the *prima facie* case and not the burden of persuasion. Burdine. Respondent contends that Complainant was constantly making clerical errors, tardy for work, and doing personal business on company time. Thus Respondent has met this burden.

11. Once Respondent has articulated a legitimate non-discriminatory reason for its action, the responsibility again returns to the Complainant. She must now demonstrate that its reason is a pretextual coverup for a discriminatory decision based upon age. McDonnell Douglas. Respondent's contention would be a concern in an employment situation. However, Complainant had completed her training program for the office receptionist program and had formerly been performing satisfactorily as an information operator for KVRTA. Complainant was allegedly counselled and reprimanded on several occasions over her four year tenure with KVRTA. Yet Complainant was not laid off until February 20, 1986. Interestingly, there is no point of comparison between Complainant and her co-office workers since Complainant's supervisors kept a running tally of all of her alleged mistakes while overlooking the mistakes of other, younger office employees. Naturally when the determination was made to eliminate a position the Complainant's errors and deficiencies surfaced to justify her termination. Obviously, disparate

treatment existed between Complainant and her younger counterparts. From this, one concludes that Respondent's contention is but a pretext.

12. The West Virginia Human Rights Act shall be liberally construed to accomplish its objectives and purposes. W.Va. Code §5-11-15.

13. The West Virginia Human Rights Act may award backpay to a Complainant to compensate for discriminatory employment practices of a Respondent. W.Va. Code § 5-11-13(c).

14. The West Virginia Human Rights Commission may award compensatory damages for humiliation, embarrassment, emotional and mental distress and loss of personal dignity without proof of monetary loss. State of West Virginia Human Rights Commission v. Pearlman Realty Company, 239 S.E.2d 145 (W.Va. 1977).

PROPOSED ORDER

It is the recommendation of this Hearing Examiner that the Commission issue the following final Order:

1. Judgment for the Complainant;
2. That the Complainant be reinstated to the position of information operator/general office receptionist.
3. That the Complainant be awarded backpay for the relevant time period commencing March 15, 1986 and continuing until she is reinstated to the position of information operator/general office receptionist. To date Complainant has lost thirty-six (36) weeks' wages due to the discrimination practiced on her by the Respondent.

4. That the backpay award be calculated at a rate of

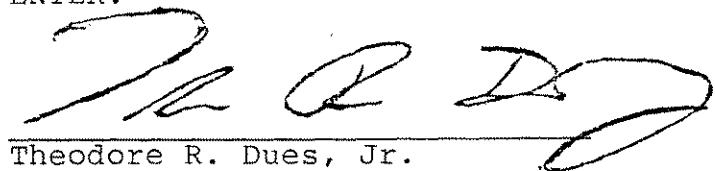
\$447.92 gross pay for each two week period. To date Complainant's backpay award amounts to \$8,062.56. Less the two weeks wages of \$157.50 per week from Alford Termite Service, Complainant's backpay award amounts to \$7,847.56.

5. That the Complainant be awarded compensatory damages in the amount of \$5,000.00 for her emotional and mental distress.

6. That judgment interest of 10% per annum be applied to the total dollar amount of this award. The interest shall accrue from the date of entry of this Order by the Commission.

DATED: June 23, 1987

ENTER:



Theodore R. Dues, Jr.
Hearing Examiner

CERTIFICATE OF SERVICE

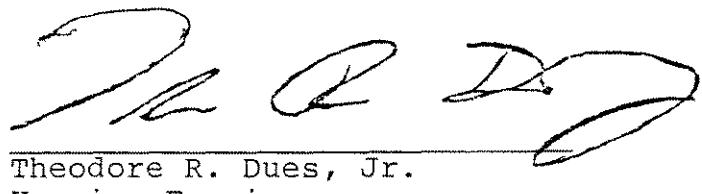
I, Theodore R. Dues, Jr., Hearing Examiner, hereby swear and say that I have served a true and exact copy of the foregoing EXAMINER'S RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW upon the following:

Cheryl Harris Wolfe, Esq.
Jackson, Kelly, Holt & O'Farrell
P.O. Box 553
Charleston, WV 25322

and

Thomas Hindes, Esq.
Deputy Attorney General
812 Quarrier Street
Fourth Floor, L & S Bldg.
Charleston, WV 25301

by mailing the same by United States Mail on this 23rd day of June, 1987.



Theodore R. Dues, Jr.
Hearing Examiner