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STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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CHARLESTON, WEST VIRGINIA 25301**

ARCH A. MOORE, JR.
Governor

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April 25, 1986

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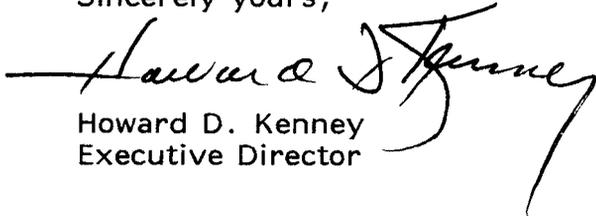
RE: Holcomb V Carbon Fuel/ES-367-81

Dear Above Parties:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Holcomb V Carbon Fuel.

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/RR

Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CHERYL LYNN HOLCOMB,

Complainant,

vs.

Docket No. ES-367-81

CARBON FUEL COMPANY,

Respondent.

O R D E R

On the 11th day of March, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Theodore R. Dues, Jr. After consideration of the aforementioned, the Commission does hereby not adopt the Findings of Fact and Conclusions of Law as its own, except as indicated below and substitutes therefor its own Findings of Fact and Conclusions of Law set forth below.

The Commission adopts as its own Findings of Fact 1 through 11 and Conclusions of Law 1 through 3 of the Hearing Examiner's recommended Findings of Fact and Conclusions of Law. The Commission hereby substitutes its own Findings of Fact as follows:

"12. The testamentary and documentary evidence shows with credibility that the respondent failed to hire complainant because of unsatisfactory references.

13. The respondent had a policy of checking references on all applications except those in which the applicant had been a

former employee.

14. The respondent checked at least one reference on 73 out of 81 male applicants and those applicants whose references were not checked were former employees."

The Commission hereby substitutes its own Conclusions of Law as follows:

"4. The respondent articulated a legitimate nondiscriminatory reason for its failure to hire the complainant in that reference checks were unsatisfactory.

5. Once a legitimate non-discriminatory reason for the alleged discrimination has been articulated the burden shifts to the complainant to show that the reason or reasons so articulated were pretextual. The credible evidence, particularly the documentary evidence, shows that the respondent did receive unsatisfactory references on the complainant and made reference checks on all applicants for employment, including males who were hired in preference to complainant, except those who were former employees. The respondent therefore made a legitimate business decision that the complainant would not be a satisfactory worker based on the references and because it was a general policy, followed in all cases, to check references on applicants who were not former employees, the reasons articulated for failing to hire complainant were not pretextual.

6. The claimant has, therefore, not sustained by a preponderance of the evidence her allegations of prohibited

discrimination.

It is, therefore, ORDERED that this complaint be dismissed.

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and those which have been adopted as stated above be made a part of this Order.

By this Order, a copy of which shall be sent by Certified Mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 21st day of March, 1986.

Respectfully Submitted,



CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

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

W.V. HUMAN RIGHTS COMM.

CHERYL LYNN HOLCOMB,
Complainant,

*Approved
ARS 12/20/85*

vs.

Docket No. ES 367-81

CARBON FUEL COMPANY,
Respondent.

EXAMINER'S RECOMMENDED FINDINGS
OF FACT AND CONCLUSIONS OF LAW

This matter matured for public hearing on July 18, 1985. Appearing at the hearing were the Complainant, in person, and by her counsel, Penelope Crandall. The Respondent appeared by its counsel, James T. Carney and William Robinson. Also present on behalf of the Respondent was Tod Cloer. The presence of a Hearing Commissioner was previously waived by the parties.

After considering the testimony of record, the documentary evidence and the proposed findings submitted by the Complainant and the Respondent on October 14, 1985 and August 15, 1985, respectively, the Examiner makes the following recommended decision.

ISSUE

1. Whether the Respondent's refusal to hire the Complainant was due to her gender.

FINDINGS OF FACT

1. The Complainant is a female.
2. At the time the Complainant applied with the Respondent for employment she possessed her miner's certificate

and was familiar with several pieces of underground mining equipment.

3. In particular the Complainant had familiarized herself with the operation of the shuttle car, the scoop and was proficient at the position of pinner helper, miner helper and setting jacks.

4. The Complainant's previous mine employment was with Cannelton Industries for the period of June 1978 through June 1980.

5. The Complainant had worked in mines no. 110 and 115 for Cannelton Industries.

6. That while at Cannelton, the Complainant performed her work satisfactorily and showed above average interest in her job in learning more about other job classifications and their duties in the mines.

7. While working for Cannelton Industries, the Complainant was given a written warning on one occasion when she and other workers left the work site early and on another occasion which ultimately was stricken from her employment records.

8. That on or about August 12, 1980, the Complainant applied for employment with the Respondent.

9. During the interview process management for the Respondent inquired of the Complainant as to what transportation would be used to get her to work, the number of children that she had and what her husband's attitude was about her working in the mines.

10. The Complainant later became aware of hirings made by the Respondent subsequent to the filing of her application and approached management for Respondent for an explanation.

11. Management for Respondent indicated to the Complainant that the reason for their failure to hire her was due to bad job references received from "asking around".

12. The Respondent for the same relevant time period as the Complainant's initial application, hired males without making reference checks.

13. The Complainant, at all times relevant to the consideration by the Respondent of her application for employment, was physically capable of performing underground mining duties for which she was qualified.

14. The Complainant incurred lost wages in the amount of Eleven Thousand Four Hundred Four Dollars and Fifty-Five Cents (\$11, 404.55).

15. Under the circumstances relating to the depressed coal market in West Virginia and the lack of underground mining job opportunities, the Complainant reasonably mitigated her damages in this case.

16. As a result of the conduct of the Respondent, the Complainant incurred mental pain and anguish.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the subject matter and the parties herein.

2. As in all cases, the Complainant bears the burden of proving the allegation of her complaint that the Respondent

discriminated against her because of her sex in its decision not to hire her on or about August 12, 1980.

3. The Complainant proved a prima facie case both by direct and indirect evidence. Particularly, the Complainant proved that she is a female; that she is a qualified experienced miner; that she applied for work as an underground miner and was not hired; and that the Respondent hired male underground miners immediately following her application for employment.

Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E.2d 342 (1983); McDonnell Douglas v. Green, 411 U.S. 792 (1973).

4. The Respondent failed to articulate a credible nondiscriminatory reason for its failure to hire the Complainant.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

5. The Complainant is entitled to backpay in the amount of Eleven Thousand Four Hundred Four Dollars and Fifty-Five Cents (\$11,404.55), along with full contributions by the Respondent toward Complainant's Social Security and retirement fund credits and compensatory seniority applicable to any panel rights Complainant might have in the event that Respondent or its successor company should reopen its mining operations.

6. The Complainant is entitled to damages for embarrassment and humiliation in the amount of Fifteen Thousand (\$15,000.00) Dollars.

7. The Complainant is entitled to reasonable attorney's fees and costs in amount to be provided by the Examiner in a

supplemental Order on fee issues.

DETERMINATION

The Complainant proved with direct and indirect evidence that the Respondent utilized unlawful sex related considerations in its decision not to hire her. In addition, the Respondent failed to introduce credible evidence to rebut the Complainant's prima facie case.

Accordingly, the Examiner concludes that the Respondent violated the West Virginia Human Rights Act in its consideration of the Complainant for employment.

PROPOSED ORDER

The Hearing Examiner recommends the Commission take the following action:

A. That the Complainant be awarded backpay in the sum of Eleven Thousand Four Hundred Four Dollars and Fifty Five Cents (\$11,404.55) with prejudgment interest, along with full contributions by the Respondent toward Complainant's Social Security and retirement fund credits and compensatory seniority applicable to any panel rights Complainant might have in the event that Respondent or its successor company should reopen its running operation.

B. That incidental damages be awarded in the amount of Fifteen Thousand (\$15,000.00) Dollars;

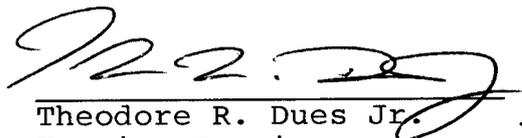
C. That the Commission order reasonable attorneys' fees and costs to the attorney for the Complainant in an amount to be provided by this Examiner in a

supplemental Order on these issues; and

D. That the Commission issue a cease and desist Order requiring the Respondent to comply with the West Virginia Human Rights Act in its interaction with the Complainant and any other targeted persons under the act.

DATED Dec. 13, 1985

ENTER:


Theodore R. Dues Jr.
Hearing Examiner