



COPY

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE: 304-348-2616

ARCH A. MOORE, JR.
Governor

May 30, 1986

Gail Ferguson
Assistant Attorney General
Walt Auvil
Assistant Attorney General
1204 Kanawha Boulevard, E.
Charleston, WV 25301

Gene Bailey, Esq.
Charles Q. Gage, Esq.
Jackson, Kelly, Holt & O'Farrell
1600 Laidley Tower
P. O. Box 553
Charleston, WV 25322

RE: Johnston V Ashland Coal, Inc.
ES-181-85

Dear Ms. Ferguson, and Mr. Bailey:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Johnston V. Ashland Coal, Inc. ES-181-85.

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
Howard D. Kenney
Executive Director



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Executive Director

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

MICHAEL G. JOHNSTON,

Complainant,

vs.

Docket No. ES-181-85

ASHLAND COAL, INC.,
a Subsidiary of
Ashland Oil Co.,

Respondent.

O R D E R

On the 6th day of May, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner John M. Richardson. After consideration of the aforementioned, the Commission does hereby adopt the 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.

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 23 day of May, 1986.

Respectfully Submitted,



Betty Hamilton
CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

THE WEST VIRGINIA HUMAN RIGHTS COMMISSION
OFFICE OF THE HEARING EXAMINER

MICHAEL G. JOHNSTON,

Complainant,

v.

DOCKET NO. ES-181-85

ASHLAND COAL INC.,
A SUBSIDIARY OF ASHLAND
OIL CO.

Respondent.

RECOMMENDED DECISION

I.

Preliminary Matters

This matter arises under West Virginia Code 5-11-1 et. seq. (1981) as amended. On September 27, 1984, the Complainant filed his verified complaint alleging that he was discriminated against on the basis of his sex (male). At a status conference held on August 8, 1985, the presence of a Hearing Commissioner was waived. Thereafter, probable cause having been found, a public hearing was held on December 4, 1985, in Room 3 of the Cabell County Library in Huntington, West Virginia. The Complainant, Michael G. Johnston, was present and represented by counsel, Walt Auvil, and Eumi Choi, Assistant Attorneys General for the State of West Virginia. The Respondent, Ashland Coal, Inc., was present and

represented by its counsel, Charles Q. Gage and Gene W. Bailey of the law firm of Jackson, Kelly, Holt & O'Farrell.

Whereupon, the Complainant presented his evidence and upon completion thereof rested his case. At that time, the Respondent, by counsel, renewed its earlier motion to dismiss the complaint based upon the execution and payment of money under a previous severance agreement entered into by the parties, and, in addition thereto, presented its motion for a directed verdict upon the grounds that the Complainant had failed to carry its burden of proof or to provide sufficient evidence to rebut Respondent's non-discriminatory reason for discharging the Complainant. At that time, the Hearing Examiner made preliminary findings and conclusions wherein the Respondent's motion to dismiss the complaint as a result of the previously executed agreement was overruled, however, the Respondent's motion for a directed verdict was preliminarily sustained. In accordance with Rule 7.22(b) of the Rules and Regulations Pertaining to Practice and Procedure Before The West Virginia Human Rights Commission, the Hearing Examiner directed that the Respondent, within 10 days, make proposed findings in accordance with the preliminary rulings made by the Hearing Examiner and directed that the Complainant would have 15 days to prepare its proposed findings, conclusions, and exceptions to the Hearing Examiner's preliminary ruling and file therewith any motion to reconsider or otherwise.

Thereafter, Complainant's counsel filed with the Chairman of the Commission a motion requesting the recusal of the

Hearing Examiner and an extension of time upon which to file exceptions. Upon discovery of the filing of the motion, which was mailed to Nathaniel Jackson, Chairman, and served upon Gene W. Bailey, counsel for the Respondent, with only a courtesy copy sent to the Hearing Examiner, counsel for both parties were consulted and the Complainant was granted a five day extension for the filing of proposed findings and any motions to reconsider the preliminary ruling made by the Hearing Examiner. At that time the motion to recuse was overruled.

On January 16, 1986, at its regularly scheduled meeting and 23 days after the deadline ordered for the filing of the proposed findings, exceptions and motions, the Commission met and considered the Complainant's motion and found that the Complainant was entitled to 15 days after the filing of the transcript to file its proposed findings, exceptions and motions, and refused to grant the Complainant's request for recusal of the Hearing Examiner. [It is noted that the complete transcript of the public hearing was filed herein on December 23, 1985.]

The Complainant took no action until the Hearing Examiner directed the parties, by counsel, to appear at the Commission's offices on February 19, 1986 at 10:00 a.m. At that time, the Hearing Examiner again considered Complainant's motion which now included a request to reopen the public hearing and for recusal of the Hearing Examiner. The Complainant's motion was again overruled, and counsel for the

Complainant was directed to prepare proposed findings of fact and conclusions of law and filed the same with the Hearing Examiner no later than February 24, 1986.

On February 24, 1986, as directed, the Complainant, by counsel, filed his proposed findings of fact and conclusions of law. Thereafter, on March 12 & 13, 1986, the Commission met and again considered Complainant's motion to reopen and recuse. The Complainant's motion was denied as evidence by a letter from the Executive Director, Howard D. Kenney, dated March 17, 1986 which was received by the Hearing Examiner on March 24, 1986.

For the purposes of this decision, the Hearing Examiner has considered all of the pleadings, testimony, exhibits and to the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent they are inconsistent 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 various witnesses' testimony is not in accord with the findings herein, it is not credited and to the extent that the findings are conclusionary they are so acknowledged.

II.

Issues

1. Did Complainant's execution of the severance agreement releasing all claims relating to his employment or termination of employment and his acceptance of money thereunder bar this action before the Commission?

2. Did Respondent's discharge of the Complainant amount to an unlawful discriminatory act in violation of West Virginia Code 5-11-9(a), in that the Complainant alleges he was terminated from employment while a female with less seniority was retained?

3. In accordance with Rule 7.10 of the Rules and Regulations Pertaining to Practice and Procedure Before the West Virginia Human Rights Commission, does the Hearing Examiner have the authority to rule on motions filed under Rule 7.04(b) and Rule 7.10(b) and, thereafter, proceed to issue a recommended decision pursuant to Rule 7.22 (b) and (c)?

III.

Findings of Fact

1. Michael G. Johnston, the Complainant, is a white male.

2. Clare O'Shea-McCarty is a white female.

3. Respondent is a corporation doing business in West Virginia having 12 or more employees and is a subsidiary of Ashland Oil Company.

4. Complainant was employed by Respondent as a Geologist I on December 15, 1980 and was terminated August 3, 1984.

5. Clare O'Shea-McCarty was employed by the Respondent in February 1982 as a Geologist I and was promoted to Geologist II late in 1984.

6. Complainant was unemployed for a period of approximately four months after he was terminated by the Respondent.

7. Complainant voluntarily signed a severance agreement wherein he received additional money for releasing all of his claims which might have arisen out of his employment, including termination with the Respondent.

8. Complainant received no legal advice from any of the Respondent's representatives or from private counsel before he signed the severance agreement.

9. The Complainant did not appreciate the legal ramifications surrounding the waiver of his rights at the time he signed the severance agreement containing the waiver set forth in Fact No. 7.

10. The Complainant graduated from Austin Peay State University earning a B.S. Degree with a major in Geography.
(1966-1970)

11. The Complainant attended Murray State University and obtained another major in Geology (1975-1976).

12. The Complainant attended graduate school at Eastern Kentucky University studying Geology but earned no graduate degree (1977).

13. The Complainant attended the University of Kentucky Geology Field Camp in the summer of 1977.

14. The Complainant had two years prior work experience in Geology with Westmoreland Coal Co.

15. Clare O'Shea-McCarty graduated from Penn State University having a 3.5 grade average, earning a B.S. Degree in Earth Sciences with an emphasis in Geology.

16. Clare O'Shea-McCarty had a broad educational background and had courses in computer science.

17. The Complainant and Clare O'Shea-McCarty had the same supervisors throughout the course of their mutual employment with the Respondent.

18. Clare O'Shea-McCarty was rated as a better employee than the Complainant.

19. The Respondent's Geology Department had a need for and utilized Clare O'Shea-McCarty's experience and training in computer science.

20. The Complainant could not have performed the same duties as Clare O'Shea-McCarty without substantial additional training in computer science.

21. The Complainant and Clare O'Shea-McCarty logged core samples as their job assignments required them to do so.

22. The Complainant and Clare O'Shea-McCarty performed a substantial number of hours outside of the office doing field work.

23. The Complainant and Clare O'Shea-McCarty's differing work assignments were a result of different educational skills and based on the needs of the Respondent.

24. When the Complainant and Clare O'Shea-McCarty performed similar work assignments they carried them out in a similar fashion and neither was "pampered."

25. Complainant was terminated as a result of a reduction in force caused by a poor economic forecast.

26. Clare O'Shea-McCarty was not terminated because she had certain training in computer science which provided her with skills that the Complainant did not have.

IV.

Discussion

The ensuing discussion will be separated into three parts to correspond numerically with the three issues herein before set forth.

1. During the public hearing, the Complainant testified that that while he had read the severance agreement it was his belief that he had to sign it in order to obtain the severance benefits contained therein. No effort was made on the part of the Respondent to provide a legally

trained person to explain that the severance agreement contained a waiver which waived his Title VII Rights or rights under the West Virginia Human Rights Act.

Therefore, the issue presented to the Hearing Examiner and ultimately to the Commission by the Respondent's motion to dismiss the Complainant's complaint is whether the Complainant voluntarily and knowingly waived his right to any further relief under the West Virginia Human Rights Act.

In the instant case, it is amply clear that the Complainant's only motivation to sign the severance agreement was to obtain the monetary benefits contained in it. The Respondent did not coerce or offer any other inducement to the Complainant to sign the agreement. A similar situation existed in the case of Rogers v. General Electric Company, 36 FEP 674, W/D Texas (1984), the court held where the Plaintiff asserted that the release was void as against public policy due to the fact she was "practically compelled to submit to the stipulation" in the agreement, but further stated she was not forced to sign except that it was necessary in order for her to receive the monetary benefits then, the act of signing by the Plaintiff was a voluntary act. To be a valid waiver, however, the waiver must not only be voluntary it must also be knowing, with a full understanding of what rights are being waived. See United States of America Equal Employment Opportunity Commission

et. al. v. Trucking Employers, Inc., 561 F2d 313, 318, 15FEP cases 232 (D.C. Cir. 1977). This decision was recently followed by District Judge Hayden in the case of Pearce v. West Virginia Department of Highways, 36 FEP cases 875 (1982) wherein the Plaintiff voluntarily and knowingly entered into a predetermination conciliation agreement before the West Virginia Human Rights Commission.

In the present case, the Complainant was not counselled by any lawyer and testified that he was not made aware of the specific rights he was waiving. Pursuant to the cases cited, this falls short of being a "knowing" waiver, inasmuch as the Complainant did not have a full understanding of what rights were being waived. The Respondent's only evidence in this regard was that Ms. Withrow, a trained personnel officer, talked with the Complainant. Ms. Withrow was not directed by the Respondent to explain the nature of the waiver and she had no legal training or background.

For the aforementioned reasons, the Respondent's motion to dismiss the complaint based upon the previously executed severance agreement was overruled, and the Respondent's motion for directed verdict was then considered by the Hearing Examiner.

2. The Respondent's motion for a directed verdict requires resolving the basic issue for which the public hearing

was held, namely, was the Complainant's termination by the Respondent while retaining a female with less seniority an unlawful discriminatory act.

The Complainant offered no evidence under the reverse-discrimination theory that the Respondent was utilizing a quota system or following an affirmative action plan to retain minorities, etc. The only evidence the Complainant offered was of a comparative nature which would be consistent with the disparate treatment theory.

When the issue is the disparate treatment of the Complainant, the U.S. Supreme Court in the case of McDonnell Douglas Corp. v. Green, 411 U.S. 702, 4FEP 965 (1973) has established a three step procedure in order to prove a discriminatory motive on the part of the Respondent. Briefly, these steps are: (1) the Plaintiff must establish a prima facie case; (2) the Defendant must offer a legitimate, non-discriminatory reason for its actions; and (3) the Plaintiff must establish that this supposedly legitimate, non-discriminatory reason was a pretext to mask an illegal motive.

While the McDonnell Douglas Corp. v. Green case (*Ibid.*) was a refusal to hire case, almost every decision by a court considering a discharge case had held that the principles of McDonnell Douglas were applicable. While there is some modification in the discharge situation, it relates to the proof of a prima facie case. The U.S. Supreme Court spoke to the allocation of proof and upon

whom the burden is carried in the case of Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 25FEP 113 (1981) wherein the court held that while the burden of proof remains with the Plaintiff throughout, that after a Plaintiff has established a prima facie case, the Defendant must articulate a legitimate, non-discriminatory reason for its actions. Thereafter, if the employer articulates a legitimate, non-discriminatory reason for the discharge, the burden then returns to the Plaintiff to demonstrate that the reason given by the employer for the discharge was pretextual. The West Virginia Supreme Court of Appeals in the case of Shepherdstown Volunteer Fire Dept. v. State of West Virginia ex. rel. State of West Virginia Human Rights Commission et. al. ___ WVa___, 309 S.E. 2d 342 (1983) adopted the frame work of McDonnell Douglas Corp. v. Green, thereby establishing the guidelines to be applied in West Virginia.

In this public hearing, the Complainant offered proof that he was a white male with greater seniority than Clare O'Shea-McCarty, a similarly situated female who was retained in her employment with the Respondent while the Complainant was not. Thereafter, the Respondent showed, by cross examination and exhibits offered by the Complainant's own witnesses, that Ms. O'Shea-McCarty was a graduate of Penn State University with a 3.5 average and majoring in Earth Sciences with an emphasis in Geology and Computer Science. The

Complainant basically had a B.S. Degree in Geology and some graduate courses in that field.

The Complainant also complained that he was assigned to more field work than was Ms. O'Shea-McCarty and was required to log heavy core samples while she was not. The Respondent showed that because of Ms. O'Shea-McCarty's educational background she was utilized in areas involving her computer science background and that when her assignments required logging of core samples they were in fact logged by her.

The Respondent articulated that due to the economic conditions a reduction in force was necessary and that because of Ms. O'Shea-McCarty's high performance evaluations and knowledge in the area of computer science, she was retained while the Complainant was not. In doing this, the Respondent had articulated a legitimate, non-discriminatory reason for its actions. It, thereafter, became the burden of the Complainant to show that the Respondent's non-discriminatory reason was pretextual.

While the Complainant continued to offer evidence, there was little or no evidence offered for the purpose of showing that Respondent's non-discriminatory reason was pretextual. That is, the Complainant offered no credible evidence that Ms. O'Shea-McCarty's evaluations were higher because she was female or that Complainant's were lower because he was male. Neither did the

Complainant offer any credible evidence that Respondent's reduction in force was pretextual. However, it was shown by Respondent that the Complainant could not have performed the same computer work as Ms. O'Shea-McCarty without additional training.

At this point, the Complainant rested its case thereby announcing he had no further evidence to offer. The Respondent moved for a dismissal (discussed in Part I above) and a directed verdict on the grounds that the Complainant had failed to prove a prima facie case and to carry the burden of proof of rebutting Respondent's legitimate, non-discriminatory reasons for terminating the Complainant. The Hearing Examiner had only to apply the standard tests set forth in the McDonnell Douglas Corp. v. Green case (*Ibid.*) and Texas Dept. of Community Affairs v. Burdine (*Ibid.*) as adopted by West Virginia. In applying this test, the Hearing Examiner sustained the Respondent's motion and directed that the Respondent provide findings of fact and conclusions of law in accordance with the preliminary ruling and that the Complainant prepare its proposed findings, conclusions, exceptions and file any motions to reopen or otherwise within 15 days.

3. After closing the public hearing on December 4, 1985, the Complainant, by counsel, proceeded to make several motions addressed to the Chair of the Commission. These motions will be discussed in Part III.

The Commission's rules effective September 6, 1985, are the only means whereby individuals may process their complaints administratively. In the instant case, the Complainant filed a motion prior to the Hearing Examiner's making a recommended decision and addressed the motion to the Chair of the Commission. The Commissions rules provide, specifically Rule 7.10(a), that:

"subject to the provisions of these regulations, the Hearing Examiner shall have full authority and discretion to control the procedure of the hearing,..."

Thereafter, Rule 7.10(b):

"on any questions which would be determinative of the jurisdiction of the Commission, or might otherwise result in the dismissal of the complaint, the Hearing Examiner may recommend proposed findings of law and fact. In that event, the Hearing Examiner may proceed to take testimony or close the record, but, in either event, need not continue the hearing in order to allow the Commission to rule on any issue."

The rules further provide in Rule 7.10(d) Motions and Objections at Hearing -:

"Motions made during a hearing and objections with respect to the conduct of the hearing, including objections to the introduction of evidence shall be stated orally and shall, with the rulings of the Hearing Examiner, be included in the transcript of the hearing."

By the above-cited rules, the Commission clearly intended that Hearing Examiners be given full control of

the matters presented at the hearing including the discretion of ruling on motions and then, thereafter, providing recommended findings of fact and conclusions of law. In the instant case, the Complainant had presented all of its evidence and rested its case against the Respondent. Thereafter, the Respondent before opening its case, requested that the Hearing Examiner rule on its motion for a directed verdict on the grounds that the Complainant had failed to provide sufficient evidence upon which the Hearing Examiner could conclude that the Complainant was entitled to any relief. Following a recess, during which the Hearing Examiner reviewed his notes and the exhibits entered by the Complainant, ruled that the Respondent's motion should be sustained.

It is clear that the Hearing Examiner has full authority to direct the procedure of the hearing and to make rulings upon all motions raised during the hearing. It, therefore, follows that the Hearing Examiner did not exceed his authority by ruling upon the motion for a directed verdict which was timely made at the close of all of the Complainant's evidence.

On January 16, 1986, the Commission addressed the Complainant's motion to recuse the Hearing Examiner because the Hearing Examiner had ruled on Respondent's motion for a directed verdict thereby exhibiting bias towards the Complainant in exceeding his authority. That reasoning, of course, must fail because as stated above

the Hearing Examiner has full authority to make such a ruling; it is, of course, obvious that the real reason for the motion for recusal was because the motion for a directed verdict was sustained. Had the motion been overruled, of course, there would have been no motion to recuse. This brings to light that the factors underlying the Complainant's Motion, were contrary to those required in Rule 7.14(b),

"the qualification of the Hearing Panel shall, where applicable be guided by the Judicial Code of Ethics. Any party may file in good faith a motion alleging that a member of the Hearing Panel should not be allowed to hear the case. The motion shall be determined as part of the record prior to the taking of other evidence."

In the instant case, the Complainant filed the motion for recusal with the Chair of the Commission before the Hearing Examiner had made a recommended decision. It, therefore, appears that the motion was not timely nor was it made to the Hearing Panel at the hearing as the rule requires.

It is, therefore, obvious that the Commission correctly overruled the Complainant's motions in January and March 1986 which had previously been accomplished by the Hearing Examiner in December, 1985 and in February 1986. In that light, it further becomes obvious that the Complainant's failure to properly direct its motions to the Hearing Examiner as provided in the rules has resulted in this recommended decision being delayed for

v.

Conclusions of Law

1. The Commission has jurisdiction of the subject matter alleged in the Complaint.

2. The Complainant proved a prima facie case in that he proved he was a white male who was discharged while a white female with less seniority was retained.

3. Respondent rebutted Complainant's inference of unlawful discrimination by credible evidence showing that Clare O'Shea-McCarty was a more highly rated employee and possessed skills in computer science which Complainant did not have, and further that these skills were needed and used by the Respondent.

4. The Respondent articulated a legitimate, non-discriminatory reason for its actions by showing that Complainant was terminated as a result of a reduction in force due to a poor economic forecast.

5. The Complainant failed to rebut Respondent's legitimate, non-discriminatory reason for his discharge.

6. Complainant's failure to rebut Respondent's legitimate, non-discriminatory reason and thereafter resting the case opened the procedural avenue for the Respondent to make a motion for a directed verdict.

7. Pursuant to Rule 7.10 (a) and (b) the Hearing Examiner has the authority to rule upon all motions including a motion for directed verdict, and, thereafter, make

8. Motions made during the hearing under Rule 7.04(b) must be directed to the Hearing Examiner, who, pursuant to this Rule and Rule 7.10, may rule upon the motion and make recommended findings of law and fact to the Commission.

9. A party's motion to recuse under Rule 7.04(b) must have a "good faith" basis. A belief, supported only by an adverse ruling, that the Hearing Examiner has acted outside his authority in ruling on a motion properly made during the hearing, is not a sufficient showing of good faith.

10. An order by the Hearing Examiner, pursuant to Rule 7.22(b), wherein the Respondent and the Complainant are given 10 and 15 days respectively to prepare proposed findings, etc. or file any motions to reconsider or otherwise is clearly permitted by this Rule.

11. Pursuant to Rule 7.08 all motions made prior to the Hearing Examiner's recommended decision shall be filed with the Hearing Examiner.

VI.

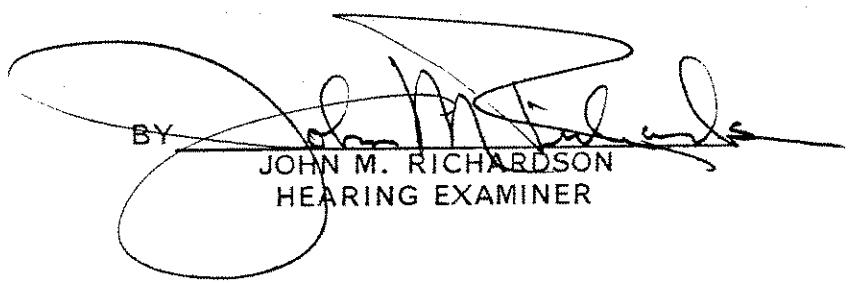
Recommended Order

The Hearing Examiner recommends that the Commission adopt as its final order the following:

1. The Commission hereby adopts the Hearing Examiner's recommended decision and all of the contents thereof.
2. The Complaint herein be dismissed with prejudice.

3. That each of the parties bear their own costs of this proceeding.

RESPECTFULLY SUBMITTED

BY 
JOHN M. RICHARDSON
HEARING EXAMINER