



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
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CHARLESTON, WEST VIRGINIA 25301

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ARCH A. MOORE, JR.
Governor

February 21, 1986

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Charleston, WV 25305

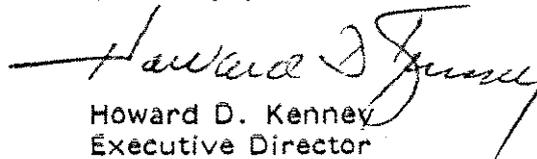
RE: Joan Montgomery V WV Dept. of Employment Security
ER-271-76

Dear Ms. Marsh and Mr. Daugherty:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Joan Montgomery V WV Department of Employment Security.

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
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

RECEIVED

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION JAN 16 1986

W.V. HUMAN RIGHTS COMM.

JOAN MONTGOMERY,

Complainant,

vs.

Docket No. ER-271-76

WEST VIRGINIA DEPARTMENT OF
EMPLOYMENT SECURITY,

Respondent.

ORDER

On the 8th day of January, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner, Anne B. Charnock. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own with the exceptions set forth below.

The Commission hereby amends the Findings of Fact, Conclusions of Law and Recommendations of the Hearing Examiner on the final page thereof by deleting from paragraph 1 the figure "\$1,500.00" and substituting therefore the figure "\$5,000.00", and by inserting and adding paragraph 2., as follows:

2. The respondent shall be Ordered to cease and desist from denying to all individuals full and equal rights on the basis of race, sex, age, religion, color, national origin, or handicap in matters relating to employment.

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 except insofar as they are amended by 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 4 day of Feb., 1986.

Respectfully Submitted



CHAIR/VICE-CHAIR
West Virginia Human
Rights Commission

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DEC 13 1985

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION
W.V. HUMAN RIGHTS COMM.

JOAN MONTGOMERY,

Complainant

Vs.

ER 271-76

WEST VIRGINIA DEPARTMENT OF
EMPLOYMENT SECURITY,

Respondent.

RECEIVED

OCT 24 1985

ADMINISTRATIVE DIRECTOR
SUPREME COURT OF APPEALS

Approved
HRP
12/10/85

FINDINGS OF FACT, CONCLUSIONS
OF LAW, RECOMMENDATIONS AND
ORDER

Pursuant to notice issued to the Respondent, this matter came on for hearing on the 19th day of June, 11th day of July and 16th day of July, 1985, in both Charleston and Logan, WV. Anne B. Charnock, Hearing Examiner, presided and the presence of a Hearing Commissioner was waived by both parties.

The Complainant, Joan Montgomery, appeared in person and by her counsel, Carolyn Marsh, Special Assistant Attorney General, State of West Virginia, and the Respondent, West Virginia Department of Employment Security, appeared in person by Norma Thompson, former manager of Respondent's Logan office, and by its counsel, D. B. Daugherty, of Respondent's Legal Division.

It appearing to the Hearing Examiner that notice as required by law, setting forth the time and place of the hearing and the matters to be heard, had regularly been served upon the Respondent and that the same appeared by their representatives, the hearing was convened at the aforesaid times and places.

Upon due consideration of the pleadings; the testimony, demeanor and credibility of the witnesses; a review of the exhibits entered as evidence at the hearing and a review of the transcript of the hearing; the Hearing Examiner makes the following findings of fact, conclusions of law and recommendations:

FINDINGS OF FACT

1. The Complainant, Joan Montgomery, is a black female who, but for a 4 month period, has been a life long resident of Logan County, West Virginia.
2. The Respondent, West Virginia Department of Employment Security, was and is a state agency with offices throughout the State. An office was and is located in Logan, West Virginia.
3. The Respondent maintains local offices to provide job listings and referrals to area residents. However, Respondent does not make the actual decision to hire an applicant. Rather it refers applicants to the particular employer who is seeking employees. A number of other job-related activities are also maintained in the local office. In the mid-'70's the Logan Office operated the local CETA program.
4. The Complainant was employed in a number of positions in the area commencing with her graduation from high school. However, in the fall of 1974, she became unemployed and with the exception of a few month period in the interim, remained unemployed until January, 1976.

5. On September 1, 1974, Complainant registered with Respondent's Logan office. She frequently visited the office looking for job openings and seeking referrals to said openings. Complainant was subsequently certified as eligible for CETA openings.

6. The Complainant is a high school graduate and has attended a number of colleges and institutions for advanced learning. She was an "exceptional applicant" (Transcript p. 51 7-11-85) according to Louis Damron, one of Respondent's employees. Further he testified that that was the consensus of the other office employees.

7. On one of Complainant's visits to Respondent's Logan office she spoke with Nancy Risko, CETA director, about CETA openings. She was told no CETA jobs were available. (Transcript p. 12, 7-11-85) A few minutes later Complainant overheard Ms. Risko telling another person that indeed a CETA position was open. (Do) This other person has never been identified in any manner. Respondent admitted that this event did happen and Ms. Risko claims to have "temporarily forgotten" the job. (Transcript p. 61, 7-11-85). Complainant then left the Respondent's office and went to another office where she and a friend call Respondent inquiring about a CETA opening. (Transcript p. 12, 7-11-85). At this time Ms. Risko told her a CETA slot was available. (DO).

8. During this sixteen month period Complainant was referred to somewhere between one and three jobs by the Respondent. The testimony is contradictory but the jobs were with C & O Railroad, a credit union and an insurance company. Complainant worked for a short period of time with C & O but was not hired for the other two jobs.

9. As a result of Respondent's acts Complainant became "upset" (Transcript p. 12, 7-11-85)

10. The job Complainant secured in January, 1976, was not as a result of Respondent's referrals.

11. Although Complainant complains of a number of other improprieties these have not been proven..

CONCLUSIONS OF LAW

1. The Complainant is a "person" within the meaning of the West Virginia Human Rights Act. W. Va. Code § 5-11-3(a).

2. The Respondent is an "employment agency" within the meaning of the West Virginia Human Rights Act. W. Va. §5-11-3(g).

3. It is the public policy of the State of West Virginia to provide all of its citizens equal opportunity for employment. Equal opportunity in the areas of employment is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness or handicap. W. Va. Code §5-11-2.

4. On December 15, 1975, Complainant filed a complaint against Respondent (ER 271-76) alleging that Respondent had engaged in unlawful discriminatory practices prohibited by law. §5-11-9(a).

5. Said complaint was timely filed as within ninety days of the alleged act of discrimination. W. Va. Code § 5-11-10.

6. Pursuant to the mandate issued by the Court in Edith Allen, et al v. State of West Virginia Human Rights Commission, et al , 324 S. E. 2d 299 (W. Va. 1964) the public hearing was held.

7. Racial discrimination need not be proved by direct or circumstantial evidence. Rather a multi-point standard has been adopted in both federal and state courts. McDonnell-Douglas v. Green,

411 U. S. 792 (1973), Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S. E. 2d 342 (W.Va. 1983). This scheme requires the Complainant to meet established criteria to establish a prima facie case. These requirements are: (1) That complainant was a member of a protected class, (2) that she applied and was qualified for the position, (3) that she was rejected despite her qualifications, (4) that following the rejection Respondent continued to accept the applications of similarly qualified persons. Complainant carries the burden of establishing a prima facie case. If Complaint fails, the complaint is dismissed. McDonnell-Douglas Shepherdstown.

8. Complainant has established a prima facie case. As a black person she is a member of a protected class. She was qualified for a number of possible job referrals and was certified as eligible for a CETA job. Because Respondent is an employment agency and not the actual employer Respondent does not make the actual employment decision. However, Respondent must make job referrals in a non-discriminatory manner. So although Complainant was never rejected for a job despite her qualifications she was denied a referral despite her qualifications. Lastly, another person eligible for the job was given a referral after Complainant was refused.

9. Once Complainant has established a prima facie case the responsibility shifts to the Respondent to articulate some legitimate non-discriminatory reason for Complainant's rejection. McDonnell-Douglas, Shepherdstown. This is but a burden of producing evidence to rebut the prima facie case and not the burden of persuasion. Texas Dept. of Community Affairs v. Burdine, 450 U. S.

248 (1981). Respondent contends that Complainant was not informed of the CETA job because its employee, Ms. Risko, "temporarily forgot" about the job.

10. Once Respondent has articulated a legitimate, non-discriminatory reason for his action, the responsibility again returns to the Complainant. She must now demonstrate that this reason is a "pretextual coverup for a racially discriminatory decision." McDonnell Douglas, Shepherdstown. Although no person is infallible it would appear incredulous that a person, when asked face-to-face about the availability of a CETA job opening, would not recall that an opening exists. However it is absolutely incredible that just minutes after this exchange took place, that when another person called the office about the same job that suddenly the employee remembered a job existed. Furthermore, the employee, who was dispensing this information, was the director of the CETA program and not just someone answering the phones. If the CETA director did not know what jobs were open, no one would.

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

12. 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).

THEREFORE, based on the foregoing, I make the following recommendations:

1. That the Complainant, Joan Montgomery, be awarded damages in the amount of \$1500.00 for her humiliation, anger, emotional and mental distress.

Respectfully submitted this 23rd day of October, 1985.

Ann Blhannol
Hearing Examiner