



COPY

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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ARCH A. MOORE, JR.
Governor

January 3, 1986

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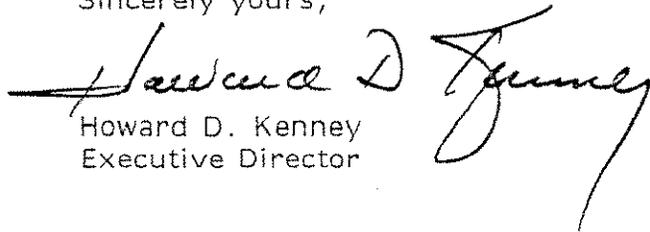
RE: Joyce Ann Marcum V Ranger Fuel Corporation
Docket No.: EH-518-82

Dear Mr. Surber and Ms. Falk:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Joyce Ann Marcum V Ranger Fuel Corporation/Docket No.: EH-518-82.

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

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W.V. HUMAN RIGHTS COMM.
ADDRESS

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JOYCE ANN MARCUM,
Complainant,

vs.

Docket No. EH-518-82

RANGER FUEL CORP.,
Respondent.

ORDER

On the 14th day of November, 1985, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Robert R. Harpold, Jr. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own with the exception set forth below.

The Commission hereby amends the Findings of Fact and Conclusions of Law by deleting the paragraph relating to pre-judgment interest and substituting therefor the following language:

It is ORDERED that the Respondent shall pay to the complainant pre-judgment interest on the award of damages made by the Hearing Examiner and adopted by this Order at the rate of ten percent (10%) per annum from March 1, 1982.

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 19 day of Dec., 1985.

Respectfully Submitted,



CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

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

JOYCE ANN MARCUM

Complainant

vs:

DOCKET NO. EH 518-82

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W.V. HUMAN RIGHTS COMMISSION

RANGER FUEL CORPORATION

Respondent

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Pursuant to proper notice, this matter came on for hearing on the 2nd day of July, 1985, beginning at 9:00 a.m. in the County Commission Courtroom of the Raleigh County Courthouse in Beckley, West Virginia. Robert R. Harpold, Jr., Hearing Examiner presided, the parties having specifically waived the presence of a hearing commissioner (Commission Exhibit #1).

The complainant, Joyce Ann Marcum, was present and represented by her counsel, Gail Falk. The respondent, Ranger fuel Corporation, was also present by Tom Brugnoli, and was represented by its counsel, Charles M. Surber, Jr., of Jackson, Kelly, Holt & O'Farrell.

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, has regularly been served upon the respective parties hereto and that the same appeared by their

respective representatives and counsel, the hearing was convened at the aforesaid time and place.

Each of the parties was given a full and complete opportunity to present evidence, argument, and briefs in support of their respective positions. Based upon review of the transcript of the witnesses' testimony and of the exhibits and stipulations placed into evidence by the parties, and based further upon observations relating to the relative credibility of the witnesses appearing on behalf of each of the parties, the undersigned Hearing Examiner does hereby issue the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On or about June 22, 1981, the complainant, Joyce Ann Marcum, a 35 year old female, applied for an underground coal mining job with respondent, Ranger Fuel Corporation, and indicated on her application for employment her first and second job preferences as "shuttle car" and "roof bolter helper", respectively.
2. Ranger Fuel Corporation employs more than twelve employees.
3. Several months after her submission of an employment application, complainant was interviewed by Mr. Senator, Ranger's personnel manager, and was informed that she would be hired as a general inside laborer (second shift - 4p.m. to 12

midnight) at Ranger's Beckley No. 4 mine conditioned upon her successful completion of a pre-employment physical examination.

4. In 1982, the job duties of a general inside laborer at Ranger's Beckley No. 4 mine included but were not limited to: shoveling belts and roadways; laying track; setting timbers; rock dusting; greasing belts; making belt splices; loading belts; making supply runs; working on the move crews and performing such tasks as moving belt structures, etc.; and other tasks associated with periodic assignments to the face area of the mine.

5. The general inside conditions of Ranger's Beckley No. 4 mine are as follows:

- a. The average underground atmospheric temperature is approximately 60°F.
- b. The underground mine is generally very damp with many areas of standing water particularly along the beltlines.
- c. The height of the mainlines varies from forty-eight to seventy-two (48-72) inches.
- d. The height of the underground operating sections is forty-eight (48) inches or less.

6. Complainant suffers from psoriasis, a skin disease. She had had the condition continuously since age 21. Her psoriasis is classified as moderately severe. When she takes medication, the disease remains under control.

7. On February 23, 1982, complainant underwent a pre-employment physician examination conducted by Dr. Bernard J.

Begley. The valuation consisted of the completion of a lengthy questionnaire by the applicant, followed by a "hands-on" examination which included: height, weight, and blood pressure determination; physical examination of the ears, eyes, neck, chest, heart, and skin; examination of the neurological system (i.e., reflexes); examination of the musculoskeletal system for postural problems, range of motion, back and knee problems; hearing tests, visual tests, breathing tests, and chest x-rays, all of which were considered in conjunction with the requirements of the proposed job assignment of the complaint. Dr. Begley was aware at the time of the pre-employment physical examination that complainant was applying for general duty underground in low coal.

8. Dr. Begley's examination of complainant revealed the presence of active lesions associated with the condition of psoriasis, which lesions were located predominantly on complainant's lower extremities and which were of a moderate degree of severity.

9. As a result of his examination findings coupled with the requirements of the job for which complainant was being considered, Dr. Begley recommended to respondent that complainant not be hired. Respondent's medical examiner did not explain to complainant or to mine management that he would have approved her for any job not involving work on her hands and knees.

10. Based upon Dr. Begley's recommendation, respondent did not hire complainant. In making the decision whether or not

to hire the Complainant, the Respondent relied upon the medical recommendation of the examining physician, Dr. B. J. Begley; therefore, except for the results of the pre-employment physical examination, complainant would have commenced employment with respondent on March 1, 1982.

11. Complainant was denied employment as a general inside laborer with Respondent because it was revealed during the Complainant's pre-employment physical examination that Complainant has psoriasis.

12. But for the results of the pre-employment physical examination, Complainant would have commenced employment on March 1, 1982.

13. If Respondent had employed Complainant on March 1, 1982, she would have received one day of on-the-job training.

14. Between March 1, 1982, and November 10, 1982, Complainant was properly certified to perform the job of general inside laborer.

15. The procedures described in the Pittston Company Policy Manual (Joint Exhibit No. 5) governed Respondent's procedures in February and March, 1982 and were followed by Respondent in processing Complainant's application for employment.

16. Complainant would have been permanently laid off on November 10, 1982, pursuant to a reduction in the work force at Respondent's Beckley No. 4 mine.

17. Between March 1, 1982, and November 10, 1982, Complainant would have been covered under the terms of the National Bituminous Coal Wage Agreement of 1981, of which Respondent was a signatory operator.

18. Between March 1, 1982, and June 6, 1982, the standard daily rate for a general inside laborer working on the second shift was \$87.98 per day. The rate increased to \$93.18 per day on June 7, 1982 and to \$94.38 on September 7, 1982.

19. The four individuals actually hired by Complainant as general inside laborers at Beckley No. 4 on March 1, 1982, who worked continuously until being laid off November 10, 1982, earned an average of \$16,497.22 for this period.

20. During the period March 1, 1982, to November 10, 1982, Complainant had actual gross earnings of approximately \$3,341.42 (\$284.38 from Goodson's and \$2,778.04 from from Buddy's Discount (Midwest Corporation); and an estimated \$279 from Dollencorp, Inc.).

21. In 1982, Respondent's Beckley No. 4 mine was operating one longwall mining section and three continuous miner sections.

22. On April 23, 1982, complainant filed the instant charge, Docket No. EH 518-82, alleging that she had been discriminated against on the basis of her handicap, psoriasis, as a result of respondent's failure to hire her.

23. On July 1, 1982, the West Virginia Human Rights Commission promulgated its Interpretive Rules Governing

Discrimination of the Handicapped, which pursuant to § 1.04 of the Rules, became effective on August 1, 1982.

24. Complainant did seek employment with other companies after rejection for employment with respondent.

25. In 1982, respondent hired sixteen (16) new hourly employees at the Beckley No. 4 mine.

26. Prior to applying for work with respondent, complainant worked for approximately two years at Consolidation Coal Company's Itmann mines as an underground coal miner.

27. During the nearly two years complainant worked for Consolidation Coal complainant suffered from psoriasis, but her psoriasis never interfered with her ability to perform coal mine work.

28. Respondent refused to hire complainant for employment because of psoriasis though its medical consultant did not consider complainant's psoriasis to present any health or safety risk to other employees or to be or to present any economic or financial burden to the employer.

29. Respondent refused to hire complainant because its medical consultant believed that the complainant, because of her psoriasis, should not be hired for underground mining because of aggravation of her condition.

CONCLUSIONS OF LAW

The hearing examiner, having heard the evidence and having reviewed the exhibits filed at the hearing, hereby makes the following conclusions of law:

1. Ranger Fuel Corporation is an "employer" within the meaning of § 5-11-3(d) of the Act, and complainant filed a charge, sufficient as to form, with the West Virginia Human Rights Commission alleging employment discrimination on the basis of handicap, in accordance with the requirements of § 5-11-10 of the Act. Said charge was filed less than 90 days after the acts complained of.

2. The Act, as amended in 1981, prohibits discrimination against the handicapped. Section 5-11-9, in pertinent part, sets forth the prohibited discriminatory acts:

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, . . . :

(a) For any employer to discriminate against an individual with respect to . . . hire . . . if the individual is able and competent to perform the services required even if such individual is blind or handicapped

Section 5-11-3(h) defines the term "discriminate":

(h) The term "discriminate" or "discrimination" means to exclude from, or fail or refuse to extend to, a person equal opportunities because of . . . handicap

§ 5-11-3(t) defines "handicap" as "any physical or mental impairment which substantially limits one or more of an individual's major life activities.

3. Section 4.01 of the West Virginia Human Rights Commission's Interpretive Rules Governing Discrimination of the Handicapped prohibits employment discrimination against handicapped persons and Section § 2.07(c) defines "handicapped person" to include a person who "is regarded as having such a handicap".

The West Virginia Administrative Procedures Act, W.Va. Code § 29A-1-1, et seq. (1982) provides for three types of administrative rules and regulations: interpretive, legislative, and procedural. Section 29A-2-5 is clear that this tripartite classification of administrative regulations applies to all state regulations, regardless of when they were promulgated:

(a) Notwithstanding any filing prior to the effective date of this section . . . , each agency shall hereafter file in the state register a certified copy of all of its lawfully adopted rules which are in force on the date of such filing and all of its proposed rules which have not become effective prior to the date of such filing. All such rules and proposed rules shall be arranged, compiled, numbered and indexed in accordance with the provisions of § 6 . . . of this article, and shall also include a designation of each rule as either legislative rule, interpretive rule or procedural rule.

Section 29A-1-2 provides that interpretive rules are not determinative of any issue affecting private rights, privileges or interests, may not be relied upon to impose civil sanctions or regulate private conduct, and are not admissible in any administrative or judicial proceeding for such a purpose. Under § 29A-1-2(c) of the Act, interpretive regulations are admissible only (a) to show that an individual acted in good faith reliance upon the regulation; or (b) to show that a discretionary agency act was not in violation of the agency's own internal rules.

The West Virginia Human Rights Commission's rules pertaining to handicapped discrimination are clearly interpretive as § 1.01 of the Rules specifically provides:

The following interpretive regulations of the WV Human Rights Act set forth rules for complying with the handicap provisions of the WV Human Rights Act, WV Code § 5-11, and are intended to interpret and implement the provisions of the WV Human Rights Act, particularly the 1980 amendments relating to handicap discrimination, and to assist all persons in understanding their rights, obligations and duties under the law.

These regulations in many respects adopt the handicap interpretation provisions found in the federal anti-discrimination laws. "Guidelines on the Application of the Definition of Handicapped Individual" 41 C.F.R. Pt 60-741 (1978). These guidelines define the phrase "is regarded as having such an impairment" as follows:

"refers to those individuals who are perceived as having a handicap, whether an impairment exists or not, but who, because of attitudes or for any other reason, are regarded as handicapped by employers, or supervisors who have an effect on the individual securing, retaining, or advancing in employment."

Thus, when the W.Va. Human Rights Commission set forth its Interpretive Rules that handicap discrimination included discrimination against persons regarded as handicapped, it was not introducing employers to a novel concept but bringing consistency with the federal handicap discrimination guidelines and decisions. See E.E. Black, Ltd, et al v. Marshall, 497 F.Supp 1088 (1980).

Other jurisdictions have adopted the federal interpretation of the perception doctrine. In the case of Barnes

v. Washington National Gas Co., 22 Wash App 576, 591 P2d 461 (1979), the Supreme Court of the State of Washington construed its state human rights act to bar discrimination against a person erroneously perceived to be handicapped even though the statute did not explicitly protect persons wrongly perceived to be handicapped.

The Court stated:

"The Commission here has been granted broad discretion and responsibility for administration of the Act. We must rely upon and give weight to the Commission's interpretations of the statute reflected in its regulations.

With the foregoing rules of construction in mind, and recognizing that the legislature has directed that the Act be liberally construed, RCW 49.60.020, we must determine whether regulation WAC 162-22-040(1)(b)(iii) is valid.

It is the intent of the legislature to prohibit discrimination in employment against a person with a sensory handicap. It would be an anomalous situation if discrimination in employment would be prohibited against those who possess the handicap but would not include within the class a person 'perceived' by the employer to have the handicap.

The essence of unlawful employment discrimination is the application of unreasonable generalizations about people to the hiring, promotion, and discharge of workers. Race, religious creed and sex are among the prohibited criteria for judging workers' qualifications because of the prejudgments often made on the basis of these characteristics. Proscriptions of discrimination against handicapped persons were added to RCW 49.60 in 1973 because of similar prejudgments often made about persons afflicted with sensory, mental or physical handicaps, such as epilepsy.

Just as the person who is perceived as belonging to a noncaucasian racial or ethnic

group may be discriminated against because of his or her perceived racial characteristics, a person who is perceived to be afflicted with epilepsy may be discriminated against because of his or her perceived handicap even though that perception turns out to be false in either case. It would defeat legislative purpose to limit the handicap provisions of the law against discrimination to those who are actually afflicted with a handicap, such as epilepsy, and exclude from its provision those perceived as having such a condition. Prejudice in the sense of a judgment or opinion formed before the facts are known is the fountainhead of discrimination engulfing medical disabilities which prove on examination to be unrelated to job performance or to be nonexistent. The intent of the law is to protect workers against such prejudgment based upon insufficient information. The law's application, therefore, should not be limited to those who actually have handicaps, excluding those who are discriminated against in the same way because they are only thought to have handicaps.

It makes no difference to the employee whether he is discharged because he, in fact, has epilepsy or that the employer perceives or believes that he has. The employer has terminated the employment for the same reason which constitutes discrimination contrary to the provisions of the statute. The class protected by the statute is those persons whom the employer discharges or intends to discharge because he believes the person is afflicted with a 'mental, sensory, or physical handicap.'

Public policy, expressed by the Act to eliminate and prevent discrimination in employment requires protecting from discriminatory practices both those perceived to be handicapped as well as those who are handicapped."

It is the opinion and conclusion of the hearing examiner that the reasoning in the Washington case should be followed in this case. Therefore, the fact that the rules were adopted after the alleged act of discrimination is, in the opinion of this examiner, irrelevant because it is this examiner's opinion that a consistent

interpretation of the term "handicap" carries with it the meaning set forth in the Barnes case.

4. Based upon the preceding conclusions, the question, therefore, in this case is whether the complainant's psoriasis was a handicap under the Human Rights Act or whether the complainant was perceived by the respondent to be handicapped.

Section two of the Rules and Regulations of the West Virginia Human Rights Administrative Interpretation of Rules Governing Discrimination of the Handicapped sets forth several definitions which are important in arriving at the answers to these issues. The definitions are as follows:

"2.01 Handicap - Means any physical or mental impairment which substantially limits one or more of a person's major life activities.

2.02 Physical Impairment - Means any physiological disorder or condition or cosmetic disfigurement or anatomical loss or abnormality affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic, and lymphatic.

2.03 Mental Impairment - Includes any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and learning disabilities.

2.04 Physical or Mental Impairment - Includes but is not limited to such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, autism, multiple sclerosis, cancer, diabetes, heart disease, obesity, drug addiction, tobacco addiction, and alcoholism. However, use or abuse of alcohol, tobacco or drugs in the absence of medically verifiable addiction does

not constitute a 'physical or mental impairment.'

2.05 Major Life Activities - Includes communication, ambulation, self-care, socialization, learning, vocational training, employment, transportation, and adopting to housing.

2.06 Substantially Limits - Means interferes with or affects over a substantial period of time. Minor temporary ailments or injuries shall not be considered physical or mental impairments which substantially limit a person's major life activities. Examples of minor temporary ailments are colds or flu, or sprains or minor injuries.'

The ultimate burden of persuasion in cases such as this always rests with the complainant. See § 3.10 of the Interpretive Rules; see also Shepherdstown VFD v. W. Va. Human Rights Comm.'n, 309 S.E.2d 342, 352 (W.Va. 1983).

Applying the evidence to these definitions and the various cases decided regarding handicaps, it is clear that the complainant has met its burden of proof and that she was denied employment because her employer perceived her to be handicapped.

The evidence is clear that, at the time of the acts which gave rise to this complaint, underground coal mining was complainant's chosen occupation. She had taken both the minimum 80-hour course and additional training as well. She had worked without incident as a coal miner for about two years, and since leaving that mine had been looking for coal mine work.

As defined, one of a person's "major life activities" is employment [2.05 Rules and Regulations] (Supra).

In the E.E. Black case (supra), the court devoted considerable attention to defining the concept of "substantially

limits" with respect to employment. Rejecting a similar reasoning as set forth by the respondent, the district court held that:

A person who is disqualified from employment in his chosen field has a substantial handicap to employment, and is substantially limited in one of his major life activities. (Emphasis added). E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hi. 1980).

The federal court suggested that an adjudicatory officer must look to the individual to decide whether the impairment or perceived impairment constitutes a substantial handicap to employment. The court listed the factors to consider as follows: (E.E. Black, supra, at 1100 ff.)

1. Number and types of jobs from which the impaired individual is disqualified and their distribution in the area where the applicant lives. (Applying this criterion to the case at hand, complainant would be excluded from all entry level jobs in underground coal mining.)

2. The individual's job expectations and training must be taken into account. (In this case, the complainant's training and job expectations were that of an underground coal miner).

Applying these criteria in the case of a man disqualified from being a journeyman carpenter because of back abnormalities revealed on x-ray, the Court in E.E. Black found the rejected employee was substantially limited from a major life activity.

The record clearly demonstrates that complainant was qualified for and capable of performing the job of general inside

laborer for Ranger Fuel. She was appropriately certified, has performed similar work competently at Itmann mines and in fact has been recommended by her foreman for work at Ranger. Further, she passed all steps of pre-employment selection and screening except for the pre-employment physical. Her psoriasis was not a bar to the performance of coal mine employment.

Therefore, based upon the facts of this case, the law and statutory enactments, it is the finding and conclusion of this examiner that:

1. Even though complainant's psoriasis would not, by itself, be considered a physical or mental impairment so as to constitute a handicap under the West Virginia Human Rights Act, the complainant's psoriasis has substantially limited her ability to engage in underground coal mine employment because of the respondent's attitude towards her psoriasis.

2. The complainant has a handicap within the meaning of W. Va. Code 5-11-3(f) and Section 2.07 of the Interpretive Rules because she is regarded by the respondent as having a handicap.

3. Complainant is qualified for the position of general inside labor in an underground coal mine: She is able and competent to perform the essential functions of this job.

4. Respondent's refusal to hire complainant because of her psoriasis constituted an unlawful discriminatory practice as that term is defined in W. Va. Code §5-11-9(a).

5. In view of the above holding, it is not necessary to decide whether the respondent rejected the complainant for employment because it was of the opinion that complainant's psoriasis would worsen and become job related in the future. Although the respondent was concerned with the effect underground mining would have on the complainant's condition, there was no evidence that the respondent was concerned about the worsening of the condition becoming job related. In fact, the respondent had hired two other persons with psoriasis for other jobs. Therefore, I reject the complaint's contention as it relates to this contention.

6. Since the complainant cannot be afforded the remedy of hiring in this case because all employees of respondent with a seniority date of March 1, 1982, have been on permanent lay off since November, 1982, the complaint is entitled to back pay, including compensation for pension benefits she would have received, for the period March 1, 1982, through November 10, 1982, at the rate set for general laborer in the then-effective National Bituminous Coal Wage Agreement, and subject only to set off for complainant's earnings. In computing this amount, the average earnings for this period amount to \$16,497.22, less her earnings in the amount of \$3,341.42. Therefore, the net loss of back pay would be \$13,155.80. I, therefore, award the sum of \$13,155.80 as back wages.

7. The complainant is not entitled to prejudgment interest. Syvock v. Milwaukee Boiler Mfg. Co., Inc., 668 F2d 149 (7th Cir 1981).

8. While complainant does not seek these damages, the facts of this case do not support an award of damages for emotional distress, and certainly do not constitute willful and wanton actions necessary for the imposition of punitive damages.

9. Under the provisions of Section 9.02(b)(1) of the Rules and Regulations of the West Virginia Human Rights Commission and Section 3.01 of the West Virginia Human Rights Commission Interpretive Rules Governing Discrimination in the Handicapped, the examiner may award the costs of obtaining and presenting such medical evidence and may award attorney fees. There was no evidence of any costs presented and, therefore, any award by the examiner would be speculative. However, I hereby award to the complainant the out-of-pocket cost of having her medical doctor appear to testify on her behalf. Proper documentation shall be presented to the Commissioner to verify the dollar amount.

In regards to attorney fees, I hereby award the sum of \$5,000 (77 hours at \$65 per hour) plus costs of \$83.04.


ROBERT R. HARFOLD, JR.
HEARING EXAMINER

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JOYCE ANN MARCUM,
Complainant,

v.

Case No. EH-518-82

RANGER FUEL CORPORATION,
Respondent.

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W.V. HUMAN RIGHTS COMM.

COMPLAINANT'S EXCEPTIONS TO HEARING EXAMINER'S
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Complainant takes exception to the proposed Findings of Fact and Conclusions of Law and Order in this case as follows:

1. The hearing officer should have awarded pre-judgment interest. The sole explanation provided by the hearing officer for failing to award prejudgment interest was a citation to the case Syvock v. Milwaukee Boiler Mfg. Co., 665 (sic) F.2d 149 (7th Cir. 1981). The Syvock case may represent the rule in the Seventh Circuit, but it does not represent the general rule. Larson, 2 Employment Discrimination § 55.37(b)(iii). For the Fourth Circuit view, see Cline v. Roadway Express, Inc., 689 F. 2d 481, 489 (4th Cir. 1982), where the Court said, "Prejudgment interest is necessary, in the absence of liquidated damages, to make the individual discriminatee whole." Furthermore, even if the rule of the Commission were to deny prejudgment interest under the Syvock standard, the hearing officer has made no findings of fact which would justify denial of prejudgment interest.

2. The hourly rate applied to calculate the attorney's fee was too low. In determining the attorney's fee, the hearing officer awarded counsel \$65.00 per hour; counsel has received \$100.00 per hour in a previous case and should have received at least this rate in this case:

- (a) The fee was contingent. The contract under which the Attorney General's office assigns HRC cases to private counsel preclude counsel from charging a fee except for a fee to be paid by respondent if the case is won.
- (b) The case involved novel and difficult questions involving the handicap discrimination aspect of the statute. At the hearing, the hearing officer recognized the novel and difficult nature of the questions involved and requested briefs of the issues. In his opinion, the hearing officer relied heavily on the research and brief of complainant's counsel.
- (c) The attorney is experienced. Counsel for complainant has ten years' experience in civil rights law and eight years' experience in cases involving rights of handicapped persons. She has practiced law for more than fourteen years.
- (d) Extensive time was involved. Because of the time schedule of these cases, intensive work in a short period was required. It may appear that the total number of hours expended was high for a case of this type (it was). However, counsel for complainant repeatedly suggested to counsel for respondent that the case be tried by deposition or upon stipulation. Such excessive time as

was required for litigation of this case was necessitated by respondent's insistence upon overtrying the factual aspects of this case. Counsel for complainant should not be penalized for respondent's conduct in this regard.

3. Counsel notes that the correct amount of costs is \$83.04 and that complainant had no out of pocket expenses for her medical witness.

Respectfully submitted,



Gail Falk
1200 Quarrier Street, Suite 27
Charleston, WV 25301

Counsel for Complainant