



3/10/93

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION

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22 October 1993

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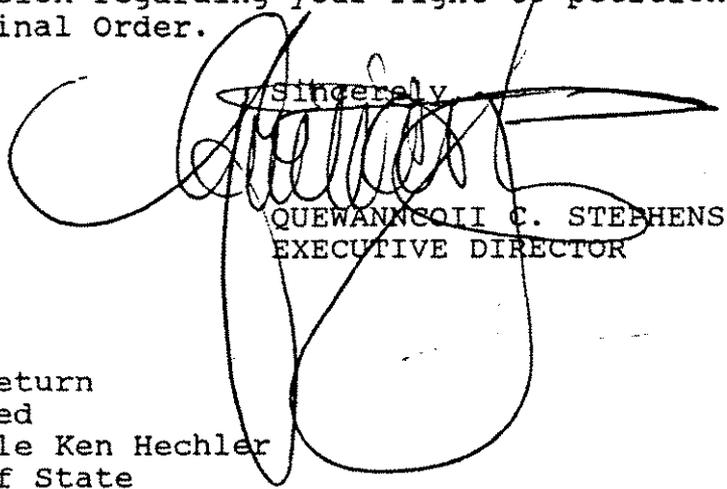
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Charleston, WV 25322

Re: Morrison v. Kanawha Valley Regional  
Transportation Authority  
Docket No. EH-598-87

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled case. Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for review of this Final Order.

Sincerely,  
  
QUEWANNCOII C. STEPHENS  
EXECUTIVE DIRECTOR

QCS  
Enclosures  
Certified Mail/Return  
Receipt Requested  
cc: The Honorable Ken Hechler  
Secretary of State

Mary Catherine Buchmelter  
Deputy Attorney General

## NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed, is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code § 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

MARGARET P. MORRISON,

Complainant,

v.

DOCKET NO. EH-598-87

KANAWHA VALLEY REGIONAL  
TRANSPORTATION AUTHORITY,

Respondent.

**FINAL ORDER**

This case came before the West Virginia Human Rights Commission on October 14, 1993, pursuant to the timely appeal of the complainant to the Final Decision of the Hearing Examiner. Upon due consideration of the issues raised on appeal, the record of the hearing, and the written arguments of counsel, the Commission hereby affirms the hearing examiner as to her ruling in favor of the respondent, but modifies her Decision as set forth below.

This is a handicap discrimination in employment case involving a workplace injury. On May 17, 1985, complainant was hurt when the bus she was driving hit a pothole and the steering wheel was jerked back and forth. (Finding of Fact No. 13). She was initially diagnosed at Thomas Memorial Hospital "as having a muscle sprain in her neck, shoulders and arm." (Finding of Fact No. 13). She was prescribed pain medication and referred to her family physician. She returned to work, but continued to suffer symptoms which interfered with her ability to drive a bus. Complainant saw several other doctors "in order to see if her problem could be diagnosed." (Finding of Fact No. 14). On July 8, 1985,

complainant saw an orthopedic physician. He found no orthopedic problems, and concluded she could return to work. (Finding of Fact No. 15). On September 25, 1985, after more absences, respondent sent complainant to its doctor. He advised that she could do her job without restrictions. (Finding of Fact No. 16).

In October 1985, complainant saw Dr. Hills at the request of the Workers' Compensation Fund. He attributed her pain to "rhomboid muscle strain." He concluded that she would be disabled at least six months. Dr. Hills also concluded that complainant had not reached her maximum recovery and approved her for six months of disability. (Finding of Fact No. 17). Complainant received temporary total disability through the Workers' Compensation Fund through the end of 1985. She made efforts to improve her condition through exercise and therapy. (Finding of Fact No. 18).

In January 1986, Dr. Sale examined complainant and concluded that she could return to work without restriction. Complainant sought to return to work. Respondent's doctor was not available, so she was sent to Dr. Lindroth, who recommended that complainant could return to work, but with the restriction that she should not drive buses which had manual steering. Respondent told complainant that it could not guarantee her a power steering bus, and so would not allow her to return to work. (Finding of Fact No. 21).

On March 11, 1986, Dr. Hills examined complainant again in connection with her Workers' Compensation claim. He found complainant's symptoms to be similar to those noted previously, and recommended a 5% permanent disability award. He further found that

complainant could work, but recommended that she not drive manual steering buses.

On July 22, 1986, complainant went to Dr. Saville. For the first time, complainant's condition was diagnosed as fibrositis. On October 15, 1986, respondent's doctor examined complainant. He repeated his recommendation that complainant be restricted to power steering buses. Respondent was not notified of the diagnoses of fibrositis until almost a year later, when the complaint was filed in this action.

In or about April 1987, complainant was given an unconditional return to work recommendation by Dr. Jackson. Respondent sent her to its own doctor, and complainant was given an unconditional return to work recommendation from respondent's doctor. (Finding of Fact No. 36). Complainant went back to work, driving both power and manual steering buses. In December 1987, complainant was given a regular route with a power steering bus.

On May 26, 1987, complainant filed this complaint with the Human Rights Commission. The complaint specifies fibrositis as the handicap. The hearing examiner ruled that the complaint was not timely filed. The hearing examiner noted that the complaint was not filed until May 26, 1987, more than a year after the complainant had been made aware of the respondent's initial decision to not allow her to return to work. The hearing examiner considered and rejected the complainant's contention that the refusal to allow complainant to come back to work was a "continuing violation."

The Commission hereby finds that on this threshold question the hearing examiner's ruling was in error. While it is clear that the complaint was filed more than 180 days after the complainant was first refused the opportunity to return to work after her injury, the record reflects that this was only the beginning of a continuing effort to return to work. In general, where an employer does not terminate the employment relationship, there is a continuing expectation on the part of both employer and employee that the employee will return as soon as she is able.

As long as the respondent maintains in place the surmountable barrier, and refuses to provide a reasonable accommodation, which would in effect remove the barrier, then the discrimination, if indeed there is illegal discrimination, is continuing. This situation is not comparable to the employer who chooses a non-handicapped individual for a particular job over a handicapped individual. It is more like an employer who refuses to make accommodations when it knows of an employee's handicap and knows of the work restrictions. Curry v. United States Postal Service, \_\_\_ F. Supp. \_\_\_, 1 A.D. Cases 573, 580-581 (S.D. Ohio 1984). Particularly with important considerations in flux, differing medical views, sometimes a need to explore the availability of adaptive technologies, etc., a complainant should not be required to sue at the first sign of resistance or forever forfeit her rights.

While the hearing examiner held that the complaint was untimely, which would ordinarily have ended the inquiry, she went on to consider the issue of handicap. The hearing examiner found

that the complainant was handicapped within the meaning of the Act, by virtue of her fibrositis, but held that the respondent had not been timely notified of this handicapping condition. The hearing examiner concluded that there was no serious issue that the complainant was actually handicapped. However, the Commission takes a different view of this. The question of handicap appears to be a close one, and based upon the evidence in this record, the Commission finds that handicap has not been proven here.

First, this case arises under the pre-1989 statute, so there must be an actual handicap; a perceived handicap is not enough, even if it was the basis of the adverse action. Here the respondent clearly perceived that the impairment was severe enough to prevent the complainant from driving a manual steering bus, but whether the impairment was actually this severe was a matter of dispute. The doctors who had examined the complainant did not seem to agree as to how severe the impairment was.

Second, the Commission's handicap regulations require that the impairment be for a "substantial period of time" and exclude "temporary" injuries. Although disabilities resulting from occupational injuries can be handicaps within the meaning of the Human Rights Act, the disability must meet requirements of severity under this Act. In this case, the employer did not receive notice of complainant's diagnosis of fibrositis until the complaint was filed. Prior to that date, the complainant generally insisted that she could return to work, while the employer resisted her return. As a result, this case has aspects of cases which involve perception of handicap, which was not cognizable under this Act

until after the 1989 amendments. This case arose prior to those amendments. We conclude that the evidence is insufficient in this case to support a finding that Margaret Morrison was a qualified handicapped person within the meaning of the Act as it was written at that time. Until this complaint was filed, all of the evidence indicated that the injury was a temporary muscle strain. While there certainly are situations where occupationally-caused back strains may rise to the level of actual handicap, it appears that in this case it did not.

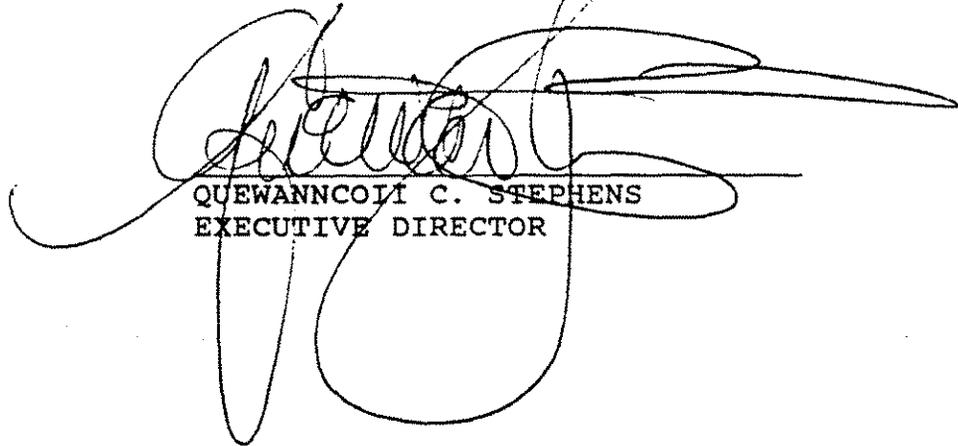
For these reasons, the Commission modifies the Hearing Examiner's Final Decision as to the finding of handicap, and finds instead that this complainant was not handicapped within the meaning of the Human Rights Act in effect prior to 1989. Having found the complainant not a qualified handicapped person within the meaning of the applicable provisions of the West Virginia Human Rights Act, the Commission hereby affirms the ultimate finding of the hearing examiner in favor of the respondent.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 22<sup>d</sup> day of October, 1993 in Charleston, Kanawha County, West Virginia.



QUEWANNCOLI C. STEPHENS  
EXECUTIVE DIRECTOR