



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

September 23, 1988

Montina Pettry
Rt. 2, Box 130
Leewood, WV 25122

Pete Sigler, President
Relgis, Inc.
Box 61
Jodie, WV 26674

Ann A. Spencer
Senior Asst. Attorney General
L & S Bldg.
812 Quarrier St.
Charleston, WV 25301

Fred Holroyd, Esq.
209 W. Washington St.
Charleston, WV 25302

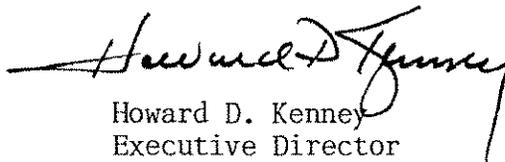
Re: Petty v. Relgis, Inc.
ES-652-86

Dear Parties:

Herewith, please find the final order of the WV Human Rights Commission in the above-styled and numbered case.

Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective April 1, 1987, any party adversely affected by this final order may file a petition for review with the supreme court of appeals within 30 days of receipt of this final order.

Sincerely,


Howard D. Kenney
Executive Director

HDK/mst
Attachments

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE
OF STATUTORY RIGHT TO JUDICIAL REVIEW

AMENDED AND EFFECTIVE
AS OF APRIL 1, 1937

Ear. H. B. 2638]

3

115 this article.

§5-11-11. Appeal and enforcement of commission orders.

1 (a) From any final order of the commission, an
2 application for review may be prosecuted by either
3 party to the supreme court of appeals within thirty days
4 from the receipt thereof by the filing of a petition
5 therefor to such court against the commission and the
6 adverse party as respondents, and the clerk of such
7 court shall notify each of the respondents and the
8 commission of the filing of such petition. The commis-
9 sion shall, within ten days after receipt of such notice,
10 file with the clerk of the court the record of the
11 proceedings had before it, including all the evidence.
12 The court or any judge thereof in vacation may
13 thereupon determine whether or not a review shall be
14 granted. And if granted to a nonresident of this state,
15 he shall be required to execute and file with the clerk
16 before such order or review shall become effective, a
17 bond, with security to be approved by the clerk,
18 conditioned to perform any judgment which may be
19 awarded against him thereon. The commission may
20 certify to the court and request its decision of any
21 question of law arising upon the record, and withhold
22 its further proceeding in the case, pending the decision
23 of court on the certified question, or until notice that the
24 court has declined to docket the same. If a review be
25 granted or the certified question be docketed for
26 hearing, the clerk shall notify the board and the parties
27 litigant or their attorneys and the commission of the fact
28 by mail. If a review be granted or the certified question
29 docketed, the case shall be heard by the court in the
30 manner provided for other cases.

31 The appeal procedure contained in this subsection
32 shall be the exclusive means of review, notwithstanding
33 the provisions of chapter twenty-nine-a of this code:
34 *Provided*, That such exclusive means of review shall not
35 apply to any case wherein an appeal or a petition for
36 enforcement of a cease and desist order has been filed
37 with a circuit court of this state prior to the first day
38 of April, one thousand nine hundred eighty-seven.

39 (b) In the event that any person shall fail to obey a
40 final order of the commission within thirty days after
41 receipt of the same, or, if applicable, within thirty days
42 after a final order of the supreme court of appeals, a
43 party or the commission may seek an order from the
44 circuit court for its enforcement. Such proceeding shall
45 be initiated by the filing of a petition in said court, and
46 served upon the respondent in the manner provided by
47 law for the service of summons in civil actions; a hearing
48 shall be held on such petition within sixty days of the
49 date of service. The court may grant appropriate
50 temporary relief, and shall make and enter upon the
51 pleadings, testimony and proceedings such order as is
52 necessary to enforce the order of the commission or
53 supreme court of appeals.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

MONTINA PETTRY,

Complainant,

vs.

Docket No. ES-652-86

RELGIS, INC.,

Respondent.

O R D E R

On the 31st day of August, 1988, the West Virginia Human Rights Commission reviewed the proposed order and decision of the Hearing Examiner, Theodore R. Dues, Jr., in the above-captioned matter. After consideration of the aforementioned, the Commission does hereby adopt said proposed order and decision, encompassing proposed findings of facts and conclusions of law, as its own.

It is hereby ORDERED that the Hearing Examiner's proposed order and decision, encompassing findings of facts and conclusions of law, be attached hereto and made a part of this final order.

It is finally ORDERED that this case be dismissed with prejudice.

By this final 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 final order and that they may seek judicial review.

ENTERED this 16th day of Sept, 1988.

Respectfully Submitted,

George Ruthenburg
CHAIR/VICE-CHAIR
WV HUMAN RIGHTS COMMISSION

RECEIVED

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JUL 12 1988

MONTINA PETTRY,
Complainant,

W.V. HUMAN RIGHTS COMM.
~~XXXXXXXXXXXXXXXXXXXX~~

v.

Docket No. ER-652-86

RELGIS, INC.

Respondent.

**EXAMINER'S RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

This matter matured for public hearing on the 28th day of January, 1988. The hearing was held in the Conference Room of the Daniel Boone Building, 405 Capitol Street, Charleston, WV, 25301. The hearing panel consisted of Theodore R. Dues, Jr., Hearing Examiner and Russel Van Cleve, Hearing Commissioner.

The Complainant appeared in person and by her counsel, Ann A. Spaner. The Respondent appeared by its representative, Pete Sigler and by its counsel, Fred F. Holroyd.

After a review of the record, any exhibits admitted in evidence, any stipulations entered into by the parties, any matters for which the Examiner took judicial notice during the proceedings, assessing the credibility of the witnesses and weighing the evidence in consideration of the same, the Examiner makes the following findings of fact and conclusions of law. To the extent that these findings and conclusions are generally consistent to any proposed findings of fact and conclusions of law submitted by the parties, the same are adopted by the Examiner, and conversely, to the extent the same are inconsistent to the findings and conclusions, the same are rejected.

ISSUES

1. Did the Respondent refuse to hire the Complainant for reasons related to her sex?
2. If so, to what relief is the Complainant entitled?

FINDINGS OF FACT

1. The Complainant is a female.
2. The Complainant was laid off in 1982 from Carbon Fuel Coal Company. Her previous experience in mining included performing as a roof operator, certified carpenter, welder and a brattice person.
3. The Complainant applied for employment with the Respondent on several occasions. The last time being May 14, 1986. At that time she indicated that she had seen two "red hats", i.e., miners with less than six months mining experience, loading "cribs".
4. When the Complainant initially sought employment with the Respondent, she was asked whether she had auger mining experience. She did not.
5. The Respondent never offered the Complainant a job.
6. There were males hired by the Respondent, during the period of time that the Complainant applied for employment.
7. On May 14, 1986, the Complainant reached a determination that she would never be hired by the Respondent and based upon her belief that, at least one miner did not have prior auger mining experience, and, yet was hired, she filed a

complaint with the West Virginia Human Rights Commission.

8. The Complainant was capable of doing support work around auger mining equipment.

9. The Respondent utilizes its personnel in a manner in which employees are required to perform several different functions during the course of a business day. Accordingly, it would not be sufficient for a person merely to be capable of safely working around an auger mining machine, unless that person was capable of performing some other needed function; required during the auger mining process.

10. The miner to whom the Complainant referred, as having been hired by the Respondent without prior auger mining experience, admits that he lied during the hiring process by representing that he had prior auger mining experience.

11. Only special skilled persons were hired without prior auger mining experience. Special skills would be those persons, such as electricians, that would possess such a high degree of specialization that such a skill alone would be sufficient enough for the Respondent to hire them.

12. The other employees hired, during the time period relevant to the Complainant's efforts to seek employment with the Respondent, possessed skills different and apart from that of the Complainant.

13. Miners who work in an auger mining process must work in close proximity to the auger machine.

14. Auger mining is recognized by the West Virginia Department of Energy, Division of Mines and Minerals as being a

dangerous process.

15. The Respondent has earned safety awards for four and one half years for realizing no accidents contributable to injury in its auger mines.

16. Subsequent to the Complainant's application in May 1986, the Respondent hired no full time permanent, or, part time regular, positions, for which the Complainant would be qualified.

DISCUSSION

The Complainant sought employment with the Respondent on several occasions prior to May 1986. On May 14, 1986, the Complainant was again rejected for employment and was told that prior auger mining experience was a requirement for applicants at the mine. The Complainant, acting upon the fact that she saw several "red hat" miners performing basic mining functions, for which she felt qualified, and the knowledge she possessed that a friend had been hired by the Respondent, notwithstanding his lack of prior auger mining experience, led the Complainant to file a charge with the West Virginia Human Rights Commission.

The evidence if viewed solely from the perspective most favorable to the Complainant, established a prima facie case of sex discrimination under the guidelines of McDonnell Douglas v. Green, 411 U.S. 804, 93 S.Ct. 1825 (1973). Specifically, the Complainant proved by being a female that she is a member of a protected class under the West Virginia Human Rights Act; that she applied for, and contended she was qualified for, the job

which the Respondent was seeking applicants; that despite her overall alleged qualifications the Respondent rejected her for the job; and, that after her rejection, the job remained open, and the employer continued to seek applicants, from persons with her alleged qualifications. However, the evidence introduced by the Respondent seriously mitigated the strength of the Complainant's proof that she was qualified for the job which the Respondent was seeking applicants, and further, that the Respondent was actually seeking applicants that possessed the qualifications possessed by the Complainant.

The Respondent introduced evidence to establish that all miners hired by it were required to have prior auger mining experience. The exception noted by the Complainant, in her case, was explained when that employee admitted to having lied about having such experience to obtain the job. The reason for this policy requiring prior auger mining experience, was indicated to be the highly dangerous process and threat that is posed to persons working in an auger mine. Corroborating the Respondent's position, as to the dangerousness of this particular type of mining, were the State and Federal regulatory agencies determinations to this effect. Accordingly, the Respondent articulated a legitimate nondiscriminatory reason for its policy requiring its employees, with limited exceptions, to have prior auger mining experience. McDonnell Douglas Corp, supra; Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981). Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E.2d 342 (W.Va. 1983).

The Complainant failed to establish that the reasons articulated by the Respondent were pretext in nature for unlawful sex discrimination. Burdine, supra. State ex rel. West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, 329 S.E.2d 77 (W.Va. 1985).

CONCLUSIONS OF LAW

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

2. As in all cases, the Complainant has the burden of proof of establishing that she is qualified to perform the duties of an auger miner and that her failure to be hired was motivated, at least in part, by her sex.

3. The Complainant established a prima facie case of sex discrimination by introducing evidence which indicated that she applied with the Respondent, that the Respondent did not hire her for the position and subsequently hired males, who Complainant contended was no more qualified, for the position sought to be filled by the Respondent.

4. The Respondent articulated a nondiscriminatory reason for its failure to hire the Complainant, by establishing, that the Complainant was not qualified for the position, due to the fact that she did not possess prior auger mining experience. The credible evidence of record, indicates that the Complainant was asked, as to whether she had prior auger mining experience, and further, the only male hired without auger mining experience with whom the Complainant was a friend, was hired because the

male in question lied about his prior auger mining experience during his employment interview.

5. Additionally, the Respondent justified its policy by introducing evidence to establish the dangerous environment in which persons are placed during an auger mining operation. To corroborate this position, the Respondent introduced documentary evidence from the two primary governing agencies for the mining industry; specifically, the Mine Safety Health Administration, on the federal level, and the Department of Energy, Division of Mines and Minerals, on the state level, that acknowledged the inherent hazards involved in auger mining.

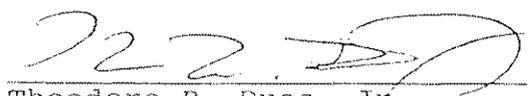
6. The Complainant failed to establish that the Respondent's articulated reasons for failing to hire her were in fact pretext for unlawful sex discrimination against her, or, that requiring prior auger mining experience was not a bonafide occupational qualification for the position in question.

PROPOSED ORDER

Accordingly, it is the recommendation of this Hearing Examiner that the Respondent be awarded judgement in this matter and that the Complainant take naught from her Complaint.

DATED: July 21, 1988

ENTER:


Theodore R. Dues, Jr.
Hearing Examiner