



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING  
1036 QUARRIER STREET  
CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE JR.  
Governor

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February 17, 1988

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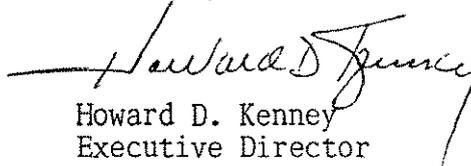
Re: Rollyson v. Belington Bank  
ES-379-87 & EA-380-87

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

116 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

WILLARD L. ROLLYSON,

Complainant,

v.

DOCKET NOS. ES-379-87  
EA-380-87

BELINGTON BANK,

Respondent.

FINAL ORDER

On the 11th day of February, 1988, the West Virginia Human Rights Commission reviewed the proposed order and decision of Hearing Examiner, James Gerl, in the above-captioned matter. After consideration of the aforementioned and exceptions thereto, the commission does hereby adopt said proposed order and decision, encompassing proposed findings of fact and conclusions of law as its own, with modifications and amendments set forth below.

In the subsection titled Findings of Fact, on page 3, finding number 12 is stricken.

In the subsection titled Conclusions of Law, on page 5, the language "by failing to recall him" is stricken from conclusion number 4.

In the subsection titled Discussion of Conclusions, page 7, referencing the first full paragraph, the sixth sentence which begins "Complainant permitted...." and the seventh sentence which begins "As complainant points out...." are both deleted in their entirety.

It is hereby ORDERED that the Hearing Examiner's proposed order and decision, encompassing findings of fact and conclusions of law, be attached hereto and made a part of this final order except as amended by 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 16<sup>th</sup> day of February, 1988.

RESPECTFULLY SUBMITTED,

BY Betty A. Hamilton  
~~CHAIR~~/VICE CHAIR  
WV HUMAN RIGHTS COMMISSION

RECEIVED

STATE OF WEST VIRGINIA  
HUMAN RIGHTS COMMISSION

JAN 19 1988

W.V. HUMAN RIGHTS COMM.

WILLARD L. ROLLYSON,

Complainant,

v.

DOCKET NOS. ES-379-87  
EA-380-87

BELINGTON BANK

Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on October 20-21, 1987 in Philippi, West Virginia. Commissioner Nate Jackson served as Hearing Commissioner. The complaints were filed on February 13, 1987. The notice of hearing was issued on June 2, 1987. Respondent filed Answers to the complaints on June 11, 1987. A telephone Status Conference was convened on July 24, 1987. Subsequent to the hearing, both parties filed written briefs and proposed findings of fact.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions, and arguments advanced by the parties are in accordance with the findings, conclusions and views as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been

omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with findings as stated herein, it is not credited.

#### CONTENTIONS OF THE PARTIES

Complainant contends that respondent constructively discharged him because of his sex and his age. Respondent maintains that complainant quit his employment with respondent and that his status was changed to part-time because of his job performance and because of insubordination.

#### FINDINGS OF FACT

Based upon the parties stipulations of uncontested facts as set forth in the joint pre-hearing memorandum, the Hearing Examiner has made the following findings of fact:

1. Complainant is male and as of January 1, 1987, he was fifty-nine years of age.
2. Complainant was hired by respondent on August 9, 1976, and worked as collections manager for respondent from that date until December 28, 1986.
3. On December 28, 1986, complainant's hours were reduced from full-time to part-time, and he was changed from a salaried employee to an hourly employee.
4. At the time that complainant's hours were reduced, he was the only male non-administrative employee at respondent.
5. Some of complainant's job responsibilities were redistributed to other employees in and after December, 1986.

6. The employees who took over some of complainant's job duties in and after December, 1986, were Whittaker, Wagoner, Strum and Sponaugle.

7. Complainant's work area was relocated, and Mace, Vice-President of Bank Operations, was moved into complainant's office after the relocation.

8. Before complainant was changed from a salaried employee to an hourly employee, he was paid at the rate of \$288.46 per week or \$1,153.84 per month.

Based upon a preponderance of the evidence, the Hearing Examiner has made the following findings of fact:

9. Complainant's job performance at respondent was satisfactory until 1985, at which point his performance deteriorated.

10. Beginning in October, 1985, Whittaker, respondent's chief executive officer, attempted to establish firm collection procedures regarding reporting, insurance on collateral, floor plan checking, etc. Complainant objected to and resisted complying with the new policies and procedures implemented by Whittaker.

11. Complainant refused to submit certain oral status reports which he was instructed by Whittaker to prepare.

12. Among complainant's job duties as collections manager was to ensure that judgments were properly executed so that they would not lapse. In 1985 complainant failed to secure an execution on a judgment of approximately \$2,000.00 in favor of respondent, thereby permitting said judgment to lapse.

13. Complainant refused to file magistrate court lawsuits to collect bad checks. Mace, respondent's vice-president, had instructed complainant to file such lawsuits.

14. Complainant refused to comply with specific instructions from Whittaker to reposses a vehicle.

15. Complainant failed to report to respondent that one of its customers sold floor plan vehicles out of trust. Respondent did not learn of this fact until it was brought to respondent's attention by federal and state bank examiners.

16. Complainant often complained to co-workers regarding his employment conditions and his pay. His complaints were so excessive that they interfered with his ability to perform his job duties. Complainant was especially resentful of any change in bank policies or procedures.

17. Complainant's performance evaluation rating for 1984 was good. In 1985 respondent did no performance evaluations because of the flood. In 1986 complainant's performance evaluation rating was poor.

18. As a result of complainant's deteriorated job performance, respondent advised complainant that beginning in 1987 he would be working approximately three days per week, and in addition, he would be paid on a contractual basis for repossessions.

19. Because he objected to the decrease in his income as a result of the change in his status to a part-time employee, complainant quit his job at respondent.

20. One of respondent's tellers is seventy-two years old.

21. No employee or officer of respondent ever made any comments about complainant's age or sex.

#### CONCLUSIONS OF LAW

1. Willard L. Rollyson is an individual claiming to be aggrieved by an alleged unlawful discriminatory practice and is a proper complainant for purposes of the Human Rights Act. West Virginia Code, §5-11-10.

2. Belington Bank is an employer as defined by West Virginia Code Section 5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. Complainant has not established a prima facie case of age and sex discrimination.

4. Respondent has not discriminated against complainant on the basis of his age or sex by failing to recall him. West Virginia Code, Section 5-11-9(a).

#### DISCUSSION OF CONCLUSIONS

In fair employment, disparate treatment cases, the initial burden is upon the complainant to establish a prima facie case of discrimination. Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission 309 S.E.2d 342, 352-353 (W.Va. 1983); McDonnell-Douglas Corporation v. Green 411 U.S. 792 (1973). If the complainant makes out a prima facie case,

respondent is required to offer or articulate a legitimate non-discriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra. If respondent articulates such a reason, complainant must show that the reason is pretextual. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra.

In the instant case, complainant has not established a prima facie case of discrimination. The parties have stipulated that complainant is male, that he was fifty-nine years old as of January 1, 1987, and that his hours were reduced on December 28, 1986. There is no evidence in the record, however, which if otherwise unexplained would raise an inference of discrimination. Furnco Construction Company v. Waters 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981). The record evidence indicates that respondent employed persons over 40 years old, including one teller who is age 72. The record evidence indicates that respondent employed females in officer and non-officer positions. No comments regarding complainant's sex or age were made by any officer or employee of respondent. There is no evidence in the record that respondent treated similarly situated females or persons younger than complainant any differently than it treated complainant. No statistics were offered by complainant. In short there seems to be no connection between the reduction in complainant's reduced hours and either his sex or his age.

Assuming arguendo that complainant had established a prima facie case of discrimination, respondent has articulated a legitimate non-discriminatory reason for reducing complainant's hours. Complainant's job performance was good through 1984, but beginning in 1985 his performance deteriorated. Complainant resisted the new collections procedures implemented by Whittaker, respondent's CEO. Complainant refused to follow supervisory instructions. He refused to submit oral reports to Whittaker. He refused to file magistrate court suits for bad checks. He refused to repossess a vehicle. Complainant permitted a \$2,000.00 judgment to lapse by failing to properly execute the judgment. As complainant points out in his brief, respondent did not learn of the lapsed judgment until after complainant quit, but the lapsed judgment is nonetheless illustrative of complainant's refusal to perform his basic job duties. Complainant chronically complained to his co-employees regarding his job; his complaining was so frequent that it sometimes precluded him from having time to do his job. Complainant's performance in 1986 was poor as reflected upon his performance evaluation. In view of complainant's poor job performance, respondent could well have fired him. Instead, respondent chose to reduce his work hours. These facts certainly raise no issue of constructive discharge.

Complainant has not demonstrated that the reason articulated by respondent for reducing his hours is a pretext for discrimination. The testimony of respondent's witnesses was credible, especially that of Whittaker, Mace and Turner. Turner in particular was

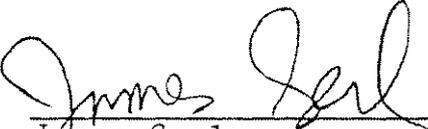
obviously reluctant to testify against complainant, but she did testify that his performance became bad, and that he would try to get others to do his job. The testimony of complainant, on the other hand, was not credible because of his evasive and complaining demeanor and because of various contradictions in his testimony. For example, complainant testified on direct examination that respondent never criticize his work. On cross examination, however, he was forced to admit that he received a written reprimand on May 23, 1986 and that he had received an oral reprimand concerning his being too loud with a customer. Also, complainant testified at the hearing that he failed to provide oral reports to Whittaker because Whittaker was always on the phone and, therefore, not accessible. This testimony is contradicted, however, both by complainant's deposition testimony that he didn't feel that he should have to provide oral reports because he was already doing his job and by the testimony of complainant's witness Harris who testified at the hearing that Whittaker was accessible. In addition, complainant's testimony at the hearing was also contradicted by his witness Strum who testified that she did not call complainant at home regarding floor plans.

The only evidence offered by complainant that even remotely leans toward pretext is the testimony of Proudfoot to the effect that Mace once told Proudfoot that employees with long seniority make it difficult for respondent to create a retirement plan. Despite this lunchtime comment, however, respondent continues to

employ elderly persons including one teller who is 72 years old. Proudfoot testified that she experienced no age discrimination, and there is no evidence in the record which indicates any effort by respondent to rid itself of older employees. This comment, therefore, is not sufficient to demonstrate that respondent's reason for reducing complainant's hours is pretextual.

PROPOSED ORDER

Based upon the foregoing, the Hearing Examiner hereby recommends that the Commission dismiss the complaint in this matter, with prejudice.

  
\_\_\_\_\_  
James Gerl  
Hearing Examiner

ENTERED: January 18, 1988

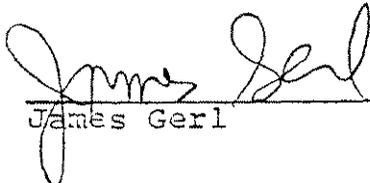
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served  
the foregoing PROPOSED ORDER AND DECISION  
by placing true and correct copies thereof in the United States  
Mail, postage prepaid, addressed to the following:

Harry A. Smith  
P. O. Box 1905  
Elkins, WV 26241

Sharon Mullens  
Antoinette Eates  
Asst. Attorneys General  
812 Quarrier Street  
Charleston, WV 25301

on this 18th day of JANUARY, 1988.

  
\_\_\_\_\_  
James Gerl