



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Executive Director

September 30, 1998

**CERTIFIED MAIL - RETURN
RECEIPT REQUESTED**

Charles Akins
Post Office Box 37
Thurmond, WV 25936

John McFerrin, Esq.
Asst. Attorney General
Civil Rights Division
812 Quarrier Street, Suite 500
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Tom's Convenient Food Mart, Inc.
d/b/a Whitewater Information
c/o Tom Louisos
408 Virginia Street
Oak Hill, WV 25901

Charles R. Webb, Esq.
#8 Capitol Street, Suite 800
Charleston, WV 25301

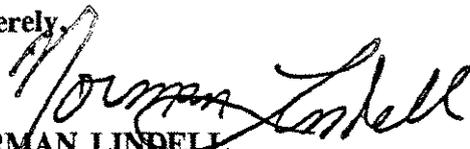
Gene Carte, Esq.
Post Office Box 326
Fayetteville, WV 25840

Re: **Charles Akins v. Tom's Convenient Food
Mart, Inc., d/b/a Whitewater Information
Docket No. EA-395-95**

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,


NORMAN LINDELL
ACTING EXECUTIVE DIRECTOR

NL/jk

Enclosures

cc: The Honorable Ken Hechler
Secretary of State

Mary Catherine Buchmelter
Deputy Attorney General
Civil Rights Division

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CHARLES AKINS,

Complainant,

v.

DOCKET NO. EA-395-95

**TOM'S CONVENIENT FOOD MART, INC.,
d/b/a WHITEWATER INFORMATION,**

Respondent.

FINAL ORDER

On August 13, 1998, the West Virginia Human Rights Commission reviewed the Administrative Law Judge's Final Decision in the above-styled action issued by Administrative Law Judge Mike Kelly. After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer filed in response to the Administrative Law Judge's Final Decision, the Commission decided to, and does hereby, adopt said Administrative Law Judge's Final Decision as its own, without modification or amendment.

It is, therefore, the order of the Commission that the Administrative Law Judge's Final Decision be attached hereto and made a part of this Final Order.

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 as Exhibit A. The calculation of damages attached hereto as Exhibit B brings the amount of the back pay award forward up to and including the date of this Final Order and

incorporates the Administrative Law Judge's award of postjudgment interest compounded quarterly at the rate of ten percent per annum.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 30th day of September 1998, in Charleston, Kanawha County, West Virginia.



NORMAN LINDELL
ACTING EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION

**BEFORE THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION**

CHARLES AKINS,

Complainant,

v.

Docket No. EA-395-95

**TOM'S CONVENIENT FOODMART, INC.,
d/b/a WHITEWATER INFORMATION,**

Respondent.

**FINAL DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

This matter came on for hearing on 8 July 1997 at the Fayette County Courthouse, Fayetteville, Fayette County, West Virginia. Complainant Charles Akins was present in person and his case was presented by the West Virginia Human Rights Commission and its counsel, Assistant Attorney General John McFerrin. Respondent was present by its representative Tom Louisos, Sr., and by its counsel, Charles R. Webb, Esq. and Gene Carte, Esq.

I. ISSUE TO BE DECIDED

Whether respondent, through its agent, violated W.Va. Code §5-11-9(1) by discharging complainant from employment because of his age.

II. FINDINGS OF FACT

Based upon the credibility of the witnesses, as determined by the Administrative Law Judge, taking into account each witness' motive and state of mind, strength of memory, and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and the bias, prejudice and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence; and upon thorough examination of the transcript of the proceedings, the exhibits introduced into evidence and the written recommendations and argument of counsel, the Administrative Law Judge finds the following facts to be true¹:

A. Background

1. Complainant Charles Akins is a resident of Thurmond, Fayette County, West Virginia. His date of birth is 18 May 1939. It was undisputed that Mr. Akins is an experienced whitewater river guide.

¹ To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion 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 as not necessary to a proper determination of the material issue as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

2. Respondent Tom's Convenient Foodmart, Inc. (hereafter "Tom's") is a West Virginia corporation with its headquarters at Oak Hill, Fayette County, West Virginia. In or about March 1995, Tom's purchased Whitewater Information ("WI") and began operating a river rafting business under that name. Respondent is an "employer" as that term is defined by W.Va. Code §5-11-3(d).

3. William Tom Louisos and William Tom Louisos, II are father and son and corporate officers of respondent. The Commission produced no evidence that either of these gentlemen personally engaged in or were aware of any act of unlawful discrimination.

4. George "Butch" Burgess was, at all times relevant herein, the general manager of Whitewater Information after it was purchased by respondent. He had actual authority to hire employees at WI and, at a minimum, apparent authority to discharge. He was not employed by respondent as of the date of the hearing, having been fired sometime earlier. For the period during which he was general manager at WI, Mr. Burgess was a supervisory agent of respondent and his actions within the scope of his employment, including the management of personnel, may be imputed to respondent. *Hanlon v. Chambers*, 195 W.Va. 99, 464 S.E. 2d 741 (1995).

5. River rafting is a seasonal industry with peak business from April thru mid-October. During the off-season, employees are frequently eligible for "low earnings" unemployment compensation.

B. Complainant's Short and Stormy Tenure With Respondent

6. Mr. Akins first worked as a commercial river guide in 1984 at age 45 years. He has earned certificates in both first aid and CPR. From 1989 thru mid-March 1995 he was employed by WI under its former owners. He was still in WI's employment when it was purchased by respondent.

7. Respondent purchased WI in March 1995. Mr. Burgess was hired to run the company and manage the personnel. According to Mr. Louisos, II, Mr. Burgess had authority to hire, but had to obtain specific authorization in order to discharge. It was unclear if the limitation on Mr. Burgess' authority was communicated to WI's employees.

8. Sometime in March 1995 after respondent purchased WI, a meeting was held of all WI employees, including Mr. Akins. The meeting was called by respondent. Mr. Burgess testified that the employees present, including Mr. Akins, were told that none of them were going to be let go and that it was his intention to manage the business as it had been run by the previous owners. None of the employees were required to apply for positions with Tom's.

9. As of the date of the above-described meeting, complainant considered himself an employee of respondent and Tom's considered itself to be complainant's employer.

10. Mr. Burgess had previously supervised Mr. Akins in the early 1980's when both were employed by a different entity. Mr. Burgess denied that there was any "bad blood" between them and

testified that he believed Mr. Akins to be a good river guide and he never had any problem with the quality of complainant's work.

11. Joe Freeman was a manager for WI when it was purchased by respondent. He attended the March 1995 meeting for WI employees. After the meeting, Mr. Freeman met with Mr Burgess to go over a list of WI employees. Mr. Freeman testified credibly that he told Mr. Burgess that complainant was an asset to the company and that there was no one who was more dependable. He told Mr. Burgess: "Charlie's a worker. He could outwork anybody." Mr. Freeman testified that respondent's general manager had inquired about Mr. Akins in a tone that suggested "some sort of hostility between them" and which questioned complainant's "guiding abilities". Based on an assessment of credibility set forth infra, I credit Mr. Freeman's testimony as true.²

12. Four "Low Earnings" reports signed by complainant were admitted into evidence. They were signed by the employer and delivered to Mr. Akins on the following dates in 1995: March 13, March 20, March 27 and April 11. The first two reports are signed by Brenda Dow as the employer's representative. Ms. Dow was WI's office manager. The latter two reports are signed by Mr. Burgess. When respondent assumed control of WI, Mr. Burgess reserved to himself the responsibility of reviewing and signing the reports.

² Mr. Freeman voluntarily resigned employment with WI and apparently never went to work at Tom's.

13. On or about 11 April 1995, Mr. Akins went to WI's office to obtain a signature on his low earnings report. He presented the form to Ms. Dow, who informed him that it now had to be signed by Mr. Burgess. (Mr. Burgess had signed the previous report on 27 March 1995). Mr. Burgess was not then in the office. Mr. Akins waited at the office for 2 to 3 hours. He was admittedly upset since Ms. Dow didn't seem "to be doing anything except not signing my slip." He asked her to sign it several times, but she refused. He admits that they had words. "I didn't really scream at her. I did question on why I was being detained that long to get a low earning slip. And she kept saying that the general manager had to sign them, that she was not allowed to sign them anymore." When Mr. Burgess finally arrived complainant was required to wait another hour. Mr. Akins admits that he and Mr. Burgess had a verbal confrontation: ". . . we said several things. He kind of got onto me and I kind of got onto him right there in the office. There were several people present. He invited me outside to whip my 'old gray-headed ass', was his words." During the "shouting match", according to complainant, the general manager told him "This is a young man's game." Mr. Burgess finally signed the slip and he ". . . handed it to me and told me to get up, get the hell out of the office, so I left."

14. Complainant testified that a few days after the "shouting match", and without any further contact between them, Mr. Burgess telephoned him and told him that he was fired. When he asked "Why?", Mr. Burgess hung up the phone. Mr. Akins immediately called the WI office, asked again for the reason he was fired and Mr. Burgess again hung up on him.

15. Mr. Burgess completely denied that he and complainant had ever had an in-person verbal confrontation. He testified that when he arrived at the office on or about 11 April 1995, Ms. Dow was very upset and told him that Mr. Akins had become quarrelsome because she would not sign his low earnings slip.³ He alleged that he called Mr. Akins at his home and left a message for him to call in. According to Mr. Burgess, complainant called back two to three days later at which time the general manager fired him. Mr. Akins, after being discharged, cursed Mr. Burgess and a shouting/swearing match ensued.

16. Mr. Burgess called the Messrs. Louisos after his telephone conversation with complainant and after he had fired him. Based on his rendition of events, they gave him authority to fire complainant (perhaps believing that he had not yet done so).

17. There was no evidence that Messrs. Louisos had any knowledge whatsoever of Mr. Burgess' comments regarding complainant's age or that the discharge decision was motivated by a discriminatory animus.

18. Mr. Burgess admitted that he has "had words" with other employees but did not fire any of them because of it. This case is different, he testified, because Mr. Akins "cussed me out" and

³Though Ms. Dow resides in Fayette County, neither side subpoenaed her to appear at hearing. Because both sides had equal opportunity to require her presence, and neither acted to do so, I will not apply an adverse inference that her testimony would have favored or disfavored a particular party.

was "disrespectful to me and the company". However, he admitted that Mr. Akins did not curse him until after the discharge.

19. An assessment of credibility is crucial in this case. First, Mr. Akins claims that there were two verbal confrontations between the men, one in person and one over the phone; Mr. Burgess admits to a brief telephone confrontation, but denies that an in-person squabble ever took place. Second, Mr. Akins attributes to Mr. Burgess at least two statements suggesting a bias against older river guides; Mr. Burgess denies making any statement that could reasonably be construed as discriminatory. I resolve the discrepancies in their testimonies in favor of Mr. Akins. My assessment of credibility is based on the following factors:

(a) Mr. Akins demeanor on the stand was consistent with one who is telling the truth. He answered questions to the best of his ability and did not attempt to eliminate from his testimony facts that could be considered counter to his best interests (e.g. he admitted to "having words" with Ms. Dow and "getting on to" Mr. Burgess);

(b) Mr. Burgess' testimony was frequently vague and confused and, therefore, unreliable; and

(c) Mr. Freeman was credible on the stand when he testified that Mr. Burgess singled out complainant from the other inherited WI employees and made inquiries suggesting or hinting that complainant was too old to do the job; his testimony was succinct and careful and he appeared to take some caution to assure that his testimony was accurate.

20. At the time of his discharge, Mr. Akins was about six weeks shy of his 56th birthday and was the oldest WI river guide. Mr. Burgess was 41. Among other river guides employed by WI in April 1995, were persons ages 40 (2 employees), 41, 42 (2 employees) and 45.

21. Complainant was the only WI employee inherited by respondent who was discharged.

C. Unlawful Discrimination

22. I find as fact, after an assessment of credibility, that more likely than not age was a motivating factor in Mr. Burgess' decision to discharge complainant. This finding is based on the following evidence:

- (a) Mr. Burgess' conversation with Mr. Freeman,⁴
- (b) The two references to age made by Mr. Burgess during his in-person argument with complainant; and
- (c) Other, younger employees engaged in behavior similar to that engaged in by Mr. Akins prior to his discharge, but were not disciplined or were disciplined less severely.

⁴ Since Mr. Burgess admitted that his prior experience with Mr. Akins' job skills some ten years earlier had been a good one, it seems only logical that his questioning of complainant's abilities had more to do with concerns about Mr. Akins' age than with his job knowledge or skills.

23. Respondent offered no evidence that others who engaged in the same or similar behavior were discharged.⁵

D. Damages

24. As a result of the discharge complainant was unemployed during the months of April, May, June and July 1995. During that period he suffered a loss of income in the amount of \$875 per month or a total of \$3,500.

25. Mr. Akins found other employment in late July 1995, earning the same or more than he would have made had he not been discharged. Complainant having properly mitigated his damages the accumulation of back pay is terminated at the end of July 1995.

26. Mr. Akins suffered embarrassment, emotional distress and annoyance and inconvenience as a result of his unlawful discharge.

⁵ I cannot credit Mr. Burgess' testimony that he fired Mr. Akins because he had made Ms. Dow "very upset". I did not find Mr. Burgess credible and Ms. Dow herself did not testify.

III. CONCLUSION OF LAW

1. Complainant Charles Akins is an individual aggrieved by an unlawful discriminatory act and is a proper complainant under the West Virginia Human Rights Act, W.Va. Code §5-11-10.

2. Respondent Tom's Convenient Food Mart, Inc., dba Whitewater Information, is a person and an employer as those terms are defined by W.Va. Code §§5-11-3(a) and 5-11-3(d), respectively.

3. The complaint in this matter was timely filed and the West Virginia Human Rights Commission has jurisdiction over the parties and the subject matter.

4. The Commission showed by direct and circumstantial evidence that age was a motivating factor in the decision of George Burgess to discharge complainant.

5. George Burgess was the general manager of respondent's WI operation and was the agent of respondent when he made personnel decisions. An employer can be held liable for the actions of its agents when those agents are acting within the scope of their employment. See, e.g., Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E. 2d 801 (1996); Holstein v. Norandex, Inc., 194 W.Va. 727, 461 S.E. 2d 473 (1995); Barath v. Performance Trucking Company, Inc., 188 W.Va. 367, 424 S.E. 2d 602 (1992); Paxton v. Crabtree, 184 W.Va. 237, 400 S.E. 2d 245 (1990); Musgrove v. Hickory Inn, Inc., 168 W.Va. 65, 281 S.E. 2d 499 (1981). When Mr. Burgess fired

complainant he was acting within the scope of his employment to manage personnel regardless of whether he had explicit authority to discharge. Moreover, the discharge decision was later ratified by respondent.

6. The Commission having shown by a preponderance of the evidence that age was a motivating factor in the decision to discharge Mr. Akins, the burden switched to respondent to show that it would have discharged complainant even in the absence of unlawful discrimination. Skaggs v. Elk Run Coal Co., 198 W.Va. 51, 479 S.E. 2d 561 (1996). Respondent failed to meet its burden in that the evidence showed that younger employees engaged in similar behavior but were not discharged. Disparate discipline based on membership in a protected class, as occurred here, is violative of the West Virginia Human Rights Act, See, State v. Logan-Mingo Area Mental Health Agency, 329 S.E. 2d 77 (1985) and Fourco Glass v. State Human Rights Commission, 367 S.E. 2d 760 (1988).

7. It is not a defense to a charge of discrimination that the respondent has hired or retained other employees in the protected class (over age forty). Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996).

8. Based on evidence of the whole record I conclude as a matter of law that respondent violated W.Va. Code §5-11-9(1) by discriminating against Charles Akins because of his age.

9. The Commission having prevailed, Mr. Akins is entitled to the following relief:

- (a) Back pay, with prejudgment interest, in the amount of \$4,397;
- (b) Incidental damages in the amount of \$1,603; and
- (c) Postjudgment interest at the rate of 10% per annum, compounded quarterly, until paid.

10. A Cease and Desist Order is directed against respondent from engaging in act of unlawful discrimination in violation of the West Virginia Human Rights Act.

WV HUMAN RIGHTS COMMISSION

ENTER this 6th day of April, 1998.

BY: Mike Kelly
MIKE KELLY
Administrative Law Judge
Post Office Box 246
Charleston, West Virginia 25321
(304) 344-3293

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 West Virginia Human Rights Commission and the adverse party as respondents. The employer or the person or entity 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, person or entity 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.

EXHIBIT A

CHARLES AKINS-FINAL ORDER DAMAGE CALCULATION
 QUARTERLY INTEREST AT .10

DATE	LOST BACK PAY	INTEREST EARNINGS	ENDING BALANCE
BACK PAY/PREJUDGMENT INTEREST	4,397.00	.00	4,397.00
APRIL/MAY/JUNE 1998	.00	109.93	4,506.93
JULY/AUG/SEPT 1998	.00	112.67	4,619.60
OCT/NOV/DEC 1998	.00	115.49	4,735.09
JAN/FEB/MARCH 1999	.00	118.38	4,853.47
APRIL/MAY/JUNE 1999	.00	121.34	4,974.81
JULY/AUG/SEPT 1999	.00	124.37	5,099.18
OCT/NOV/DEC 1999	.00	127.48	5,226.66
TOTALS:	4,397.00	829.66	5,226.66

BACK PAY/PREJUDGMENT INTEREST AWARDED BY ALJ	4,397.00
POST JUDGMENT INTEREST ON BACK PAY AWARD	829.66
TOTAL BACK PAY AND INTEREST	5,226.66
INCIDENTALS AWARDED BY ALJ	1,603.00
TOTAL DAMAGES	6,829.66

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EXHIBIT B