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NOTICE OF FINAL DECISION

PLEASE TAKE NOTICE that pursuant to W.Va. Code §5-11-8(d) and 6 WVCSR §77-2-10, any party aggrieved by the attached final decision shall file with the executive director of the West Virginia Human Rights Commission, WITHIN THIRTY (30) DAYS OF RECEIPT OF THE DECISION, a petition of appeal setting forth such facts showing that the party is aggrieved, stating all matters alleged to have been erroneously decided herein, the relief to which the party believes they are entitled and any argument in support thereof.

The filing of an appeal to the Commission from the final decision shall not operate as a stay of the decision unless specifically requested by the appellant in a separate application for the same and approved by the Commission or its executive director.

All documents shall be directed to:

Executive Director
West Virginia Human Rights Commission
1321 Plaza East, Room 104-106
Charleston, WV 25301

Dated this 9th day of September, 1994.

WV HUMAN RIGHTS COMMISSION

BY:



MIKE KELLY
Administrative Law Judge
Post Office Box 246
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(304) 344-3293

cc: Norman Lindell, Acting Executive Director
West Virginia Human Rights Commission

**BEFORE THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**RHONDA R. ADKINS,
Complainant,**

v.

Docket No. REP-138-94

**TOWN OF WAYNE,
Respondent.**

**FINAL DECISION
OF THE
ADMINISTRATIVE LAW JUDGE**

THIS MATTER matured for public hearing on 4 May 1994. The hearing was held at Town Hall, Town of Wayne, Wayne County, West Virginia. The complainant appeared in person and her case was presented by the West Virginia Human Rights Commission and its counsel, Assistant Attorney General Susan E. Jewell. The respondent appeared by its Mayor, James Ramey, Jr., and by its counsel, W. Michael Frazier.

I. ISSUE TO BE DECIDED

Whether respondent violated W.Va. Code §5-11-9(7)(C), which makes it an unlawful discriminatory practice for any person or employer to "engage in any form of reprisal or otherwise

discriminate against any person because he has opposed any practices or acts forbidden under this article or because he has filed a complaint, testified or assisted in any proceeding under this article."

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 exhibits introduced into evidence and the written recommendations and argument of counsel, the Administrative Law Judge finds the following facts to be true:¹

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.

A. Preliminary Facts

1. Complainant Rhonda R. Adkins is a white female who filed a complaint in a proceeding under the West Virginia Human Rights Act, W.Va. Code §5-11-1 et seq. ("HRA").

2. Respondent Town of Wayne (hereinafter "Town") is a person and employer as those terms are defined by W.Va. Code §§ 5-11-3(a) and (d), respectively.

3. Ms. Adkins was employed by the Town from September 1983 until May 1992. She was discharged from her employment with respondent on 4 May 1992.

4. On 21 July 1992, Ms. Adkins filed a complaint with the West Virginia Human Rights Commission (hereinafter "Commission") charging that her former employer discharged her because of her sex, female. The complaint was docketed as Case No. ES-33-93.

5. On 26 July 1993, the Commission issued a letter of determination finding that there was no probable cause to believe that respondent had discriminated against Ms. Adkins because of her sex.

6. On 3 October 1993, Ms. Adkins filed a second complaint with the Commission, this one charging that respondent had taken

acts of reprisal and retaliation against her because she had filed the first complaint. It is this second complaint which is before the Administrative Law Judge for decision.

B. Ms. Adkins' Employment with the Town of Wayne

7. After over eight (8) years of employment with the Town, complainant was fired by Mayor Ramey on 4 May 1992. Ms. Adkins was afforded a written notice of termination which stated that she was being discharged "due to poor work performance". The letter referred Ms. Adkins to certain sections of the Town personnel policy which she allegedly violated, and informed her of her right to a hearing before "Town Council" to challenge the Mayor's decision.

8. At the time of her discharge, Ms. Adkins held the position of Town Clerk. Her duties included accepting payments to the Town in the form of cash and check and making timely revenue deposits.

9. Testimony at hearing clearly showed that the event which precipitated Ms. Adkins' discharge was Mayor Ramey finding two undeposited personal checks from Ms. Adkins in her cash drawer at City Hall. One check was dated 21 April 1992 and was written for the amount of \$10.00. The second check, for \$20.00, was dated

April 24, 1992. He found the checks in her drawer on the weekend prior to 4 May, a Monday.

10. Credible testimony at hearing indicated that Town employees were permitted to cash personal checks from their revenue drawer. There was no written policy as to how often revenue deposits had to be made. However, deposits were made from Ms. Adkins' drawer on 23 April 1992 and 1 May 1992. Her checks were not among the funds deposited. There was no credible explanation offered by either side as to why the funds were not deposited.

11. Bank records introduced into evidence show that complainant had sufficient funds in her personal checking account to cover the checks had they been deposited on either 23 April or 1 May. She was also assured of payment by her bank's overdraft protection policy.

12. The Town's contention that Ms. Adkins did not deposit the checks because she was interested in obtaining an "interest free" loan at the Town's expense was not supported by any credible evidence.

13. When the checks were finally deposited by a co-worker on 4 May, shortly after Ms. Adkins' discharge, they cleared without problem and the Town's account was properly credited.

14. Evidence of other infractions committed by Ms. Adkins, during the course of her employment, such as tardiness and a "failure to write herself up" on one occasion, were offered at hearing, but are not relevant to the issue presented for determination and are given no weight in the final decision.

15. Mayor Ramey's decision to discharge complainant was upheld by Town Council.

C. Post-Discharge Activities

16. Ms. Adkins did not believe that her conduct was worthy of discharge and she actively pursued available means of redress, including:

(a) Hiring an attorney to write a letter to the Town threatening suit if she was not reinstated;

(b) Filing an administrative complaint with the U.S. Department of Labor alleging a violation of the federal wage and hour laws; and

(c) Filing her complaint with the HRC in Case No. ES-33-93.

17. In addition, complainant's husband, after a disagreement with the Mayor, which resulted in him being removed from Town Hall, sought to have the Mayor indicted by a Wayne County grand jury.

18. The Mayor, in turn, informally met with the Wayne County prosecuting attorney to seek his opinion as to whether Ms. Adkins had committed a violation of the criminal law by not depositing the checks in a timely manner. The Mayor never sought a formal filing of charges and no criminal warrant or summons was ever issued.

19. The efforts of the Adkins and the Mayor to punish each other through the legal system proved unsuccessful, though the Department of Labor did find that other Town employees were owed small amounts in back wages.

D. Ms. Adkins Applies for Employment with APCO

20. On 1 November 1992, complainant was hired by the Wayne County Commission, where she was still working as of the day of hearing.

21. On or about 7 June 1993, complainant was interviewed for a position with Appalachian Power Company (APCO). Her interviewers rated her as "acceptable" and she was recommended for hire. The position for which she was being considered was Customer Service Rep.-D, which involved the handling of cash.

22. After her interview, Ms. Adkins' file was forwarded to Robert Heil, an APCO Human Resources Supervisor. Mr. Heil

proceeded to make telephone reference checks to the previous employers listed on Ms. Adkins' employment application. Other than the Town, her previous employers all gave her a good reference.

23. On 22 June 1993, Mr. Heil called the Town of Wayne for a reference on Ms. Adkins. He spoke to Kim Brooks, a clerk. Mr. Heil's notes indicate that Ms. Brooks informed him of complainant's duties when she was Town Clerk and verified her dates of employment. She did not offer any additional information.

24. Despite Ms. Brooks' hesitance to discuss Ms. Adkins, Mr. Heil testified at hearing that he felt that his reference check was complete. Mr. Heil could not remember leaving a message for the Mayor or someone else in authority to return his call. Ms. Brooks testified that he did not leave such a message.

25. On 22 June 1993, Mr. Heil telephoned Ms. Adkins and made a contingent offer of a job. He told her that she would probably start work shortly after 4 July 1993. In a letter of the same date to Ms. Adkins, he explained that "this offer is contingent upon the successful completion of the pre-employment physical examination, receipt of satisfactory reference checks, and the production of appropriate employment verification documents." At hearing, he testified that he considered all reference checks to be complete at the time he wrote to Ms. Adkins.

E. Mayor Ramey's Telephone Call

26. On 23 June 1993, Mayor Ramey called Mr. Heil. Mr. Heil took notes of their conversation, which state, in their entirety, as follows:

"James Ramey, Mayor of Wayne, called me at 9:55 a.m. I was on the phone. I returned Mr. Ramey's call at 10:00 a.m. He wanted to know if I had called yesterday to check on Rhonda Adkins. I said I had called yesterday to do a pre-employment reference check on Ms. Adkins and needed job title, duties, dates of employment and so on. He said the Town of Wayne was considering prosecuting her for taking money. He asked if she said why she left. I said she indicated "political" reasons.* Mr. Ramey said "She was fired". "She was not dependable" and "She is trouble". He indicated that she had filed sexual discrimination suits that the Town of Wayne won. He indicated something to the effect that he didn't want to see Appalachian Power hire a problem. I said I would review this information with the department head involved".

* He mentioned that he didn't understand why she would say political since she and her husband were Democrats.

The notes are signed by Mr. Heil and dated "6/23/93".

27. The Mayor testified that he called Mr. Heil because "I think Appalachian Power is a very excellent company. And I just don't think they needed anybody like Rhonda Adkins working for them." Under cross-examination, the Mayor admitted that one reason he perceived Ms. Adkins as "trouble" for an employer was her filing of the HRC complaint. He also stated that Mr. Heil's notes accurately reflect the basics of their conversation, "but . . . I couldn't say word for word". He said that he did not believe that

he would be acting in good faith if he gave her a positive reference.

28. While the Town, in a pre-hearing response to discovery that was admitted into evidence as Joint Exhibit 14, indicated that Mr. Heil had quizzed the Mayor about Ms. Adkins, Mr. Heil testified at hearing that "I did not ask any question or solicit the information".

29. Within minutes, Mr. Heil took the information he had received from the Mayor to his supervisors. He testified at hearing that since the "normal function" of the job offered to Ms. Adkins "mostly is to act as a cashier", a decision was made to rescind the contingent offer based on the Mayor's representation that the Town was considering criminal prosecution of Ms. Adkins "for taking money".

30. At 2:40 p.m. on 23 June 1993, Mr. Heil telephoned Ms. Adkins and withdrew the job offer, according to his notes, "based on unsatisfactory reference checks. She asked which one. I said the Town of Wayne. She asked what was the problem. I said I couldn't get into a discussion of that.". He then wrote a letter to her confirming that the job offer had been rescinded.

31. The next day, 24 June 1993, Ms. Adkins called Mr. Heil and asked for more information as to why the offer had been

rescinded. She told him about her HRC case, which, at that time, was still in the investigatory stage. She asked if the Town representative to whom Mr. Heil had spoken "stay[ed] within the boundaries of what he was asked?" Mr. Heil declined to answer.

32. The parties stipulated that during her first conversation with Mr. Heil, when she was made the contingent offer, Ms. Adkins told him that she did not leave the Town's employ on good terms and that he replied that a personal reference from the Town was not necessary. She did not state that she was discharged.

33. When she was offered the job, Ms. Adkins testified she was "ecstatic. I really was. I've known people that have really tried all their life to obtain a job with a company, where you can move up, where you have a career that you can look forward to. I was really excited."

34. When the job offer was rescinded, Ms. Adkins testified, "it was just like the floor had been pulled out. It was very upsetting. I took a break at that time and went down stairs. Several of my co-workers came down and talked to me, and I cried, I was very upset."

35. As a result of not getting the APCO position, Ms. Adkins has lost earnings in the amount of \$56.39 based on a comparison of

her reasonable expectation of earnings at APCO and her actual income from the Wayne County Commission.

III. DISCUSSION OF EVIDENCE AND APPLICABLE LAW

W.Va. Code §5-11-9(7)² makes it unlawful "For any person [or] employer . . . to":

(C) Engage in any form of reprisal or otherwise discriminate against any person because he has opposed any practices or acts forbidden under this article or because he has filed a complaint, testified or assisted in any proceeding under this article. (Emphasis added).

In making out a case of unlawful reprisal arising out of a prior complaint of discrimination filed with the HRC, it is not necessary for the Commission to litigate or prove the merits of the original claim. Davis v. State University of new York, 802 F.2d 638 (2nd Cir. 1986); Berg v. LaCrosse Cooler Co., 612 F.2d 1041, 1043, (7th Cir. 1980); Rogers v. McCall, 488 F. Supp. 689, 697, (D.

² The anti-reprisal provision of the HRA appears considerably broader in scope than that contained in Title VII of Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1). The use of the term "person", along with "employer", makes it clear that former employers, like the Town of Wayne, are also prohibited from engaging in retaliation. Thus, the debate regarding the liability of former employers for retaliatory acts now raging in the federal courts is unnecessary here. See, Charlton v. Paramus Bd. of Ed., 25 F.3d 194 (3rd Cir. 1994) and Polsby v. Chase, 970 F.2d 1360 (4th Cir. 1992) vacated sub. nom. Polsby v. Shalala, 113 S.Ct. 1940 (1993).

D.C. 1980); Slotkin v. Human Dev. Corp., 454 F. Supp. 250, 257, (E.D. Mo. 1978). The ultimate burden on the Commission in a reprisal case such as this, after the evidentiary framework has fallen to the wayside, is to prove by a preponderance of evidence that a retaliatory motive played a part in an employment decision adverse to the complaint. Davis, supra; Womack v. Munson, 619 F.2d 1292 (8th Cir. 1980), cert. den. 101 S.Ct. 1513 (1981). Mitchell v. Visser, 529 F.Supp. 1034 (D.Kan. 1981). As the Second Circuit stated in Davis, an anti-reprisal provision is "violated if a retaliatory motive played a part in the adverse employment actions . . . even if it was not the sole cause." 802 F.2d at 642.

Here, it is not contested that Mayor Ramey's phone call to Mr. Heil played a part in APCO's withdrawal of its contingent job offer to Ms. Adkins. In fact, it cannot be denied that the Mayor's phone call was the sole cause of the adverse employment action. Therefore, the causal link between the alleged retaliatory act and the subsequent adverse outcome is not really at issue.

What is at issue is whether the Mayor acted with the required retaliatory intent. The Commission has shown, by a preponderance of the evidence, that he did.

The Mayor's testimony that he did not act with a retaliatory motive and that it was simply business as usual for him to return a call regarding a reference check, whether a return call was

requested or not, is, in light of the substance and dynamics of the phone call, dismissed as not credible. A review of the evidence leads ineluctably to the opposite conclusion.

First, Mr. Heil testified that when he ended his initial conversation with Ms. Brooks, the Town Clerk, the information she supplied, while scant, met his purposes. He did not expect a return phone call and does not remember requesting one. Ms. Brooks verified that he made no such request. Additionally, Mr. Heil's notes of his conversation with the Mayor indicate that his purpose was limited to a verification of basic employment information such as dates, positions and duties.

Second, Mr. Heil testified that when he spoke with the Mayor, Mr. Ramey freely offered the information reflected in Mr. Heil's notes. Mr. Heil stated that he asked no questions and did not steer the conversation in one direction or another.

The written documents admitted into evidence as Joint Exhibits 10 and 14, in which the Town states that the Mayor "was forced" to make statements due to Mr. Heil's persistent questioning, are found to lack credibility.

Third, the substance of the conversation, as reflected in Mr. Heil's notes, which the Mayor admits are basically accurate, shows

the clear intent to injure Ms. Adkins' job prospects. The Mayor stated that he was "considering prosecuting her for taking money", that "she is trouble" and that "she had filed sexual discrimination suits that the Town of Wayne won". He stated at hearing that he considered Ms. Adkins to be "trouble", in part, because she had filed a complaint with the HRC.

It is possible that the mere mention to a prospective employer that a former employee had filed a discrimination claim could be sufficient to show retaliatory intent. As the court stated in Czarnowski v. Desoto, Inc., 518 F.Supp. 1252, 26 F.E.P. Cases 962 (N.D. Ill. 1981):

. . . informing [a prospective employer] of the filing of the EEOC charge by plaintiff is contrary to the spirit and purpose of a title VII which provides employees with a congressionally-mandated process to remedy employment discrimination. Employees must be free to pursue this process without the fear that the filing of such a charge will be freely communicated to prospective employers by a former employer.

26 F.E.P. Cases at 967.

See, also Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977) and Carl v. Reavis, 35 F.E.P. Cases 917 (W.O.N.C. 1983).

Here, the evidence of intent to retaliate is buttressed by the fact that much of what the Mayor told Mr. Heil was not true or was put in a false light. The Mayor's conversation with Mr. Heil took

place on 23 June 1993. At that time, and contrary to the Mayor's indication, the Town was not considering prosecuting Ms. Adkins. Almost nine months earlier, on 22 September 1992, the Town had informed the HRC, in response to interrogatories that ". . . no charges have been brought, and the Town of Wayne does not anticipate bringing any criminal charges against Ms. Adkins". (Joint Exhibit 9, p. 3).

Similarly, the original HRC sex discrimination claim which the Mayor mentioned was not "won" by the Town and communicated to the parties until 26 July 1993, more than a month after the Mayor talked with Mr. Heil.

Finally, the Mayor's bold statement that Ms. Adkins had been discharged for "taking money" put her in a false light. Ms. Adkins, contrary to the connotation implicit in the Mayor's comments, was not a thief. There was credible evidence that the cashing of personal checks by employees was allowed. There was no evidence that Ms. Adkins intentionally failed to deposit her checks or that she in any way garnered some economic gain by neglecting to deposit them.

Viewing the evidence of record as a whole, the Commission has shown the existence of retaliatory intent or motive by a preponderance of the evidence.

Once the Commission had proven that a respondent violated W.Va. Code §5-11-9(7)(c), the Town could still escape liability by showing that APCO's adverse action would have been taken even in the absence of the unlawful retaliatory act. Ruggles v. California Polytechnic State University, 797 F.2d 782 (9th Cir. 1986). Here, the Town offered no evidence that APCO would not have hired Ms. Adkins even if the phone call had not been made. While the Town implies that it should, nonetheless, escape liability because APCO's decision was based on the "taking money" allegation and not on the reference to the HRC complaint, it is impossible to separate out the two accusations and to say with any certainty that APCO was motivated by one to the exclusion of the other. Mr. Heil's notes, which he shared with his supervisors, makes reference to both charges, and it is clear that the filing of the discrimination complaint, at a minimum, played a part in APCO's decision. To the extent that Mr. Heil's testimony intimates that APCO gave no weight to the filing of the HRC complaint, it is dismissed as self-serving and not credible. Mr. Heil, who is a company supervisor and who was accompanied to the hearing by an APCO attorney, was undoubtedly aware that any admission that APCO considered the HRC filing in deciding to withdraw the job offer previously extended to Ms. Adkins could subject APCO itself to liability under the broad anti-reprisal scope of W.Va. Code §5-11-9(7). See, Fahie v. New York City Dept. of Corrections, 737 F.Supp. 15 (S.D.N.Y. 1990); Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977).

IV. SUMMARY OF FINDINGS OF FACT

1. The Administrative Law Judge finds as fact that the Commission has proved by a preponderance of the evidence that the Town of Wayne, through its Mayor, intentionally engaged in an unlawful form of reprisal against complainant because she had filed a complaint under the HRA.

2. The Administrative Law Judge finds as fact that the form of reprisal undertaken by respondent played a part in the decision of APCO to withdraw its job offer to Ms. Adkins.

3. The Administrative Law Judge finds as fact that as a result of respondent's unlawful act complainant suffered lost earnings in the amount of \$56.39.

4. The Administrative Law Judge finds as fact that as a result of respondent's unlawful discriminatory act Ms. Adkins suffered embarrassment, humiliation, annoyance and mental and emotional distress.

V. CONCLUSIONS OF LAW

1. The respondent is an employer within the meaning of W.Va. Code §5-11-3(d), and a person within the meaning of §5-11-3(a).

2. The complainant is a citizen of the State of West Virginia and a person within the meaning of W.Va. Code §5-11-3(a).

3. On or about 21 July 1992, complainant filed a verified complaint with the West Virginia Human Rights Commission properly alleging that respondent had engaged in one or more of unlawful discriminatory practices within the meaning of W.Va. Code §5-11-9. Said complaint was timely filed within 180 days after complainant became aware of the alleged act of discrimination and the West Virginia Human Rights Commission had jurisdiction over the parties and the subject matter of that action pursuant to the authority granted it by W.Va. Code §§ 5-11-8, 9 & 10.

4. The West Virginia Human rights Act is violated when an employer or a person engages in a form of reprisal because a person has filed a complaint with the HRC.

5. The Commission showed by a preponderance of the evidence that on 23 June 1993 respondent intentionally engaged in an unlawful form of reprisal against complainant because of her previous filing with the HRC.

6. The Commission having proven its case by a preponderance of the evidence, Ms. Adkins is, therefore, entitled to the following relief:

(a) an award of backpay in the amount of \$56.39, plus prejudgment interest in the amount of \$4.37.

(b) incidental damages in the amount of \$2,500.00 for the humiliation, embarrassment and loss of personal dignity suffered by complainant as a result of the respondent's unlawful acts.

7. Finally, a cease and desist Order should be, and is hereby, directed against the Town of Wayne to cease and desist from engaging in acts of reprisal and retaliation in violation of the West Virginia Human Rights Act. The Town is further **ORDERED** to post a copy of this decision on a bulletin board in Town Hall in a place fully accessible to the public.

8. The Commission is awarded costs in the amount of \$671.68 and the Attorney General is awarded his costs in the amount of \$160.08.

Decided this 9th day of September, 1994.


MIKE KELLY
Administrative Law Judge
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Charleston, West Virginia 25321
(304) 344-3293