



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

ARCHA MOORE, JR.
Governor

TELEPHONE: 304-348-2616

October 22, 1987

Calvin Brown
1419 Sattes Circle
Nitro, WV 25143

White Lincoln-Mercury, Inc.
321 Virginia St.
Charleston, WV 25302

Dan L. Hardway, Esq.
711 Atlas Bldg.
Charleston, WV 25301

James T. Cooper, Esq.
Lovett, Vaughan & Cooper
400 Charleston National Plaza
Charleston, WV 25031

RE: Brown v. White Lincoln-Mercury, Inc.
EA-53-87

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,

A handwritten signature in cursive script that reads "Howard D. Kenney".

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, 1987

Ear. H. B. 2638]

3

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

CALVIN BROWN,

Complainant,

v.

DOCKET NO. EA-53-87

WHITE LINCOLN-MERCURY, INC.,

Respondent.

FINAL ORDER

On the 8th day of October, 1987, 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 findings of fact and conclusions of law, as its own, with the following modifications.

In the subsection titled Findings of Fact on page 3, paragraph enumerated as 9 is modified as follows: the year "1909" is stricken, substituted, therefore, is the year "1929."

On page 4 of said subsection paragraph enumerated as 19, the second sentence contained therein is modified by adding the language "in response to what he perceived to be a cut in pay" after the word "quit." Also, on page 4 of the same subsection, paragraph enumerated as 20 is deleted.

On page 8 of said subsection, the last paragraph is deleted.

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 modified 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 16th day of October, 1987.

RESPECTFULLY SUBMITTED,

BY Betty C. Hamblin
CHAIR/VICE CHAIR
WV HUMAN RIGHTS COMMISSION

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

RECEIVED

JUL 30 1987

WEST VIRGINIA HUMAN RIGHTS COMM.

CALVIN BROWN,

Complainant,

v.

Docket No. EA-53-87

WHITE LINCOLN-MERCURY, INC.,

Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on April 15-16, 1987 in Charleston, West Virginia. Commissioner Russell VanCleve served as Hearing Commissioner. The complaint was filed on July 30, 1986. The notice of hearing was issued on November 14, 1986. Respondent answered on November 21, 1986. A telephone Status Conference was convened on March 5, 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 fired him because of his age. Respondent maintains that it fired complainant because of poor performance.

FINDINGS OF FACT

Based upon the parties stipulations of uncontested facts as set forth on the record during the hearing, the Hearing Examiner has made the following findings of fact:

1. Complainant was employed by respondent from July 29, 1985, to May 19, 1986, in the position of credit manager.

2. Complainant was discharged from employment with respondent on May 19, 1986.

3. Prior to his discharge, complainant was never told that he would be discharged.

4. At the time of his discharge, complainant was earning wages in the amount of \$1,700.00 per month.

5. Boyles is younger than complainant. Boyles was 41 years of age at the time of complainant's dismissal.

6. Prior to working for respondent, complainant had been employed for over 17 years at Raines Lincoln-Mercury, Incorporated as a credit manager.

7. On or about July 29, 1985, respondent purchased Raines Lincoln-Mercury Incorporated.

8. In addition to his pay at the time of discharge, complainant received the following benefits:

- a. Partial payment of group health insurance premiums until October 31, 1985;
- b. Automobile allowance of \$200 per month;
- c. Life insurance in the amount of \$10,000.00.

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

9. Complainant was born on May 3, 1909 and he was 57 years old on the date of his discharge.

10. Complainant was discharged by respondent because he could not perform his job duties in a competent manner.

11. Complainant was excessively rude to respondent's customers and he had a very gruff manner which is inconsistent with the new reputation which was sought by respondent.

12. Complainant did not implement the new plans, procedures, programs and computer systems he was asked to implement by K. White, respondent's owner.

13. Complainant took $6\frac{1}{2}$ days of vacation when he was only entitled to take 5 days.

14. Respondent investigated complainant's accounts while he was on vacation and discovered that he was not performing his job adequately.

15. On many occasions, K. White told complainant that he was the head of the credit department and because he was the manager of the credit department, he was responsible for doing what was necessary to solve the problems in the credit department.

16. Respondent has lost money each month since acquiring Raines Lincoln-Mercury; except March, 1986, when a \$417.00 profit was registered.

17. Because of its poor economic condition, respondent found it necessary to reduce its workforce. When respondent acquired the dealership, there were 70 employees. Respondent now has 47 employees.

18. Of the 47 persons currently employed by respondent, one is over seventy years old, nine other employees are over sixty years old, fifteen other employees are over fifty years old. The remaining twenty-two employees are under age 50.

19. At one point shortly after respondent had purchased Raines Lincoln-Mercury, complainant issued an ultimatum to his employer. Complainant threatened to quit if he was not given a raise of \$300.00 per month. Inasmuch as he was the only person at that time who knew where the credit records were located, respondent gave in to his demands.

20. K. White is state chairperson of the JTPA Commission, which funds training programs for the handicapped and the elderly. K. White was responsible for hiring the first female service manager in the Kanawha Valley. K. White has long been active in equal employment opportunity.

21. Boyles, who replaced complainant, was more qualified than complainant to perform the credit manager job the way respondent wanted the job done.

CONCLUSIONS OF LAW

1. Calvin L. Brown 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. White Lincoln-Mercury, Inc. 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 discrimination.

4. Respondent has not discriminated against complainant on the basis of his age by firing 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 (WVa 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 such reason is pre-textual. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra.

In the instant case, complainant has not established a prima facie case of discrimination. Complainant has proven that he is a member of a group protected by the Human Rights Act by showing that he was 57 years old at the time of his discharge. The parties have stipulated that complainant was discharged by respondent and that his replacement was younger than complainant. These facts, however, are insufficient to raise any inference of discrimination because complainant has failed to demonstrate that he was qualified in the sense that he was performing his job competently. Accordingly, no inference of age discrimination may be raised and no prima facie case has been established. See Furnco Construction Company v. Waters 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981).

Assuming arguendo that complainant has established a prima facie case, respondent has articulated a legitimate non-discriminatory reason for his discharge. Respondent has presented testimony that complainant's job performance was not competent. Complainant was very rude to customers, and his gruff manner was inappropriate for respondent's desired new image. Complainant failed to implement the new plans, procedures, and

computer operations that the new management of the dealership requested him to implement. Complainant took an excessive vacation. Complainant's accounts were in a shambles. Despite K. White's repeated instructions to complainant that he should solve the problems of the department of which he was the head, the problems persisted. Respondent was faced with tough choices in view of its persistent failure to turn a profit. Complainant was one of many employees to lose his job at respondent.

Despite the very good job by complainant's counsel at hearing and in the brief, the record evidence in this case does not support a conclusion that the reason articulated by respondent for complainant's discharge was pretextual. The testimony of complainant and his witnesses was less credible than the testimony of respondent's witnesses. Complainant's demeanor on cross-examination was very evasive and combative. Complainant appears to take the attitude that he is not responsible for any of the problems with his work. Complainant's credibility is also impaired by the fact that he changed his testimony. Complainant testified on direct that he received no warnings from respondent. On cross-examination complainant changed his testimony to reflect that he did not remember being warned that the credit department was taking too much of management's time. The testimony of many of complainant's witnesses was also extremely evasive and apparently hostile to respondent. The testimony of respondent's witnesses, on the other hand, was credible. K. White's demeanor was very credible.

It is true that K. White gave more detail in her testimony herein than in previous written statements. K. White explained, however, that she didn't realize that every point had to be listed on such statements. In view of her otherwise very credible testimony, this minor problem does not significantly impair her credibility.

Complainant argues that his rudeness is excusable because under the prior owner complainant was the bad guy and the owner was more lenient with customers behind in their payments. In view of the change in ownership and its communicated desire to implement new policies and procedures, this argument must be rejected.

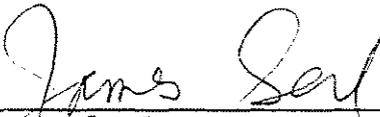
Complainant argues that the articulated reason is pretextual because respondent never confronted him with his shortcomings and gave him an opportunity to correct them. This argument ignores the fact that complainant was a management employee. Respondent clearly and repeatedly informed complainant on several occasions that he was the head of the credit department and that he was responsible for solving any problems in his department. A respondent cannot reasonably be expected to teach its management employees how to perform every task.

If respondent sought to discriminate against employees on the basis of age, it did not do a very good job. Respondent's workforce statistics reveal that this respondent has an exemplary record concerning the employment of older persons. Indeed, even complainant's replacement was in the age group protected by the Human Rights Act.

Complainant has failed to demonstrate by a preponderance of the evidence that the reason articulated by respondent for complainant's discharge 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: July 29, 1987

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:

Dan Hardway, Esq.
1031 Quarrier Street
Charleston, WV 25301

James T. Cooper, Esq.
Lovett, Vaughn & Cooper
400 Charleston National
Plaza
Charleston, WV 25301

on this 29th day of July, 1987.


James Gerl