

**BEFORE THE  
WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**SHARON K. BRUMFIELD,**

**Complainant,**

v.

**Docket No. ES-316-91**

**UNION BOILER,**

**Respondent.**

**RECEIVED**

**AUG 17 1995**

**ATTORNEY GENERAL  
CIVIL RIGHTS DIV.**

**FINAL DECISION OF  
ADMINISTRATIVE LAW JUDGE**

THIS MATTER matured for public hearing on 23 February 1995. By agreement of the parties, the hearing was held at 405 Capitol Street, Charleston, Kanawha County, West Virginia. The complainant appeared in person and by her counsel, Shirley A. Skaggs, and Calwell & McCormick. The respondent appeared by its designated representative, Roger McGaw, and by its counsel, Ricklin Brown, Elizabeth D. Harter, and Bowles Rice McDavid Graff and Love.<sup>1</sup>

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<sup>1</sup> From the inception of the complaint, Union Boiler has challenged the jurisdiction of the West Virginia Human Rights Commission to hear this case. It is recognized that respondent appeared at hearing for the purposes of contesting jurisdiction and did not put on its own case-in-chief.

## **I. ISSUES TO BE DECIDED**

1. Whether the West Virginia Human Rights Commission (HRC) has jurisdiction over this complaint.

2. If the HRC does have jurisdiction over this matter, whether respondent violated W. Va. Code §5-11-9(1) by discriminating against complainant because of her sex by creating or tolerating a hostile sexual environment at her workplace or by treating her differently than similarly situated male employees.

## **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:<sup>2</sup>

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<sup>2</sup> 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

### **A. Facts as to Jurisdiction**

1. Complainant, Sharon K. Brumfield, 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") and is a person protected by the HRA. Ms. Brumfield is a resident of Lesage, Cabell County, West Virginia.

2. Respondent Union Boiler is a person and employer as those terms are defined by W.Va. Code §§5-11-3(a) and (d), respectively.

3. Ms. Brumfield was employed by Union Boiler as a warehouseman or materials checker from 2 May 1990 until 23 October 1990.

4. Ms. Brumfield was laid off by respondent on 23 October 1990, allegedly due to a lack of work for her to perform.

5. It is undisputed that during the entire course of her employment with respondent, Ms. Brumfield reported to work at Union Boiler operation at the Ashland Oil refinery in Catlettsburg, Kentucky.

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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.

6. Complainant was referred to the Union Boiler job by her union, Teamsters Local 505 (LU505). LU505 is headquartered in Huntington, Cabell County, West Virginia, and has work jurisdiction over parts of West Virginia, Kentucky and Ohio.

7. Other than being referred to Union Boiler from her West Virginia based union, all other activities common to starting a new job, such as filling out paperwork, meeting supervisors and initiation to the workplace occurred in Kentucky. Also, Ms. Brumfield received her paychecks in Kentucky.

8. In asserting that the HRC does have jurisdiction in this matter, Ms. Brumfield points to the following facts, all of which are found to be true:

- (a) She is a resident and citizen of West Virginia;
- (b) Union Boiler is headquartered in West Virginia;
- (c) She was referred to Union Boiler by West Virginia based LU505;
- (d) At times, she came into West Virginia on assignment from Union Boiler, usually to pick up parts, and then returned to the Kentucky workplace;
- (e) Her termination notice was mailed to her in an envelope with a Nitro, West Virginia return address; and
- (f) She received the termination notice in West Virginia.

9. In asserting that the HRC does not have jurisdiction, Union Boiler cites the following facts, all of which are likewise found to be true:

- (a) Those facts already set forth and credited in paragraph 5 and 7, above;
- (b) Ms. Brumfield traveled into West Virginia for Union Boiler on only two or three occasions, and at no time was an alleged discriminatory act committed against her while she was in West Virginia performing duties for Union Boiler;
- (c) Whenever she travelled into West Virginia for Union Boiler, she first reported to work in Kentucky and received her job instructions in Kentucky;
- (d) When travelling into West Virginia to carry out Union Boiler's instructions, she was never accompanied by any other Union Boiler employee, supervisors or otherwise;
- (e) Ms. Brumfield's trips into West Virginia cumulatively accounted for less than one full eight hour work day and did not involve an overnight stay; and,
- (f) Ms. Brumfield's layoff notice was mailed and postmarked in Kentucky, despite the envelope bearing a West Virginia return address.

**B. Facts as to the Merits**

10. There was great confusion as to who was Ms. Brumfield's direct supervisor. Based on the evidence as a whole, I conclude, and so find as fact, that complainant was directly supervised by Mr. Dale Amison, who was not an employee of Union Boiler. While Mr. Amison was employed by the Foster Wheeler Company, he appeared to take direction from Union Boiler, and is considered and found to be an agent of Union Boiler.

11. Mr. Amison was a difficult boss. Ms. Brumfield testified colorfully that "you couldn't satisfy that man if you stood on top of your head and stacked bb's. You just can't do it." (Tr. 59).

12. Ms. Brumfield related that on one occasion Mr. Amison cussed at her. On another occasion, he threw a stapler at her and an ashtray. "Maybe he didn't aim it at me," she said, "but it went flying past." (Tr. 63).

13. Willard Brumfield, complainant's husband, is also a member of LU505 and had worked for Union Boiler at the Ashland refinery. He, too, had worked under the supervision of Mr. Amison. Generally, he described Mr. Amison as a temperamental and difficult boss who treated all employees curtly and with little respect.

14. In regard to her allegation of sexual harassment, Ms. Brumfield testified as follows, all of which is hereby credited as being true:

(a) A Union Boiler supervisor, J. R. Elam, after noting the existence of a "romantic" relationship between a male management employee and a female hourly employee, once stated to complainant: "Women . . . don't belong out here on these jobs. If you want to know how to stick around here . . . if you plan to stay around here . . . it depends on who you sleep with."

(b) In the process of making the above comment, Mr. Elam did not threaten or harass complainant, nor did he appear to imply that she would be required to have a sexual relationship with him in order to keep her job;

(c) On one occasion, an offensive drawing was left near her work area;

(d) On two occasions, she overheard male supervisors, in the heat of argument, refer to each other as a "cocksucker," "dicklicker" and "four-eyed S.O.B.;"

(e) When she confronted a supervisor about his use of foul language, he, on two occasions, apologized and said he wouldn't do it again;

(f) Ms. Brumfield admitted that the foul language was not directed towards her, but was more of a "slip of the tongue," (Tr. 87);

(g) Ms. Brumfield admitted that she was never propositioned in a sexual manner, never touched in a sexual manner, and was never the intentional recipient of sexually explicit or suggestive language; and

(h) All of the above acts took place in Kentucky.

15. In regard to her allegation of disparate treatment, complainant offered the following evidence:

(a) On 23 October 1990, complainant began to feel ill at work. She was eventually admitted to the hospital that day and unable to work for the next 14 to 18 days;

(b) While she was off sick, she received notice that she had been laid off due to lack of work as of 23 October 1990;

(c) When she tried to return to work, she was referred to a Union Boiler management employee who said "You've been a good employee. You've done a fine job over there. If we need you, we will call you back." (Tr. 92). She thanked him and left the premises.

(d) Mr. Brumfield testified that after his wife was laid off, he observed a male employee doing the same work that she had done; and

(e) Mr. Brumfield also testified that in 1989 and 1990, when he performed the exact same duties for Union Boiler as his wife later did, he was off due to illness for eight weeks, but was returned to the work force upon recovery;<sup>3</sup> and

(f) All of the above acts took place in Kentucky.

### III. CONCLUSIONS OF LAW

1. Complainant asserts that the HRC has jurisdiction over this matter pursuant to the power granted it by W. Va. Code §5-11-8(d), which authorizes the Commission:

(d) To hold and conduct public and private hearings in the county where the respondent resides or transacts business or where agreed to by the parties or where the acts complained of occurred, on complaints, matters and questions before the commission and, in connection therewith, relating to discrimination in employment, or places of public accommodations, housing accommodations or real property and during the investigation of any formal complaint before the commission relating to employment, places of public accommodation housing accommodations or real property . . .

2. Respondent, however, asserts that W. Va. Code §5-11-8(c) limits the Commission to hearing allegations of discrimination that, at least in significant part, arose within West Virginia and grants the HRC no authority to extend its jurisdiction to employment relationships that, at their core,

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<sup>3</sup> Complainant also sought to use as her "comparison" evidence the sworn statement of a Union Boiler hourly employee and the testimony of a similar individual who had not been identified by complainant when the required list of witnesses were exchanged by the parties. For the reasons appearing in the record, this evidence was not allowed and not considered.

are formed, developed and carried out in a foreign jurisdiction. W.Va. Code §5-11-8(c) delimits the Commission's authority as follows:

(c) To receive, investigate and pass upon complaints alleging discrimination in employment or places of public accommodations, because of race, religion, color, national origin, ancestry, sex, age, blindness or handicap, and complaints alleging discrimination in the sale, purchase, lease, rental and financing of housing accommodations or real property because of race, religion, color, national origin, ancestry, sex, blindness, handicap, or familial status, and to initiate its own consideration of any situations, circumstances or problems, including therein any racial, religious or ethnic group tensions, prejudice, disorder or discrimination reported or existing within the state relating to employment, places of public accommodations, housing accommodations and real property;

(Emphasis added).

3. As an administrative agency, the HRC is a creature of statute. Its power depends upon its statute and in order to undertake a certain act, it must find within its statute authority to do so. The HRC has no general or common law powers, but only those powers which have been conferred upon it by law expressly or by implication. *Appalachian Reg. Health Care v. WVHRC*, 376 S.E. 2d 317 (1988).

4. W.Va. Code §5-11-8(d) does not expressly confer upon the HRC the authority to hear cases of discrimination arising from an employment relationship formed and in an overwhelming part carried out in an another state.

5. By fair and reasonable implication, W.Va. Code §5-11-8(d) governs the venue of complaints, matters and questions properly "before the commission" and does not govern whether the Commission has jurisdiction over a particular complaint.

6. Since the HRC has no general or common-law powers, it cannot ignore the locus of the alleged wrong and assert jurisdiction over every respondent who meets the traditional "minimum contacts" test.

7. Even if "minimum contacts" jurisdiction was a possibility under the HRA, in this case the HRC would be required to apply the laws of Kentucky. *Perkins v. Doe*, 350 SE. 2d 711 (1986). The HRC has no statutory or regulatory authority to apply the laws of Kentucky to a set of facts or parties before it, but must, in all cases, apply the HRA and no other statute.

8. By fair and reasonable implication, W.Va. Code §5-11-8(d) limits the Commission to hearing allegations of unlawful discrimination that arise in whole or in significant part within the boundaries of the State of West Virginia. At a minimum, some significant discriminatory act must occur within West Virginia in order for the HRC to have jurisdiction.

9. The allegations of discrimination heard in this case did not, neither in whole nor in significant part, occur in West Virginia.

10. Given that the alleged acts of discrimination complained of herein occurred in the Commonwealth of Kentucky, the West Virginia Human Rights Commission does not have jurisdiction over this matter despite the facts that complainant is a citizen of West Virginia and Union Boiler does business in West Virginia.

Based upon the foregoing, the motion of Union Boiler to dismiss this complaint for lack of jurisdiction is GRANTED.

This case having been disposed of on jurisdictional grounds, no decision is rendered as to its merits.

Decided this 31st day of July, 1995.

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MIKE KELLY  
Administrative Law Judge  
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