

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Ivin B. Lee
Executive Director

**VIA CERTIFIED MAIL-
RETURN RECEIPT REQUESTED**

April 29, 2004

Stephen Bailey
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Charleston WV 25321-0273

Re: Stephen Bailey v. Pardee Resources Group, Inc.
Docket Number: ED-360-01 EEOC: Number:17JA10248

Dear Parties:

Enclosed please find the **ADMINISTRATIVE LAW JUDGE'S FINAL DECISION** of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective January 1, 1999, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

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10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the administrative law judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

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

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before an administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before an administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the administrative law judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.a. In conformity with the Constitution and laws of the state and the United States;

10.8.b. Within the commission's statutory jurisdiction or authority;

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10.8.c. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.d. Supported by substantial evidence on the whole record; or

10.8.e. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from an administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact Ivin B. Lee, Executive Director of the commission at the above address.

Yours truly,



Phyllis H. Carter
Administrative Law Judge

PHC/lms

Enclosure

cc: Ivin B. Lee, Executive Director
Lew Tyree, Chairperson
Paul R. Sheridan, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

STEPHEN BAILEY,

Complainant,

v.

Docket Number: ED-360-01

EEOC Number: 17JA10248

PARDEE RESOURCES GROUP, INC.,

Respondent.

ADMINISTRATIVE LAW JUDGE'S FINAL DECISION

This matter matured for public hearing on January 29 and 30, 2003 in Charleston, West Virginia, at the Commission's Office before Administrative Law Judge Phyllis H. Carter.

The Complainant, Stephen Bailey, appeared in person and by his attorney, William D. Ryan. The Respondent, Pardee Resources Group, Inc. appeared in person by its representative, Walter Stroud, Vice President, Engineering Services, and by its counsel Attorneys Samuel M. Brock Esquire and Eric E. Kinder, Esquire of Spilman, Thomas & Battle, P. L. L. C.

All proposed findings of fact, conclusions of law, and argument, submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. To the extent that the proposed findings of fact, conclusions of law, and argument, advanced by the parties are in accordance with the findings, conclusions, and legal analysis of the administrative law judge and supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions of law, and argument, are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been determined as not in accord

decision. To the extent that testimony of various witnesses is not in accord with the findings as stated herein, it is not credited. The parties stipulated as to the authenticity of Complainant's Exhibits 1-10. (Hr. Tr. Vol. I. at 34).

I.

FINDINGS OF FACT

1. The Complainant, Stephen Bailey, resides in Charleston, Kanawha County, West Virginia. (Hr. Tr. Vol. I, at 58).

2. The Respondent, Pardee Resources Group Inc., is headquartered in Philadelphia, Pennsylvania. The Company has two offices in West Virginia, one in Charleston and another in Webster Springs (Hr. Tr. Vol. II, at 139). Pardee Resources Group, Inc., is a person and employer as those terms are defined by W. Va. Code §§ 5-11-3(a) and 5-11-3(d) within the meaning of the West Virginia Human Rights Act.

2. Mr. Bailey was employed by Pardee in Charleston, West Virginia as a draftsman/autocad technician from October 20, 1999 until April 5, 2001 at which time he was terminated by Pardee. (Hr. Tr. Vol. I, at 59; Vol. II, at 61, 63 and Complainant's Exhibit 9).

3. During his entire employment with Pardee, Mr. Bailey was a draftsman. As a draftsman/autocad technician at Pardee, Mr. Bailey created maps using the computer. (Hr. Tr. Vol. II, at 63). His job duties never changed. Mr. Bailey admitted on cross examination that he was never told that his job duties were going to change when Pardee decided to implement a new geographical information system software. (Hr. Tr. Vol. I, at 134). Mr. Bailey's testimony is credible in this regard.

His job duties never changed. Mr. Bailey admitted, on cross examination, that he was never told that his job duties were going to change when Pardee decided to implement a new geographical information system software. (Hr. Tr. Vol. I, at 134). Mr. Bailey's testimony is credible in this regard.

6. Mr. Praskewiecz, Senior Vice President, Coal Division, testified that Mr. Bailey worked at a drafting table in front of a computer at his work station. (Hr. Tr. Vol. I, at 211-112).

7. When Mr. Bailey was hired permanently, he expressed concern about his rate of pay. In April 2000, Pardee gave Mr. Bailey a One Thousand Dollar (\$1,000.00) bonus in order to bring Mr. Bailey's pay more in line with what Mr. Bailey thought he should be making. (Hr. Tr. Vol. II, at 70, 71).

8. At the time of his hire, Pardee, through Mr. Stroud and Mr. Praskewiecz, was aware of Mr. Bailey's physical condition. (Hr. Tr. Vol. I, at 138-139 and Vol. II, at 59, 60).

9. Mr. Bailey suffers from a physical disability, namely, fractures of the left tibia and fibula; fracture of the right humerus and fractures of the vertebrae as a result of a motor vehicle accident that occurred in 1990. He was awarded full disability by the Social Security Administration. (Hr. Tr. Vol. I, at 73).

10. Mr. Stroud and Mr. Praskewiecz observed that Mr. Bailey had a visible limp when he was hired. He sometimes uses a cane. He has weakness of the left leg, increased reflexes of the left knee, and a weak left Achilles reflex. (Hr. Tr. Vol. I, at 77, 78).

11. The Complainant's physical limitations include the inability to run, the inability to stand long periods of time, increase difficulty walking on uneven terrain, and a limited ability to lift. He has to wear a brace on his leg to walk. (Hr. Tr. Vol. I, at 99).

12. Mr. Bailey received his education and training for a draftsman position from the West Virginia Division of Rehabilitation Services. (Hr. Tr. Vol. I, at 63, 72). He completed 1080 hours of instruction in both hands-on-drafting and Autocad. (Hr. Tr. Vol. I, at 66).

13. Autocad (Computer Assisted Drawing) is a computer program used in engineering to provide maps, blueprints, court exhibits, and drawings. (Hr. Tr. Vol. I, at 64-67).

14. Prior to his employment at Pardee, Mr. Bailey worked at Stagg Engineering Services, Inc. ("Stagg"), a Charleston West Virginia area firm as part of a student training programs, without pay, while still enrolled at the West Virginia Rehabilitation Center. Thirty days later, he was hired into a full-time position with Stagg as an engineering technician. Subsequently, he was hired by Stagg as a full-time Autocad technician. (Hr. Tr. Vol. I, at 69, 134, and at Vol. II, at 67).

15. While employed at Stagg, Mr. Bailey used the CAD, Autocad and SurvCAD programs. He learned to work with drawings, operate a planimeter, enter data into spreadsheets and databases. He learned mine safety and how to use plotters, printers, digitizers, and bond copiers. (Hr. Tr. Vol. I, at 71, Exhibit 5).

16. Pardee Senior Vice President John M. Praskewicz formerly worked at Stagg. He was there when Mr. Bailey was employed at Stagg. It was Mr. Praskewicz who recommended Mr. Bailey for the job as a draftsman at Pardee. (Hr. Tr. Vol. I, at 252, 253).

17. While employed at Pardee, Mr. Bailey worked in the Charleston office at his desk. In response to counsel's questions, Mr. Praskewicz testified as follows:

Q: Was Mr. Bailey required to work in the field?

A: No

Q: Do you have any other employees who were in the field?

A: Yes we do.

* * *

Q: Was the draftsman position going to be working in the field?

A: No, it was not.

Q: Was Mr. Bailey told when he was hired that he would be working in the field?

A: No, he wasn't.

Q: Was he told at any point in the course of his employment that he would be doing field work?

A: No, he was not.

Mr. Stroud's testimony is credible in this regard.

(Stroud Testimony, Hr. Tr. Vol. II, at 64-66).

18. He admitted that he was never asked to work out in the field. Occasionally, Mr. Bailey made trips to the Courthouse and Charleston Blueprint. (Hr. Tr. Vol. I, 134-135, and 185; Vol. II, at 64, 65). In response to Pardee's counsel's questioning, Mr. Bailey testified as follows:

Q: You were never required to go in the field and collect that data in order to do your drafting job; is that right?

A: That's correct.

* * *

Q: Well, I'll try to refer to it as the autocad technician, but the entire time you worked there, (Pardee) that was the job you had; is that right?

A: Yes, sir.

Q: It was largely a sedentary position where you sat at a desk or sat at the computer

and worked; is that right?

A: Yes, sir.

Q: And you only rarely- even rarely- left the office; is that right?

A: Uh, yes sir. I find Mr. Bailey's testimony credible.(Bailey's Testimony, Hr. Tr. Vol. I, at 134-135).

19. Pardee experienced many problems with Mr. Bailey's work performance. (Hr. Tr. Vol. I, at 72-73).

20. Dee Curtain, Senior Vice President of Pardee Resources Company and President of Pardee and Curtain Realty , L. L .C. described one occasion where Mr. Bailey prepared a property map which left about half of the relevant properties off the map. (Hr. Tr. Vol. II, at 195, 196). Also, Mr. Curtain described another occasion where Mr. Bailey's final draft of a map contained misplaced property lines; property lines which were mapped as roads and a misspelling of the word boundary. (Hr. Tr. Vol. I, at 196-198).

21. Mr. Jeff Brown, Senior Vice President of Pardee Resources Group, Inc., Oil and Gas Division, refused to work with Mr. Bailey because of the poor quality of his work. (Hr. Tr. Vol. II, at 28, 29).

22. Mr. Praskewiecz described Mr. Bailey's work product as mediocre, slow, and not very meticulous. According to Mr. Praskewiecz, Mr. Bailey made lots of mistakes. (Hr. Tr. Vol. I, at 213).

23. Mr. Praskewiecz described Mr. Bailey's work as follows:

A: We had a system, basically, where he would bring me maps, and

I would show him where the mistakes were, make revisions, give it back to him, and

then he would have to make the changes and then bring it back to me and I would go through it, and in this process, you know, you shouldn't need too many of those cycles, but you know, with Steve it seemed to take a lot longer to get all the corrections made.

Q: When you would point out errors on the draft of a map and give it back to Mr. Bailey, would all those changes be made?

A: Not always, no.

Q: Would there be new mistakes that would appear?

A: On occasion, things that were right the first time came back wrong the second time.(Mr. Praskewiecz's Testimony, Hr. Tr. Vol. I, at 215).

24. With regards to mine maps, Mr. Praskewiecz stated that Mr. Bailey made lots mistakes such as shading over text making it impossible to read the text; using the wrong colors when he shaded the maps; using the wrong size text thus making the map difficult to read, and failing to digitized things correctly. (Hr. Tr. Vol. I, at 216).

25. Mr. Bailey did a good job on tonnage calculations; although there, were some occasions when mistakes were found. (Hr. Tr. Vol. I, at 216).

26. Pardee addressed these concerns informally with Mr. Bailey on August 25, 2000. (Hr. Tr. Vol. II, at 74-75).

27. On August 25, 2000, Mr. Bailey, Stroud, and Praskewiecz met to discuss Mr. Bailey's work performance including the quality of his work, overall work attitude and inability to work without close supervision. (Hr. Tr. Vol. II, at 78 and Complainant's Exhibit 15).

28. At this meeting, the parties discussed Mr. Bailey's inability to turn in error free drafts

and a lack of willingness to do the work to get job assignments done. (Stroud's Testimony, Hr. Tr. Vol. I, at 78-88).

29. Mr. Bailey prepared a written response and submitted it to Stroud and Praskewiecz. In his response, Mr. Bailey addressed Pardee's concerns and indicated that he would try to do better. Bailey indicated that he was open to suggestions. (Complainant's Exhibit 16).

30. In September 2000, another meeting took place among Bailey, Stroud and Praskewiecz, at which time a discussion took place regarding Bailey's work performance including the quality of his work, overall work attitude and inability to work without close supervision. (Hr. Tr. Vol I at 85-86, Complainant's Exhibit 15).

31. In response to the meeting, Mr. Bailey's work improved for a short period but began to deteriorate again. (Hr. Tr. Vol. II, at 88-89; Vol. I, 230).

32. Mr. Stroud and Mr. Praskewiecz continued to work with Mr. Bailey to correct his deficiencies informally; praising him for performing well and offering constructive criticism. (Hr. Tr. Vol. I, at 230-231).

33. In an effort to improve Mr. Bailey discussed his work performance with Stroud and Praskewiecz on a number of occasions. (Hr. Tr. Vol I at 48).

34. Mr. Bailey did not learn the naming system used by Pardee as a means of assisting employees in finding maps that had been created. This would have prevented Mr. Bailey from making numerous mistakes. (Stroud's Testimony, Hr. Tr. Vol I, at 98).

35. In December 2000, Pardee awarded merit bonuses to certain employees. Mr. Bailey's performance bonus in December 2000 was zero. (Hr. Tr. Vol. II, at 100, 101 and 102).

36. On January 5, 2001, Mr. Bailey received a 7% across the board bonus of \$1,375.00

which was given to every employee at Pardee. (Hr. Tr. Vol. II, at 101-102).

37. Mr. Bailey also received a 3% (\$72.90) across the board the cost of living pay increase. (Hr. Tr. Vol. II, at 102).

38. When Mr. Bailey met with Mr. Stroud and Mr. Praskewiecz to discuss why he had not received a performance increase, he was told that his work needed improvement and that he continued to make the same mistakes he had made before. (Hr. Tr. Vol. II, at 103-104).

39. Pardee decided to implement a new geographical information system ("GIS") software. GIS was the use of specific data from global positioning satellites ("GPS") Implementation of this new software would require more of Mr. Stroud's time and would require Mr. Bailey to work more independently and without supervision. (Hr. Tr. Vol. II, at 91, 96, 98).

40. A GIS unit is a hand-held device that an individual on the ground can use, through communication with satellites, to give an exact position for the GSP receiver. (Hr. Tr. Vol. II, at 92, 93).

41. Pardee field staff used GPS data to get exact locations for roads, gas wells, gates and things of that nature and then give the GPS information to the draftsman to draw maps. (Hr. Tr. Vol. II, at 93).

42. Mr. Bailey was terminated by Pardee because his overall job performance had not improved and Mr. Stroud was no longer able to give Mr. Bailey the close supervision he needed. Additional pressure associated with the implementation of the GIS software prevented Mr. Stroud from providing closer supervision to Mr. Bailey.

II.

DISCUSSION

The Complainant, Mr. Bailey, was employed by the Respondent, Pardee Resources Group, Inc., as a draftsman/autocad technician from October 20, 1999 until April 6, 2001 at which time he was terminated by Pardee. Walter Stroud was his direct supervisor. Mr. Bailey was terminated because of his poor performance and not because of his disability.

Mr. Bailey alleged that he was discriminated against because of his disability and that Pardee failed to give him a reasonable accommodation. The record, however, does not support this contention.

The record is clear that Pardee hired Mr. Bailey with full knowledge of his condition. His limp was apparent. There is no evidence of any disparaging remarks, comments, or behavior directed at Mr. Bailey by any Pardee employees or agents. The record is, however, replete with instances of Mr. Bailey's poor job performance.

Mr. Bailey alleges that Pardee was planning to change his duties and have him work in the field where he would have required an accommodation because of his physical disability. There is no direct or circumstantial evidence to support these allegations. This is speculation on the part of Mr. Bailey. Bailey made some assumptions which are not substantiated by the evidence. Furthermore, Mr. Bailey admitted at the hearing that no one from Pardee ever told him that he would be required to work in the field or that his job as a draftsman would change in any way.

Furthermore, Mr. Bailey failed to comply with the requirements of the Commission's legislative rule. 77 C. S. R. 3.1. Legislative rules have the force and effect of law.

West Virginia Code § 5-11-9(1) of the "Act", makes it unlawful "for any employer to discriminate against an individual with respect to ... hire, tenure, conditions or privileges of

employment if the person is able and competent to perform the services required . . . ” The term “discriminate” or “discrimination” as defined in W. Va. Code § 5-11-3(h) means to “exclude from, or fail or refuse to extend to, a person equal opportunities because of disability . . . ” A person is considered disabled under the “Act” if he or she have

- (1) A mental or physical impairment which substantially limits one or more of such person’s major life activities. The term major life “activities” includes functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;
- (2) A record of such impairment; or
- (3) Being regarded as having such an impairment. . . .

Stone v. St. Joseph’s Hospital, 538 S.E.2d at 399, n. 14 (quoting W. Va. Code 5-11-3 (m)).

The “Act” “embraces the traditional employment discrimination theories of disparate treatment and disparate impact.” Skaggs v. Elk Run Coal Co., 479 S.E.2d 561, 573 (W. Va. 1996); Barefoot v. Sundale Nursing Home, Syl. Pt.6, 193 W. Va. 475,457 S.E. 2d. 152 (1995), West Virginia University v. Decker, 191 W. Va. 567, 447 E.E.2d 259 (1994); Guyan Valley Hospital, Inc. v. West Virginia Human Rights Commission, 181 W. Va. 251, 382 S.E.2d 88 (1989).

The complainant is proceeding under a disparate treatment theory. There are three different analyses which may be applied in evaluating evidence in a disparate treatment case.

A discrimination case may be proven under a disparate treatment theory which requires that a complainant prove a discriminatory intent on the part of the respondent. A complainant may prove discriminatory intent by the three steps inferential proof formula first articulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and, adopted

by the West Virginia Supreme Court in Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). Under this formula, a complainant must first establish a prima facie case of discrimination; a respondent has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally the complainant must show that the reason proffered by a respondent was not the true reason for the decision, but some pretext for discrimination.

The term "pretext" has been held to mean an ostensible reason or motive assigned as a color or cover for the real reason; false appearance; or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (W.Va. 1986). The pretext may be shown through direct or circumstantial evidence of falsity or discrimination. Where the pretext is shown, discrimination may be inferred. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995). Discrimination need not be found as a matter of law. St. Mary's Honor Society v. Hicks, 509 U.S., 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

There is also the "mixed motive" analysis under which a complainant may proceed to show the pretext, as established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed.2d 268 (1989). Recognized by the West Virginia Supreme Court in West Virginia Institute of Technology, supra, "Mixed motive" applies where a respondent articulates a legitimate nondiscriminatory reason for its decision which is not pre-textual, but where a discriminatory motive plays a part in the adverse decision. Under the mixed motive analysis, a complainant need only show that he or she is a member of a protected class and that this played some

part in the decision. The only way that an employer can avoid liability is to prove that it would have made the same decision even if a complainant's protected class had not been considered. Barefoot, 457 S.E.2d at 162, n. 16; 457 S.E.2d at 164, n. 18.

Finally, a disparate treatment case may be proven by direct evidence of discriminatory intent. The burden shifts to a respondent to prove by a preponderance of the evidence that it would have terminated the complainant even if it had not considered the illicit reason.

In order to establish a case of disparate treatment for discriminatory discharge under W.Va. Code § 5-11-9, with regard to disability, a complainant must prove as a prima facie case, that:

- (1) The complainant is a member of a protected class;
- (2) The employer made an adverse decision concerning the complainant; and,
- (3) But for the complainant's protected status, the adverse decision would not have been made. Conway v. Eastern Associated Coal Corp., 178 W.Va. 475, 358 S.E.2d 423 (1986). If a complainant satisfies the requirements of a prima facie case, then respondent must prove a legitimate nondiscriminatory reason for terminating the complainant.

Furthermore, 77 W. Va. C.S.R. 1 § 3.1 provides that

If at the time of the public hearing, there is a question or dispute as to whether the complainant is a person with a disability, or as to the nature of the impairment, the burden of proof is upon the complainant to present by reasonable medical opinions or records:

- 3.1.1. The nature of the disability;
- 3.1.2. Any limitation caused by said disability; and,
- 3.1.3. Any restrictions upon the disabled individual's work activity.

3.2. It is intended that medical evidence will be required only in cases where there is an actual dispute as to the nature or medical implications of the disability.

Applying these standards, Mr. Bailey is not a member of a protected status in that he failed to introduce medical opinions or records that describe the nature of his disability, limitations caused by his disability, and restrictions upon his work activity. In this instance, Pardee contested whether Mr. Bailey is an individual with a disability as that term is defined under the "Act" and its Legislative Rule 77 W. Va. C.S.R. 1 et seq. in its Verified Answer to Mr. Bailey's Complainant:

SIXTH AFFIRMATIVE DEFENSE

Complainant is not a disabled individual as defined under the West Virginia Human Rights Act, W. Va. Code § 5-11-3(m), because Complainant had no mental or physical impairment which substantially limited one or more of the Complainant's major life activities nor did Pardee regard him as having such an impairment.

SEVENTH AFFIRMATIVE DEFENSE

Even if Complainant were disabled, which Pardee denies, Complainant was not a qualified individual with a disability as defined under the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq., because he could not perform the essential functions of his job.
Verified Answer at p.3.

Mr. Bailey fails to meet the first and third prongs of the prima facie case.

With regards to the first prong, obviously, Mr. Bailey has a physical limitation. Although he did introduce a record from the Division of Vocational Rehabilitation Services to the effect that he was found disabled by the Social Security Administration, this was not enough. Once Pardee raised affirmative defenses in its Verified Answer objecting to Mr. Bailey's claim that he is disabled under the "Act"; the Commission's Rules required Mr. Bailey to introduce evidence that

satisfied the requirements set out in 77 W. Va. C.S.R. 1 § 3.1. Mr. Bailey did not introduce any evidence that satisfied these requirements. A medical opinion or records from Mr. Bailey's treating physician setting out the nature of the disability; any limitation caused by said disability; and, any restrictions upon the disabled individual's work activity could have satisfied these requirements.

In Ranger Fuel Corporation v. West Virginia Human Rights Commission, et al (180 W. Va. 260, 376 S. E. 2d 154 (1988), the West Virginia Supreme Court of Appeals held that the definition of "handicapped (now disability) must be strictly construed to assist individuals with substantial handicaps in achieving employment; a strict construction allows proper accommodation of interests of handicapped individuals, other employees, employer and the public . . . where the language in the West Virginia Human Rights Act is clear and unambiguous, the language must be given the same clear and unambiguous force and effect in the Commission's Rules and Regulations." Legislative rules have the force and effect of law.

With regards to the second prong, Mr. Bailey 's legal discharge meets the test. Pardee made an adverse decision against Mr. Bailey when it terminated his employment on April 6, 2001.

Mr. Bailey failed to prove the third prong of the prima facie test.

Even if Mr. Bailey had established a prima facie case, Pardee has shown by a preponderance of the evidence that it had a legitimate business reason for terminating Complainant. The evidence overwhelmingly supports a finding that Mr. Bailey did not perform his job at an acceptable level; that he required close supervision; that even with close supervision, he continued to make the same mistakes; that he failed to learn the map system

which Pardee used to store maps on its computer and that some employees would not give him work to do because of his many errors. Mr. Bailey was discharged because of his poor performance.

With regards to the accommodation issue, the “Act” imposes an affirmative duty on a Respondent to reasonably accommodate “qualified disabled persons.” *West Virginia Human Rights Commission’s Legislative Rules Regarding Discrimination Against Individuals With Disabilities*, W.Va. C.S.R. § 77-1-4.5 (1994); see Morris Memorial Convalescent Nursing Home, Inc. v West Virginia Human Rights Commission, 189 W. Va. 314, 431 S.E.2d 353 (1993); Coffman v. West Virginia Board of Regents, 182 W. Va. 73, 386 S.E.2d 1 (1988). “Reasonable accommodation means reasonable modifications or adjustments to be determined on a case-by-case basis which are designed as attempts to enable an individual with a disability to be hired or remain in the position for which he or she was hired.” Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 479 S.E.2d 561 (1999), at SYL. pt. 1 (*quoting in part* W. Va. C.S.R. § 77-1-4.4).

If an accommodation is possible and it would allow an employee to perform the essential functions of the job, then a respondent must provide the accommodation, unless it would impose an undue hardship upon a respondent’s business. W. Va. C.S.R. § 77-1-4.6. Failure by a respondent to reasonably accommodate is unlawful discrimination, notwithstanding motive.

The West Virginia Human Rights Commission has duly promulgated guidelines for interpreting the “Act”’s prohibition against disability discrimination. W. Va. C.S.R. § 77-1-4 *et seq.* Because these regulations are legislative rules, they have the force and effect equivalent of the “Act” itself and are entitled to controlling weight. See Appalachia Power Co. v. State Tax Dept. of West Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995); West Virginia Health Care Cost

Review Authority v. Boone Memorial Hospital, 196 W. Va. 326, 472 S.E.2d 411 (1996).

The Commission's 1994 legislative rules explain that under the "Act", "Reasonable accommodation requires that an employer make reasonable modifications or adjustments designed as attempts to enable a disabled employee to remain in the position for which she/he was hired." W. Va. C.S.R. § 77-1-4.4. Further, the rules provide that "Reasonable accommodations include, but are not limited to: . . . job restructuring, part-time or modified work schedules, reassignment to a vacant position for which the person is able and competent to perform . . . and similar actions." W. Va. C.S.R. § 77-1-4.5. et seq. See generally Skaggs, 479 S.E.2d at 582 (*discussed in Page v. Columbia Natural Resources, Inc.*, 198 W. Va. 378, 480 S.E.2d 817,830,n.14 (1996)). A complainant must prove, by a preponderance of the evidence, every element of the failure to reasonably accommodate claim. See generally Lutz v. Orinick, 184 W. Va. 531,401 S.E.2d 464, 467 (1990) (citations omitted).

To state a claim for breach of the duty of reasonable accommodation under the "Act", W.Va. Code, 5-11-9 (1992), a plaintiff must allege the following elements: (1) The plaintiff is a qualified person with a disability; (2) the employer was aware of the plaintiff's disability; (3) the plaintiff required an accommodation in order to perform the essential functions of a job; (4) a reasonable accommodation existed that met the plaintiff's needs; (5) the employer knew or should have known of the plaintiff's need for the accommodation; and (6) the employer failed to provide the accommodation. Skaggs, at Syl. pt. 2.

In addition to the above, and of particular significance here, the fact finder must also scrutinize the "process by which accommodations are adopted." Skaggs, 479 S.E.2d at 577. Such process, said the Skaggs Court, "ordinarily should engage both management and the

affected employee in a cooperative, problem solving exchange.” *Id.* Skaggs quotes approvingly 29 C.F.R. § 1630.2(o)(3), a regulation promulgated pursuant to the Americans With Disabilities Act, 42 U.S.C. §§12101 et seq., which provides that:

To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(o)(3) (1995).

Skaggs also cites to 29 C.F.R. § 1630.9 (Appendix, at 414), which provides that “The employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible interactive process that involves both the employer and the [employee] with a disability.” 479 S.E.2d at 577.

Finally, the Skaggs Court admonished that both sides bear responsibility for the success of the process:

Neither the West Virginia statutes nor the federal law assigns responsibility for when the interactive process is not meaningfully undertaken, but we infer that neither party should be able to cause a breakdown in the process. The trial court should look for signs of failure to participate in good faith or to make reasonable efforts to help the other party determine what specific accommodations are necessary and viable. A party that obstructs or delays the interactive process or fails to communicate, by way of initiation or response, is acting in bad faith. 479 S.E.2d at 577-578.

The Human Rights Commission’s legislative regulations define the term “disability” as follows:

2.1.1 A mental or physical impairment which substantially limits one or more of a

person's major life activities; or

2.1.2 A record of such impairment; or

2.1.3 Perception of such an impairment.

2.1.4 This term does not include persons whose current use of or addiction to alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat (as defined in Rule 4.8) to property or the safety of others.

W.Va. C.S.R. § 77-1-2.1. (1994).

The term "Qualified Individual with a Disability" is defined in Rule 4.2 of the Commission's legislative regulations as an "individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job. . . ." "Able and Competent" as defined in Rule 4.3 "means that, with or without reasonable accommodation, an individual is currently capable of performing the work and can do the work without posing a direct threat (as defined in Section 4.8) of injury to the health and safety of other employees and the public."

The evidence supports a finding that Mr. Bailey is not a qualified person with a physical disability which substantially limited one or more of his major life activities. While he is impaired and has a physical disability, he has failed to established that he is a "qualified person with a disability" as that term is defined by *W.Va. C.S.R. § 77-1-2.1. (1994).*

A complainant must prove, by a preponderance of the evidence, every element of the failure to reasonably accommodate claim. Mr. Bailey cannot prove any of the elements of a

claim for breach of the duty of reasonable accommodation under the West Virginia Human Rights Act. His job duties were never modified, and he never alleged that he needed a modification to perform the job of a draftsman/autocad technician.

Under the burden shifting formula of McDonnell Douglas Mr. Bailey failed to show by a preponderance of the evidence that the reasons advanced by Pardee for the termination were pretextual. Under the mixed-motive analysis of Price-Waterhouse Pardee has shown that Mr. Bailey would have been terminated absent any unlawful discriminatory animus on the part of Pardee.

III.

CONCLUSIONS OF LAW

1. Mr. Bailey, the Complainant, is a proper Complainant under the West Virginia Human Rights Act. W. Va. Code § 5-11-1et seq.
2. Pardee Resources Group, Inc., the Respondent, is an employer and person as defined by W. Va. Code § 5-11-1 et seq. and is subject to the provisions of the West Virginia Human Rights Act.
3. The Complaint in this matter was properly filed in accordance with W. Va. Code § 5-11-10.
4. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to W. Va. Code § 5-11-9 et seq.
5. The Complainant, Mr. Stephen Bailey, has not established a prima facie case of employment discrimination and failure to accommodate based on his disability.

6. The Complainant has failed to prove by a preponderance of the evidence that he was subjected to discrimination based on his disability.

7. The Respondent, Pardee Resources Group, Inc. has articulated a legitimate non-discriminatory motive for terminating Mr. Bailey from employment and that reason is not because of his disability.

8. The Complainant, Mr. Bailey is not entitled to an accommodation.

IV.

RELIEF AND ORDER

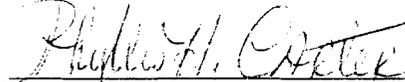
Pursuant to the above findings of fact and conclusions of law, this administrative law judge orders the following relief:

1. That the above captioned matter is dismissed against the Respondent Pardee Resources Group, Inc. with prejudice and stricken from the docket.

It is so **ORDERED**.

Entered this 29th day of April, 2004.

WEST VIRGINIA HUMAN RIGHTS COMMISSION



PHYLLIS H. CARTER
Administrative Law Judge
1321 Plaza East, Room 108-A
Charleston, WV 25301-1400
Phone: 304-558-2616 Fax 304-558-0085

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

STEPHEN BAILEY,

Complainant,

v.

Docket Number: ED-360-01

EEOC Number: 17JA10248

PARDEE RESOURCES GROUP, INC.,

Respondent.

CERTIFICATE OF SERVICE

I, Phyllis H. Carter, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing ORDER by facsimile and by depositing a true and correct copy of the same in the United States Mail; postage prepaid this 29th day of April, 2004 to the following individuals:

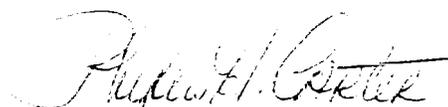
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Phyllis H. Carter
Administrative Law Judge