



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION

1321 Plaza East

Room 104/106

Charleston, WV 25301-1400

TELEPHONE 304-348-2616

GASTON CAPERTON
GOVERNOR

Quewanncoii C. Stephens
Executive Director

March 28, 1990

Darryl Caul
114 Pleasant St.
Hinton, WV 25951

Foodland Grocery Store
(Bluestone)
106 Main St.
Hinton, WV 25951

Greg Sproles, Esq.
509 Church St.
Summersville, WV 26651

Mike Kelly
Deputy Attorney General
812 Quarrier St.
L & S Bldg. - 5th Floor
Charleston, WV 25301

Re: Caul v. Foodland Grocery Store
ER-234-87

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 July 1, 1989, any party adversely affected by this final order may file a petition for review with the Kanawha County Circuit Court within 30 days of receipt of this final order.

Sincerely,



Quewanncoii C. Stephens
Executive Director

Enclosures
CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal you must file a petition for appeal with the clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a non-resident of this state, the non-resident may be required to file a bond with the clerk of the supreme court.

In some cases the appeal may be filed in the Circuit Court of Kanawha County, but only in: (1) cases in which the commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code Section 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DARRYL CAUL,

COMPLAINANT,

v.

DOCKET NO. ER 234-87

FOODLAND GROCERY STORE,

RESPONDENT.

FINAL ORDER

On 10 January 1990 the West Virginia Human Rights Commission reviewed the Recommended Findings of Fact and Conclusions of Law filed in the above-styled matter by Hearing Examiner, Theodore R. Dues, Jr. After consideration of the aforementioned, and all exceptions filed in response thereto, the Commission decided to, and does hereby, adopt said Recommended Findings of Fact and Conclusions of Law, as its own, with the modifications and amendments set forth below:

In the subsection entitled, "Proposed Order," the second paragraph is modified to read:

\$2,500 in incidental damages for embarrassment and humiliation suffered as a result of the respondent's unlawful discriminatory act."

It is, therefore, the Order of the Commission that the Hearing Examiner's Recommended Findings of Fact and Conclusions of Law be attached hereto and made a part of this Final Order, except as amended by this Final Order.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and to the Secretary of State of the State of West Virginia, 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.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 23rd day of March, 1990, in Charleston, Kanawha County, West Virginia.



QLEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR/SECRETARY

/elm

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DARRYL CAUL,
Complainant,
v.
FOODLAND GROCERY,
Respondent.

RECEIVED

MAR 10 1989

DOCKET NO: ER-234-87

WV HUMAN RIGHTS COMM.
Answered _____

**EXAMINER'S RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

This matter matured for public hearing on November 13, 1987. The hearing was held in the Summers County Memorial Building, Summers County, Hinton, West Virginia. The hearing panel consisted of Theodore R. Dues, Jr., Hearing Examiner. The presence of a Hearing Commissioner was previously waived by the parties. The Complainant appeared in person and by its Counsel, Mary Buchmelter. The Respondent appeared by its representative Eugene Cook and by his Counsel, Greg Sproles.

After a review of the record, any exhibits admitted in evidence, any stipulations entered into by the parties, any matter for which the Examiner took judicial notice during the proceedings, assessing the credibility of the witnesses and weighing the evidence in consideration of the same, the Examiner makes the following findings of fact and conclusions are generally consistent to any proposed findings of fact and conclusions of law submitted by the parties, the same are adopted by the Examiner, and

conversely, to the extent the same are inconsistent to the findings and conclusions, the same are rejected.

ISSUES

1. Did the Respondent refuse to hire the Complainant on the basis of his race?

2. If so, to what relief is the Complainant entitled?

FINDINGS OF FACT

1. The Complainant is a black male. At the time of hearing, he was 19 years of age.

2. As a result of the Respondent's newspaper ad, the Complainant applied with the state job services program. He was referred by the program to the Respondent, for an interview, for work at the Bluestone store which was to be opened in the then near future.

3. The Complainant interviewed with Eugene Cook. Cook advised the Complainant he would receive a decision within a week or so.

4. After a couple of weeks had transpired and the Complainant had not heard from Cook, the Complainant went to the Bluestone store and was advised by Cook that he was to be patient because Cook was still looking for a spot for him. During this visit, the Complainant noticed approximately forty (40) time cards in the time clock rack.

5. In November 1986, the Complainant filed a

charge with the Commission alleging racial discrimination in the Respondent's failure to hire him at its Bluestone Store.

6. In June 1987, the Respondent offered the Complainant a job.

7. The Complainant was humiliated and hurt by the Respondent's initial refusal to hire him.

8. The Complainant is seeking back pay from September 1986 to November 1987; at which time he became an employee for the Kroger Company.

9. The salary that the Complainant would have received had he been hired by the Respondent would have been Three Dollars Fifty Cents (\$3.50) per hour. The employees hired by the Respondent averaged approximately 32 hours per week.

10. The Respondent laid off persons from its Bluestone Store in the beginning of December 1986.

11. Notwithstanding the evidence by the Respondent, it is unclear whether the Complainant would have, in fact, been one of those persons affected by the lay off in December 1986.

12. The Complainant incurred a loss of wages as a result of the Respondent's refusal/failure to hire him in the amount of \$5,196.33.

DISCUSSION

The Complainant proved a prima facie case of race discrimination by establishing that he applied for a

position with the Respondent, he was qualified to perform the duties of that position, that he was not hired for the position, that the Respondent continued to seek and interview applicants for the positions sought and that persons outside the protected class were hired for the positions. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Human Rights Commission v. Logan-Mingo Area Mental Health Agency Inc., 329 S.E. 2d 77, 85 (1985); Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E.2d 342 (1983).

The Respondent introduced evidence to establish that two Blacks, counting the Complainant, were interviewed for the bagger/clerk position and two for cashier. However, none of the Blacks were hired. The record reflects that the Respondent contends that the Complainant was offered a position for the first available job that opened, subsequent to his application, and that the fact that the offer came after the date of the filing of the Complainant's complaint with the Commission, had no significance upon the Respondent's conduct in offering the same. However, the Examiner discounts the credibility of Mr. Cook, the source of this testimony, in as much as, the credibility of Mr. Cook was perceived to be considerably less than that of the Complainant. The evidence reflects that the Complainant saw approximately 40 time cards at the time clock, in the Bluestone store, when he approached Mr. Cook for the purpose

of determining why he had heard no response, subsequent to his interview. This fact, coupled with the other evidence of record, effects the conclusion that the articulated reasons of the Respondent are pretext for unlawful discrimination against the Complainant, based upon his race. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981).

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the parties and the subject matter herein.

2. The Complainant established a prima facie case of race discrimination by establishing that he was qualified for certain positions at the Respondent's Bluestone Store, that the Respondent failed to hire him, that the Respondent continued to seek and interview applicants for the positions, and that the Respondent hired persons, outside the protected class, to fill the positions.

3. The Respondent failed to articulate a credible nondiscriminatory reason for its action for failing/refusing to hire the Complainant.

4. Accordingly, the Complainant has met his burden of proving by a preponderance of the evidence that the Respondent discriminated against him on the basis of his race when it refused/failed to hire him in 1986 at its Bluestone Store.

5. The Complainant incurred a loss of back wages in

the amount of \$5,196.33.

6. The Complainant suffered embarrassment and humiliation as a result of the Respondent's conduct in refusing/failing to hire him.

PROPOSED ORDER

Accordingly, this Examiner does hereby recommend to the Commission that it award judgement for the Complainant and the following relief:


1. That the Complainant be awarded back wages in the amount of \$5,196.33 and that the Complainant be awarded prejudgment interest in the amount of 10 percent (10%) per annum until paid in full.

2. Assuming that the West Virginia Supreme Court of Appeals does not determine that the Bishop case is to be retroactive, the Complainant should be awarded \$2,500 for embarrassment and humiliation.

3. A cease and desist Order should be issued prohibiting the Respondent from further violations of the West Virginia Human Rights Act and the Commission should establish such monitoring and reporting requirements as are deemed necessary by it to assure compliance with this provision.

DATED: March 2, 1989

ENTER:


Theodore R. Dues, Jr.
Hearing Examiner

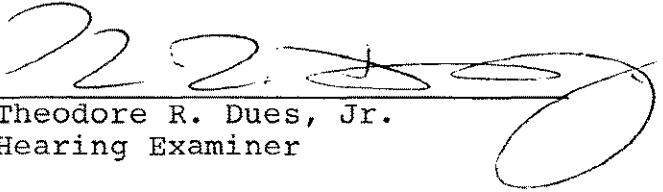
CERTIFICATE OF SERVICE

I, Theodore R. Dues, Jr., Hearing Examiner, do hereby swear and say that I have served a true and exact copy of the foregoing EXAMINER'S RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW upon the following:

Mary Buchmelter, Esquire
c/o Sharon Mullens, Esquire
L & S Building, 4th Floor
812 Quarrier Street
Charleston, WV 25301

Greg Sproles, Esquire
509 Church Street
Summersville, WV 26651

by depositing the same in the United States mail postage prepaid on this 2nd day of March, 1989.


Theodore R. Dues, Jr.
Hearing Examiner