



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

APCH E. MOORE, JR.
Governor

TELEPHONE 304-348-2616

March 10, 1988

John D. Cobb
704 E. 4th Ave.
Williamson, WV 25661

N & W Railroad
8 N. Jefferson St.
Roanoke, VA 24042

Charles Garten, Esq.
12 Capitol St.
Charleston, WV 25301

Mark D. Perreault, Esq.
Norfolk & Southern Corp.
One Commercial Place
Norfolk, VA 23510

Scott Sheets, Esq.
1001 6th Ave.
P.O. Box 2185
Huntington, WV 25722

RE: Cobb v. N & W Railroad
EA-477-86

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
STATUTORY RIGHT TO JUDICIAL REVIEW

AMENDED AND EFFECTIVE
AS OF APRIL 1, 1987

Enr. H. B. 2538]

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

JOHN D. COBB,

Complainant,

v.

DOCKET NUMBER: EA-477-86

NORFOLK AND WESTERN RAILWAY,

Respondent.

FINAL ORDER

On the 11th day of February, 1988, the West Virginia Human Rights Commission considered the Proposed Order and Decision of Hearing Examiner, James Gerl, in the above-styled case, and the Commission is of the opinion that the decision of the Hearing Examiner should be adopted.

It is therefore **ORDERED** that the Commission adopt the Proposed Order and Decision of the Hearing Examiner as its own.

It is further **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.

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 noti-

fied that they have ten days to request a reconsideration of this Final Order and that they may seek judicial review.

Entered this 9th day of March, 1988.

Betty A. Samuelson
~~CHAIR~~/VICE CHAIR, WEST VIRGINIA
HUMAN RIGHTS COMMISSION

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

JOHN D. COBB

Complainant,

DOCKET NUMBER: EA-477-86

vs.

NORFOLK AND WESTERN RAILWAY

Respondent.

RECEIVED
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W.V. HUMAN RIGHTS COMM.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on June 9, 1987 in Williamson, West Virginia. The complaint was filed on April 1, 1986. The notice of hearing was issued on January 13, 1987. A telephone Status Conference was convened on February 13, 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 failed to recall him because of his age. Respondent maintains that complainant was not recalled until he provided his medical records.

FINDINGS OF FACT

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

1. Complainant was born in April, 1942 and is 45 years old.
2. Seven employees of respondent were recalled by respondent in 1986. All seven of said employees were recalled to jobs in Norfolk, Virginia.
3. Respondent's practice, in general, is to recall employees from layoff based upon seniority.
4. Complainant was medically qualified for work in November 1981 following two back surgeries.
5. Complainant was employed by respondent from November 1981 until August 1982 when he was laid off because of reduction of force.
6. When respondent was considering recalling complainant, respondent requested that complainant supply his medical records to respondent.
7. It is respondent's normal practice to request medical records or a physical if an employee is off work for a period of time.

8. Complainant's job was a carman. Carman do a great deal of heavy lifting. Respondent was especially interested in reviewing complainant's medical records because of his prior back surgery and its potential to affect his ability to perform his job.

9. Complainant refused to provide respondent with his medical records until March 24, 1986.

10. After complainant provided his medical records, he was referred for a physical, and he was recalled by respondent on May 5, 1986.

11. Complainant believes that he is not required to follow the orders and directives of his employer.

12. Respondent's delay in recalling complainant until he furnished his medical records was not related to his age.

CONCLUSIONS OF LAW

1. John D. Cobb 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. Norfolk and Western Railroad Company 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 established a prima facie case of age discrimination.

4. Respondent has articulated a legitimate non-discriminatory reason for its failure to recall complainant.

5. Complainant has not demonstrated that the reason articulated by respondent for failing to recall him is pretextual.

6. Respondent has not discriminated against complainant on the basis of his age by failing to recall him. West Virginia Code, Section 5-11-9(a).

7. The West Virginia Human Rights Act is not preempted by the Federal Railway Labor Act.

DISCUSSION OF CONCLUSIONS

A. PREEMPTION

Respondent argues that the West Virginia Human Rights Act is preempted by the Federal Railway Labor Act. The Human Rights Act, however, is an anti-discrimination law. The Railway Labor Act, on the other hand, is a statute designed to foster collective bargaining and to provide a mechanism for the orderly resolution of employee grievances. Accordingly, the Railway Labor Act does not preempt the Human Rights Act. Munsey v. Norfolk and Western Railway Company 650 F.Supp. 641 (S.D. W.Va. 1986); See, Colorado Anti-Discrimination Commission v. Continental Airlines 372 U.S. 714 (1963).

B. MERITS

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, 352-253 (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 pretextual. Shepherdstown Volunteer Fire Dept., supra;

McDonnell Douglas, supra.

In the instant case, complainant has established a prima facie case of discrimination by proving facts, which if otherwise unexplained, raise an inference of discrimination. Furnco Construction Company v. Waters 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981).

Complainant has demonstrated that he is forty five years old, that he was not recalled while seven employees with lesser seniority were recalled, and that seniority generally governs recall from layoff at respondent.

Respondent articulated a legitimate non-discriminatory reason for not recalling complainant. Respondent demonstrated that it requested that complainant furnish medical records and that complainant failed to do so until March 24, 1986. Upon furnishing the requested medical records, complainant was referred for a physical and was recalled to work by respondent on May 5, 1986.

Complainant has failed to demonstrate that the reason articulated by respondent for failing to recall him is pretextual. Complainant admits that he was requested to furnish his medical records and that he made no efforts, other than a couple of telephone calls, to obtain said records. Complainant testified that he feels that he does not have to comply with the orders given to him by his employer, such as the request for medical records, if the employer does not first tell complainant the reason for the order.

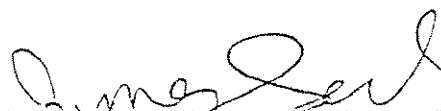
The testimony of the complainant was not credible. His demeanor was very belligerent, even on direct examination. His demeanor was extremely evasive on cross examination.

Lamonica, an official of Local 6454 of the International Brotherhood of Railway Caremen, testified that it is respondent's normal practice to require an employee who is off work for a period of time to submit medical records or to appear for a physical. Thus, there is nothing suspect about the request for medical records.

The only evidence that even approximates a showing of pretext involves complainant's assertion that he heard two statements about his age. Because of the noncredible nature of complainant's demeanor and because of the problems outlined below, it is concluded that no such statements were made. The first allegation is that a clerk in respondent's office in Norfolk, Virginia stated that complainant is kind of old for an apprentice. Even if it were true that the clerk made this statement, it would not be significant because she is not a management employee of respondent and complainant has not shown that the statement was reported to management. The second allegation involves a statement allegedly made by Ratliff, another clerk for respondent who died prior to the hearing herein. This testimony is not credited. Complainant provided no specifics as to what Ratliff allegedly said. In addition, complainant testified at the hearing that this comment was made between February 1986 and May 1986, but in his interrogatory answers complainant stated that Ratliff made this comment in August or September 1985. Even if the statement was made, Ratliff was not a management employee and complainant did not show that the statement was brought to the attention of management. It is concluded that neither of these two alleged comments was ever made.

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: December 18, 1967


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:

Charles Garten, Esquire
12 Capitol Street
Charleston, WV 25301

Mark D. Perrault, Esquire
Norfolk Southern Corporation
One Commercial Place
Norfolk, VA 23510

on this 18th day of December, 1987.



James Gerl