



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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October 15, 1986

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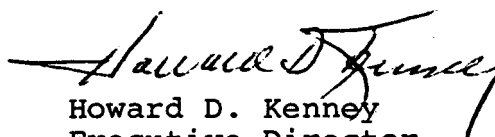
RE: Cox v. Sears
ER-621-85

Dear Above Parties:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the county wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within thirty (30) days, the Order is deemed final.

Sincerely yours,


Howard D. Kenney
Executive Director

HDK/mst
Enclosure

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

THE WEST VIRGINIA HUMAN RIGHTS COMMISSION
OFFICE OF THE HEARING EXAMINER

RAYMOND A. COX, JR.,
Complainant.

v.
SEARS, ROEBUCK & CO.,
Respondent.

DOCKET NO. ER-621-85

RECOMMENDED DECISION

I.

Preliminary Matters

On June 11, 1985, the Complainant caused to be filed a memorandum of complaint wherein it was alleged that he was denied a promotion due to unlawful, racial discrimination. Thereafter, probable cause was found and notice of hearing was issued. The public hearing was held in the Marion County Courthouse, Fairmont, West Virginia, on December 10, 11 & 12, 1985. John M. Richardson, Hearing Examiner, and Iris Bressler, Hearing Commissioner comprised the Hearing Panel before whom there appeared the Complainant in person and by his counsel, Assistant Attorney General, Sharon Mullens, and the Respondent appeared by its representative, Carl Blackburn, and by counsel, Kurt E. Entsminger and William Booker.

Thereafter, the parties, by counsel, made opening statements and presented their evidence and rested. On February 26, 1986, following the submission of proposed findings and conclusions of law by counsel for the parties, the Respondent requested, by letter, that the public hearing be reopened for the purpose of taking further testimony relating to alleged events involving the Complainant's employment and after consideration of said request and noting the objection of the Complainant thereto, this request was and is hereby denied for reasons which will hereinafter become apparant. It is further noted that the allegations contained in the request by the Respondent were in no way considered in arriving at the recommended decision herein.

For the purposes of this decision, the Hearing Examiner has considered all of the pleadings, testimony, exhibits and to the extent that proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views stated herein, they have been accepted and to the extent that they are inconsistent, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues as presented. To the extent that the various witnesses' testimony is not in accord with findings herein, it is not credited, and to the extent that findings are conclusionary, they are so acknowledged.

II.

Issue

Was the Complainant denied a promotion due to unlawful, racial discrimination?

III.

Findings of Fact

1. The Complainant, Raymond Cox, is a black male who was employed by the Respondent from November 16, 1964 until June 1, 1985.

2. The Respondent, Sears, Roebuck & Co., is a corporation which maintains and operates retail merchandise stores in numerous locations across the United States and the State of West Virginia.

3. The Respondent employed the Complainant in its retail merchandise store at the Middletown Mall in Fairmont, West Virginia.

4. The Sears store at the Middletown Mall is one of approximately 37 stores making up the "Pittsburgh group."

5. The Complainant was employed as a Division Manager of the Home Appliance Department at the Sears store in Fairmont.

6. Richard Danford was the Store Manager at the Sears store in Fairmont, and, as such, was in charge of the entire store including all of its operations and employees.

7. In early 1985, Sears initiated and began to implement a Nationwide Managerial Reorganization Plan which was to be placed in effect on June 1, 1985. Under this reorganization, all store "Division Managers" and "Merchandising Managers'" positions were to be eliminated and their duties were to be consolidated in a reduced number of "Sales Manager" positions.

8. Under this Reorganization Plan, Richard Danford, as a Store Manager, was to make recommendations concerning which of the Division Managers were to become Sales Managers. The final decision was to be made by Frank Titus, Group Manager, and Carl Blackburn, Group Personnel Manager, with the advice and consent of territorial officials located at St. Davids, Pennsylvania.

9. Richard Danford was responsible for the promotion of the Complainant to the position of Division Manager in August, 1981. As Division Manager of the Home Appliance Department, the Complainant had responsibility for overseeing the sales functions of such items as refrigerators, washers and dryers, and microwaves, etc. This responsibility included the supervising of "Commission Sales Persons" who were assigned to that department.

10. Prior to the implementation of the Reorganization Plan, there were eight Division Managers, one Merchandising Manager and one Automotive Center Manager at the Fairmont store. Following implementation of the Reorganization Plan on June 1, 1985, those ten positions were consolidated into six Sales Manager positions.

11. Under the Reorganization Plan, the four Managers who were not made "Sales Managers" were offered productive positions with the assurance of salary protection designed to allow them to maintain their current salary. As an alternative, they could elect to be paid 7 months pay as a severance allowance.

12. The Complainant was not selected to fill one of the new "Sales Manager" positions and elected to receive the 7 months severance pay, in lieu of a "Commission Sales" job.

13. Richard Danford, Store Manager, did not recommend that the Complainant be assigned to one of the newly created "Sales Manager" positions.

14. Richard Danford's decision was based upon the Complainant's experience, previous performance, attitude and his work relations with all employees at the Sears store.

15. Richard Danford, Store Manager, conducted annual evaluations of all Division Managers in the Fairmont store for the years 1984 and 1985. These evaluations occurred in the fall of each year.

16. The Complainant was evaluated for the year 1984 but not for 1985 due to the fact that Complainant elected to be terminated before the evaluations occurred.

17. Each of the Division Managers who were ultimately selected to become "Sales Managers" had more experience and higher evaluations than did the Complainant.

18. The "Pittsburgh group" was managed by Frank Titus who assigned Carl Blackburn, Manager of Personnel, to administer the Reorganization Plan within the group.

19. Anthony R. Sorce was the "Group Merchandising Manager" and as such was responsible for, among other things, performing annual evaluations of the Home Appliance Division Managers within the group. These evaluations were independent of those made by the store managers.

20. In December 1984, Mr. Sorce evaluated the Complainant and of the 37 Home Appliance Division Managers which Mr. Sorce evaluated, the Complainant rated second from the lowest among them.

21. Three incidences were focused upon by the Complainant in an attempt to show racial animosity at the Fairmont store. These incidences involved, a refrigerator, a gun and racial remarks. In each of these incidences the Complainant was shown to have had sufficient culpability to have warranted the Respondent's investigation and reaction.

22. In the refrigerator incident, the Complainant purchased a refrigerator at a discount price in such a manner as to warrant the Respondent having investigated the paper work and surrounding circumstances.

23. In the gun incident, the Complainant was criticized for bringing a gun on to the premises in his brief case which was contrary to the store and company policy. The Complainant was instructed he was not to bring a gun to work in the future.

24. The racial remark incident occurred between Mr. Cox and Mr. Izzo who accused the Complainant of bringing a gun to work. The ensuing argument resulted in an exchange

of the terms "whitey," "boy" and the threat of burning Mr. Izzo's house. No disciplinary action was taken against either person as result of this heated verbal exchange.

25. The three incidences referred to above did not independently or cumulatively result in any adverse disciplinary action.

IV.

Discussion

The sole issue presented to the Commission as a result of the public hearing in this case was whether the Complainant was denied promotion to "Sales Manager" because of racial discrimination. The applicable portion of the Act, WV Code 5-11-9(a), provides:

"It shall be an unlawful discriminatory practice... (a) for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required..."

The West Virginia Supreme Court of Appeals in its interpretation of this statute has in the case of Shepherdstown Volunteer Fire Dept. v. WV Human Rights Commission, WV, 309 SE2d 342 (1983) adopted the requirements as set forth in the United States Supreme Court cases of McDonnell Douglas Corp. v. Green, 411 U.S. 792

(1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

As a result of the afore-mentioned cases, the Complainant has the burden of proving: (a) that he is a member of the protected class; (2) that he applied for and was qualified for the position sought; (3) that despite his qualifications, he was rejected and after the rejection the Respondent continued to except applications of similarly qualified persons.

Should the Complainant succeed in proving these elements, a prima facie case is established. Thereafter, the Respondent is obligated to articulate a legitimate, non-discriminatory reason for its actions, whereupon, the Complainant must renew his efforts by carrying the burden of proof and proving that the reasons offered by the Respondent were merely a pretext to mask unlawful discriminatory motives.

In this case the Complainant proved that he was a black male and a member of the protected class and further proved that he was a Division Manager and as such was eligible for the promotion to the position of "Sales Manager." Thereafter, the Respondent showed that while the Complainant as a Division Manager was eligible for consideration for the position of "Sales Manager" he was not selected because of his inexperience and low evaluations of performance. Thereafter, the Complainant had the burden of proving that these reasons were pretextual and masked and illegal discriminatory motive. This the Complainant did not do.

The Respondent clearly showed that the Complainant had just recently been promoted to Division Manager as compared to the Division Managers who were ultimately selected. Further, the Respondent proved that through independent evaluations the Store Manager and the Group Home Appliance Manager both gave the Complainant lower evaluations than any of those individuals ultimately selected to fill the position of Sales Manager.

While the courts often closely scrutinize subjective evaluations of employees, a wider latitude is given in those areas where the employees to be selected are in "white collar" positions. This is due to the fact that individuals seeking "white collar" positions must be evaluated on their leadership, performance and other criteria which do not easily lend themselves to object criteria. (See Ramirez v. Hofheinz, 619 F2d 442, (5th Cir. 1980); EEOC v. Etna Insurance Co., 616 F2d 719, (4th Cir. 1980); Guy v. Peaches Records and Tapes, Inc., 477 F. Sup. 656 (E.D.Mo. 1979); Nathe v. General Electric Co. 438 F. Sup. 213, (E.D. Pa. 1977); Frink v. U.S. Navy, 16 FEP 67 (E.D. Pa. 1977); Milton v. Bell Laboratories, 428 F. Sup. 502 (D.N.J. 1977).

Thus, the Respondent having shown by objective criteria (the Complainant being less experienced by having less years of service as a Division Manager) and by two independent subjective evaluations that he was not as qualified for the position as were those selected and the Complainant's only effort to show that these were pretextual reasons, was that,

he had been unfairly subjected to scrutiny as a result of the purchasing of a refrigerator, carrying a gun on the store premises and subjected to racial remarks during an argument with a fellow supervisor. These incidents were insufficient to show that the Respondent's reasons for placing others in the position of Sales Manager was pretextual. The incidences above-referred to occurred over a period of several years and in each case were shown to have been independent of the Respondent's decision.

The Complainant brought upon himself an internal investigation when he purchased a refrigerator at a discount price in such a manner as to arouse suspicion that he had not accomplished the appropriate paper work in order to have been in the position to properly have purchased the refrigerator at an unusually low price. The gun incident occurred as a result of the Complainant's carrying a gun in his brief case contrary to the store's policy and allowing the same to be viewed by an employee(s) which was later brought to the attention of Mr. Izzo who confronted the Complainant about the violation and in the argument which ensued the Complainant was alleged to have called Mr. Izzo a "whitie" and threatened to burn his house and Mr. Izzo is alleged to have called the Complainant a "boy."

While the above incidences might have given the impression of a racially charged environment this was dispelled by the fact that no disciplinary was ever taken against the Complainant as a result of the incidences and

while it could be inferred that they might have some influence on Mr. Danford, the Store Manager's evaluation, it was shown that Mr. Sorce's evaluation was made independently and without any knowledge of the incidences and therefore the similarity and the results of the evaluations would disspell any belief that the Store Manager's evaluation was improperly prejudiced.

Hence, the Complainant failed to prove that he was as qualified as those persons selected for the positions he sought and failed to prove that the Respondent's reasons for selecting those person were pretextual. Therefore, the Complainant has failed to prove that the Respondent is guilty of unlawful discrimination as alleged in the complaint.

V.

Conclusions of Law

1. The Commission has jurisdiction of the parties and the subject matters as alleged in the complaint.
2. The Complainant proved a prima facie case and to which the Respondent articulated legitimate, non-discriminatory reasons for its actions and thereafter the Complainant failed to prove that these reasons were pretextual.
3. The Complainant's complaint, Docket No. ER-621-85, should be dismissed with prejudice.

4. There are no costs to be awarded to either party.

VI.

Recommended Order

The Hearing Examiner recommends that the Commission adopt as its final order the following:

1. The Hearing Examiner's recommended decision together with all of the contents thereof.
2. The Respondent be found not guilty of any unlawful discrimination as alleged in the complaint.
3. The complaint be dismissed with prejudice.
4. That neither party be awarded costs in this action.

Entered this 12th day June, 1986.

RESPECTFULLY SUBMITTED,

BY


JOHN M. RICHARDSON
HEARING EXAMINER