



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE 304-348-2616

ARCH A. MOORE, JR.
Governor

May 4, 1988

Dennis Dailey
510 Bridge St., Apt. 33
Huntington, WV 25702

Extra Touch Cleaning Service, Inc.
P.O. Box 6763
Charleston, WV 25362

Sharon Mullens
Senior Asst. Attorney General
812 Quarrier St. - 4th Floor
L & S Bldg.
Charleston, WV 25301

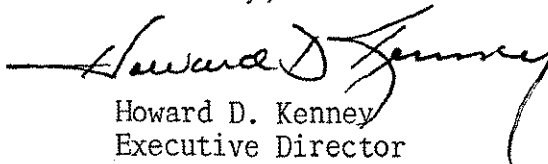
RE: Dailey v. Extra Touch Cleaning Services, Inc.
EH-75-87

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 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,


Howard D. Kenney
Executive Director

HDK/mst
Attachments

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE
OF STATUTORY RIGHT TO JUDICIAL REVIEW
AMENDED AND EFFECTIVE
AS OF APRIL 1, 1987

Err. H. B. 2688]

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

DENNIS DAILEY,

Complainant,

vs.

Docket No. EH-75-87

EXTRA TOUCH CLEANING SERVICE,

Respondent.

O R D E R

On the 14th day of April, 1988, the West Virginia Human Rights Commission reviewed the proposed order and decision of the Hearing Examiner, Theodore R. Dues, Jr., in the above-captioned matter. After consideration of the aforementioned, the commission does hereby adopt said proposed order and decision, encompassing proposed findings of fact and conclusions of law, as its own.

It is hereby 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 except as amended by 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 notified that they have ten days to request a reconsideration of this final order and that they may seek judicial review.

Entered this 14th day of May, 1988.

Respectfully Submitted,

George Rutherford
CHAIR/VICE-CHAIR
WV HUMAN RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DENNIS DAILEY,

Complainant,

v.

Docket No. EH-75-87

EXTRA TOUCH CLEANING
SERVICE,

Respondent.

EXAMINER'S RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This matter matured for public hearing on the 18th day of February, 1988. The hearing was held at 405 Capitol Street, Daniel Boone Building, Fourth Floor Conference Room, Charleston, West Virginia. The hearing panel consisted of Theodore R. Dues, Jr. The parties previously waived the presence of a Hearing Commissioner.

The Complainant appeared in person and by her counsel, Sharon Mullens. The Respondent did not appear.

After a review of the record, any exhibits admitted in evidence, any stipulations entered into by the parties, any matters 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 of law. To the extent that these findings 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.

ISSUE

1. Whether the Respondent discriminated against the Plaintiff in the conditions of his employment and/or his termination.

FINDINGS OF FACT

1. The Complainant began work for the Respondent in January of 1986.

2. At that time, the Respondent assumed the cleaning services contract held by the Complainant's previous employer at that site.

3. At the time of his hire by the Respondent, the Complainant had fifteen (15) years experience in performing janitorial duties.

4. Since age four (4), the Complainant has had osteomyelitis in his right leg and hip, which manifests itself by restricting his gait.

5. Additionally, there are symptoms of chronic stiffness in the rotation of the right leg and hip joints.

6. At the time the Complainant became an employee of the Respondent, it was aware of the limited use of his right leg.

7. The Complainant worked part time for the Respondent; averaging from 20 to 30 hours per week.

8. During his tenure with the Respondent, the

Complainant's supervisor continually accused him of hiding and smoking while he should have been on duty.

9. These accusation were false and were not levied at employees who were in fact abusing break periods.

10. Additionally, the Complainant's supervisor constantly scrutinized his work but the Complainant's co-workers did not receive same the scrutiny of their work product and habits.

11. On at least one occasion, the Complainant's supervisor removed him from a specific work assignment due to the supervisor's representation that the other employee could work faster than the Complainant.

12. The duties for which the Complainant were responsible were not such that time was of the essence.

13. The Complainant performed his janitorial duties, during his tenure with the Respondent in a reasonable and satisfactory manner.

14. The Complainant averaged One Hundred Twenty Five Dollars (\$125.00) in gross income every two weeks. The position with the Respondent provided no benefits other than salary.

15. The Complainant was terminated on or about July 11, 1986, for smoking and not performing his work fast enough.

16. After his termination, the Complainant sought work at various places of employment.

17. The Complainant was embarrassed by his termination.

DISCUSSION

The Complainant introduced evidence to establish a prima

facie case of handicap discrimination by establishing that he has a physical impairment which substantially limits one or more of his major life activities. WVC * 5-11-3(t). In addition, the Complainant proved that he was competent to perform the janitorial responsibilities assigned to him by the Respondent and that in fact he did perform the same in a satisfactory fashion, during his tenure of employment. McDonnell Douglas v. Green, 411 U.S. 792, 802, 804 (1973).

Additionally, the Complainant further introduced evidence to indicate that he was harrassed and scruntized by his supervisors in ways different and apart from his co-workers. The record reflects that the harrassment was most likely motivated by the Complainant's handicap condition; as opposed to legitimate work related factors.

Accordingly, it is the position of the Examiner that the work conditions and the termination of the Complainant were infested by unlawful discriminatory conduct, on the part of the Respondent, as a result of its reaction to the Complainant's handicap.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter herein. WVC * 5-11-1 et. seq.
2. At all times referred to herein, the Complainant is and has been a citizen and resident of West Virginia within the meaning of WVC Section 5-11-2.

3. At all times referred to herein, the Respondent constituted an employer, as is more specifically defined in WVC Section 5-11-3(d).

4. As in all cases, the Complainant has the burden of proof in establishing that he is a qualified handicapped individual and that the terms and conditions of his employment was motivated in part by his handicap.

5. The Complainant established a prima facie by introducing evidence that he is handicapped, that he was able and competent to perform the position of janitor with reasonable accommodation and that to his knowledge no reasonable accommodation was made.

6. The Complainant further introduced evidence that he in fact performed the duties of janitor in a reasonable and satisfactory manner, notwithstanding his handicap. But the employer, as a result of its reaction to the Complainant's handicap, harrassed him and ultimely terminated him.

7. The Respondent failed to appear in this matter after due diligence to serve, process and provide notice of these proceedings were made.

8. The Complainant is entitled to damages in the form of backpay in the amount of Four Thousand Five Hundred Sixty Dollars (\$4,560.00). The was computed by multiplying nineteen (19) months by Two Hundred Forty Dollars (\$240.00).

9. The Complainant is entitled to mental pain and anguish in the amount of Five Thousand Dollars (\$5,000.00).

PROPOSED ORDER

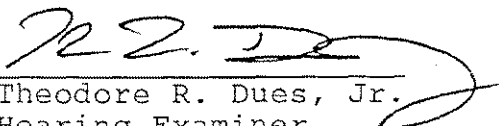
1. It is the recommendation of this Examiner that the Commission award judgment in this matter for the Complainant and provide the following relief:

a. Backpay in the amount of Four Thousand Five Hundred Sixty Dollars (\$4,560.00) with prejudgment interest at the rate of ten percent (10%) per annum.

b. Damages in the amount of Five Thousand Dollars (\$5,000.00) for mental pain and anguish.

c. A cease and desist Order against the Respondent prohibiting further discriminatory conduct.

DATED: April 5, 1988

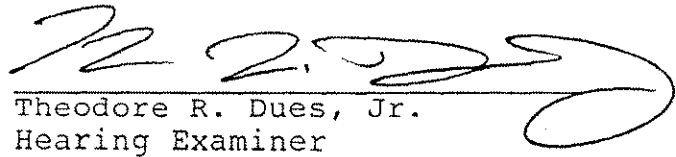
ENTER: 
Theodore R. Dues, Jr.
Hearing Examiner

CERTIFICATE OF SERVICE

I, Theodore R. Dues, Jr., Hearing Examiner, 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:

Sharon M. Mullens, Esq.
Senior Assistant Attorney General
812 Quarrier Street
Fourth Floor, L & S Bldg.
Charleston, WV 25301

by mailing the same by United States Mail on this 5th day of April, 1988.


Theodore R. Dues, Jr.
Hearing Examiner