



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING  
1036 QUARRIER STREET  
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE: 304-348-2616

December 12, 1988

ARCH A. MOORE, JR.  
Governor

Gaye V. Day  
Star Rt., Box 30  
Dry Fork, WV 26263

Canaan Valley Resorts, Inc.  
Rt. 1  
Davis, WV 26260

Robert M. Steptoe, Jr., Esq.  
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Sharon Mullens  
Deputy Attorney General  
812 Quarrier St.  
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Charleston, WV 25301

Re: Day v. Canaan Valley Resorts, Inc.  
EA-510-86

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

Ear. H. B. 2638]

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

GAYE V. DAY,

Complainant,

vs.

DOCKET NO.: EA-510-86

CANAAN VALLELY RESORTS, INC.,

Respondent.

O R D E R

On the 31st day of October, 1988, the West Virginia Human Rights Commission reviewed the Recommended Findings of Fact and Conclusions of Law and Proposed Order and Decision of Hearing Examiner Theodore R. Dues, Jr., and Respondent Canaan Valley Resorts, Inc.'s Exceptions to the Hearing Examiner's Second Recommended Findings of Fact and Conclusions of Law in the above-captioned matter.

After consideration of the aforementioned, the Commission does hereby hold that the Hearing Examiner clearly erred as to specific Findings of Fact, and that the Hearing Examiner erred in granting relief to Complainant Gay V. Day. Accordingly, the Commission hereby reverses the Hearing Examiner as to specific Findings of Fact and Conclusions of Law, and the Proposed Order and Decision in toto.

In reference to the Findings of Fact, the Commission finds that it was clearly erroneous for the Hearing Examiner to fail to find that oral complaints, from both a customer and other employees, were received by Complainant Canaan Valley Resorts, Inc. and its predecessor Canaan Valley beverages specifically

naming Complainant Gaye V. Day as appearing unclean while working behind the snack bar. Further, the Hearing Examiner clearly erred in failing to find that two of Complainant Gaye V. Day's witnesses -- Thelma Waybright and Jeraldine Pennington -- testified as to an incident where Complainant Gay V. Day cleaned her fingernails with a kitchen paring knife in front of customers.

Finally, the Hearing Examiner also clearly erred in finding that all the employees utilized by Respondent Canaan Valley Resorts, Inc. in the snack bar were outside of the protected age group. The record shows that Thelma Waybright was age 48 and that Jeraldine Pennington was age 42.

In reference to the Conclusions of Law, the Commission finds that the Hearing Examiner erred in concluding that Complainant Gaye V. Day had shown by a preponderance of the evidence that reasons articulated by Respondent Canaan Valley Resorts, Inc. for prohibiting Complainant Gaye V. Day from working in the snack bar -- her appearance and complaints about her appearance -- were pretextual and motivated by an unlawful discriminatory reason. Clearly, prohibiting Complainant Gaye V. Day from preparing food at the snack bar in the plain view of customers, when her hands and fingernails were dirty with grease, was a rationale, reasonable business decision, and it was not motivated by an unlawful discriminatory reason. This is clearly distinguishable, although no more hygienic, from restricting Complainant Gaye V. Day to the kitchen, out of public view.

Accordingly, the Commission reverses the Proposed Order and

Decision for Complainant Gaye V. Day, and orders judgment for Respondent Canaan Valley Resorts, Inc.

It is hereby ORDERED that the Hearing Examiner's Recommended Findings of Fact and Conclusions of Law and Proposed Order and Decision be attached hereto and made a part of this final order.

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 (10) days within which to request reconsideration of the West Virginia Human Rights Commission's Order, and that they may seek judicial review.

ENTERED this 12<sup>th</sup> day of Dec, 1988.

Respectfully submitted,

  
CHAIR/~~VICE-CHAIR~~  
WEST VIRGINIA HUMAN  
RIGHTS COMMISSION

**RECEIVED**

SEP 26 1988

W.V. HUMAN RIGHTS COMM.

GAYE V. DAY,

Complainant,

v.

DOCKET NO.: EA-510-86

CANAAN VALLEY RESORTS, INC.

Respondent.

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

This matter matured for public hearing on the 8th of December, 1986. The hearing was held at the Blackwater Falls State Park Lodge, Davis, West Virginia. The hearing panel consisted of Theodore R. Dues, Jr., Hearing Examiner and Nathaniel Jackson, Hearing Commissioner.

The Complainant appeared in person and by her counsel, Mary C. Buchmelter. The Respondent appeared by its representative, Blair Taylor, and by its counsel, Robert M. Steptoe, Jr.

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 weighting 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 these findings and conclusions, the same are rejected.

#### ISSUES

1. Whether the Respondent discriminated against the Complainant because of her age.
2. If so, to what relief is the Complainant entitled.

#### FINDINGS OF FACT

1. The Complainant is sixty (60) years of age.
2. The Complainant began work at the Canaan Valley Lodge in the food service department for Canaan Valley Beverages in January, 1978.
3. Respondent, Canaan Valley Resorts, assumed the contract for food service for Canaan Valley Lodge in November, 1984.
4. The Respondent and Canaan Valley Beverages, both, received written complaints of cleanliness on occasion, regarding persons working in the snack bar.
5. These written complaints were anonymous, as to the name(s) of the employee(s) subject of the complaint.
6. The Respondent considered the Complainant to be the subject of those complaints received during the Complainant's tenure of employment.
7. The Complainant's hands were somewhat rougher, in appearance, than perhaps other persons who did not engage in assisting with working on automobiles and performing other manual tasks, at home, which would cause ones hands to chaff and crack,

and in some instances to assume a "bronzed" look.

8. Initially, respondent hired all other workers who were previously employed in the snack bar.

9. Respondent did not hire Complainant, at that time, for reasons that were attributed to her appearance.

10. During her tenure with the Respondent, the Complainant performed cooking services in the kitchen area, as well as, being assigned to work in the snack bar from time to time.

11. Respondent hired Complainant in December, 1984.

12. Complainant began work for the Respondent in December, 1984, in the snack bar at Canaan Valley Lodge.

13. Respondent moved Complainant back and forth between the snack bar and the kitchen until March, 1986. At this time, Respondent moved Complainant permanently into the kitchen as dishwasher and cook. Each move affected her seniority, that is, in respect to the length of time co-employees would have been working in a specified area.

14. The pattern of movement of the Complainant from position to position, at the work place, was more frequent, than for any other employee, during her tenure with the Respondent.

15. Complainant was given fewer hours than any other employee.

16. As a result of the Complainant's lack of exposure to employment within the snack bar, the Complainant was deprived of the opportunity to receive the tips, which were commonly attendant to that assignment.

17. As a result of the Respondent's conduct, the Complainant suffered humiliation and emotional distress.

18. The employees utilized by the Respondent in the snack bar, during Complainant's tenure, were all younger than the Complainant and outside of the protected age group.

#### CONCLUSION OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to Section 8, 9, and 10 Article 11, Chapter 5 of the West Virginia Code.

2. The Complainant met her burden of a prima facie showing by introducing evidence that Respondent discriminated against her by denying her the opportunity to work extra hours and work in the snack bar. Complainant showed by a preponderance of the evidence that (a) she is a member of the protected class of age; (b) that she was qualified for the position in the snack bar; (c) that she was rejected despite her qualifications; and (d) that simultaneously with her rejection, Respondent considered and awarded this position to persons outside the protected classes. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); State ex rel. State of West Virginia Human Rights Commission v. Logan Mingo Area Mental Health Agency, Inc., 329 S.E.2d 77 (1985).

3. The Respondent articulated as a defense that the reasons for failing to give Complainant work in the snack bar was

due to her appearance and the complaints received from customers during her tenure. Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1094; Furnco Construction v. Waters, 438 U.S. 567, 98 S.Ct. 2943 (1978); Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E.2d 352 (1983); State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d at 86.

4. The Complainant showed by a preponderance of the evidence that the reasons articulated by Respondent were pretextual and that Respondent was more likely motivated by an unlawful discriminatory reason. The Hearing Examiner also found Complainant's witnesses to be more credible than Respondent's witnesses to the effect that but for Complainant's age she would not have been the subject of the conduct in issue herein. McDonnell Douglas Corporation v. Green, 93 S.Ct. at 1825; Texas Department of Community Affairs v. Burdine, 101 S.Ct. at 1095; United States Postal Service v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L. Ed. 2d 403 (1983); State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d at 87.

5. Complainant having proved her case by a preponderance of the evidence is, therefore, entitled to the following relief:

- a. Seniority rights of two (2) years and position in the snack bar;
- b. Back pay in the amount of Five Thousand Dollars (\$5,000.00);

c. Prejudgment interest to be calculated at the rate of ten percent (10%) per annum compounded annually;

d. Incidental damages in the amount of Fifteen Thousand Dollars (\$15,000.00) for the humiliation, embarrassment, and loss of personal dignity suffered by Complainant as a result of Respondent's unlawful acts.

#### DISCUSSION

The face value of the evidence in this case would lead one to believe that the Complainant was inadvertently the singular "victim" of having been transferred back and forth between departments during a time in which the Respondent had/has a policy that dictates an employee accrues seniority within a particular department rather than companywide. Consequently, the Complainant's being shifted from one department to another was inherently preclusive of her acquiring any significant seniority rights within any given department, over any persons, whether they be junior or senior to her hiring date. This, coupled with the fact that management of the Respondent had an attitude pertaining to the Complainant's desirability of presence in the snack bar, effected the Complainant being involuntarily more restrictive in her job choice and assignments than any other employee then employed. The record reflects, on the occasions, when complaints were received from customers about the appearance of certain person(s) working in the snack bar, these complaints were anonymous as to the name of the employee involved. Further,

in some instances, the Respondent was unable to produce documentary evidence of such complaints having been received.

The weight of the evidence, that is the credibility of the witnesses, lends itself to one reasonable inference. That is, that the Respondent preferred younger more "vivacious" employees in the snack bar. The most critical piece of evidence leading to this inference is that the Respondent did not hesitate to place the Complainant into the snack bar at times that other regular snack bar employees were not present. The Respondent sought to legitimize this action by saying that the Complainant's physical appearance was poor, and accordingly, it was decided to use her in a less highly exposed public food handling position. Besides the fact that they utilized her when other regular snack bar employees were not there, in the absence of filling in for other snack bar employees, the Complainant served as a cook in the Respondent's kitchen. Certainly, it is well known and accepted that our State has health laws governing the conduct, hygiene and procedures to be utilized by persons handling and serving food in public places. It is inconceivable that the Respondent can articulate a legitimate reason for not having the Complainant handle the food which is protected in part by plates, glasses, cups, etc., and yet be clean or hygienic enough to handle the actual food product in the process of preparing the food in the kitchen facility.

Moreover, if the Commission accepts the proposition articulated by the Respondent in its explanation of its treatment regarding the Complainant's restrictive assignment to the snack

bar, it would be a license for any employer covered by the act to suggest that the person was not hired, promoted or assigned to perform a certain function due to the fact that they were not positively received by customers, patients, clients, etc., as a result of their physical appearance. The Examiner concedes that in an extreme situation such an articulated reason may be probative and determinative of legal conduct and a legitimate nondiscriminatory basis for an employer's actions. But, in this instance, the evidence falls miserably short of that standard.

#### PROPOSED ORDER

Accordingly, it is the recommendation of this Examiner that the Commission adopt an Order in this case as follows:

a. That the Complainant be given a regular position in the snack bar with vested seniority of two (2) years.

b. That the Complainant receive back pay in the amount of \$5,000.00.

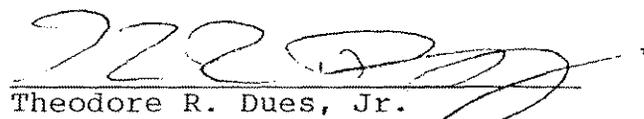
c. That the Complainant receive prejudgment interest to be calculated at the rate of (10%) per annum compounded annually.

d. That the Complainant receive incidental damages in the amount of \$15,000.00 for humiliation, embarrassment and loss of personal dignity.

e. That the Commission issue a cease and desist Order prohibiting the Respondent from perpetuating its discriminatory conduct against employees because of their age.

DATED: Sept. 20, 1988

ENTER:

  
Theodore R. Dues, Jr.  
Hearing Examiner