



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

215 PROFESSIONAL BUILDING  
1036 QUARRIER STREET  
CHARLESTON, WEST VIRGINIA 25301

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ARCH A. MOORE, JR.  
Governor

May 1, 1986

Barbara Fleischauer, Esq.  
258 McGara Street  
Morgantown, WV 26505

James B. McIntyre, Esq.  
611 Virginia St., E.  
Charleston, WV 25301

RE: Gaines v. General Laborers Union, ES-61-77

Dear Above Parties;

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Carol Gaines vs. General Laborers Union, ES-61-77.

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 (30) days, the Order is deemed final.

Sincerely yours,

*Howard D. Kenney*  
*(cdm)*

Howard D. Kenney  
Executive Director

HDK/kpv/*KN*

Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CAROL GAINES,

Complainant,

vs.

Docket No. ES-61-77

GENERAL LABORERS UNION,

Respondent.

O R D E R

On the 9th day of April, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner David J. Joel. After consideration of the aforementioned, the Commission does hereby not adopt the Findings of Fact and Conclusions of Law as its own.

The Commission is persuaded that this case falls squarely within the holding of the West Virginia Supreme Court of Appeals in W.V.H.R.Com'n v. United Transportation Union, 280 S.E.2d 653, as argued by the complainant in her exceptions and brief in support thereof. The Commission, therefore, adopts as its own the complainant's proposed Findings of Fact and Conclusions of Law with the exceptions and amendments set forth below.

The Commission hereby amends the complainant's Proposed Findings of Fact and Conclusions of Law in Section C, Order of Relief, paragraph 1, page 8, by inserting after the phrase "\$2,780.80 in back wages" the phrase "with pre-judgment interest at the rate of ten percent (10%) per annum from June 21, 1976,

until October 29, 1985, the date of this hearing.

It is hereby ORDERED that the Complainant's proposed Findings of Facts and Conclsuions of Law be attached hereto and made a part of this Order, except as amended by this Order.

The respondent is hereby ORDERED to provide to the Commission proof of compliance with the Commission's Order within thirty-five (35) days of service of said Order by copies of cancelled checks, affidavit or other means calculated to provide such proof.

By this 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 ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 21 day of April, 1986.

Respectfully Submitted,



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CHAIR/VICE-CHAIR  
WEST VIRGINIA HUMAN  
RIGHTS COMMISSION

WEST VIRGINIA SUPREME COURT OF APPEALS  
FOR THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CAROL GAINES,

Complainant,

vs.

CASE NO. ES-61-77

GENERAL LABORERS UNION,

Respondent.

COMPLAINANT'S FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND  
ORDER OF RELIEF

Submitted By:

Barbara Jo Fleischauer  
Special Assistant  
Attorney General  
346 Watts Street  
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A. FINDINGS OF FACT

1. The complainant is an adult female.

2. The respondent is a labor organization as defined by section 5-11-3 of the West Virginia Human Rights Act.

3. The complainant filed an application for Hiring Hall registration with the respondent on June 21, 1976.

The complainant was told that filing this application was a necessary prerequisite for obtaining pipeline construction work.

4. During July and August of 1976 and after the complainant had filed her application, forty-four (44) individuals were referred by the Union for jobs with Pace Pipeline Co. Twenty-eight (28) of those persons worked as laborers for Pace.

5. Steve Cunningham submitted an application on August 9, 1976 and was one of the laborers hired by Pace. He began work on August 16, 1976.

6. The referral system utilized by respondent places a premium on experience in the construction industry, and classifies applicants in five groups based on the length of their experience. Those with five or more years are in group A; those with three years of experience or more are in group B; those in group C must have at least two years experience; group D is composed of applicants with one or more years experience; and those with less than a years experience are in group E. Within each group, applications are placed in chronological order, and applications are kept on file one year (Tr. 30-32).

7. When an employer requests the Union to refer an applicant, the first person given an opportunity to take a job is the person in the A category with the oldest application. The Union checks the back of the application to see that the applicant has indicated he or she can perform the job duties (everyone is assumed capable of performing "laborer" tasks), and the employee is called. If the first person rejects the job, for whatever reason, the person with the next-to-the-oldest application in the A group is then called. If all persons in the A group reject the job, then the Union's task is to look through the applications in the lower classifications, following the same procedure as outlined above.

8. Once a person classified in one of the five groups takes a job, his or her application is removed. Upon completion of the jobs, new applications may be filled out. The new application is then placed in chronological order among the rest of the applications in the same classification or group.

9. The complainant would have been placed in the E classification in accordance with that system.

10. In accordance with respondent's referral system, the complainant was never considered for this job because persons in the classification groups with more construction experience were offered and accepted the job first.

11. The respondent ignored information on complainant's application form that she had experience performing tasks involving heavy labor that was not in the construction field.

12. To perform laborer jobs, a person need only possess a certain amount of physical strength, and the ability to follow directions for using relatively unsophisticated tools and/or machinery.

18. To determine whether the difference in success ratio was statistically significant, Dr. Hobbs used a "Z" test, which yielded a statistical value of 3.6188. Dr. Hobbs testified that this was far in excess of the value required to reject the conjecture that the proportions of success were the same for both men and women.

19. Dr. Hobbs also stated that the chance the different success ratios could have occurred by luck alone was less than one in ten thousand.

20. Because applicants are required to join the Union after eight days of employment, the Union's membership statistics also reflect the level of participation by women. The Union's 1976 EEO-3 report showed 5 females out of a total of 869 members in the Clarksburg local, which translates to .057%.

21. Despite this extremely low percentage, Mr. Goss testified that no special efforts were made to increase women's participation by the respondent.

22. New applicants are not informed how referrals are made, whether training opportunities exist, or how to go about getting experience unless they specifically ask for this information.

23. The respondent did not articulate any reason why its referral system was necessary for safe and efficient job performance, nor did the respondent explain what business purpose the referral system served.

24. The respondent presented no evidence to prove that its referral system amounted to a business necessity.

25. The respondent produced no proof of any relationship between the referral procedure and job performance.

26. With respect to jobs classified as "laborer" and at least eight other jobs, the respondent admitted that no extensive training or experience was required. Moreover, respondent's attorney offered to stipulate that the majority of jobs covered by the respondent's contract required little or no previous experience.

27. For the nine jobs, and perhaps for the majority of jobs, the referral system used by respondent was not job related.

28. The respondent made no effort to show that the discriminatory impact must be tolerated because the referral system was the only way its business purpose could be accomplished.

## B. CONCLUSIONS OF LAW

1. The complainant proved a prima facie case of sex discrimination in hiring. She presented evidence showing the respondent's referral system had a disparate impact on women. Male applicants had a significantly greater success ratio in obtaining employment in comparison to female applicants under respondent's referral system.

2. The complainant also proved that she suffered as an individual class member from respondent's referral system by showing that: 1) she is a female; 2) she applied with the respondent to be referred to construction jobs; 3) she was qualified to perform pipeline work and laborer jobs; and 4) a male who had submitted an application after she did was hired for a laborer job.

3. The respondent failed to prove its referral procedures were a business necessity or to prove that the classification system used to refer applicants was job related.

4. Therefore, the complainant sustained her burden of proving by a preponderance of the evidence that respondent's referral system discriminated against women as a class and against her as an individual member of the class.

5. Because the complainant has prevailed, she is entitled to be made whole, under the standards set forth in Albermarle Paper Co. v. Moody, 422 U.S. 405, 423 (1975) and State Hum. Rts. Comm'n v. Pearlman Realty, 239 S.E.2d 145 (W.Va. 1977). This would include back pay and damages for emotional distress.

6. To remedy the pattern and practice violation, the respondent must develop an alternate referral system that includes some mechanisms for women to gain entry into the trade and thereby eliminates the negative impact of the system on women. U.S. v. Sheet Metal Workers, 416 F.2d 123 (6th Cir. 1969) and Heat & Frost Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

7. The respondent should be required to publicize its modified referral system and the fact that equal opportunities will be available regardless of sex once the modified referral procedures are in operation. U.S. v. Sheet Metal Workers Int. Ass'n, Local 36, 416 F.2d 123, 137-140.

8. To ensure that the modifications of respondent's referral system and the publicity program are actually implemented and have their intended effect, the Human Rights Commission should retain jurisdiction over this matter. The Human Rights Commission is the appropriate body to approve any proposed plan for reforming the referral system. This would include reviewing goals and time tables and monitoring its implementation of the plan.

C. ORDER OF RELIEF

1. It is hereby ORDERED that the respondent pay the complainant the sum of \$2,780.80 in back wages. The complainant's back wages were calculated by a comparison to what Mr. Cunningham earned during his employment at the Pace Pipeline job, which Mr. Goss testified lasted a couple of months (Tr. 84). During two and one-half months employment (55 working days), at a pay rate of \$6.32 per hour (See Complainant's Exhibit No. 6, 1976-1978 Highway Agreement, p. 39 and Tr. 27-28). Mr. Cunningham's wages would have been \$2,780.80.

2. It is hereby ORDERED that the respondent pay the complainant the sum of \$1,500.00 as incidental damages for humiliation, embarrassment and emotional distress.

3. It is hereby ORDERED that the respondent develop an alternate referral system. The end-goal of modifying the referral system is to eliminate the negative impact that the current system has on the entry of women into the trade and on women's participation in all of the job classifications covered by the respondent's labor contracts.

4. The respondent is hereby ORDERED to submit a proposal for modifying its referral system within ninety (90) days of the date of this ORDER. Such proposal should include goals and time tables for achieving the above-stated end goal. The Human Rights Commission shall review the proposed plan submitted by the respondent and approve it for implementation if it is determined that it will encourage women's entry into the construction trade, and increase women's participation in all job classifications covered by respondent's organization.

If the plan does not meet with the Commission's approval, the Commission is authorized to make recommendstions to the respondent on provisions that would be included in an acceptable plan. If the Commission cannot obtain agreement from the respondent on a plan that meets the objectives of this Order, then the Commission may order the respondent to adopt a plan that has been devised by Commission staff.

5. It is hereby ORDERED that the respondent develop a plan to publicize the modification of its referral procedures and submit this plan to the Human Rights Commission for approval within ninety (90) days of the date of this Order. If the plan is unacceptable and the Commission cannot obtain agreement on an acceptable plan, it may order the respondent to implement a publicity plan that has been devised by Commission staff members.

  
Barbara J. Fleischauer  
Special Assistant  
Attorney General  
346 Watts Street  
Morgantown, WV 26505

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January, 1986, I mailed a copy of the Complainant's Findings Of Fact, Conclusions Of Law, Order of Relief and Brief In Support Thereof to Gary Collias, Counsel for Respondent, at MacIntyre, Haviland & Jordan, 611 Virginia St. East, Charleston, West Virginia . 25314.

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