



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

1321 Plaza East

Room 104/106

Charleston, WV 25301-1400

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GASTON CAPERTON
GOVERNOR

January 5, 1990

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Anker Energy Corp.
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Morgantown, WV 26505

Re: Harris v. Anker Energy Corp.
ES-411-86

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 July 1, 1989, any party adversely affected by this final order may file a petition for review with the WV Supreme Court of Appeals within 30 days of receipt of this final order.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "Quewanncoii C. Stephens".

Quewanncoii C. Stephens
Executive Director

QCS/mst

Enclosure

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal you must file a petition for appeal with the clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a non-resident of this state, the non-resident may be required to file a bond with the clerk of the supreme court.

In some cases the appeal may be filed in the Circuit Court of Kanawha County, but only in: (1) cases in which the commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code Section 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

AMBER HARRIS,

Complainant,

v.,

DOCKET NUMBER: ES-411-86

ANKER ENERGY CORPORATION,

Respondent.

ORDER

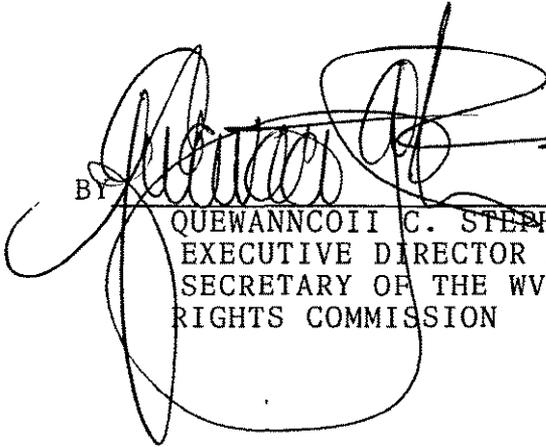
On December 6, 1989, the West Virginia Human Rights Commission reviewed the proposed order and decision of the Hearing Examiner, James Gerl, in the above-captioned matter. After consideration of the aforementioned and the exceptions thereto, the Commission adopted said proposed order and decision, encompassing the findings of fact and conclusions of law therein, as its own, with the modifications and amendments set forth below:

In subsection "Proposed Order" of the original proposed order and decision, paragraph number four is modified to read: "That the respondent pay to the complainant the sum of \$2,500.00 for incidental damages for humiliation, embarrassment, emotional and mental distress and loss of personhood and dignity as a result of the discriminatory treatment toward her by respondent."

It is therefore, the ORDER of the Commission 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.

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, at the direction of the Commission, this 21st
day of December, 1989.

BY 
QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR AND
SECRETARY OF THE WV HUMAN
RIGHTS COMMISSION

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

RECEIVED

OCT 27 1988

W.V. HUMAN RIGHTS COMM.

AMBER HARRIS

Complainant,

v.

DOCKET NUMBER: ES-411-86

ANKER ENERGY CORPORATION,

Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on October 22-23, 1987 in Morgantown, West Virginia. Commissioner Sid Allen served as Hearing Commissioner. The complaint was filed on February 12, 1986. The notice of hearing was issued on June 1, 1987. Respondent answered on June 9, 1987. A telephone Status Conference was convened on July 20, 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 discriminated against her on the basis of her sex by terminating her because she was pregnant. Respondent maintains that complainant was laid off because her supervisor had quit and that complainant's job performance was bad.

FINDINGS OF FACT

Based upon the parties stipulations of uncontested facts as set forth in the joint pre-hearing memorandum, the Hearing Examiner has made the following findings of fact:

1. From April 8, 1985 to January 22, 1986 complainant was employed by respondent as a secretary.
2. Complainant was on maternity leave at the time she ceased employment with respondent.
3. Dixon began employment with respondent on January 6, 1986.
4. After Lee, complainant's supervisor, learned on about May 7, 1985 that complainant was pregnant, he became upset and he told her that "a woman's place is in the home."
5. After learning that complainant was pregnant, Lee increased

her workload substantially, particularly her overtime work. The only criticism of complainant's job performance by respondent was by Lee after he learned that complainant was pregnant. On two occasions after he learned of her pregnancy, Lee threatened to fire complainant.

6. Lee attempted to deny complainant her pregnancy benefits, but respondent's personnel department allowed her such benefits.

7. When complainant was terminated, Sparks, respondent's Vice President, told her that he wished he could predict when a woman is pregnant when they hire her.

8. After complainant's termination, Dixon had the same duties as complainant had. Dixon replaced complainant.

9. At complainant's pre-employment interview with respondent, she was asked if she was married, whether she had children, and what her plans were.

10. Complainant earned a salary of \$15,000.00 per year while employed by respondent.

11. Complainant could easily have found a job with a salary of \$12,000. per year after her termination by respondent, but she chose not to do so.

12. Since the date of her termination, complainant has earned approximately \$1,635.00 per year babysitting.

13. As a result of her termination by respondent, complainant was devastated. Her self esteem suffered and she was very upset emotionally.

14. A reasonable hourly rate for the legal services rendered

in this matter by complainant's attorney, Waugh, is \$75.00 per hour.

15. Complainant's attorney, Waugh, reasonably expended 175.85 hours in preparing and litigating this matter.

16. A reasonable hourly rate for the legal services rendered in this matter by complainant's attorney Fleischauer is \$100.00 per hour.

17. Complainant's attorney Fleischauer reasonably expended 27.25 hours in preparing and litigating this matter.

18. Complainant expended \$1,105.40 in costs and expenses reasonably necessary for the litigation of this matter.

CONCLUSIONS OF LAW

1. Amber Harris 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. Anker Energy Corporation is an employer as defined by West Virginia Code §5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. Complainant has established a prima facie case of sex discrimination.

4. Respondent has articulated a legitimate non-discriminatory reason for its termination of complainant.

5. Complainant has demonstrated that the reason articulated

by respondent for terminating complainant is pretextual.

6. Respondent discriminated against complainant on the basis of her sex in violation of West Virginia Code § 5-11-9(a) by terminating her employment.

7. Complainant has not exercised reasonable diligence in locating employment subsequent to her termination by respondent.

DISCUSSION OF CONCLUSIONS

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, 352-353 (W.Va. 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). The parties have

stipulated that complainant worked for respondent from April 8, 1985 to January 22, 1986 as a secretary, that complainant was on maternity leave when she ceased employment with respondent, and that respondent hired Dixon, a new secretary, shortly before complainant ceased employment with respondent. Complainant has proven that shortly after Lee, her supervisor at respondent learned that she was pregnant, he became upset, told her that "a woman's place is in the home," began increasing her workload, began subjecting her work to a much higher level of scrutiny, and twice threatened to fire her. These facts establish a prima facie case of sex/pregnancy discrimination.

Respondent has articulated legitimate non-discriminatory reasons for terminating complainant. Respondent presented evidence that complainant's job performance was not good and that complainant was laid off for a lack of work.

Complainant has demonstrated that the reasons articulated by respondent are pretextual. Complainant was far from a perfect employee; it is indeed difficult to believe that an "executive secretary" can think that there is no need for her to proofread her own work. Yet it is clear from the record, and particularly from the testimony of respondent's witness Sparks, that complainant's job performance was not any part of the reason for respondent's decision to not continue complainant's employment. Moreover, complainant received no criticism of her work at respondent until after she became pregnant. Respondent also made weak allegations regarding

complainant's use of the copy machine and the telex, but again, these allegations are insignificant in view of the testimony given by respondent that the job performance of complainant was not a reason for her termination. That respondent's reason for terminating complainant is pretextual is illustrated by the fact that respondent devoted so much of its evidence to job performance, an issue which respondent concedes is not the reason for her termination.

Respondent also articulated lack of work as the reason for complainant's "lay off." The documentary evidence and testimony at the hearing, however, make it clear that respondent hired Dixon to replace complainant. The lack of work reason, therefore, is also pretextual.

Complainant has also shown pretext by demonstrating that management employees of respondent made a number of statements which indicated that sex, pregnancy, childbirth and family plans are important to respondent when it is making employment decisions. Complainant testified that Lee, her supervisor, stated upon learning of complainant's pregnancy that "a woman's place is in the home." Complainant testified that when she was fired, Sparks said that he wished that respondent could predict which employees would become pregnant before they are hired. Complainant testified that at the initial interview, she was asked questions regarding whether she was married, whether she had children, and what her plans were. The testimony of complainant and her witnesses was credible because of their demeanor. Complainant's credibility was enhanced by a candid admission that her deposition testimony was in error regarding

mitigating income. Other apparent minor inconsistencies pointed to by respondent were well explained by complainant. Lee did not testify at the hearing, and no evidentiary deposition for him was offered by respondent. Thus, complainant's credible testimony regarding Lee's discriminatory comments and conduct stand unrebutted. The credibility of Sparks was impaired by an evasive demeanor on cross-examination and by a contradiction regarding whether Dixon replaced complainant. Faltis' demeanor on cross-examination was hostile, and Faltis admitted that he asked complainant whether she was married at her interview in order "to get to know a person better." Thus, it is concluded that complainant's testimony regarding such statements by respondent is credible. Inasmuch as complainant has shown that pregnancy, sex and childrearing are factors which respondent considers in making employment decisions, it is concluded that the reasons articulated by respondent are a pretext for pregnancy discrimination. Pregnancy discrimination constitutes unlawful sex discrimination under the Human Rights Act. Montgomery General Hospital v. Human Rights Commission 346 S.E.2d 557 (W.Va. 1986).

RELIEF

Complainant seeks backpay. The testimony of complainant at the hearing was clear that she could easily have gotten a job for \$12,000 per year, but she declined to do so. Yet she did accept babysitting jobs which paid much less. It is clear that complainant did not make a reasonable effort to mitigate her damages. A complainant must do more than sit back and let the damages accrue.

Accordingly, it is recommended that complainant's backpay award be limited to \$3,000.00 per year. [That is \$15,000 (her salary at respondent) minus \$12,000 (what she would have earned at a job she could easily have obtained after her termination) = \$3,000]. Broken down into months, the recommendation is that complainant be awarded \$250.00 per month [$\$3,000 \div 12 = \250].

Complainant seeks attorney's fees. Turning first to the issue of hourly rate, the Hearing Examiner finds the rate of \$85.00 per hour claimed by Waugh to be excessive. Given her apparent level of experience, as determined by observation because no background was provided in the petition, an hourly rate of 75.00 per hour seems more appropriate. The \$100.00 per hour rate sought by Fleischauer is appropriate, if not understated. Fleischauer has appeared in other cases before this Hearing Examiner and the Commission is familiar with her high level of skill and legal ability.

In the attorney's fees petition, Waugh claims a total of 221.10 hours. Three hours have been deducted for the clerical task of compiling expenses which should not be counted. Waugh claims a total of 62.25 hours for writing complainant's brief. This is an excessive amount of time to spend on a brief; twenty hours is a more appropriate amount of time. Thus, a deduction of 42.25 hours is recommended. The attorney's fee recommended for Waugh is \$13,188.75 ($= 221.10 - 3 = 218.1 - 42.25 = 175.85 \times \$75 = \$13,188.75$). The only deduction recommended for Fleischauer is 0.5 hour for compiling billing; again this constitutes clerical work, not legal services. The attorney's fee recommended for Fleischauer is \$2,725.00 ($= 27.75 - 0.5 = 27.25 \times \$100 = \$2,725.00$).

PROPOSED ORDER

In view of the foregoing, the Hearing Examiner recommends the following:

1. That the complaint of Amber Harris, Docket No. ES-411-86 be sustained.

2. That respondent rehire complainant into her former position at a rate of pay comparable to what she would be receiving but for the discriminatory termination.

3. That respondent pay complainant a sum equal to the wages she would have earned but for respondent's unlawful termination of complainant's employment minus what complainant would have earned if she had exercised reasonable diligence in obtaining mitigating employment. The back pay should be calculated at \$250.00 per month from January 22, 1986 until the entry of the Final Order. Respondent should also be ordered to pay complainant interest on the amount of back pay owed her at the statutory rate of ten percent.

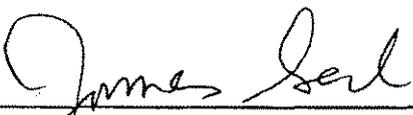
4. That respondent pay to complainant the sum of \$3,000.00 for incidental damages for humiliation, embarrassment, emotional and mental distress and loss of personhood and dignity as a result of the discriminatory treatment toward her by respondent.

5. That respondent be ordered to pay complainant's reasonable attorney's fees in the amount of \$15,913.75 (\$13,188.75 to Waugh; \$2,725.00 to Fleischauer).

6. That respondent be ordered to pay complainant the sum of \$1,105.40 for costs reasonably expended by complainant and reasonably necessary to the litigation of this matter;

7. That respondent be ordered to cease and desist from discriminating against individuals on the basis of their sex in making employment decisions.

8. That respondent report to the Commission, within thirty days of the entry of the Commission's Order, the steps taken to comply with the Order.



James Gerl
Hearing Examiner

ENTERED: October 25, 1988

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:

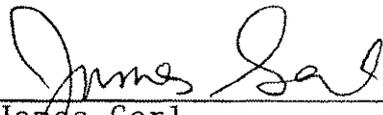
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Billy Atkins
Furbee, Amos, Webb & Critchfield
5000 Hampton Center
Morgantown, WV 26505

Barbara Fleischauer
346 Watts Street
Morgantown, WV 26505

on this 25th day of October, 1988.



James Gerl