



**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

September 23, 1988

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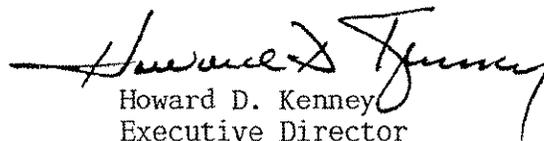
Re: Hammock v. ARA Leisure Services  
EA-670-86 & ES-671-86

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,

  
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

Enr. 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

BEVERLY J. HAMMOCK,

Complainant,

vs.

Docket Nos. EA-670-86  
ES-671-86

ARA LEISURE SERVICES,

Respondent.

O R D E R

On the 31st day of August, 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 and the exceptions thereto, the Commission does hereby adopt said proposed order and decision, encompassing proposed findings of facts 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 16<sup>th</sup> day of Sept, 1988.

Respectfully Submitted,

  
CHAIR/VICE-CHAIR  
WV HUMAN RIGHTS COMMISSION

**RECEIVED**

JUL 12 1988 *plm*

W.V. HUMAN RIGHTS COMM.

BEVERLY J. HAMMOCK,  
Complainant,

v.

DOCKET NOS.: EA-670-86  
ES-671-86

ARA LEISURE SERVICES,  
Respondent.

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

This matter matured for public hearing on the 14th day of May, 1987. 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., and Jack McComas, Hearing Commissioner.

The Complainant appeared in person and by her counsel, Sharon Mullens. The Respondent appeared by its counsel, Marilyn Kuhr, and by its representative, Mark Williams.

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.

### ISSUES

1. Was the Complainant's termination a result of sex discrimination.

2. Was the Complainant's termination a result of age discrimination.

3. If unlawful discrimination was the motivation for the Complainant's termination, to what relief is she entitled.

### SUMMARY OF THE EVIDENCE

The Complainant was employed with the Respondent on May 13, 1985, at forty-one (41) years of age. She was an employee of the Respondent who had a license to provide food and other services to the Tri-State Greyhound Park, a dog race track, located in Cross Lanes, Kanawha County, West Virginia. Initially, the Complainant was employed as a cashier but through steady progression she was promoted to supervisor; the position she held at the time she was discharged in June, 1986.

Respondent's employees that worked at the Tri-State site worked long and irregular hours. In fact, it was not unusual for its employees to work late into the evening and early morning hours. By the nature of the vending structures that they worked within, it was necessary that the Respondent's employees work within close physical proximity of each other.

It is undisputed that the nature of the racing business

conducted at Tri-State, as well as, to a lesser extent, the nature of the Respondent's business, created an environment which fostered the development of close personal relationships between the employees. Over the period of Complainant's tenure, there were instances, in particular five, in which the Complainant had been patted on the buttocks by John Davidson, the food and beverage director at the Tri-State site.

During the Complainant's tenure, Davidson was not her in-line supervisor. However, the Complainant had established a pattern of approaching Davidson with questions or assistance when issues would arise. The general manager, Mark Williams, was the chief operations officer at the Tri-State site. In that capacity, he supervised all management and non-management employees employed at the Tri-State site. The Complainant never complained, nor did she report to Williams, the aforementioned incidents in which John Davidson would have patted her on the buttocks. Nor did the Complainant report these incidents to the regional manager, whom she knew by name and physical location within the Respondent's corporate organization.

In addition, the Complainant, at no time, indicated to John Davidson that she did not want him to pat her on the buttocks. Moreover, the Complainant's use of foul language, joking about sexual matters, and herself patting the buttocks of a male electrician who was employed by Tri-State, could reasonably be interpreted, by others, that not only was the Complainant not offended by Davidson's touching, but that she accepted the same within the purview of acceptance for which her

own antics were accepted by others. On other occasions in her tenure, the Complainant had massaged Davidson's neck and shoulders and had spoken to him in a manner which suggested a friendly and comfortable relationship. As an example, at a going away party, for a previous general manager employed at the Tri-State site, the Complainant participated in the presentation of a plaque decorated with a hot dog projecting rigidly out from it. At the same party, a portion of the entertainment was a scantily clad "belly dancer" called "Little Egypt".

These unorthodoxed liberties, such as the patting of each other on the buttocks, extended further than the Complainant and Davidson. In fact, there was evidence at the hearing that several female employees, under and over the age of forty (40), had been patted on the buttocks by Davidson and had returned the "favor" during these times. The record further reflects that horseplay at the work site was quite common.

Some of Complainant's subordinates complained of her inaccessibility during her shift. In addition, management was noticed of complaints that the Complainant bet the races, during her shift, to the extent that the same interfered with her performing her normal duties. On one occasion, the Complainant failed to exercise, what her superiors felt to be good public relations, by refusing to clean up a spill which was pointed out to her by the general manager employed by Tri-State. As a result, the general manager for Tri-State cleaned the spill up himself. His discontent with the Complainant's attitude was later reported to Williams. In addition, Williams had received

complaints of racist remarks and attitude by the Complainant, and, what appeared to be a progressive deterioration in the employer-employee relationship between the Complainant and her subordinates.

On or about June 9, 1986, the Complainant was discharged for what the Respondent determined to be poor performance. After her discharge, the Complainant was replaced by a twenty-four (24) year old male, who had been previously employed at the Tri-State location as a dining room waiter, while completing his schooling in computer science. Respondent's position was that the male selected for the position to replace the Complainant was chosen because of his potential for assisting in other facets of the Respondent's operation.

#### DISCUSSION

In her case in chief, the Complainant introduced evidence to reflect that she was within the protected age group and gender, as the same are defined, by the language of the West Virginia Human Rights Act. Additionally, she introduced evidence to indicate that she was qualified to perform the work of concessions manager, that she was terminated and replaced by a twenty-four (24) year old male.

This evidence viewed most favorably to the Complainant, was sufficient to establish a prima facie case of age and sex discrimination. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973); State ex rel. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d 77 (1985). However,

additionally, the Complainant introduced evidence which suggested she was the subject of sexual discrimination to the effect that she was the subject of unwanted and unsolicited sexual harrassment. McDonnell Douglas.

In its case-in-chief Respondent introduced evidence greater in credibility which established that the Complainant performed various aspects of her employment in an unsatisfactory fashion. That in fact, the Complainant initiated: certain sexual jokes; sexually suggestive touchings of personnel at the Tri-State site; as well as, used vulgar and lewd language on the premises. The Respondent established that the Complianants poor job performance was, in fact, the actual reason for the Complainant's termination. These articulated reasons, having been accepted as credible, were sufficient to justify this otherwise contended questionable discharge. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981); Sheppardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E. 2d 342 (W.Va. 1983).

The Complainant's attempt to prove the Respondent's reasons to be pretextual were unsuccessful. The preponderance of the evidence indicated that the Complainant was in fact performing unsatisfactory in various aspects of her employment, as well as, being as deeply involved in sexual joking and touching, the source of lewd language and the harbinger of racist attitudes and statements, as anyone else, employed by the Respondent at the time. Burdine.

Accordingly, it is the Examiner's position and

determination, that the Respondent did not discriminate against the Complainant, on the basis of her sex or her age, in its decision to terminate her on June 9 ,1986, and that the Complainant was not the subject of sexual harassment.

#### FINDINGS OF FACT

1. The Complainant is a forty-one (41) year old female.
2. The Complainant was initially hired as a cashier and was ultimately promoted to the position of concessions manager.
3. The Complainant was at all times qualified to perform the positions which she held with the Respondent.
4. During her tenure, the Complainant was the source of: lewd joking; the touching of the buttocks of a Tri-State male employee; massaging the shoulders of a supervisor while on the job; and racist comments and attitude.
5. Between February or March of 1986, and June, 1986, the Complainant was patted on the buttocks by Davidson three to five times. The Complainant did not express any concern to this conduct either to Davidson or Williams, the Respondent's general manager at the site. The Complainant also did not report this conduct by Davidson to the regional management, although she knew the name of the regional manager and his corporate address.
6. The Complainant's conduct with her subordinates and others employed at the site, was such that a reasonable inference could be reached that she not only acquiesced in the sexually suggestive touching of her body and the jokes that permeated the work environment, but, she approved of the same as well, by being

an active participant in the same.

7. The Complainant's work performance as a concessions manager was less than satisfactory. Amongst those duties that the Complainant failed to perform adequately were: being prepared for large events and maintaining proper organization for both small and large events; inadequate accessibility to subordinates during her shift; failing to exercise proper management demeanor in addressing a sensitive incident with the Tri-State general manager; being the source of racist remarks; and maintaining an acceptable relationship with her subordinates.

8. Davidson requested the Complainant to obtain a date for him with one of the concession workers. However, this statement was said in the context of a situation in which the Complainant had no reason to believe that it was anything other than jest.

9. The Complainant was discharged by the same manager who had initially hired her.

10. The Complainant's replacement, a male caucasian, between twenty and thirty years of age, had a computer science degree with previous restaurant supervision experience with the Marriott and the Holiday Inn hotel chains.

#### CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the subject matter and the parties herein. WVC Section 5-11-1 at. seq.

2. The Complainant is a person as the same is defined by

the West Virginia Human Rights Act. WVC Section 5-11-2.

3. The Respondent is an employer as the same is defined by the West Virginia Human Rights Act. WVC Section 5-11-3(d).

4. The Complainant established a prima facie case of sex and age discrimination by establishing that: a) she is a member of the protected group, as the same is defined under the West Virginia Human Rights Act regarding age and sex; that she was qualified to perform her position as concessions manager; that she was terminated from that position; and that she was replaced by a twenty-four (24) year old male.

5. The Respondent articulated a legitimate nondiscriminatory reason for the Complainant's discharge by introducing evidence that the Complainant was not performing satisfactorily in her position as concessions manager.

6. The Complainant was unsuccessful in proving the Respondent's articulated reasons for her discharge to be pretext for unlawful discrimination on the basis of her age and/or sex.

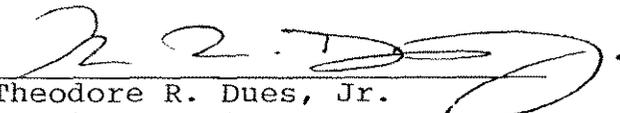
7. Accordingly, the preponderance of the evidence in the case does not justify a finding that the Respondent discriminated against the Complainant, on the basis of age or sex, in its decision to terminate her employment on June 9, 1986, nor for those reasons earlier stated herein, that she was the subject of sexual harrassment.

#### PROPOSED ORDER

Accordingly, it the recommendation of this Examiner that the Commission enter judgment in this matter for the Respondent.

DATED: July 7, 1988

ENTER:

  
Theodore R. Dues, Jr.  
Hearing Examiner