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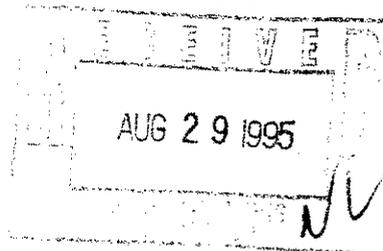
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NOTICE OF FINAL DECISION

PLEASE TAKE NOTICE that pursuant to W.Va. Code §5-11-8(d) and 6 WVCSR §77-2-10, any party aggrieved by the attached final decision shall file with the executive director of the West Virginia Human Rights Commission, **WITHIN THIRTY (30) DAYS OF RECEIPT OF THE DECISION**, a petition of appeal setting forth such facts showing that the party is aggrieved, stating all matters alleged to have been erroneously decided herein, the relief to which the party believes they are entitled and any argument in support thereof.

The filing of an appeal to the Commission from the final decision shall not operate as a stay of the decision unless specifically requested by the appellant in a separate application for the same and approved by the Commission or its executive director.



All documents shall be directed to:

Executive Director
West Virginia Human Rights Commission
1321 Plaza East, Room 104-106
Charleston, WV 25301

Dated this 25th day of August, 1995.

WV HUMAN RIGHTS COMMISSION

BY: Mike Kelly
MIKE KELLY
Administrative Law Judge
Post Office Box 246
Charleston, West Virginia 25321
(304) 344-3293

cc: Norman Lindell, Assistant Executive Director
West Virginia Human Rights Commission

**BEFORE THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION**

JAMES F. HUGHES,

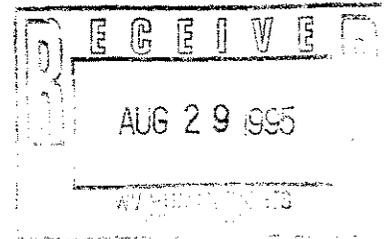
Complainant,

v.

Docket No. EA-433-92

TREES, INC.,

Respondent.



**FINAL DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

THIS MATTER matured for public hearing on 18 August 1994. By agreement of the parties, the hearing was held at the West Virginia Human Rights Commission, 1321 Plaza East, Charleston, Kanawha County, West Virginia. The complainant appeared in person and his case was presented by the West Virginia Human Rights Commission and its counsel, Senior Assistant Attorney General Paul R. Sheridan. The respondent appeared by its designated representative, Jerry Kerns, and by its counsel, Mark A. Carter and Smith, Heenan & Althen.¹

¹ It should be noted that both counsel did an outstanding job both at hearing and in their respective post-hearing written submissions.

I. ISSUES TO BE DECIDED

Whether respondent violated W.Va. Code §5-11-9(1) by discriminating against complainant by failing or refusing to hire him for a vacant position for which he was qualified because of his age.

II. FINDINGS OF FACT

Based upon the credibility of the witnesses, as determined by the Administrative Law Judge, taking into account each witness' motive and state of mind, strength of memory, and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and the bias, prejudice and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence; and upon thorough examination of the exhibits introduced into evidence and the written recommendations and argument of counsel, the Administrative Law Judge finds the following facts to be true:²

² To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion 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 as not necessary to a proper determination of the material issue as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

A. Preliminary Facts

1. Complainant James F. Hughes is a white male over the age of 40 who filed a complaint in a proceeding under the West Virginia Human Rights Act, W.Va. Code §5-11-1 et seq. ("HRA") and is a person protected by the HRA. He resides in Lesage, Cabell County, West Virginia.

2. Respondent Trees, Inc. (hereinafter "Trees") is a person and employer as those terms are defined by W.Va. Code §§ 5-11-3(a) and (d), respectively.

3. In December 1991, Mr. Hughes tendered his employment application to respondent, which, at that time, was accepting applications for positions for which Mr. Hughes was arguably qualified.

4. Mr. Hughes was not hired by Trees and, on or about 11 April 1992, he filed a complaint with the West Virginia Human Rights Commission alleging that he had been rejected for employment by Trees because of his age.

B. Mr. Hughes' Work History Prior to December 1991

5. James Hughes was born on 16 June 1938. He has a sixth grade education. He has been employed by various entities clearing trees and brush from roads and right-of-ways for over 30 years.

6. Mr. Hughes was employed by Asplundh Tree Company from 1979 until approximately November 1991. While employed by Asplundh, he worked pursuant to a contract between his employer and Appalachian Power Company (APCO), under the terms of which Asplundh was responsible for keeping the vicinity of APCO's power lines free and clear from sylvan overgrowth.

7. In mid-November 1991, Asplundh lost the APCO contract. The successful bidder was Trees, Inc. Representatives of APCO informed Asplundh employees that Trees had won the bid and would be accepting applications from the Asplundh workers.

C. The Application Process

8. Mr. Larry Gattis is the manager for Trees of its West Virginia and Virginia operations. Mr. Gattis testified credibly throughout this proceeding. He described Trees' main business as being trimming and clearing trees and brush from electric lines and right-of-ways.

9. When Trees was awarded the APCO contract in November 1991, Mr. Gattis was working for Trees in Dallas, Texas. He accepted Trees' offer of transfer to West Virginia and arrived in this state on 29 November 1991.

10. Upon his arrival in West Virginia, Mr. Gattis asked APCO personnel to inform the former Asplundh workers that Trees would be accepting applications for employment at the Ramada

Inn in Barboursville, Cabell County, West Virginia. He relied "pretty much" on APCO to get the word out in the Huntington area and made no other efforts to announce that Trees was hiring.

11. In mid-December 1991, Mr. Gattis rented a conference room at the Ramada Inn and began accepting applications. He described the process as follows:

Basically we really didn't interview, we just got the applications, looked them over to make sure we had phone numbers and things like that, to be able to contact the people. And that was really it.

Among the applications received that day was that of Mr. Hughes. Mr. Hughes testified that the person to whom he handed his application said "I'll get in contact with you later."

12. After accepting the applications, Mr. Gattis asked APCO officials if they could recommend possible supervisors among the pool of former Asplundh employees. He was given two or three names, one being Jerry Kerns. Mr. Kerns had worked as a supervisor for Asplundh. Mr. Gattis pulled Mr. Kerns' application from the stack, called him and made him an offer on a management position. Mr. Kerns accepted. Prior to this phone call, Mr. Gattis had had no personal communication with Mr. Kerns other than, perhaps, accepting his application at the Ramada Inn.

13. After hiring Mr. Kerns and another supervisor, Lovell Lyons, Mr. Gattis passed on all other applications to them and assigned them the duty of filling the remaining positions. Mr. Gattis

testified credibly that he is personally involved in the selection process only for management jobs and that he does not interview or hire applicants for rank and file positions.

14. Mr. Gattis testified that he did not instruct his new supervisors to hire or not hire any specific individuals or groups of individuals. He admitted that he gave Mr. Kerns specific authority to hire whoever he felt was appropriate and that, in fact, it was Mr. Kerns who actually hired the workforce for Trees' Huntington area operations.

15. In regard to hiring instructions or authority given to Mr. Kerns by Trees, Mr. Gattis further testified that:

(a) Though Trees does have an antidiscrimination policy in its employee handbook, he did not instruct Mr. Kerns to review, refer or abide by it;

(b) Mr. Kerns was never instructed, in any way, regarding equal opportunity hiring and the duty to not unlawfully discriminate; and

(c) Mr. Kerns was given free rein to make hiring decisions on the basis of whatever criteria he deemed relevant: ". . . they can hire anyone they see fit to fill the positions . . . The supervisors that I hired were experienced and they knew what kind of employees we needed."

D. Mr. Hughes Is Not Hired

16. Complainant testified credibly that after he submitted his application at the Ramada Inn, he was never contacted by a Trees representative. He was not interviewed, was never asked a

question about his application and was never informed that his application or work experience were in any way inadequate or unsuitable. He heard nothing back from Trees.

17. After Mr. Hughes informally learned that Mr. Kerns was Trees' hiring agent, he went to a Trees' job site on two or three occasions to ask Mr. Kerns about a job. He testified that Mr. Kerns would reply "I'm not hiring," or would be noncommittal, saying neither "yes" nor "no".

18. Mr. Kerns testified that after receiving hiring authority from Mr. Gattis, he never made the first move to hire an employee. He waited for prospective employees to contact him. He testified that "with a person contacting me for a job, that's telling me that they're wanting to work and willing to work. So that's the reason I would hire them."

19. Mr. Kerns denied that Mr. Hughes had ever contacted him about a job and denied ever talking with him on a Trees' job site. Based on an assessment of credibility between Mr. Hughes and Mr. Kerns, Mr. Kerns' testimony on this point is rejected as not credible and Mr. Hughes' testimony is specifically credited as being true.

20. Mr. Kerns also testified that he waited for applicants to contact him regardless that he did not have a phone and was not in the phone book when he first began hiring for Trees, and that the applicants had no way of knowing, early on, that he had been chosen by Trees to hire a crew.

21. Mr. Kerns admitted that his method of hiring was not applicable to his own selection by Mr. Gattis. After filling out an application, he waited for two weeks. He made no effort to contact Trees. Finally, Mr. Gattis called the friend's phone number that he had placed on the application, and he was hired.

22. Mr. Kerns also testified that, on occasion, if there were no openings when a particular person applied for a job he would take their phone number and then call them back when a vacancy developed. He never called Mr. Hughes after Mr. Hughes had visited him on the job site.

23. Mr. Kerns agreed that it was his position at hearing that Mr. Hughes' failure to aggressively pursue a job was the only reason that complainant was not hired. He specifically refuted the floated suggestions that complainant's alleged former union activity, conviction of a misdemeanor, pending criminal allegations or alleged propensity to fight on the job (arising from an incident that occurred in 1963 or 1964) had anything to do with his failure to hire Mr. Hughes. Given this testimony, to the extent that respondent raised any of the above as defense to the complaint, said defense is rejected as being not supported by the evidence.³

24. Mr. Kerns also made the following relevant admissions:

(a) He was unaware of any Trees' employee being fired for having been convicted of a crime, charged with a crime or having in the past engaged in an on the job fight;

³ Mr. Gattis also testified that Trees does not have any policy prohibiting the hiring of persons who have been convicted of a crime or who are facing criminal charges.

(b) He personally hired for Trees a former Asplundh employee who he suspected had stolen from Asplundh, and did not inform his Trees' superiors about his suspicion;

(c) In his experience, Mr. Hughes had been a good and capable employee for Asplundh;

(d) Mr. Hughes' wife had once called him and left a message about a job for her husband, but he did not call complainant back when a vacancy developed; and

(e) The mere fact that someone had filled out and returned a job application, as Mr. Hughes had, would indicate to him that he or she was interested in a job and wanted to work.

25. The stipulated evidence (Joint Exhibit 1) shows that Trees hired employees in every month in 1992, including the months after Mr. Hughes made personal contact with Mr. Kerns.

E. Other Evidence

26. Commission witness William Patrick was 49 years old when Mr. Kerns was hiring former Asplundh employees to work for Trees in 1992. He had worked for Asplundh for seven years. He filled out a Trees' application and, after he heard that Jerry Kerns was doing the hiring for Trees, he called Mr. Kerns and left messages two or three times. He never received a return phone call. Mr. Kerns testified that the only reason that he did not hire Mr. Patrick is because the latter made no effort to get in touch with him.

27. Respondent witness Roby Holland, a former employee of Asplundh and now employed by Trees, testified that after he filled out an application he was called by Mr. Lyons. He did not have

to seek out Mr. Kerns or Mr. Lyons. He admitted that when hiring for Trees first began, it was nonsensical to expect the applicants to contact the new supervisors since they had no way of knowing who had been selected to do the hiring. Mr. Holland was 44 years of age when hired by Trees.

28. Respondent witness Oral Ray was 57 when hired by Trees, four years older than Mr. Hughes was in 1992. Mr. Ray, however, was hired in Trees' Charleston district and Jerry Kerns had nothing at all to do with his being hired. Mr. Ray also testified that after he filled out an application a Trees representative called him on the phone to ask him if he wanted the job.

29. Respondent witness Paul Workman, a foreman and complainant's son-in-law, testified that he never saw Mr. Hughes ask Mr. Kerns for work while on the job site. However, when asked if he knew Mr. Hughes was interested in working, Mr. Workman said "I would say he is, I don't know."

30. Both sides offered statistical evidence in support of their respective positions. Since I did not find the statistical evidence persuasive or helpful in deciding this matter, such testimony is not considered in either the findings of fact or conclusions of law.

31. The Commission offered testimony that Mr. Hughes, while he and Mr. Kerns were employed by Asplundh, overheard Mr. Kerns say to another employee, in anticipation of Trees assuming the contract: "I don't know, but there will be a lot of them that won't get to go to work."

I figure if I get the supervisor, there will be a lot of the old ones that won't get to go back. There will be a lot of them that won't go to work." This testimony is found to be credible.

32. Respondent offered undisputed evidence that Mr. Kerns hired Lowell Ball in 1992, who, at age 55 when hired, is older than complainant. Mr. Kerns also hired three other males (ages 41, 43 and 44 at time of hire) in the protected class.

33. Respondent's average pay for a groundsman is \$5.84 per hour, with an average work week of 40 hours.

34. After not being hired by respondent, complaint was employed by G&G Nursery beginning in January 1993. He quit due to unreliable hours. The record is not clear as to when he quit. He was paid minimum wage at G&G.

35. As a result of not being hired by respondent, Mr. Hughes suffered hurt and humiliation.

F. Assessment of Credibility and Key Findings of Fact

Based on the testimony and demeanor of each witness, and after a thorough review of the transcript and supporting exhibits, the factfinder resolves the disputed evidence as follows:

36. The reason articulated by respondent for its failure to hire Mr. Hughes, his alleged lack of effort to secure the position, is unworthy of belief. This finding is based on the following considerations:

(a) Mr. Gattis testified that when taking applications he wanted to make sure that he obtained a phone number, indicating that he understood that applicants would be called;

(b) When he submitted his application at the Ramada Inn, Mr. Hughes left a phone number and was specifically informed that a Trees representative would contact him;

(c) Mr. Kerns, Mr. Holland and Mr. Ray were all contacted by Trees in a manner consistent with the testimony of Mr. Gattis and without any need to show persistence or effort;

(d) Mr. Kerns, when he was assigned to hire a crew, did not have a phone;

(e) Mr. Hughes did, in fact, exhibit effort to secure a position by visiting Mr. Kerns at the job site on two or three occasions; and

(f) The testimony of Mr. Hughes was, generally, more credible than the testimony of Mr. Kerns and Mr. Workman.

37. Based on the record as a whole, and after assessing the credibility of the witnesses, I find as fact that more likely than not respondent failed or refused to hire James F. Hughes because of his age.

III. DISCUSSION OF EVIDENCE AND APPLICABLE LAW

A. Discrimination Vel Non

Under the West Virginia Human Rights Act (HRA), it is unlawful for an employer to use age as a reason to not hire a person if that individual is age forty or above. See, W.Va. Code §§ 5-11-3(k) ("The term 'age' means the age of forty or above"), 5-11-3(h) (defining the terms "discriminate" or "discrimination"), and 5-11-9(1).

This case having been heard in its entirety, with all evidence submitted and considered, it is not necessary to address whether the Commission established a *prima facie* case. Once all the evidence has been heard, and the "defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether plaintiff really did so is no longer relevant." *U.S. Postal Service v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482 (1983). The job of the factfinder, after taking all of the evidence, is to address "the ultimate question of discrimination *vel non*." 103 S.Ct. at 1481.⁴

In other words, the factfinder must now determine, on the basis of all of the evidence, whether the Commission has proven by a preponderance of the evidence that the proffered reason for

⁴ The *Aikens* standard for assessing evidence was recently adopted by the West Virginia Supreme Court of Appeals for application in cases brought under the HRA. *Barefoot v. Sundale Nursing Home*, ____ W.Va. ____, 457 S.E. 2d 152 (1995).

respondent's failure to hire James F. Hughes is not the true reason that he was not hired, but is a mere pretext for unlawful discrimination. I find that the Commission has met its burden.

Pretext may be established by evidence supporting "the elimination of the apparent legitimate reasons for the decision," *Conaway v. Easter Associated Coal Corp.*, 178 W.Va. 164, 358 S.E. 2d 423, 430 (1986), or by evidence showing that the proffered reason is "an absurd reason" and simply unworthy of belief, *Conaway*, at 430, n. 11.

Here, respondent's articulated reason has been both eliminated and proven absurd. Other than the unreliable and inconsistent testimony of Mr. Kerns, there is little, if any, credible evidence that workers hired by Mr. Kerns for Trees had to seek him out, and be persistent about it, in order to be hired. This position is reduced to an absurdity by the admissions or undisputed testimony of Mr. Kerns, Mr. Holland, and Mr. Ray that they did not have to track down a Trees representative in order to be hired. They were all hired as Mr. Gattis had planned, i.e. a Trees representative called them on the phone.

Once the factfinder has found that the reasons put forward by respondent are unworthy of belief and should be rejected, he or she is permitted "to infer the ultimate fact of intentional discrimination . . . and no additional proof of discrimination is required." *St. Mary's Honor Center v. Hicks*, ____ U.S. ____, 113 S.Ct. 2742, 2749 (1993); quoted with approval, *Barefoot, supra*. Given that Trees permitted Mr. Kerns to do its hiring with virtual *carte blanche* authority, and given that his testimony, in particular, was not believable, I rely upon no additional proof of discrimination

in making the ultimate finding of fact that respondent intentionally discriminated against Mr. Hughes because of his age.

B. Respondent Superior

Where, as here, an employer has cloaked a supervisor with actual and unbridled authority to hire a workforce, it may be held responsible for his acts when he intentionally discriminates on the basis of age. An employer who grants sweeping hiring authority to an untrained supervisor has a duty to adequately monitor his conduct affecting equal employment opportunity. *Gay v. Board of Trustees*, 608 F.2d 127 (5th Cir. 1979).⁵ See generally, *Paxton v. Crabtree*, 184 W.Va. 237, 400 S.E. 2d 245 (1990).

C. Alleged Direct Evidence of Discrimination

The Commission sought to introduce evidence that, prior to being hired by Trees, Mr. Kerns and Mr. Holland both made statements in complainant's presence indicating a bias against older workers. Respondent objected on the ground that neither person was an agent of Trees at the time he made the statement and that the statements are, therefore, inadmissible hearsay.

⁵ It should be noted for the record that Trees' district manager, Mr. Gattis, testified credibly at hearing and appeared, in all respects, to be a fair-minded and non-discriminatory manager. His mistake was giving free rein to Mr. Kerns.

Since the evidence does not show that Mr. Holland played any role whatsoever in Mr. Hughes' rejection by Trees, I find no reason to admit his alleged statement into evidence and did not consider it in arriving at the findings of fact and conclusions of law.

In regard to Mr. Kerns' statement (see finding of fact 31, supra), while respondent is correct that the statement does not meet the criteria for an admission by a party-opponent as set forth in WVRE 801(d)(2), I find it to be admissible under WVRE 803(3) as evidence of Mr. Kerns' state of mind, intent and motive. The statement occurred after Asplundh lost the APCO contract and perhaps one month prior to Mr. Kerns being hired by Trees. The proximity in time to the discriminatory conduct is close enough to indicate that Mr. Kerns had an existing bias against older workers at the time Mr. Gattis put him in charge of hiring a workforce.

All of the above being said, and the statement admitted, the findings of pretext and intentional discrimination were made independent of and without reference to the statement.

D. Testimony of Mr. Patrick

The testimony of William Patrick (see finding of fact 26, supra) was about events that happened to him which were closely parallel in time and nature to those giving rise to this action. As with Mr. Hughes, Mr. Patrick was a former employee of Asplundh who was not hired by Mr. Kerns and Trees in 1992. Even Mr. Kerns' excuse for not hiring Mr. Patrick was identical to the reason he articulated for not hiring complainant. Under WVRE 404(b), this evidence was admissible to show

that Mr. Kerns had a discriminatory motive or intent. *See, State ex rel. Tinsman v. Hott*, 188 W.Va. 349, 424 S.E. 2d 584 (1992).

E. Hiring of Protected Class Members

Respondent introduced evidence that among its new hires in 1992 were three individuals between the ages of 41 and 44 and one worker, Oral Ray, who was 57 when hired. Mr. Ray, it will be recalled, was not hired by Mr. Kerns and, therefore, his hire is not especially relevant to the issues at bar. In regards to the other three, the fact that they, too, are in the protected class does not mean that age discrimination may not be inferred under the facts of this case. *Barnes v. Gen Corp, Inc.*, 896 F. 2d 1457 (6th Cir. 1990). The purpose of the West Virginia Human Rights Act "is to provide an equal opportunity for each applicant," regardless of his or her age, and regardless of whether older workers "are already proportionately represented in the work force." *Furnco Construction Corp. v. Waters*, 438 U.S 567, 579 (1978). The fact that the three workers in their 40's were hired by Kerns does not "conclusively demonstrate that [Kern's] actions were not discriminatorily motivated." *Id.*

F. Alleged Failure to Mitigate Ranges

Respondent proposes that any back pay awarded Mr. Hughes be cut off as of August 1993, when he quit his employment at G&G Nursery. Since Mr. Hughes testified credibly that he quit G&G only because the number of work hours available were insufficient and unreliable and the pay was at

minimum wage, I find that the G&G position was not of the same grade as jobs available at Trees (40 hours per week at \$5.84 per hour) and that no deductions should be made from the back pay amount for the period after Mr. Hughes quit G&G. *Orr v. Crowder*, 315 S.E. 2d 593 (1984).

IV. FINDINGS OF ULTIMATE FACTS

1. The Administrative Law Judge finds as fact that complainant is a member of a protected class under the HRA.

2. The Administrative Law Judge finds as fact that the reason given by respondent to explain its failure to hire Mr. Hughes is not the true reason he was not hired, but is a mere pretext for unlawful discrimination because of his age.

3. The Administrative Law Judge finds as fact that respondent failed to hire Mr. Hughes because of his age and that, by doing so, respondent violated W.Va. Code §5-11-9(1).

4. The Administrative Law Judge finds as fact that as a result of respondent's unlawful act complainant suffered lost earnings and is entitled to a "make whole" remedy.

5. The Administrative Law Judge finds as fact that as a result of respondent's unlawful discriminatory act Mr. Hughes suffered hurt and humiliation.

V. CONCLUSIONS OF LAW

1. The respondent is an employer within the meaning of W.Va. Code §5-11-3(d).
2. The complainant is a citizen of the State of West Virginia and a person within the meaning of W.Va. Code §5-11-3(a).
3. The Human Rights Commission has jurisdiction over this matter, complainant having filed a timely, verified complaint and complied with all procedural requirements of the West Virginia Human Rights Act W.Va. Code §5-11-1, et al.
4. The Commission showed by a preponderance of the evidence that respondent's explanation for failing to hire Mr. Hughes was not the true reason that he was not hired, but is a mere pretext for unlawful discrimination, and that more likely than not complainant was not hired because of his age.
5. Respondent violated W.Va. Code §5-11-9(1) by failing or refusing to hire Mr. Hughes because of his age.
6. Complainant is entitled to the following relief:

(a) Back pay of \$35,320.32 for the period of January 1992 through December 1994 (based on 40 hour work week x \$5.84 per hour x 4.2 weeks per month), minus interim earnings of \$8,166.00, for a net back pay amount through December 1994 of \$27,154.32;

(b) Back pay of \$7,848.96 for the period of January 1995 through August 1995, minus any interim earnings⁶;

(c) Prejudgment interest on back pay at the rate of 10% per annum, calculated quarterly, from the time it should have been paid to complainant up to the date of this decision, and postjudgment interest at the same terms until paid in full; and

(d) Incidental damages in an amount of \$2,950.00 for the humiliation, embarrassment and loss of personal dignity suffered by complainant as a result of respondent's unlawful act.

7. The respondent shall reimburse the Commission and the Attorney General their costs in the amount of \$1,652.96. No costs are awarded for the Commission's expert witness expenses since such testimony was neither helpful nor needed in deciding this case.

8. Reinstatement having not been requested, it is not awarded.

9. Finally, an Order is hereby directed against respondent to CEASE and DESIST from engaging in acts of unlawful discrimination in violation of the West Virginia Human Rights Act.

⁶ Within 15 days after the receipt of this decision, the Commission shall submit to respondent's counsel a verified statement of complainant's interim earnings to date in 1995. Should respondent desire to take evidence on this issue, it shall notify the Administrative Law Judge within fifteen days after receipt of the verified statement.

Decided this 25th day of August, 1995.



MIKE KELLY

Administrative Law Judge

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