



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

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**Cecil H. Underwood**  
Governor

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

August 24, 1998

Leon Heyliger  
935 Chappell Rd.  
Charleston, WV 25304

Paul R. Sheridan  
Senior Asst. Attorney General  
Civil Rights Division  
PO Box 1789  
Charleston, WV 25326-1789

Alma Ridge, Inc. et al.  
c/o J. Randolph Query  
Spradling & Query  
PO Box 3770  
Charleston, WV 25337

Re: Heyliger v. Alma Ridge, Inc., Keystone Coal, Inc., RDR Associates, Inc., R.L.S. Equipment, Inc., Keystone Resources Inc., Robert Dale Reese, Steve Mayhorn, and Les Mayhorn  
Docket Number: ERNO-147-93

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

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

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before an administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before an administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.4. Supported by substantial evidence on the whole record; or

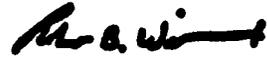
10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from an administrative law judge's final decision is not filed within thirty (30)

days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,



Robert B. Wilson  
Administrative Law Judge

RW/mst

Enclosure

cc: Normon Lindell, Acting Executive Director

**BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION**

LEON HEYLIGER,

Complainant,

v.

DOCKET NUMBER(S): ERNO-147-93

ALMA RIDGE, INC.,  
KEYSTONE COAL, INC.,  
RDR ASSOCIATES, INC.,  
R.L.S. EQUIPMENT, INC.,  
KEYSTONE RESOURCES, INC.,  
ROBERT DALE REESE, STEVE MAYHORN,  
and LES MAYHORN,

Respondents.

**FINAL DECISION**

A public hearing, in the above-captioned matter, was convened on June 4, 1998, in Kanawha County, in the West Virginia Human Rights Commission Conference Room B, at 1321 Plaza East, Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge, for the taking of evidence on the issues concerning whether the complainant was unlawfully discriminated against in his application for employment with Alma Ridge, Inc., and deferring for further proceedings any issues of vicarious liability for any such unlawful discrimination against any of the other named respondents.

The complainant, Leon Heyliger, appeared in person and by counsel for the Human Rights Commission, Paul R. Sheridan, Senior Assistant Attorney General, Civil Rights Division of the West Virginia Attorney General's Office; and by Jennifer D. Scragg, second year law student intern admitted to practice under Rule 10 of the West Virginia Rules for Admission to the Practice of Law, on brief. The respondent appeared in person by its representative, former

President and shareholder for Alma Ridge, Inc., Steve Mayhorn and former shareholder, Robert Dale Reese; as well as by counsel, J. Randolph Query with the firm Spradling & Query.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or necessary to a proper decision. To the extent that the testimony of the various witnesses is not in accord with the findings stated herein, it is not credited.

**A.**

**FINDINGS OF FACT**

1. Complainant, Leon Heyliger, is a black male, born in Guyana, South America,, where he lived his first twenty-seven years before coming to Charleston, West Virginia, in July 1973.

Tr. Page 9.

2. Respondent, Alma Ridge, Inc, is and was at all relevant times, a “person” and an “employer”, as those terms are defined under W. Va. Code §§ 5-11-3(a) and 5-11-3(d), respectively. Commission’s Exhibit No. 6.

3. In the Spring of 1992, complainant frequented the Charleston office of the West

Virginia Job Service at least once a week in search of employment, particularly in mining. Tr. Pages 20-21, and 50.

4. On May 28, 1992, complainant found a listing for the position of mining Section Supervisor posted with the West Virginia Job Service by respondent, Alma Ridge, Inc. Complainant's Job Service counselor verified that he was qualified for the position, and provided him with the address and telephone number, and instructed him to apply for the position by calling respondent, Alma Ridge, Inc. and ask to speak to Mr. Hatfield. Tr. Pages 21-23, and 52-53.

5. On May 28, 1992, complainant went directly home and called Alma Ridge at 9:55 a.m., explained that he was referred to Alma Ridge and would like to speak to Mr. Hatfield. He was told that Mr. Hatfield was currently underground and thus unavailable. An unidentified male offered to assist complainant. Complainant explained he was calling about the Section Supervisor position. The Alma Ridge male, then began to detail the position's requirements in a manner that suggested that he was trying to dissuade the complainant from pursuing the employment. First the person explained the five years mining experience, to which complainant responded that he had seven and a half years experience. Then the person suggested the requirement of a mine safety first aid code. Complainant explained he had an EMT certification, which made him more qualified than someone with a mere first aid code. This pattern continued for some time and the Alma Ridge male agreed to take complainant's name and telephone number, and that Mr. Hatfield may return his call after lunch. Tr. Pages 23-24, 28-29, 53-58; and Complainant's Exhibit No. 2.

6. Complainant did not hear back from Mr. Hatfield by 1:30 p.m., at which time he

placed a person to person call to Mr. Hatfield. When Mr. Hatfield answered the phone, complainant explained that he was calling about the Section Supervisor position and that he had called earlier. Mr. Hatfield stated that the position had already been filled. Tr. Pages 25, 63-64, and 70-71. Commission's Exhibit No. 2.

7. Complainant became suspicious that perhaps the position had not in fact been filled; and called a friend who employed a white West Virginian, Jackie Reed Dusch, who spoke with a West Virginian accent, and enquired as to whether the position was filled, and was told it had not and that her husband should come in and fill out an application. After Ms. Reed confirmed that the position was open; complainant then contacted his counselor at West Virginia Job Service, who told Mr. Rayhill about the incident, Mr. Rayhill, with Job Service called and confirmed that the position was indeed still open with respondent, Alma Ridge, Inc. Tr. Pages 26-27, 72-73, and 89-90.

8. Respondent has presented evidence that eight people were referred by West Virginia Job Service to Alma Ridge, Inc. indicating that Russell Elkins was hired on May 18, 1992; and, that Danny Banks was hired on June 1, 1992. Respondent's Exhibit No. 1.

9. The undersigned finds that the preponderance of the evidence indicates that Mr. Elkins was not hired for the position of Section Supervisor; based upon the fact that the Commission's Exhibit No. 7, the Commission's Interrogatories and the Responses thereto by respondent, indicated that Mr. Elkins was not on the list of Supervisory positions filled between January and November of 1992; while Mr. Mayhorn recalled that Mr. Elkins had been employed as an equipment operator. It is noted that those responses were prepared by the respondent at a time when respondent had the records before it; and those responses indicated that no one recalled

talking to complainant. This is directly contradicted by the West Virginia Job Service referral list and by the phone records submitted by the Commission. Therefore the testimony of complainant is deemed to be credible as to his contention that the position was not filled at the time that Mr. Hatfield told him it had been filled. Tr. Pages 113 and 115; Commission's Exhibit No. 2 and Commission's Exhibit No. 7.

10. The record is clear that complainant was qualified for the position of mine Section Supervisor for which he applied by calling the respondent, Alma Ridge, Inc.'s, agent, Mr. Hatfield on May 28, 1992. Complainant had a Bachelor's degree in Mining Engineering Technology from West Virginia Institute of Technology; he was certified as a Mine Foreman and also in Mine Maintenance; he had taken management training classes; and had various mining experience. Complainant worked for Cedar Coal Company from May 1975 through September 1979; the last year and a half as mine production supervisor. Complainant worked two summers in the coal industry, while attending college and thereafter had worked almost three years for Peabody Coal Company acquiring mining experience including production and supervision. There is no record that the successful candidate hired the Monday following complainant's calls the prior Thursday, was qualified to assume the position of Section Supervisor. Tr. pages 10, 12-14, 39, and 42-43; Commission's Exhibit No. 1.

11. The undersigned, having listened to complainant speak at hearing on this matter, finds that it would be impossible not to identify complainant as a black man speaking with a heavy West Indian accent.

12. The undersigned finds as a matter of fact, that an unidentified male at the Alma Ridge, Inc. number, with apparent authority to speak on respondent's behalf, deliberately tried to

dissuade complainant from applying for the Section Supervisor position. That conversation indicated that the position was still open. Mr. Hatfield never returned complainant's call about the position; and then deliberately told him the position had been filled, when it had not in fact been filled. The most reasonable inference is that Mr. Hatfield and others at Alma Ridge, Inc. did not desire to have a black man working there as a Section Supervisor.

13. Complainant testified about his feelings about being told that the job was filled when it hadn't been; "It made me feel really bad. It made me feel what's the use." "You see my daughter always tell me, Leon, the secret to success is hard work, study hard. Study and make sure you have a good education and work and do the job well, and you will succeed. But I felt like it didn't matter. It didn't matter how much education you had, you still wouldn't get a job. I still wouldn't have an equal chance to really make it. I thought it was clearly unfair." The undersigned finds that complainant was humiliated, embarrassed; and suffered emotional and mental distress and loss of personal dignity. Tr. Pages 37-38.

14. At the time of the unlawful race and national origin discrimination against complainant in refusing to accept complainant's application for Section Supervisor on May 28, 1992; the respondent, Alma Ridge, Inc. was owned by individual respondents, Steve Mayhorn, Robert Reese and Les Mayhorn. Alma Ridge was sold to Donita Hardin, Shawn T. Estep and Gary Mayhorn on January 1, 1993 in consideration of the purchasers' agreement to assume operations and the continued management of the corporation and the corporate obligations for the payment of all current debts or liabilities. Alma Ridge, Inc. continued mining operations through most of the remainder of 1993 under the new ownership, and it is stipulated that the work force continued to be employed during that period. Tr. Page 106; Commission's Exhibit

No. 4.

15. Shortly thereafter, the same mine was reopened under R. J. Mining, Inc. another contractor who continued operations November 1993 until August 1997. It is not known whether the same workforce continued to be employed by R. J. Mining, Inc. Tr. Pages 115-116; Commission's Exhibit No. 5.

16. Had complainant been hired for the position, he would have made \$3,109.92 per month, based on the records of Mr. Banks for the only full three month period in which he held the position of Section Supervisor. The further evidence is that he would have had a benefit package worth approximately an additional 10% of the wages paid. Tr. Page 153; Commission's Exhibit No. 6, page 8.

17. Had complainant been hired he would have been employed from June 1, 1992 through November of 1993, the date Alma Ridge closed operations and R. J. Mining undertook operations. Commission's Exhibit No. 5.

18. Complainant totally mitigated his lost wages for the seven month period of July 1992 through and including January 1993, but was completely unemployed for a ten month period from February 1993 until December 1993, when he took a job paying considerably less working for the City of Charleston. Tr. Pages 31 and 33.

19. The complainant sustained net loss back pay of \$37,630.03. Complainant is entitled to 10% interest, which compounded monthly over the period of back pay through September 1998 equals \$26,278.56. The total back pay award through September 1998 is \$63,908.59. See Commission's Proposed Findings of Fact and Conclusions of Law and Memorandum of Law, Attachment A.

**B.**

**DISCUSSION**

The West Virginia Human Rights Act makes it unlawful “for any employer to discriminate against an individual with respect to ....., hire,.....” W. Va. Code § 5-11-9(1). The term “discriminate” or “discrimination” means “to exclude from, or fail or refuse to extend to, a person equal opportunities because of race,....[or] national origin....” W. Va. Code § 5-11-3(h).

To make a prima facie case under the West Virginia Human Rights Act, the complainant must offer proof that:

1. The complainant is a member of a protected class;
2. The employer made an adverse decision concerning the complainant; and,
3. But for the complainant’s protected status, the adverse decision would not have been made. Conaway v. Eastern Associated Coal Corp., 178 W.Va. 475, 358 S.E.2d 423 (1986).

The “but for” test of discriminatory motive making up the third prong of the Conaway test is merely a threshold inquiry, requiring only that a complainant show an inference of discrimination. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995).

A discrimination case may be proven under a disparate treatment theory which requires that the complainant prove a discriminatory intent on the part of the respondent. The complainant may prove discriminatory intent by a three step inferential proof formula first articulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); and, adopted by the West Virginia Supreme Court in Shepardstown volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). Under this formula, the complainant must first establish a prima facie case of

discrimination; the respondent has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally the complainant must show that the reason proffered by the respondent was not the true reason for the decision, but rather pretext for discrimination.

The term “pretext” has been held to mean an ostensible reason or motive assigned as a color or cover for the real reason; false appearance, or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway, supra. Pretext may be shown through direct or circumstantial evidence of falsity or discrimination; and, where pretext is shown, discrimination may be inferred. Barefoot, supra. Although, discrimination need not be found as a matter of law. St. Mary’s Honor Society v. Hicks, 509 U.S. \_\_\_\_, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

There is also the “mixed motive” analysis under which a complainant may proceed to show pretext, as established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); and recognized by the West Virginia Supreme Court in West Virginia Institute of Technology, supra. “Mixed motive” applies where the respondent articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the mixed motive analysis, the complainant need only show that the complainant’s race or national origin played some part in the decision, and the employer can avoid liability only by proving that it would have made the same decision even if the complainant’s race or national origin had not been considered. Barefoot, 457 S.E.2d at 162, n. 16; 457 S.E.2d at 164, n. 18.

The complainant is a black male born and raised in Guyana; who speaks with a definitely

recognizable West Indian accent. The respondent employer made an adverse decision when its agent informed complainant that the job was filled, when in fact it had not been filled. Further the complainant has introduced evidence that the position was filled thereafter by a person who did not speak with a black West Indian accent. Thus the complainant has established a prima facie case of employment discrimination under Conaway, supra. The respondent contends that the complainant was not hired because that position had been filled at the time complainant applied. The Complainant has demonstrated by a preponderance of the evidence that the respondent was still hiring for the position sought when complainant applied; and, thus, that this proffered reason was not the true reason he was told the position was filled. Although respondent has offered evidence that the position was filled by Mr. Elkins, the undersigned determines that evidence to be non persuasive in light of the respondent's failure to back their position with the testimony of the decision maker, Mr. Hatfield; the fact that he was never listed by respondent in their responses to interrogatories as a Supervisory employee; and the respondent's president's testimony that he recalled Mr. Elkins as an equipment operator. Further there is evidence that complainant independently sought verification from others calling the number, on two occasions, that the position was in fact still open. The complainant has proven race and national origin discrimination by respondent in his application for Section Supervisor.

The Commission has produced credible evidence that complainant would have been retained in employment by respondent, Alma Ridge, Inc. from the date of his application May 28, 1992 through November 1993, at which time the mine was sold to R.J. Mining Company. As there is no credible evidence that his employment would be retained after that date by the new ownership, and because there is no ownership connection between that entity and any of the

named respondents currently before the West Virginia Human Rights Commission, it is found that back pay damages are limited to that period during which Alma Ridge continued operation through November 1993. Those back pay calculations appended to the Commission's Memorandum of Law are adopted, and the total back pay due after mitigation is determined to be \$37,630.03, plus interest calculated through September 1998 of \$26,278.56. Complainant has also proven incidental damages in the amount greater than the maximum allowable award for such damages at \$3,277.45.

Pursuant to previous discussions on the record and earlier orders, the parties are directed to begin discovery in connection with the vicarious liability issues as to the remaining respondents named in the above styled action.

**C.**

**CONCLUSIONS OF LAW**

1. The complainant, Leon Heyliger, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the West Virginia Human Rights Act, W. Va. Code §5-11-10.
2. The respondent, Alma Ridge, Inc., was an employer as defined by W. Va. Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act.
3. The complaint in this matter was properly and timely filed in accordance with W. Va. Code §5-11-10.
4. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this section pursuant to W. Va. Code §5-11-9 et seq.
5. The complainant has established a prima facie case of race and national origin

discrimination, in that he applied for a position of mining Section Supervisor, was qualified for the position, and was told the position was filled, when in fact it had not been filled. The respondent has articulated a legitimate non discriminatory motive for the respondent's action, that the position had already been filled; which the complainant, by a preponderance of the evidence has proven to be false.

6. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to backpay in the amount of \$37,630.03, plus statutory interest , (calculated at \$26,278.56 through September 1998).

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of \$3,277.45 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

8. As a result of the unlawful discriminatory action of the respondent, the Commission is entitled to an award of costs in the aggregate amount of \$1,027.35.

**D.**

**RELIEF AND ORDER**

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The respondents named hereinabove shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of receipt of the undersigned's order, the respondent shall pay backpay in the amount of \$37,630.03, plus statutory interest of \$26,278.56 calculated through

September 1998

3. Within 31 days of receipt of the undersigned's order, the respondent shall pay the Commission reasonable costs in the aggregate amount of \$1,027.35.

4. Within 31 days of the receipt of this decision, the respondent shall pay the complainant incidental damages in the amount of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination, plus statutory interest of ten percent.

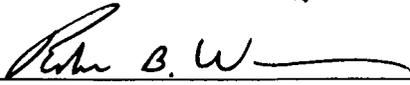
5. In the event of failure of the respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human rights Commission, Norman Lindell, Deputy Director, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

6. Pursuant to prior discussions and orders, the remaining respondents other than Alma Ridge, Inc. are directed to cooperate in further discovery relative to the issues of vicarious liability by the remaining named respondents for the liability found herein.

It is so **ORDERED**.

Entered this 21<sup>st</sup> day of August, 1998.

**WV HUMAN RIGHTS COMMISSION**

BY:   
**ROBERT B. WILSON**  
**ADMINISTRATIVE LAW JUDGE**

## CERTIFICATE OF SERVICE

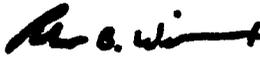
I, Robert B. Wilson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing FINAL DECISION by

depositing a true copy thereof in the U.S. Mail, postage prepaid, this 24th day of August 1998, to the following:

Leon Heyliger  
935 Chappell Rd.  
Charleston, WV 25304

Alma Ridge, Inc. et al.  
c/o J. Randolph Query  
Spradling & Query  
Suite 220  
209 Hale St.  
PO Box 3770  
Charleston, WV 25337

Paul R. Sheridan  
Sr. Asst. Attorney General  
Civil Rights Div.  
PO Box 1789  
Charleston, WV 25326-1789

  
\_\_\_\_\_  
ROBERT B. WILSON  
ADMINISTRATIVE LAW JUDGE