

**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**215 PROFESSIONAL BUILDING  
1036 QUARRIER STREET  
CHARLESTON, WEST VIRGINIA 25301**

TELEPHONE: 304-348-2616

January 9, 1986

ARCH A. MOORE, JR.  
Governor

Robert Steptoe, Jr.  
Steptoe & Johnson  
P.O. Box 2190  
Clarksburg, WV 26302

Richard L. Hinerman  
1000 Sixth Street  
Moundsville, WV 26041

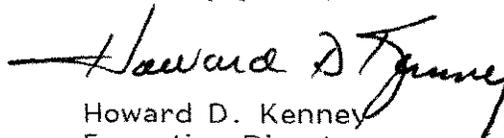
RE: EA-290-85, Hinerman v Olin Corporation

Dear Mr. Steptoe & Mr. Hinerman:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Richard L. Hinerman v Olin Corporation, EA-290-85.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,



Howard D. Kenney  
Executive Director

HDK/kpv  
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

RECEIVED

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DEC 17 1985

W.V. HUMAN RIGHTS COMM.

RICHARD L. HINERMAN,

Complainant,

vs.

Docket No.: EA-290-85

OLIN CORPORATION,

Respondent.

**ORDER**

On the 11th day of December, 1985, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner James Gerl. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own.

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order.

By this Order, a copy of which shall be sent by Certified Mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 19 day of Dec, 1985.

Respectfully Submitted,



CHAIR/VICE-CHAIR  
West Virginia Human  
Rights Commission

STATE OF WEST VIRGINIA  
HUMAN RIGHTS COMMISSION

RECEIVED

NOV 13 1985

W.V. HUMAN RIGHTS COMM.

RICHARD L. HINERMAN,  
Complainant,

VS.

DOCKET NO. EA-290-85

OLIN CORPORATION,  
Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing was convened for this matter on September 10-11, 1985, in Moundsville, West Virginia. The complaint was filed on December 27, 1984. Notice of hearing was served on May 6, 1985. A Status Conference was held on May 30, 1985. At the hearing, respondent's Motion for Directed Finding at the close of complainant's case was granted. Subsequent to the hearing, respondent submitted a proposed decision which included proposed findings of fact. Complainant was invited to file a Motion to Reconsider, but he has not done so.

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 as 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 the findings herein, it is not credited.

#### CONTENTIONS OF THE PARTIES

Complainant contends that respondent discriminated against him on the basis of his age by terminating his employment as a shift production supervisor in October, 1984. Complainant further contends that he should have been offered a lesser position as were employees Zappitelli and Grandbouche, following the indefinite shut down of the plant on October 15th because he was qualified to perform such work. Respondent maintains that those individuals who were retained to work as security guards were extremely close in age to the complainant and were better qualified than complainant to perform in a dual capacity subsequent to the plant shut down.

#### FINDINGS OF FACT

Based upon the parties stipulations of uncontested fact as set forth on the record at the hearing, the Hearing Examiner has made the following findings of fact:

1. Complainant was born on November 20, 1930, and was 54 years old at the time of hearing herein.

2. Complainant was employed by respondent from October 26, 1981, until October 31, 1984.

Based upon a preponderance of the evidence, the Hearing Examiner has made the following findings of fact:

3. At the time of his termination by respondent, complainant was 53 years of age. Complainant was hired by Allied Chemical Corporation in 1953 as an "operator" at Allied's Moundsville, West Virginia, facility. In 1956, complainant was promoted out of the union ranks to the position of shift foreman, a salaried position. As a shift foreman, he directly supervised approximately 15 employees but was not directly or immediately responsible for the operation of any of the plant's various chemical production units. While serving as a shift foreman, complainant's immediate supervisor held the title of "area supervisor".

4. In 1965, complainant was promoted from shift foreman to unit supervisor, a job he performed for Allied until 1981. As a unit supervisor, complainant was assigned almost exclusively to the mixed toluene diamines unit (TDI Unit) located in Building 52. As a unit supervisor, he continued to supervise approximately 15 employees and, just as he did when he previously served as a shift foreman, he reported directly to the area supervisor. From approximately 1977 until 1981, the area supervisor to whom complainant directly reported was Trouts.

5. In January or February of 1981, complainant was demoted from unit supervisor to shift foreman. Complainant continued to work as a shift foreman from early 1981 until October 15, 1984.

6. Olin Corporation purchased the Allied Chemical Corporation's Moundsville, West Virginia, plant on October 26, 1981, and thereafter complainant continued to work as a shift foreman under the immediate supervision of Pettit.

7. Throughout the course of his employment at the Moundsville plant from 1953 until 1984, complainant was almost exclusively involved in the front line production of chemicals. Furthermore, he was principally involved in the production of mixed toluene diamines.

8. Complainant's work at Allied Chemical and at respondent was rated "fully competent", with only one exception in which he was rated one grade higher several years prior to respondent's purchase of the Moundsville plant.

9. In September, 1984, respondent announced a temporary shut down of the Moundsville plant for extensive maintenance and capital improvements. When the maintenance outage commenced in September, complainant, whose regular job classification was shift foreman, was assigned temporarily to work as a gate guard. As a gate guard, complainant checked trucks in and out, signed bills of lading, toured the plant periodically for security purposes, and checked fire protection equipment.

10. On the 12th of October, 1984, respondent announced that the entire plant was being shut down indefinitely for economic reasons. At the time this announcement was made, complainant was on vacation and out of town. He received the news of the shut down and his termination of employment sometime around the 19th of October.

11. Subsequent to October 15th, 1984, respondent retained various hourly and FLSA salaried exempt employees to effect the shut down in an orderly fashion and then to maintain the plant in a standby condition. Additionally, respondent continued to produce limited quantities of one chemical and shipped various other chemicals which were either inventoried, manufactured on a limited basis, or purchased from other manufacturers and later resold after a period of storage at the Moundsville facility. Added to these functions and operations was the requirement that the plant be decontaminated and protected from environmental accidents.

12. Those FLSA salaried exempt employees who were retained by respondent to accomplish the foregoing work and objectives initially (beyond November 1, 1984) included the following:

	<u>Name</u>	<u>Age</u>	<u>Job Title</u>
1.	A. D. Kimble	59	Senior Chemist
2.	J. S. Springfield	59	Production supervisor-boilerwater
3.	R. L. Supan	58	Senior Safety Supervisor
4.	J. H. McNamera	53	Accounting Manager
5.	J. A. Grandbouche	53	Maintenance Specialist II
6.	V. R. Bodner	53	Senior Accounting Supervisor

<u>Name</u>	<u>Age</u>	<u>Job Title</u>
7. E. P. Zappitelli	52	Training Supervisor
8. R. L. Higgins	51	Environmental Control Superintendent
9. C. W. Tribett	50	Quality Assurance Manager
10. K. L. Bissett	46	Accountant I
11. O. F. Holley	45	Maintenance Superintendent - Mechanical
12. R. L. Warren	43	Senior Data Processing Supervisor
13. G. R. Offenbergl	41	Construction Supervisor
14. A. L. Matson, Jr.	41	Technical Manager
15. R. A. Campbell	40	Plant Manager
16. S. D. Turner	37	Purchasing Manager
17. R. A. Brendler	36	Senior Production Manager
18. S. E. Parsons	36	Engineering Manager
19. F. H. Trevino	32	Occupational Health
20. J. T. Trouts	31	Production Manager - Acting Plant Manager
21. S. Chatterjee	30	Senior Production Engineer
22. W. A. Sardonato	28	Industrial Relations Supervisor
23. R. N. Runge	27	Production Superintendent

Sardonato further testified that V. L. Fabry (age 61) was maintained on long-term disability subsequent to October 15, 1984, although he was not actually utilized for any work. Finally, Sardonato testified that O. L. Pettit (age 54) was recalled on February 20, 1985.

13. While retaining the foregoing employees to maintain the plant, handle limited production, perform decontamination, etc., respondent utilized several of these persons in a dual capacity, namely to serve as security guards stationed at the entry gate to the plant.

14. Grandbouche, born on December 29, 1930, is five weeks younger than complainant. Both individuals were age 53 on the date of the layoff, October 15, 1984. Complainant does not have as much maintenance experience and knowledge as Grandbouche; Grandbouche was a career front

line maintenance foreman whose primary responsibility was to maintain plant equipment. Complainant's own primary work responsibility at respondent was production, not maintenance. Complainant has no special education in machine shop work.

15. Grandbouche was better qualified than complainant to perform the maintenance work for which Grandbouche was retained by respondent subsequent to the shut down.

16. Zappitelli, who was 52 years old at the time of the layoff, is sixteen months younger than complainant. Prior to the layoff, Zappitelli's job title was "training supervisor". On those few occasions when complainant was instructed to write job safety analyses he did so for Zappitelli. Zappitelli provided two counseling sessions for displaced employees to instruct with respect to resume writing and job interviewing. Subsequent to the layoff, the hourly employees who were retained ended up doing jobs different from what they did prior to the layoff and, therefore, required training. Complainant's involvement in safety training for employees was limited; he had taken only several short safety training courses administered by respondent subsequent to 1981; and his involvement in safety training for employees consisted of conducting the monthly one-hour safety meetings where he read from materials prepared by the safety office or some other division of respondent.

17. Zappitelli was better qualified than complainant to perform the training job for which Zappitelli was retained subsequent to the shut down.

18. As of October 31, 1981, respondent had 62 exempt employees. Of these 62 employees, 47 (76%) are age 40 or over and 15 (24%) are under age 40. This listing of employees was made as of five days after respondent purchased the Allied Chemical plant and hired the salaried exempt employees.

19. As of October 31, 1982, respondent had 78 active employees. Of the total of 78 employees, 55 (71%) are age 40 or over and 23 employees (29%) are under age 40.

20. As of October 31, 1983, respondent had 69 active FLSA exempt employees on that particular date. Of this total of 69 active FLSA exempt employees, 48 employees (70%) were age 40 or over and 21 employees (30%) were under age 40 as of October 31, 1983.

21. As of September 1, 1984, respondent had a total of 68 FLSA exempt employees. Of these 68 employees, 52 persons (75%) were age 40 or over and 16 persons (25%) were under age 40.

22. Respondent retained the following employees on and subsequent to November 1, 1984:

	<u>Name</u>	<u>Age</u>	<u>Job Title</u>
1.	A. D. Kimble	59	Senior Chemist
2.	J. S. Springfield	59	Production supervisor-boilerwater

	<u>Name</u>	<u>Age</u>	<u>Job Title</u>
3.	R. L. Supan	58	Senior Safety Supervisor
4.	J. H. McNamara	53	Accounting Manager
5.	J. A. Grandbouche	53	Maintenance Specialist II
6.	V. R. Bodner	53	Senior Accounting Supervisor
7.	E. P. Zappitelli	52	Training Supervisor
8.	R. L. Higgins	51	Environmental Control Superintendent
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14.	A. L. Matson, Jr.	41	Technical Manager
15.	R. A. Campbell	40	Plant Manager
16.	S. D. Turner	37	Purchasing Manager
17.	R. A. Brendler	36	Senior Production Engineer
18.	S. E. Parsons	36	Engineering Manager
19.	F. H. Trevino	32	Occupational Health Nurse II
20.	J. T. Trouts	31	Production Manager and Assistant Plant Manager
21.	S. Chatterjee	30	Senior Production Engineer
22.	W. A. Sardonato	28	Industrial Relations Supervisor
23.	R. N. Runge	27	Production Superintendent

23. Of the 23 employees retained for some meaningful period of time subsequent to November 1st, 15 individuals were in the protected class (age 40 through 65) and 8 employees were in an unprotected class. Stated in terms of percentages, of the 23 retained employees, 65% were in the protected class and 35% were in an unprotected class.

24. Respondent did not engage in a pattern or practice of age discrimination.

### CONCLUSIONS OF LAW

1. Richard L. Hinerman 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, Section 5-11-10.

2. Olin Corporation is an employer as defined in West Virginia Code, Section 5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. Complainant has not made out a prima facie case that respondent discriminated against him on the basis of age by not retaining him subsequent to the plant shut down.

4. Respondent did not discriminate against complainant on the basis of age by not retaining him subsequent to the plant shut down. West Virginia Code, Section 5-11-9(a).

### 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).

A complainant may establish a prima facie case of discrimination by setting forth facts which, if otherwise unexplained would raise an

inference of discrimination. Furnco Construction Co. v. Waters 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1978). In the instant case, complainant has established no such facts.

Complainant claims that respondent discriminated on the basis of his age by retaining Zappitelli and Grandbouche after the plant shut down. It is significant, however, that Grandbouche and Zappitelli are both approximately the same age as complainant. Grandbouche is approximately five weeks younger than complainant and both Grandbouche and complainant were 53 years old on the date of layoff. Zappitelli is sixteen months younger than complainant and he was 52 years old at the time of the layoff. Moreover, complainant was not as qualified as Grandbouche to do the maintenance job subsequent to the shut down and complainant was not as qualified as Zappitelli to do the training and safety job after the shut down. Complainant's experience at respondent involved production supervision, and he had no maintenance experience and only minimal safety experience. While Grandbouche and Zappitelli were retained by respondent in part to serve as guards, their jobs also included the maintenance and training components, which complainant was not qualified to perform. Thus, it can not be concluded that respondent's retention of Zappitelli and Grandbouche raise an inference of age discrimination.

Complainant has also attempted to establish a prima facie case of age discrimination by introducing evidence which he claims proves a pattern in practice of age discrimination by respondent. With regard to the statistical evidence offered in this case, it is important to note the smallness of the statistical sample. When dealing with such small numbers, it is very difficult to draw meaningful and statistically significant conclusions. Accordingly, one must be on guard for deceptive conclusions made from small numbers. The record evidence in this case reveals that as of September 1, 1984, respondent had a total of 68 FLSA exempt employees. Of such employees, approximately 75% (52) were age 40 or over and approximately 25% (16) were under age 40. Subsequent to the shut down, respondent retained 23 of such employees. Respondent retained 8 of the 16 employees who were under age 40 (35%) and 15 of the 52 employees who were age 40 or more (65%). Because respondent's workforce was approximately 75% age 40 or above prior to the shut down, it would be expected that approximately 75% of the employees retained would be 40 years of age or greater. In fact 65% of the employees retained were age 40 or more. The discrepancy, however, is not so large as to raise an inference of discrimination; if respondent were using age as a factor in its employment decisions, the percentage of employees aged 40 or more would be expected to drop well below 65%.

Complainant testified at the hearing that he believed that respondent's decision to lay him off was unfair and that respondent had a moral duty to retain him subsequent to the shut down because of his physical condition, the number of years he served at the Moundsville plant, and because of his poor chances to obtain employment subsequent to his layoff. It is not within the province of the Commission or of the Hearing Examiner to make rulings as to the unfairness of employment decisions. Accordingly, complainant's contentions with regard to the unfairness of his treatment by respondent are not addressed herein.

It is concluded that the evidence produced by complainant at the hearing, even when viewed in light most favorable to complainant, does not raise an inference of discrimination. Complainant has not established a prima facie case of discrimination on the basis of age.

#### DETERMINATION

The complaint in this matter is not supported by the preponderance of the evidence.

#### PROPOSED ORDER

In view of the foregoing, the Hearing Examiner recommends

that the Commission dismiss the complaint in this matter with prejudice.

  
\_\_\_\_\_  
JAMES GERL  
HEARING EXAMINER

ENTERED: November 12, 1985

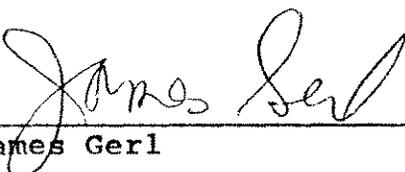
CERTIFICATE OF SERVICE

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:

John Richardson  
Human Rights Commission  
1036 Quarrier Street  
Charleston, West Virginia 25301

Robert Steptoe, Jr.  
STEPTOE & JOHNSON  
P.O. Box 2190  
Clarksburg, West Virginia 26302

on this 12<sup>th</sup> day of November, 1985.

  
\_\_\_\_\_  
James Gerl