

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

Cornelia Johnson
c/o Ola Boffman
203 Side Park Street
Bluefield, WV 24701

Alfred A. Cipoletti
1504 North Eisenhower Drive
Beckley, WV 25801

RE: Johnson v Burger King, ER-389-85

Dear Ms. Johnson and Mr. Cipoletti:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Cornelia Ann Johnson v Burger King, ER-389-85.

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.

CORNELIA ANN JOHNSON,

Complainant,

vs.

Docket No.: ER-389-85

BURGER KING,

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, with the exceptions set forth below.

The Commission hereby amends the Findings of Fact and Conclusions of Law by deleting paragraph 2 of the Proposed Order (p. 12) and substituting the following paragraph:

2. Although the respondent should pay complainant a sum equal to the wages she would have received if not terminated by respondent plus pre-judgment interest on same, that amount must be reduced by any income from other employment received by the complainant during the same period. Since calculation of the back wages of complainant pursuant to these findings of fact ($\$3.45/\text{hour} \times 25 \text{ hours per week} \times 34 \text{ weeks}$ between the termination and the date of this hearing) yields a lower figure than income received during the same period ($\$2,229.56$ from

Hardees plus approximately \$1,038.38 from Grant's Supermarket), there shall be no award for back pay.

The Commission further amends these Findings of Fact and Conclusions of Law by deleting from paragraph 3 of the Proposed Order (p. 12) the amount of \$1,000.00 and substituting therefor amount of \$5,000.00 for incidental damages.

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, except insofar as they are amended by 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 19th day of Dec, 1985.

Respectfully Submitted,



CHAIR/VICE-CHAIR
West Virginia Human
Rights Commission

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

RECEIVED

OCT 28 1985

W.V. HUMAN RIGHTS COMM.

CORNELIA ANN JOHNSON,

Complainant,

vs.

DOCKET NO. ER-389-85

BURGER KING,

Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing was convened for this matter on August 27, 1985, in Bluefield, West Virginia. The complaint was filed on February 14, 1985. The notice of hearing was served on May 10, 1985. A Status Conference was held on June 17, 1985. Subsequent to the hearing, both parties submitted written briefs and proposed findings of fact.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or 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 her on the basis of her race by discharging her and by failing to promote her. Respondent maintains that complainant was discharged for violating a policy requiring employees to call in at least 2 hours before the beginning of her shift and that complainant was not promotable.

FINDINGS OF FACT

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

1. Complainant is black.
2. Complainant began working for respondent in November, 1982, and she was terminated by respondent on December 28, 1984.
3. Complainant was a very productive employee. Her work at respondent was never criticized and she received no disciplinary write ups.
4. On Thursday, December 20, 1984, Complainant was sick and Complainant had her daughter call in to work because Complainant

was vomiting.

5. On Friday, December 21, 1984, Complainant was still ill with a kidney infection and back trouble. Complainant had her son call in to work at approximately 3:30 p.m. Complainant was scheduled to work at 5:00 p.m. Complainant's son was given a message that complainant would need a doctor's excuse.

6. On December 28, 1984, Dr. Congoria released complainant to return to work, and complainant went immediately to respondent but was told she had been fired.

7. Short, a white employee of respondent, was very often either absent or late to work without calling in to work. Short received three counsellings and three written warnings for failing to call in when late or absent. Short was eventually fired when he arrived late to work *in an intoxicated condition.*

8. Respondent's black employees received the least desirable job assignments, such as cleaning the bathrooms, more frequently than respondent's white employees.

9. Derry, an Assistant Manager for respondent, consistently talked down to black employees.

10. Complainant was very qualified for a promotion to Assistant Manager. Complainant worked for respondent since the restaurant opened. Complainant had voluntarily taken college business

courses in management and computers. She had had prior work experience as a waitress, cashier, and a cook. Complainant was a productive employee and she often volunteered to cover when employees of respondent were late. Complainant offered a suggestion that respondent create a head cashier position, and respondent accepted the suggestion and created the position.

11. Complainant made her desire to be promoted to the Assistant Manager position known to Cipolletti, owner of respondent. Cipolletti asked complainant whether she could be impartial to the other black employees.

12. Complainant was never promoted to the position of Assistant Manager at respondent.

13. At the time of her discharge by respondent, complainant worked approximately 25 hours per week.

14. At the time of her discharge by respondent, complainant was earning \$3.45 per hour.

15. From the date of her discharge by respondent to the date of the hearing herein, complainant has earned \$2,229.56 at Hardees' restaurant.

16. For approximately a three month period, subsequent to her discharge by respondent, complainant worked 20 - 30 hours per week at Grant's Supermarket. Complainant was paid \$3.35 per hour by

Grant's Supermarket.

17. As a result of the discrimination by respondent against complainant, complainant suffered humiliation, embarrassment, loss of dignity and personhood and emotional distress. Complainant felt devastated by her discharge. She cried and worried about her children.

CONCLUSIONS OF LAW

1. Cornelia Johnson 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. Burger King is an employer as defined by West Virginia Code, Section 5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. Complainant has established a prima facie case of discriminatory discharge.

4. Complainant has shown that the reason articulated by respondent for her discharge is pretextual.

5. Respondent discriminated against complainant on the basis of her race in violation of West Virginia Code, Section 5-11-9(a) by discharging her.

6. Complainant has established a prima facie case of discriminatory failure to promote.

7. Complainant has demonstrated that the reason articulated by respondent for failing to promote her is pretextual.

8. Respondent discriminated against complainant on the basis of her race in violation of West Virginia Code, Section 5-11-9(a) by failing to promote her.

Discussion of Conclusions

In fair employment, disparate treatment cases, the initial burden is upon the complainant to establish a prima facie case of discrimination. Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission 309 S.E.2d 342, 352-353 (W. Va. 1983); McDonnell-Douglas Corporation v. Green 411 U.S. 792 (1973). If the complainant makes out a prima facie case, respondent is required to offer or articulate a legitimate nondiscriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra. If respondent articulates such a reason, complainant must show that such reason is pretextual. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra.

In the instant case, complainant has made out a prima facie case of discriminatory discharge. Complainant has shown that she is black, and that she performed her duties in a competent and satisfactory

manner. Complainant received no criticisms of her work from respondent and she received no disciplinary write ups while employed by respondent. Complainant also demonstrated that she was terminated by respondent on December 28, 1984. Such facts are sufficient to establish a prima facie case of discrimination because if otherwise unexplained they raise an inference of discrimination. Furnco Construction Company v. Waters 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981).

Respondent has articulated a legitimate nondiscriminatory reason for complainant's discharge. Respondent proved that it had a policy which was posted at the restaurant that when employees were going to be late or absent from work they were required to call into the restaurant at least 2 hours before the beginning of their shift. Respondent articulated that complainant did not do so, and, therefore, complainant was fired. In its post hearing brief, respondent contends that an employer has a right to make management decisions. Although this proposition is correct in general, when such decisions are discriminatory, they are unlawful.

Complainant has shown that the reason articulated by respondent for her discharge is pretextual. The testimony of respondent's witnesses was not as credible as that of complainant and her witnesses because of their demeanor and because of various deficiencies in the testimony of respondent's witnesses. For example,

with regard to the key issue of when complainant called in to report that she would be absent on December 21, complainant testified that because she was ill she had her son call into work at 3:30 p.m. It was the testimony of respondent's witness Derry that complainant did not call in until approximately 4:10 p.m. on that day. Derry's testimony, however, is hearsay with regard to this point. Derry did not take the call from complainant or her child. Accordingly, Derry's testimony is entitled to less weight than that of complainant with regard to the time that complainant called into work. The credibility of Derry's testimony on this point is also impaired because of her evasive demeanor and because she testified that she did not issue a disciplinary warning to complainant for calling in late on December 21. Respondent, in its post hearing brief, points out that there appears to be a discrepancy between the testimony of complainant and the testimony of complainant's daughter with regard to whether complainant was so sick that she could not come downstairs to the telephone to call herself. It appeared at the hearing, however, that complainant's daughter was confused with regard to the date that she was testifying about; she seemed to be describing a call she made on December 24, and not December 21. Any minor discrepancy in this confused testimony of complainant's daughter is not entitled to any great credibility determination.

In respondent's post hearing brief, respondent also brings up the fact that complainant and some of her witnesses testified against respondent in some type of prior legal proceeding. Respondent's contention that prior testimony somehow indicates a bias against respondent is expressly rejected.

Complainant has also demonstrated pretext by showing that respondent applied its policy with regard to calling in when late or absent differently depending upon the race of the employee who violated the policy. The record evidence indicates that Short, a white employee of respondent, received three counsellings and three written warnings for failing to call in when late or absent. As respondent argues, Short was eventually terminated, however it is significant that Short was not terminated for his repeated violations of respondent's policy with regard to calling in, but, rather he was discharged for arriving at work in an intoxicated condition.

Complainant also demonstrated pretext by showing that black employees of respondent were treated differently in general than white employees of respondent. Specifically, black employees received the worst job assignments, including being more frequently assigned to cleaning bathrooms. Respondent argues in its brief that even the white employees were required to clean the bathrooms.

However, it is the frequency with which blacks were assigned to clean the bathrooms, and not the exclusivity of those assignments that demonstrates the unequal treatment of black employees. Complainant also demonstrated that Derry, one of respondent's Assistant Managers, condescended to respondent's black employees.

Complainant has demonstrated a prima facie case of discriminatory failure to promote. Complainant proved that she was a very productive employee and that she often volunteered to cover when other employees were late for a shift. Complainant was employed by respondent since the restaurant opened. She took college level business courses in management and computers. She had had prior experience in many aspects of restaurant work. Complainant even offered a suggestion that a new position be created, and respondent accepted that suggestion and created the new position. Complainant made her desire to be promoted known to the owner of respondent. Complainant was never promoted by respondent to the position of Assistant Manager.

Respondent has articulated a legitimate nondiscriminatory reason for its action in not promoting complainant. Specifically, Hamilton, Manager at respondent, testified that complainant was not promotable.

Complainant has demonstrated that the reason articulated

by respondent for its failure to promote complainant is pretextual. The testimony of respondent's witness, Hamilton, is not credible. His demeanor during his testimony was evasive, and his testimony was contradictory. Hamilton testified that complainant was not promotable because of a lack of dependability. Nonetheless, Hamilton testified that he told complainant not to tell Cipolletti, owner of respondent, that he had sent complainant to talk to Cipolletti about the promotion because it looks better for an employee to exercise initiative. Thus, Hamilton, who is the Manager of the restaurant, testified on the one hand that complainant is not promotable and on the other hand that he attempted to increase her chances of being promoted. Hamilton's testimony that complainant was not promotable is not entitled to any weight.

With regard to relief, there is no evidence in the record with regard to the amount of money which complainant would have received if she had been promoted to the Assistant Manager position. There has been no showing with regard to damages for the failure to promote. Complainant has waived reinstatement because she is satisfied with her new job at Hardees.

DETERMINATION

The preponderance of the evidence in this matter sustains the complaint.

PROPOSED ORDER

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

1. That the complaint of Cornelia Johnson, Docket No. ER-389-85 be sustained.
2. That respondent pay complainant a sum equal to the wages she would have received if not terminated by respondent (\$3.45/hour x 25 hours per week x number of weeks from discharge to final resolution of this complaint) minus any income from employment complainant has received since the date of her discharge by respondent (as of the date of hearing this sum was \$2,229.56 from Hardees plus approximately \$1,080.38 from Grant's Supermarket).
3. That respondent pay to complainant the sum of \$1,000.00 for incidental damages for humiliation, embarrassment, emotional distress, and loss of personhood and dignity as a result of respondent's discriminatory treatment of complainant.
4. That respondent be ordered to cease and desist from discriminating against individuals on the basis of their race in employment decisions, particularly with regard to discharge and promotion.
5. That respondent be ordered to post the Commission's final decision in this matter in a prominent place in its restaurant.

6. That respondent be ordered to report to the Commission, within thirty days of the entry of its Order, the steps it has taken to comply with the order.

James Gerl

James Gerl
Hearing Examiner

ENTERED: October 26, 1985

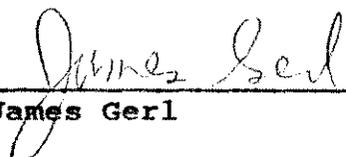
CERTIFICATE OF SERVICE

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:

Alfred A. Cipelletti
1504 N. Eisenhower Drive
Beckley, West Virginia 25801

Roxanne Rogers
Human Rights Commission
1036 Quarrier Street
Charleston, West Virginia 25301

on this 26th day of October, 1985.



James Gerl