**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**
**215 PROFESSIONAL BUILDING**
**1036 QUARRIER STREET**
**CHARLESTON, WEST VIRGINIA 25301**

ARCH A. MOORE, JR.
Governor

TELEPHONE: 304-348-2616

May 8, 1986

Theodore Jackson
628 Spring Street
Fairmont, WV 26554

Jeffrey O. McGeary, Esq.
101 First Street
Capitol Bldg.
Wheeling, WV 26003

Richard J. Klein, Esquire
1800 Washington Road
Pittsburgh, PA 15241

RE: Theodore Jackson V Consolidation Coal Company
Four States Mine #20/Docket No.: ER-302-82.

Dear Mr. Jackson, Mr. McGeary and Mr. Klein:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Theodore Jackson V Consolidation Coal Company, Four States Mine #20/Docket No.: ER-302-82.

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.

**BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION**

THEODORE JACKSON,

Complainant,

vs. Docket No. ER-301-82

CONSOLIDATION COAL COMPANY
FOUR STATES MINE #20,

Respondent.

**O R D E R**

On the 8th day of April, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Gary A. Sacco. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conlcusions 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 21 day of April, 1986.

Respectfully Submitted,

Betty Hamilton

CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

WEST VIRGINIA SUPREME COURT OF APPEALS
FOR THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

Approved H.R.S. 12/27/85

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| THEODORE JACKSON, | : | |
| Complainant, | : | |
| vs. | : | CASE NO. ER-301-82 |
| CONSOLIDATION COAL COMPANY, FOUR STATES MINE #20, | : | |
| Respondent. | : | |

RECOMMENDED DECISION

PRELIMINARY MATTERS

1. Pre-Hearing Conference was held on the above styled contested case on April 18, 1985, at the Old County Commission Courtroom, Marion County Courthouse, Marion County, Fairmont, West Virginia, pursuant to Notice issued by the West Virginia Supreme Court of Appeals for the West Virginia Human Rights Commission, dated April 2, 1985.

The following appearances were made:

Jeffrey O. McGeary, Special Assistant Attorney General, for the Human Rights Commission and Complainant;

Richard J. Klein, Esquire, for Respondent as well as A. M. Robinson, Representative of the Respondent.

Gary A. Sacco, Hearing Examiner.

A Public Hearing was held on this matter, on August 13, 1985, at 9:00 o'clock, a.m., at the Old County Commission Courtroom, Marion County Courthouse, Marion County, Fairmont, West Virginia, pursuant to Notice issued by the West Virginia Supreme Court of Appeals for the West Virginia Human Rights Commission, dated April 2, 1985.

The Complainant appeared in person, as well as by his Counsel, Jeffrey O. McGeary, Esquire, Special Assistant Attorney General. The Respondent appeared in person through one of its employees, Barry Dangerfield, as well as by its Counsel, Richard J. Klein, Esquire. The Complainant, as well as the following individuals appeared and testified on behalf of the Complainant: George Sconish, Rudolph E. Banick, James F. Fisher, James McDougal, Lowell Satterfield and Michael Renick. The following individuals appeared and testified on behalf of the Respondent: Anthony A. Polis, Earl W. Kennedy, Robert M.Laughlin, William D. Steel, Scott Liveling and Barry Dangerfield.

On March 29, 1985, Respondent filed with this Hearing Examiner and the West Virginia Human Rights Commission, its "ANSWER" to the Complaint heretofore filed.

On December 2, 1985, the Respondent filed (Post-Hearing Brief) with this Hearing Examiner.

2. This Hearing Examiner has reviewed and considered all the above set-out documentation supplied by the parties in reaching a decision in this matter.

3. Respondent's Motion to Dismiss the Complaint of Theodore Jackson:

The Respondent did make a Motion to Dismiss at the close of the Complainant's case and did renew said Motion within its Post-Hearing Brief.

Theodore Jackson, in his Complaint, deems that he was discriminated against because of his race, Black, and that his race was the reason for which he was terminated by the Respondent. He alleges that he was the subject of harassment because of his race and that caucasian employees were not subject to this harassment.

In his Case in Chief, the Complainant did not offer any credible evidence that his termination has been systematically planned for more than one (1) year prior to the action, or, as a matter of fact, for any time period prior to the termination.

In regard to the harassment, the Complainant alleges that it took various forms. The first, (Tr.pp.93-94) was that Mr. Dangerfield, the Superintendent, changed his shift; therefore his ability to operate and teach in his safety school suffered. The record indicates that, during his employment at Mine #20, the Complainant, on occasion, worked other shifts and there is no testimony concerning a difficulty with teaching and operating the school on those occasions, and the record also indicates that the initial assignment to the midnight shift was made by Mr. Dangerfield in consideration of the Complainant's request.

Theodore Jackson complains that he was once compelled to work on a holiday, Memorial Day. (Tr.p.114)

The Complainant complains that an element of harassment was that he was called "picture-taker". (Tr.pp.112-114). This appellation resulted from his taking pictures on the Company's behalf of some union activity that led to certain Union personnel

losing their jobs. The term was ascribed to him by Union men and Mr. Jackson intimates that some salaried persons (Tr.p.115) may have used it, but there is no specificity in this allegation.

According to the Complaint, he had to accompany a Union man around the mine on an inspection. (Tr.p.116) The Complainant alleges that also he was put on the afternoon shift wherein he would have a conflict "sooner or later" with that Union man. However, the Complainant never testified that he did have a conflict with the designated Union man or that there was any difficulty with that gentleman, as a result of their inspection. He also later explains that it was procedure that a monthly inspection would be carried out with a representative of the Union and Salaried personnel making that inspection.

Whether the above are acts of harassment, not to mention racial harassment, is questionable. This Hearing Examiner thinks not.

This Hearing Examiner must agree with the Respondent that these allegations are never linked to racial animosity. There are no racial epithets; the term "picture-taker" is certainly not one. The Complainant was paid for his over-time and other employees work over-time. The escorting of a Union man was something done by various Salaried people. The Complainant further alleges that caucasian employees were not subject to the harassment he encountered. It is almost impossible to respond to this allegation. This Hearing Examiner finds no "harassment" against the Complainant, but if being required to work on a holiday on one occasion and having your shift changed,

and escorting Union men on a mine inspection, is harassment, then the Complainant is incorrect; Caucasians were subjected to it and did perform those tasks.

In view of the above, no witness, other than the Complainant himself, offered any testimony concerning any incidents of harassment, racial or otherwise, directed toward to the Complainant, and the Complainant's testimony in regard to the same does not substantiate that he was harassed, racially or otherwise.

Under the three step procedure that is set out in McDonnell Douglas Corp. v. Green, (1973) 411 US792, 93 S.Ct.1817, the Complainant must create an inference of discrimination by establishing a prima facie case. If he does so the Respondent must articulate some legitimate non-discriminatory reason for its actions. The Complainant may then attempt to show that these reasons are pretextual or may present other evidence that discriminatory intent was more likely the cause of the Respondent's actions.

The first element in the above framework is the establishment of a prima facie case. In the instant situation, the Complainant establishes that he is a member of a protected class, Black; that the Respondent is a covered individual, an Employer; the Complainant, however, did not show that he was the subject of an unlawful discriminatory act, termination due to race.

Even if a position most favorable to the Complainant is taken and the Ruling was made that the prima facie case had

been made, Complainant did not introduce any evidence that could be construed to show that that Respondent's articulated, legitimate, non-discriminatory, reasons for the Complainant's termination were pretextual. The Respondent proffered, through the testimony of Barry Dangerfield, that he discharged Theodore Jackson because Mr. Dangerfield believed that Mr. Jackson had violated company instructions by removing the sampling device from the shearer when the shearer was operating. (Tr. pp.219,221,230,232,234,235,249,250); that Jackson falsely told Dangerfield that he had not left the shearer; that Jackson had been caught sleeping during working hours just one month before the sampling incident by Mr. Dangerfield; that Jackson was generally a poor performer (Tr.pp.303,305,310-312).

Jackson's absence from the shearer with the sampling device was confirmed by another employee, Mr. Laughlin. (Tr.pp.147,254,257,305,306); Jackson's poor performance as a dust foreman was confirmed by his immediate supervisor, Mr. Liveling, (Tr.p.279) and his former supervisor, Mr. Poulos, stated that Jackson had performed poorly in his previous position (Tr.pp.182-187).

There was no creditable testimony elicited which would contradict the above.

At this point, it would seem that the Respondent's Motion to Dismiss must be granted; however, one other important element must be discussed.

The Complainant, during his Case in Chief, attempted to call Barry Dangerfield, to which the Respondent objected.

Basis for said objection was that Barry Dangerfield was not listed in the Complainant's response to discovery as a witness and therefore Respondent could not prepare for the situation, was surprised, etc. This Hearing Examiner ruled that the Complainant was not entitled to call Mr. Dangerfield, based on the following reasons:

1. The Complainant had, in fact, failed to correctly respond to discovery.

2. That the Respondent would call Mr. Dangerfield as a witness and the Complainant, at that time, would be given the opportunity to cross-examine Mr. Dangerfield. (pp.67/68, Complaint)

Given the above, this Hearing Examiner, felt it only fair that the testimony of Barry Dangerfield be considered. In the recross-examination of Mr. Barry Dangerfield, it became apparent that another dust sampler, Mr. Liveling, the Complainant's immediate supervisor, did personally leave the face while coal was being mined as had the Complainant. This was one of the reasons given for the Complainant's termination by the Respondent, but Mr. Liveling, a white, was not fired. (Tr.p.338) This information introduced an inference of disparate treatment to the case and, as related in U.S.Postal Service Board of Governers v. Aikens, 103 S.Ct.1478 (1983), the prima facie case method is not to be rigid, mechanized or ritualistic, but is merely a sensible orderly way to evaluate the evidence. Therefore, the question of disparate treatment had to be dealt with regardless

of the situation in regard to his making of a prima facie case.

Re-direct examination of Barry Dangerfield adequately shows that the Complainant and Mr. Liveling were not similarly situated, in that Mr. Liveling did, as directed, not remove the pump from the face, while the Complainant did so, contrary to direction; Liveling had not been previously discovered sleeping on the job; and he had a better work record than the Complainant.

Again, in consideration of the Complainant's entire case, as well as the facts and circumstances surrounding Mr. Liveling, there is nothing in the record to show that the Respondent acted with discriminatory purpose and that is the ultimate question, whether the Respondent intentionally discriminated against the Complainant. Nix v. WLCY Radio/Rayhall Communications, 738 F.2d 1181 (1984), Moore v. Devine, 767 F2d 1541 (1985).

Finally, when one looks at the entire record of this matter, there is some confusion surrounding the special dust sampling procedures, (an element of the Complainant's termination). Again, the Courts have held that the issue is not whether an employer made a correct decision in discharging an employee but whether an employer intended to discriminate against the employee. McDaniel v. Temple Independent School District, 770 F2d 1340. And further, the fact that a Court may think that an employer misjudged qualifications of an employee, does not itself expose him to ...liability. Texas Dept. of Community Affairs v. Burdine,* p.1089 (1981). As cited above, case law indicates that the important consideration in these matter is the intentional discrimination against the employee

*101 S.Ct. 1089

and this Hearing Examiner finds that there is no evidence elicited on behalf of the Complainant, including the testimony of Barry Dangerfield, that enables him to create the inference of discrimination and establish a prima facie case. Therefore, this Hearing Examiner recommends to the Human Rights Commission that the Motion to Dismiss, made by the Respondent, be granted and that this matter be dismissed.

DATED this 23rd day of December, 1985.

Gary A. Sacco, Hearing Examiner