



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**WV HUMAN RIGHTS COMMISSION**

**1321 Plaza East**

**Room 104/106**

**Charleston, WV 25301-1400**

**TELEPHONE 304-348-2616**

**GASTON CAPERTON**  
GOVERNOR

**Quewanncoi C. Stephens**  
Executive Director

April 24, 1990

Nancy Jenkins  
210 Alethia St.  
Charleston, WV 25302

Charleston Area Medical  
Center/Kanawha Valley  
Division  
800 Pennsylvania Ave.  
Charleston, WV 25302

Fred Holroyd, Esq.  
209 W. Washington St.  
Charleston, WV 25302

Mike Kelly  
Deputy Attorney General  
812 Quarrier St.  
L & S Bldg. - 5th Floor  
Charleston, WV 25301

Re: Jenkins v. CAMC/Kanawha Valley Division  
EA-61-88

Dear Parties:

Herewith, please find the final order of the WV Human Rights Commission in the above-styled and numbered case. Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective July 1, 1989, any party adversely affected by this final order may file a petition for review with the WV Supreme Court of Appeals within 30 days of receipt of this final order.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "Quewanncoi C. Stephens".

Quewanncoi C. Stephens  
Executive Director

Enclosures  
CERTIFIED MAIL-RETURN RECEIPT REQUESTED

### NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal you must file a petition for appeal with the clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a non-resident of this state, the non-resident may be required to file a bond with the clerk of the supreme court.

In some cases the appeal may be filed in the Circuit Court of Kanawha County, but only in: (1) cases in which the commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code Section 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

NANCY JENKINS,

Complainant,

v.

DOCKET NO. EA-61-88

CHARLESTON AREA MEDICAL CENTER/  
KANAWHA VALLEY DIVISION,

Respondent.

FINAL ORDER

On 14 March 1990 the West Virginia Human Rights Commission reviewed the recommended findings of fact and conclusions of law filed in the above-styled matter by hearing examiner Theodore R. Dues, Jr. After consideration of the aforementioned, and all exceptions filed in response thereto, the Commission decided to, and does hereby, adopt said recommended findings of fact and conclusions of law as its own, with no modifications.

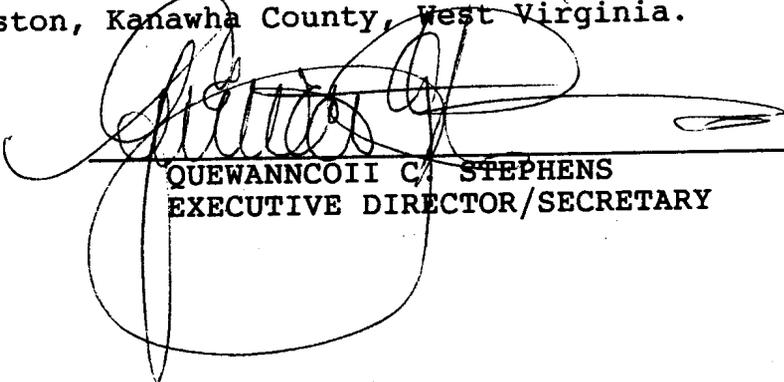
Accordingly, it is hereby ADJUDGED, ORDERED and DECREED that the complaint filed in this matter by Nancy Jenkins against Charleston Area Medical Center/Kanawha Valley Division be, and the same is hereby, dismissed with prejudice. The examiner's recommended findings of fact and conclusions of law are to be attached hereto and made a part of this Final Order.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of the State of West Virginia, the parties are hereby notified that they have ten (10) days to request that the West Virginia Human Rights Commission reconsider this Final Order or they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 30<sup>th</sup> day of March, 1990, in Charleston, Kanawha County, West Virginia.

  
\_\_\_\_\_  
QUEWANNCOII C. STEPHENS  
EXECUTIVE DIRECTOR/SECRETARY

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

NANCY JENKINS,

Complainant,

v.

DOCKET NUMBER(S): EA-61-88

CHARLESTON AREA MEDICAL CENTER,  
(CAMC), KANAWHA VALLEY DIVISION,

Respondent.

HEARING EXAMINER'S RECOMMENDED DECISION

A public hearing, in the above-captioned matter, was convened on July 14, 1988, in Kanawha County, at the office of the West Virginia Human Rights Commission, 1036 Quarrier St., Charleston, West Virginia. A second day of hearing convened on the 5th day of August, 1988, at the Public Service Commission, 201 Brooks St., Charleston, West Virginia. The Hearing Panel consisted of Gail Ferguson, Hearing Examiner, and Russell Van Cleve, Hearing Commissioner.

The complainant, Nancy Jenkins, appeared in person and by counsel, Sharon Mullens, Deputy Attorney General. The respondent, Charleston Area Medical Center (CAMC), appeared by its representative Patricia Ellison and by counsel, Fred Holroyd.

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 hearing examiner 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 not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

#### ISSUE

1. Whether the complainant, Nancy Jenkins, was laid-off and subsequently terminated from employment with respondent, CAMC, Kanawha Valley Division, because of her age, in violation of the West Virginia Human Rights Act.
2. If so, to what relief is the complainant entitled?

#### FINDINGS OF FACT

Based upon stipulations by the parties, findings one through four are uncontested.

1. The complainant, Nancy Jenkins, was 50 years old when she was laid-off by respondent on April 10, 1987.
2. The complainant was not laid-off for poor job performance.

3. In July, 1986, the complainant was transferred from billing clerk to relief PBX operator.

4. In October, 1986, the complainant was transferred to the position of full-time PBX operator from relief PBX operator.

5. The complainant, Nancy Jenkins, was hired as billing clerk in the Patient Accounts Department of Kanawha Valley Memorial Hospital in September of 1970.

6. As a billing clerk for Kanawha Valley, the complainant handled medicare forms and billing for handicapped children and vocational rehabilitation patients. Additionally, the complainant answered patient and third party inquiries about bills and relieved on the switchboard, in the admissions office and in the mailroom.

7. The complainant was among the most senior and the highest paid employees in her position.

8. The complainant was a private individual who kept to herself, refraining from socializing in the office.

9. Prior to the complainant's transfer in July, 1986 to the position of full-time relief operator by her supervisor, Trudy Shaffer, complainant and her co-workers, billing clerks Cheryl Williams, age 40 and Bonnie Balser, age 51, rotated the tasks of relieving on the switchboard and doing the mail. Ms. Williams and Ms. Balser remained in their billing clerk positions after the complainant's transfer until the Patient Accounts Department was centralized at respondent's General Division.

10. In September 1986, Kanawha Valley Memorial Hospital and respondent, CAMC, negotiated an acquisition of Kanawha Valley which became effective September 15, 1986. Respondent's plan was to convert Kanawha Valley into a hospital limited to the treatment of females and children. As a result of the acquisition numerous job functions performed at Kanawha Valley were either transferred to CAMC's central office or eliminated altogether.

11. The respondent projected that approximately 70 employees needed to be phased out of Kanawha Valley's total employment of 120 employees. That is, there were 70 more employees than were needed to operate the new hospital. Those specific employees whose jobs were to be eliminated were given several options. Among these options were early retirement, transfer to other CAMC vacancies, resignations or opportunity to bid on future jobs as they became vacant.

12. Many of Kanawha Valley employees were over the age of 40. Some employees exercised their option to take early retirement. Although there was testimony by two retirees who opted for early retirement, that there was pressure applied by CAMC to get rid of older employees through forced retirements, the evidence of record is insufficient to sustain this claim.

13. Effective after the merger, employees at respondent's Kanawha Valley Division were given priority consideration over employees at either General Division or Memorial Division when applying or bidding on job postings and vacancies.

14. Shortly after the acquisition, complainant and other affected employees of respondent's Kanawha Valley Division were advised that their jobs were to be eliminated and that they needed to seek out other jobs in CAMC through CAMC's posting and bidding process. Employees were also urged to take advantage of training classes to attain additional skills. Complainant did not or could not avail herself of the training opportunities.

15. The October 1986 placement of the complainant in the position of full-time PBX operator was made by supervisor, Trudy Shaffer, without the complainant bidding or otherwise requesting a transfer.

16. As a result of her transfer to the position of full-time PBX operator in October 1986, the complainant was removed from the Billing Department to the Communications Department, and could not, thereafter, initially bid upon any intradepartmentally posted billing positions.

17. Prior to 1985, the complainant had received merit increases because of her satisfactory performance. In January of 1985, the complainant was suspended for a work related infraction. In February of 1986, the complainant received a written disciplinary counseling report for a work related infraction.

18. A Kanawha Valley Memorial Hospital employee who was disciplined pursuant to personnel policy in effect until the merger occurred, was to have the record of said disciplinary action removed from her file after six months, and it was not to

be given any effect for purpose of transferral and other employment opportunities.

19. The written employee counseling received by the complainant in February 1986, pursuant to Kanawha Valley personnel policy was not removed from her personnel file in August 1986. In November 1986, it was still contained in the complainant's personnel file.

20. On September 28, 1986, by acknowledging receipt of the Employee Handbook of CAMC, complainant acknowledged that the policy and promises made by Kanawha Valley contained in its handbook were not binding on CAMC and that she agreed to comply with the policies of CAMC. The CAMC handbook provided that employees with a written counseling report could not bid on jobs that came up within a year of the counseling report.

21. In November of 1986, complainant was rejected for a job she applied for in respondent's business office because she had a prior written warning which was less than a year old.

22. Although, another employee, Pat Brown, a registered nurse, was transferred to another position at CAMC within one year of receiving a reprimand, CAMC's policy made a distinction between moving an employee at the convenience of the hospital after a reprimand, and placing a limitation on an employees' bidding rights as a result of a reprimand.

23. Connie Pauley, age 48, day shift PBX operator with Kanawha Valley, the person replaced by Ms. Jenkins, was transferred to the admission office as an admitting clerk by CAMC in 1986.

24. Cheryl Williams, age 40, billing clerk, was transferred to the mail clerk position by CAMC in November of 1986, which was within one year of a verbal disciplinary warning she received from her supervisor, Ms. Shaffer. CAMC personnel policy made a distinction between a verbal warning which did not impede job mobility and a written warning which did.

25. Bonnie Balser, age 51, billing clerk, was transferred to the position of patient representative-insurance verification at General Division by CAMC in January 1987.

26. After the acquisition, Karen Fitzsimmons, a floater, age 28, who intermittently worked as a billing clerk, was intra-departmentally transferred to a billing clerk position at CAMC's, General Division.

27. Diane Copley, a PBX operator, older and with more seniority than the complainant, was transferred to respondent's General Division after the acquisition by CAMC.

28. On March 25, 1987, complainant was personally advised by respondent's Personnel Director, Richard Soward, that her position as PBX operator was to be eliminated effective April 10, 1987. Mr. Soward urged the complainant to immediately apply or request a transfer to an available position as a radiology clerk in the Patient Services Department at the General Division. Said position required typing skills of 40 wpm as did most of the clerical positions at CAMC. Although the complainant initially manifested interest and stated that she would apply and hone up on her typing skills, a few days later when Mr. Soward again

decided not to apply because she did not believe she was qualified. The complainant further declined to take a typing test.

29. The complainant maintains that she was not qualified because she was unfamiliar with radiology terminology and because the job required moving heavy objects, the latter reason was not elaborated upon. However, the complainant made no effort to investigate or to interview for the job to assess her qualifications when faced with the alternative of an imminent layoff.

30. The position description in issue, that of radiology clerk, provided in pertinent part that "...knowledge of medical terminology, anatomy and the ability to differentiate between radiologic examinations would be beneficial." Hence, specific prior knowledge was not a prerequisite for this position. Further, much of this knowledge was not foreign to the complainant given her previous job experience and exposure as a billing clerk in a hospital environment. The complainant testified as to her familiarity with medical terminology and speculated that it would take her two months to become familiar with radiology terminology.

31. The complainant was laid off on April 10, 1987 for a 90 day recall period. Thereafter, the complainant was terminated.

32. Only three of the 75 total employees whose jobs were targeted for elimination after the acquisition by CAMC were laid off. Two of these were younger than the complainant, one was called back shortly after lay off and one declined employment because she found employment elsewhere.

33. During the 90 day period, complainant sought available jobs with CAMC. During this period, she was offered a part-time

job as a telephone operator by respondent, but declined this because she was interested in a full-time position.

34. The respondent retained similarly situated employees both younger and older than the complainant.

35. There was no showing that complainant's age, seniority or salary were factors considered by respondent in its decision to lay off the complainant.

36. The age of the complainant was not a consideration in respondent's termination of complainant's employment.

#### DISCUSSION

In fair employment, disparate treatment cases, the initial burden is upon the complainant to establish a prima facie case of discrimination. Shepherdstown VFD v. WV Human Rights Commission, 309 S.E.2d 342, 352-353 (WV 1983); McDonnell-Douglas Corp. 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 non-discriminatory reason for the action which it has taken with respect to complainant. Shepherdstown VFD, supra; McDonnell-Douglas, supra. If respondent articulates such a reason, complainant must show that such reason is pretextual. Shepherdstown VFD, supra; McDonnell-Douglas, supra.

In the instant case, complainant, Nancy Jenkins, has established a prima facie case of age discrimination by proving facts, which otherwise unexplained, 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). The complainant has established through stipulations that she is a member of the protected class; and that her employer, respondent, CAMC, made an adverse decision concerning her, inasmuch as she was laid-off and subsequently terminated. The complainant has further established a causal connection between her protected class status and the adverse actions, by demonstrating that the respondent retained similarly situated employees, younger than the complainant or older employees with less seniority than the complainant, who were transferred or allowed to bid on positions for which she was qualified, which secured their continued employment with CAMC.

The respondent has articulated legitimate non-discriminatory reasons for its employment decisions regarding the complainant. Namely, that a reduction in force occurred following the acquisition of Kanawha Valley Memorial Hospital by respondent in September 1986; that complainant's job as a PBX operator was to be eliminated along with the positions of approximately 65 other Kanawha Valley employees; that these employees were encouraged to update skills, take classes and seek other positions in comport with CAMC policy; that the complainant's preclusion from bidding on a position because of a previous written disciplinary warning in November 1986, was justified based on CAMC's policy; that complainant did not take classes or otherwise update her skills; that other Kanawha Valley employees, older and younger than the complainant and possessing more or less seniority than the complainant, were retained and transferred either intradepartmentally or based on the needs of the hospital or upon request to

available positions; and that in March of 1987, the complainant refused to update her typing skills and request a transfer to an available position, as repeatedly urged by respondent's personnel director to avoid being laid off in April of 1987. The respondent further asserts that the position in issue, radiology clerk, called for skills and knowledge not foreign to that possessed by the complainant given her exposure and prior work experience at Kanawha Valley Memorial, or alternatively called for knowledge and skills which could be readily mastered by the complainant based on complainant's own admission; and finally, that after complainant's lay off, along with two younger employees, she would not consider a part-time job offered by respondent in order to return within the 90 day recall period.

The complainant has not proven by a preponderance of the evidence that the reasons offered by the respondent were pretext for unlawful age discrimination.

In summary, the complainant was the subject of a series of employment actions commencing before the acquisition of Kanawha Valley by CAMC, with the non-removal of a written warning from her personnel file on a targeted date, through the tender of a suspect evaluation of complainant for 1984-1985, which was not credited. Based on observations and demeanor of the various witnesses, these facts support the conclusion that these actions were orchestrated by supervisory personnel for reasons unrelated to complainant's age.

CONCLUSIONS OF LAW

1. Nancy Jenkins 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 §5-11-10.

2. Charleston Area Medical Center, (CAMC) Kanawha Valley Division is an employer as defined by West Virginia Code §5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. The complaint herein was timely filed.

4. The West Virginia Human Rights Commission has jurisdiction over the parties and the subject matter of this action.

5. Complainant has established a prima facie case of age discrimination.

6. Respondent has articulated legitimate non-discriminatory reasons for its lay off and subsequent termination of complainant.

7. Complainant has not demonstrated that the reasons articulated by respondent for laying off or for terminating her are pretextual.

8. Respondent did not discriminate against complainant on the basis of age by laying her off and terminating her employment.

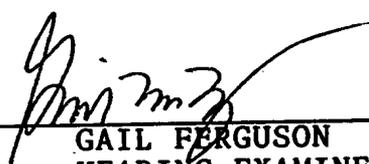
PROPOSED ORDER

Therefore, based upon the evidence and pursuant to the above findings of fact and conclusions of law, it is hereby the recommendation of the undersigned hearing examiner that the complaint in this matter be dismissed.

Entered this 31 day of March, 1989.

WV HUMAN RIGHTS COMMISSION

BY

  
\_\_\_\_\_  
GAIL FERGUSON  
HEARING EXAMINER