



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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ARCH A. MOORE, JR.
Governor

March 10, 1986

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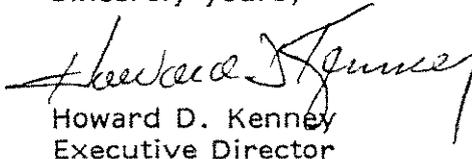
RE: CHERYL LYNN (COLLIGAN) KROPKA,
now Cheryl Powell V Foote Mineral Company,
REP-351-78

Dear Ms. Watson and Mr. Stucky:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Cheryl Lynn (Colligan) Kropka V Foote Mineral Company, Docket No. REP-351-78.

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.

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BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAN 16 1986

W.V. HUMAN RIGHTS COMM.

CHERYL LYNN (COLLIGAN) KROPKA,

Complainant,

vs.

Docket No. REP-351-78

FOOTE MINERAL COMPANY,

Respondent.

ORDER

On the 8th day of January, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner, Charles A. Riffie, II. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as it 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 4 day of Feb., 1986.

Respectfully Submitted



CHAIR/VICE-CHAIR
West Virginia Human
Rights Commission

Look...

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ADMINISTRATIVE DIRECTOR
WEST VIRGINIA SUPREME COURT OF APPEALS

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

CHERYL LYNN (COLLIGAN) KROPKA,
now Cheryl Powell,

Complainant,

vs.

FOOTE MINERAL COMPANY,

Respondent.

*Approved
MRS
12/10/85*

Case No. REP-351-78

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W.V. HUMAN RIGHTS COMM.

[Signature]

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDATIONS OF HEARING EXAMINER**

Pursuant to Notice properly issued and served upon Respondent and the granting of Complainant's Motion of Continuance and after preliminary rulings with regard to discovery and discovery cut off, this matter came on for hearing on October 7, 1985 at 9:30 a.m. in the County Commission Meeting Room, Mason County Courthouse, Point Pleasant, West Virginia, and continued through October 8, 1985, during which time the Complainant appeared in person and by Counsel, Karen G. Watson, Assistant Attorney General of the State of West Virginia; and the Respondent appeared in the person of certain company representatives and by Counsel, Carl Stucky, Jr. and Steven McGowan, of the firm of Steptoe & Johnson of Charleston, West Virginia; there were also in attendance the Hearing Examiner, Charles A. Riffie, II; the Electronic Recording Technician, Charles Preston, assigned by the Supreme Court of Appeals of West Virginia to record the proceedings; and witnesses appearing on behalf of both Complainant and Respondent. Both the Complainant and the Respondent, by and through Counsel, waived the necessity of the appearance of a Commissioner at the hearing.

It appearing that Notice, as required by law, setting forth the time and place of the hearing and the matters to be heard was regularly served upon the Respondent, and that this matter was properly set for hearing in accordance with the procedural regulations adopted by the West Virginia Human Rights Commission (hereinafter "Commission"); and the Complainant and Respondent appearing in person and by their representatives, the hearing was convened and conducted at the aforesaid times and place.

After hearing the testimony of witnesses and evidence presented on behalf of both Complainant and Respondent, and upon consideration of the proposed Findings of Fact and Conclusions of Law and proposed Order submitted by both Counsel for Complainant and Respondent, the following issues were considered by the Hearing Examiner who recommends that the Commission adopt the proposed Findings of Fact and Conclusions of Law set forth hereinbelow, and that the Commission enter an Order in accordance with the same.

ISSUES PRESENTED

1. Did Complainant file a Complaint under the West Virginia Human Rights Act (hereinafter the "Act") charging Respondent with acts of sex discrimination? And if so, when was Respondent aware of the filing of an original sex discrimination Complaint by the Complainant?

2. Did Respondent engage in unlawful acts of reprisal and retaliation in violation of the Act as a result of Complainant's alleged filing of prior sex discrimination charges against Respondent? And if so, to what relief is Complainant entitled?

FINDINGS OF FACT

1. Complainant is a female and began working with Foote Mineral Company, her employer, at the Graham Plant situate in New Haven, Mason County, West Virginia, as a General Laborer on May 25, 1977.

2. During the course of her employment, Complainant worked in both the production and shipping areas of the plant.

3. Complainant is still an employee of Respondent and has not been terminated or discharged by Respondent.

4. For all purposes during the employment of Complainant, Charles Pyles was the Superintendent of the Shipping area and Don Mills was the Personnel Supervisor at the plant.

5. The only merit rating of Complainant established by and admitted into evidence as Complainant's Exhibit No. 1 was a favorable merit rating given by Charles Pyles bearing date of May 25, 1977 and was given during Complainant's probationary period.

6. Complainant testified that after her probationary period had ended, Charles Pyles refused to give her a yellow hat signifying that she was a union dues paying member and no longer a probationary employee as was the alleged usual procedure in the plant. Charles Pyles testified that he had nothing to do with giving out yellow hats; that issuing hats was the responsibility of the plant Guard.

7. Restrooms and shower rooms in the Plant. Considerable testimony was given concerning the types and availability of restroom and shower facilities for men and women within the Plant with the Complainant testifying that the only shower facility for women was located in the former Plant Manager's private shower facility converted for use by women (later described as the Superintendent's private shower facility by Charles Pyles), which shower facility was located in the center of the Plant and a considerable distance from the extreme boundary dimensions of the Plant, testimony ranging from 50 yards to 500 yards from said boundary lines. Testimony supports the fact that there were primarily two women's restroom facilities in the Plant, one in the main office, primarily used by

on February 9, 1978 that Complainant did make Respondent aware of her allegations that Charles Pyles had made sexual advances to her for the purpose of having her sleep with him. (See Charles Pyles incidents.)

9. Charles Pyles Incidents. Complainant testified that shortly prior to the end of her probation period in June, 1977, that Charles Pyles attempted to have her go with him to the Holliday Inn with the implied purpose of going to bed with him, and that upon her refusal Pyles stated that she would be out of the Plant within three months. Respondent's evidence introduced through the testimony of Donald Mills, Personnel Superintendent, through business records kept in the ordinary course of business, being a written memorandum of the February 9, 1978 grievance hearing, demonstrate conclusively that Complainant on February 9, 1978, claimed that Pyles made these alleged sexual advances about the time of her birthday, August 31, 1977, as opposed to within Complainant's probationary period. Charles Pyles denied ever making sexual advances to Complainant, or asking her to go to the Holliday Inn with him. Other business records kept in the ordinary course of business further conclusively demonstrate that Complainant was working in the production area as opposed to the shipping area where Pyles was Superintendent, in August 1977, when Pyles allegedly made said sexual advances to Complainant. Pyles further denied using sexual slurs or sexually abusive, degrading or derogatory remarks or references to Complainant as alleged by Complainant. This is supported by Complainant's own witness, Bernard White, former Union President, to the best of his knowledge. Although Complainant contended that Pyles and Respondent treated Complainant disparately and harassed Complainant as a result of her alleged filing of a Human Rights Complainant, testimony of Respondent's witnesses, Donald Mills, Charles Pyles and Cindy Viers (now Roach) as well as Complainant's witnesses, Bernard White and Larry Pepper, indicate otherwise. On direct examination, Complainant made no mention of the regularity or other dates, times and events of Pyles' alleged

secretaries, and the other located in the said shower room facilities for women. Testimony further supports the fact that there are several restroom facilities available to men throughout the different areas of the Plant although the men have one main shower area. Testimony is conflicting as to whether the restroom facilities located in the different areas of the Plant were secure enough, by lock, or private enough for women to use said facilities.

8. Shower Room Complaint. Complainant's evidence tended to show that she was given a "pink slip" and two days off on or about February 3, 1978 for allegedly reporting to the shower room ten to fifteen minutes prior to quitting time in violation of company policy. Complainant filed a grievance with the National Labor Relations Board (NLRB) No. G3-78, Respondent's Exhibit No. 2, contending that she was harassed; that she was using the restroom as opposed to showering early. This grievance was dropped by the Union as written on the face of the grievance on February 9, 1978. There is conflicting testimony as to why the grievance was dropped. Complainant's evidence adduced from Complainant and former Union President, Bernard White, is that Respondent agreed to withdraw the "pink-slips" and purge Complainant's personnel files in exchange for Complainant dropping her Human Rights Complaint. Respondent's evidence, adduced from the testimony of Donald Mills and Charles Pyles is that the pink-slips were withdrawn and Complainant's personnel records purged of this incident in consideration of Complainant's dropping or withdrawal of the NLRB grievance with no mention or awareness of any Human Rights Complaint. A similar Complaint was filed by another female, Cindy Viers, now Cindy Roach, as Grievance No. G4-78, Respondent's Exhibit No. 3, which was handled in like manner. Cindy Roach testified that she was present at the grievance hearing along with Complainant, Bernard White, Donald Mills and Charles Pyles, and that she had no knowledge of the dismissal of the Human Rights Complaint as a condition for withdrawing the "pink-slips". It was at the grievance hearing

sexual harassment of her, and for the first time, in the middle of cross examination, testified that Pyles harassed her by suggestions of sexual liaisons and use of derogatory, degrading sexual slurs in reference to Complainant as often as three times a week. No mention of this is made in the written Complaint alleging reprisal filed by Complainant on March 7, 1978 or, as mentioned earlier, in her direct examination. Further, there is no testimony that Complainant complained of this conduct to anyone in authority at the Plant. Complainant further testified that she introduced Pyles to her brother with the implication being that her brother would put a stop to Pyles' conduct. Pyles denies sexual harassment, derogatory and degrading sexual references to Complainant and having ever met Complainant's brother. Complainant further alleges Pyles harassed her in a meeting with W. Burdette alleging that Burdette and Pyles had observed her for three or four weeks in the yard; claiming that her work was unsatisfactory; that Pyles was going to observe Complainant for thirty days and if he didn't like what he saw that Complainant would be "going down the road". Complainant testified that Pyles could not have observed her for that period of time since she only had three days experience in the yard. Complainant further testified that after this meeting she telephoned someone at the Human Rights Commission who returned her call the same day; and that in the presence of Charles Pyles, Complainant stated clearly and loud enough for Pyles to hear, three times, that she was filing a Complaint with the Human Rights Commission alleging sexual harassment. Pyles testified that this meeting concerned the work performance of Complainant, which was poor, and denied that the meeting was for the purpose of sexually harassing or treating Complainant disparately from any male employee. Pyles further denied ever hearing Complainant make any telephone Complaint to the Human Rights Commission. A written memorandum of the February 2, 1978 meeting with Complainant signed by Pyles was admitted into evidence as Respondent's Exhibit No. 4.

10. Alleged Sex Discrimination Complaints Prior to Reprisal Complaint. There is no evidence that Complainant filed any written original Complaint alleging disparate or discriminatory treatment in her employment by reason of sex as a result of the February 3, 1978 meeting with Pyles and Burdette or for any other reason. Complainant's testimony is that she orally complained to the Human Rights Commission by telephone and in a return conversation from the Commission on February 3, 1978, which conversation was alleged to have been overheard by Pyles. Even in the event that it can be established that Complainant made an original sexual discrimination Complaint by telephone with the Human Rights Commission, there is no clear evidence that Respondent through its employees, was aware of this oral Complaint at the time the grievances, G2-78 and G3-78 were dropped by the Union in consideration for the Respondent's pulling of the "pink-slips" and purging Complainant's personnel records. A review of the best evidence available, being the written memoranda of the February 9, 1978 grievance hearing makes no mention of the dropping of the Complaint before the Human Rights Commission. This documentary evidence is supported by the testimony of Respondent's witnesses, Donald Mills, Charles Pyles and Cindy Viers (now Roach), who filed a similar shower room grievance (G4-78), as well as the cross examination of Bernard White, Complainant's witness who admitted that his recollection of the "Complaint" being dismissed could have referred to the NLRB grievance procedure as opposed to the Human Rights Commission Complaint, although he believed the Human Rights Commission Complaint was dismissed. White further testified that Complainant had not been treated any differently than twenty-seven males who were likewise reprimanded for showering early prior to quitting time, and that he did not feel that Pyles or Mills treated women disparately from men in the Plant.

11. Donald Mills Incidents. Complainant testified that in addition to Pyles and Burdette watching her, she "caught" Personnel Superintendent, Donald Mills, on several occasions hiding behind beams, looking at his wrist (presumably his watch) observing and timing Complainant during her trips to the restroom. Mills testified that he spent less than 10% of his time out in the Plant and had greater responsibilities than to observe employees going to and from the restroom. On another occasion Complainant testified that in April, 1978, after Mills had Notice of the written Complaint of Reprisal which is the subject of this proceeding, that Mills had an argument with Complainant at the Meigs Inn informing her that women should not be working at the Plant, resulting in Mills' wife leaving early without Mills. Mills admitted speaking to Complainant on this occasion but denies that any argument occurred or that his wife left separately without him. This is supported by the testimony of Cindy Viers (now Roach). Complainant's witness, Larry Pepper, did confirm that he heard an argument between Mills and Complainant at the Meigs Inn; that Mills did say that the work was too strenuous for women; and that Mills would get rid of Complainant. On cross examination Pepper stated that he had heard Mills express the same general attitude and method of conversing, confronting and disciplining male employees as well as female employees, and that, in fact, Complainant is still employed with Respondent.

12. Other Incidents. Other incidents concern Pyles allegedly "chewing-out" Complainant in the lunch room, alleged policies for women to keep their hair under their hard hats, shirt tails in, and prohibiting them from wearing shorts to and from work. On cross examination, Complainant admitted that she was not affected or hurt by the alleged policies with regard to hair, shirt tails and shorts insofar as she did not obey these policies anyway with the exception of keeping her hair under her hat and eventually cutting it short. With regard to "chewing-out" Complainant in the lunch room, testimony from

Complainant's own witness, Bernard White, as well as from Charles Pyles and Donald Mills indicates that Charles Pyles had probably "chewed-out" almost all of his employees, primarily male, in the lunch room for one reason or another, and that on no occasion was Complainant chewed-out in a sexually disparate manner or for reasons of sex. Pyles and Mills denied that Respondent had policies disparately treating women with regard to hair, shirt tails and shorts.

13. Credibility of Witnesses. A review of the record as a whole, inclusive of the best written evidence, the contradictions in Complainant's testimony and the best evidence as well as Complainant's own witnesses weaken Complainant's credibility. Complainant was nonresponsive to questions of her own Counsel as well as Counsel for the Respondent and did slur her speech more than occasionally. Complainant denied that she was under the influence of any prescriptive or non-prescriptive drug or alcohol, but did state that she had taken two Bayer aspirin and one Dimetapp for sinuses the morning of the first hearing. Her wandering of speech and nonresponsiveness to questions continued through the second day of hearings.

14. Mental and Emotional Suffering, Humiliation. Complainant testified that as a result of the actions of Pyles and Mills, primarily, and the policies of Respondent, that she has suffered humiliation, embarrassment, mental and emotional distress and had to seek psychiatric treatment and care. On cross examination, Complainant admitted that during the course of her employment with Respondent in the years 1977, 1978 and/or 1979 she had gone through two divorces, the last of which she could not remember the year, the last divorce being from a man twenty-years her senior with an alcohol problem; and that she had problems with children of her second husband's previous marriage which in fact contributed greatly to her seeing a psychiatrist. Complainant also admitted to a drug conviction wherein she advised others how to forge prescriptions for

drugs and "took the rap" for the same. This latter drug conviction evidence was considered by the Hearing Examiner only in regard to the issue of how it might have affected her mental state vis-a-vis other problems, inclusive of the alleged reprisals and retaliation against her at her place of employment. Complainant testified that this drug conviction was not detrimental in any manner to her state of mind.

15. Complainant put on no proof of loss of income, wages, fringe or other employment benefits.

CONCLUSIONS OF LAW

In consideration of the foregoing, the Hearing Examiner recommends that the Commission adopt the following proposed Conclusions of Law:

1. Complainant is a female and a member of a protected class within the meaning of the West Virginia Human Rights Act (the "Act"). West Virginia Code 5-11-1, et seq.

2. Respondent is an "employer" within the meaning of the Act. West Virginia Code 5-11-1, et seq.

3. To establish a prima facie case of retaliation in employment, the Complainant must initially prove: (a) that she engaged in statutorily protected activity; (b) that an adverse employment action was taken; and (c) that there was a causal link between the employment action and the protected activity. This third element will invariably include a showing that the employer knew that the Complainant engaged in protected activity. Schlei v. Grossman, Employment Discrimination Law, 2d ed. (1983), p. 557 et seq.; Hochstadt v. Worcester Foundation, 425 F. Supp. 318 (D. Mass 1976) aff'd 545 F. 2d 222 (1st Cir. 1976); Grant v. Bethlehem Steel Corp., 622 F. 2d 43, (2d Cir. 1980); Womack v. Munson, 619 F. 2d 1292 (8th Cir. 1980) cert. denied 101 S. Ct 1613 (1981);

Hamm v. Members of the Board of Regents of the State of Florida, 708 F. 2d 647 (11th Cir. 1983).

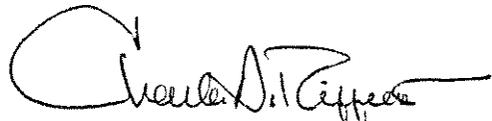
4. The evidence, when considered as a whole, does not support Complainant's claim of unlawful discrimination by reason of sex, or reprisal or retaliation, on the part of Respondent, as a result of Complainant's "Complaint" of sex discrimination. Complainant has failed to prove a prima facie case of reprisal or retaliation.

5. Complainant has further failed to establish and prove damages to which she would be entitled had she proven unlawful discrimination by reason of sex or retaliation or reprisal as a result of her sex discrimination Complaint.

RECOMMENDATION

On the basis of the foregoing, it is the recommendation of the Hearing Examiner that the Commission enter an Order dismissing the Complaint filed in these proceedings with prejudice to the Complainant.

DATED this 6th day of December, 1985.



CHARLES A. RIFFÉE, II
HEARING EXAMINER

CERTIFICATE OF SERVICE

I, Paul R. Stone, hereby certify that I have this 10th day of December, 1985, mailed a true copy of the Findings of Fact named in the foregoing letter by depositing same in the United States Mail in properly stamped and addressed envelopes to the following persons:

Karen G. Watson, Esquire
Assistant Attorney General
Room E-26, State Capitol
Charleston, West Virginia 25305

Carl F. Stucky, Esquire
Steptoe & Johnson
P. O. Box 1588
Charleston, West Virginia 25326



Paul R. Stone