



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

**WV HUMAN RIGHTS COMMISSION
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**CERTIFIED MAIL
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September 18, 1992

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Re: Lunsford v. Inco Alloys International Inc.
EA-558-84

Dear Parties:

Enclosed, please find the final decision of the undersigned hearing examiner in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the hearing examiner's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition

setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the examiner, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the hearing examiner shall not operate as a stay of the decision of the hearing examiner unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the hearing examiner, or an order remanding the matter for further proceedings before a hearing examiner, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a hearing examiner, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the examiner on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the hearing examiner's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a hearing examiner's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the examiner's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,


Gail Ferguson
Hearing Examiner

GF/mst

Enclosure

cc: Glenda S. Gooden, Legal Unit Manager
Mary C. Buchmelter, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

HAROLD D. LUNSFORD,

Complainant,

v.

DOCKET NUMBER(S): EA-558-84

INCO ALLOYS INTERNATIONAL, INC.,

Respondent.

HEARING EXAMINER'S FINAL DECISION

A public hearing, in the above-captioned matter, was convened on October 11 and 12, 1990 and January 24, 1991, in Cabell County, West Virginia, before Gail Ferguson, Hearing Examiner.

The complainant, Harold D. Lunsford, appeared in person and by counsel, Donald Capper, Esq. The respondent, INCO Alloys International, Inc., appeared by its representative, Mary Lou Zirkle, and by counsel, Evan H. Jenkins, Esq. and John E. Jenkins, Jr., Esq.

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.

FINDINGS OF FACT

1. Respondent, INCO Alloys International, Inc. (hereinafter "Inco"), is in the business of developing and manufacturing high nickel alloy products in Huntington, West Virginia.

2. Harold D. Lunsford (complainant herein) was born on September 6, 1923 and was originally employed by Inco in 1951 as a Mechanical Engineer in the Engineering Department. Throughout his employment with Inco, complainant was a salaried employee. In January, 1958, complainant was transferred from the Engineering Department to Manufacturing to become the Assistant Superintendent of the Machine Shop. In February, 1972, complainant became the Superintendent of the Machine Shop.

3. The respondent's workforce is divided into two groups: monthly salary and hourly. The hourly employees are represented by the United Steelworkers of America labor union and governed by the terms and conditions set forth in the Works Contract. The monthly salaried employees are not represented by a union and do not have a collective bargaining agreement which covers their employment. Monthly salary employees are employees at-will and may be terminated at any time with or without cause.

4. In August, 1982, complainant was assigned to respondent's Management Project Team. The Team had been formed several years prior to complainant's assignment for the purpose of providing an in-house consulting group to do analytical work on special projects. The Team consisted of a group of skilled personnel selected because of their experience and expertise.

5. Complainant was first advised of his appointment by his immediate supervisor, David Ohl, Vice President of Manufacturing. Complainant was also advised by Inco Executive Vice-President John Allen that he had been selected for the Team because of his experience.

6. In the early 1980's, respondent experienced a major reorganization. According to respondent, the changes were driven by factors such as increasing costs and technological advances. Respondent was also experiencing declining sales volume and profitability and had lost significant markets, competition had increased, and prices had declined relative to cost.

7. As a result, in addition to other changes, there was less of a requirement for superintendents, chief foremen and foremen. Inco eliminated five superintendent positions. Respondent was placing greater responsibility on the machine operators. There were consolidations of the Burnaugh, Kentucky and Huntington, West Virginia Melt superintendent positions and a consolidation of the Primary Mill and Bar & Wire Mill. Moreover, Cold Draw and Strip Mill were combined as well as the various Maintenance Group Superintendents.

8. After complainant's assignment to the Team, Frank Lambertus, age 46, assumed complainant's responsibilities in the Machine Shop as superintendent. Lambertus had been the Superintendent of Bar & Wire and was familiar with the Machine Shop. Mr. Lambertus had been displaced when his former position of superintendent of Bar & Wire was consolidated under the superintendent of the Primary Mill, Ray Meadows. Through the reorganization, Lambertus continued with some of his former responsibilities and assumed the additional responsibility for the Machine Shop.

9. Complainant's salary in 1983 was \$54,768.

10. Mr. Lambertus' salary in 1983 was \$55,824.

11. Complainant served on the Team from 1982 until January 31, 1984. During such time complainant worked on numerous projects and was supervised by and reported directly to the President of Inco, William Bissett.

12. By early 1984, the Management Project Team, over time, gradually dwindled down to one or two members. Some Team members were used to fill jobs that were being vacated due to retirements and other changes.

13. As a salaried employee, complainant had no contractual rights to his former position once his responsibilities on the Management Project Team had been completed.

14. Inco President William Bissett questioned all vice presidents and the other section heads about any openings for complainant. No openings could be found. Complainant was notified that he was being reduced in January, 1984, by Mr. Bissett.

15. Complainant was advised that, although he had an excellent work record, respondent had to reduce costs.

16. Immediately thereafter the Management Project Team was disbanded. Some of the other Team members are still employed by respondent, others retired, and others were involuntarily retired.

17. Mr. Judd and Mr. Dudley were other members of the Team who were involuntarily terminated. Mr. Judd was approximately 47 years of age and Mr. Dudley was 53 years of age.

18. Based on accumulated vacation and leave time, complainant's last day of service was May 1, 1984. The complainant was 60 years of age at the time of his termination.

19. Complainant receives a pension of \$1,445.66 per month.

20. From 1978 until 1987, Inco has had a reduction of annual shipments from 90 million pounds to 50 million pounds.

21. During the eighties, the hourly workforce was reduced by 50% and the salaried workforce was reduced by 30%.

22. The people who either voluntarily retired or who were involuntarily terminated from Inco in the early 80's spanned all age groups.

23. In October, 1983, 62 salaried employees were involuntarily terminated.

24. In 1982, 27.1% of the salaried workforce was under 40 years of age and 72.9% were 40 years of age or over. In 1987, 20% of the salaried workforce was under 40 years old, and the percentage of salaried employees 40 years old or over had grown to 80%.

25. Respondent hired 38 salaried personnel between January 1984 and March 1985. Most of these employees were relocated to

Huntington, West Virginia after respondent closed a research facility in Sterling Forest, New York. Of the 38 employees, 36 were under the age of 40; eight were technical positions of either metallurgists or engineers. All of them were entry level jobs and commanded salaries less than half of that earned by the complainant.

26. The complainant had been continuously employed for 33 years by respondent in a supervisory position for most of that time. None of the employees hired were placed in manufacturing or managerial positions.

27. The complainant was never offered or considered for any lower level jobs available. According to the respondent, it is not its policy to ask executive personnel to take a salary cut or a significant demotion in position.

28. In August 1984, complainant became a Professor of Mechanical Engineering and Technology at West Virginia Institute of Technology. Complainant currently earns \$30,903.74. Complainant also works as a consultant.

DISCUSSION

Under WV Code 5-11-3 (1987), "discrimination" means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age, blindness or handicap, and includes to separate or segregate[.]" It is unlawful "for any employer to discriminate against an individual with respect to...tenure of...employment if the

individual is able and competent to perform the services required[.]” WV Code 5-11-9(a) (1977).

The West Virginia Supreme Court of Appeals generally adopted the order and allocation of proof test established in McDonnell Douglas v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) in disparate treatment discrimination cases under the State Human Rights Act.

The complainant carries the initial burden of establishing a prima facie case of intentional discrimination. After this showing, the burden shifts to the respondent to articulate a legitimate nondiscriminatory reason for the employer's rejection. After the respondent has articulated a justification, the burden shifts back to the complainant to prove, by a preponderance of the evidence, that this reason was merely a pretext for the alleged discrimination. Shepherdstown Volunteer Fire Dept. v. WV Human Rights Commission, 309 S.E.2d 342 (1983); State ex rel. State of WV Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d 77 (1985).

In Conaway v. Eastern Associated Coal Co., 358 S.E.2d 423 (WV 1986) an age discrimination case, the Court proposed a general test for determining a prima facie case of illegal employment discrimination in situations where McDonnell Douglas is unadaptable. In order to make a prima facie case, a complainant must prove the following: (1) that the complainant is a member of a class; (2) that the employer made an adverse decision concerning the complainant; and (3) but for the complainant's protected status, the adverse decision would not have been made.

However, the Court has clearly held since Conaway in Kanawha Valley Regional Transportation Authority v. WV Human Rights Commission, 383 S.E.2d 857 (1989) that a different standard may apply in reduction in force cases such as is presented here.

As pointed out by the Court in KVRTA citing an earlier 5th Circuit decision:

"In a reduction-in-force case, what creates the presumption of discrimination is not the discharge itself, but rather the discharge coupled with the retention of younger employees. Unlike in an ordinary discharge case, where the mere discharge creates a presumption of discrimination because we assume that an employer does not fire a qualified employee, in a reduction-in-force case, discharges are readily explicable in terms of the employer's economic problems. Consequently, the fact that qualified, older employees are laid off is no inherently suspicious and does not in itself warrant shifting the burden of production to the employer to justify his actions....

"Instead, what is suspicious in reduction-in-force cases is that the employer fired a qualified, older employee but retained younger ones." Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 644 (5th Cir. 1985).

The basic elements of a prima facie case as embraced and discussed by the Court in KVRTA are:

- (1) that the claimant was a member of the protected class (at least forty years of age);
- (2) that a negative action was taken (that she was fired);
- (3) that she was qualified; and
- (4) that others not in the protected class were treated more favorably.

Applying that standard to the case at bar, it is undisputed that the complainant, a 60 year old male, is within the protected age group and that the respondent made an adverse decision concerning his employment when it terminated him. What is further needed is some

evidence, direct or circumstantial, to sufficiently link the complainant's status as a class member and respondent's decision to give rise to an inference of discrimination. Put another way, the complainant must establish that he was qualified and that persons outside the protected class was treated more favorably, i.e., not terminated. The qualified element has been described as follows: that the complainant was qualified for the position held, Manter v. Hardy Corp., 825 F.2d 1554 (11th Cir. 1987); Montana v. First Federal S & L of Rochester, 869 F.2d 100 (2nd Cir. 1989); or that the complainant was qualified to assume another position at the time of the reduction in force.

The evidence reveals that the complainant's position as superintendent did not remain open but rather that these duties were subsumed within another position during respondent's reorganization. Significantly, the complainant does not challenge respondent's motive in consolidating his former position, superintendent of the machine shop, as age related and discriminatory based.

Alternatively, the complainant seeks to establish that he was qualified to assume another position at the time of his reduction by virtue of his background as an engineer and that respondent retained similarly qualified persons outside the protected class.

The complainant points to uncontroverted evidence that at the time he was terminated respondent transferred 38 new employees; 36 were under the age of 40 and 8 were hired for technical positions of either metallurgists or engineers positions he was qualified to assume, based on his broad range of experience. Upon these facts, complainant has established a prima facie case requiring the

respondent to articulate nondiscriminatory reasons for its decision to terminate the complainant.

The respondent presented evidence that an economic decline in business precipitated the need to reduce personnel under a major reorganization at the Huntington location from 1978 through 1987. Further, that it was also experiencing declining sales volume and profitability due to increased competition and declining prices relative to cost, and finally, that Inco's parent company, Inco Limited, had losses of 500 million dollars between 1981 and 1984.

Respondent testified that in order to combat Inco's critical financial condition, it decreased the formal structure of the plant operations and reduced the number of personnel; and that the total reductions in the hourly workforce during the eighties was 50% and the salaried workforce was reduced by 30%. According to respondent as a result of reorganization, greater responsibility was placed on the machine operators and layers of supervision were eliminated, specifically there was a reduction in the need for management personnel in the positions of superintendents, chief foremen, and foremen, and that a total of five superintendent positions were eliminated through consolidation.

Although it is unrebutted that respondent hired or transferred 36 salaried employees under the age of 40 to its Huntington location between January 1984 and March 1985, the evidence reveals that none of these employees were reassigned to manufacturing and all had been in entry level technological and sales slots in respondent's other offices.

Finally, notwithstanding the complainant's argument that he would have or could have filled any one of the positions assumed by the younger transferees to the Huntington plant, particularly those in engineering or metallurgy, the respondent presented uncontroverted testimony that it was not its policy to offer lower level jobs or sizeable reduction in pay to its executive or top managerial staff.

As further indication that older employees in general were not discriminatorily targeted, respondent points out that after the reductions, the average age of the workforce actually increased. In 1982, 27.1% of the salaried workforce was under forty years of age and 72.9% were over forty. In 1987, 20% of the salaried workforce was under forty and the percentage of employees over forty had grown to 80%.

The complainant has failed to establish respondent's reasons as unworthy of credence nor has the complainant presented sufficient evidence statistically or by other means to rebut respondent's articulated reasons as pretextual.

Accordingly, the complainant has not proven, by a preponderance of the evidence, that the respondent discriminated against him based on his age, in violation of the West Virginia Human Rights Act.

In summary, while it is not illegal for an employer to exercise business judgement, even poor business judgement, the complainant was impressive as a witness and his demeanor, credibility and qualifications outstanding. It is readily apparent to the undersigned that respondent's loss of such a valuable employee was complainant's subsequent employer's gain.

CONCLUSIONS OF LAW

1. The complainant, Harold D. Lunsford, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the West Virginia Human Rights Act, WV Code §5-11-10.

2. The respondent, Inco Alloys International, Inc., is an employer as defined by WV Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act,

3. The complaint in this matter was properly and timely filed in accordance with WV Code §5-11-10.

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to WV Code §5-11-9 et seq.

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

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has not established, by a preponderance of the evidence, to be pretext for unlawful age discrimination.

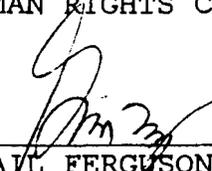
RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is ORDERED that this case be dismissed with prejudice and be closed.

Entered this 18 day of September, 1992.

WV HUMAN RIGHTS COMMISSION

BY



GAIL FERGUSON
HEARING EXAMINER