



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING  
1036 QUARRIER STREET  
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE 304-348-2616

ARCH A. MOORE JR.  
Governor

December 23, 1987

Kenneth Loudermilk  
Box 255  
Van, WV 25206

Eastern Associated Coal  
Box 70  
Beckley, WV 25802-0070

Charles Q. Gage, Esq.  
Gene W. Bailey, Esq.  
Jackson, Kelly, Holt & O'Farrell  
P.O. Box 553  
Charleston, WV 25322

Heidi Kossuth  
UMWA  
1300 Kanawha Blvd. E.  
P.O. Box 1313  
Charleston, WV 25325

RE: Loudermilk v. Eastern Associated Coal Co.  
EH-45-86

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 April 1, 1987, any party adversely affected by this final order may file a petition for review with the supreme court of appeals within 30 days of receipt of this final order.

Sincerely,

A handwritten signature in cursive script that reads "Howard D. Kenney".

Howard D. Kenney  
Executive Director

HDK/mst  
Attachments

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE  
OF STATUTORY RIGHT TO JUDICIAL REVIEW

AMENDED AND EFFECTIVE  
AS OF APRIL 1, 1987

Err. H. B. 2628]

8

116 this article.

§5-11-11. Appeal and enforcement of commission orders.

1 (a) From any final order of the commission, an  
2 application for review may be prosecuted by either  
3 party to the supreme court of appeals within thirty days  
4 from the receipt thereof by the filing of a petition  
5 therefor to such court against the commission and the  
6 adverse party as respondents, and the clerk of such  
7 court shall notify each of the respondents and the  
8 commission of the filing of such petition. The commis-  
9 sion shall, within ten days after receipt of such notice,  
10 file with the clerk of the court the record of the  
11 proceedings had before it, including all the evidence.  
12 The court or any judge thereof in vacation may  
13 thereupon determine whether or not a review shall be  
14 granted. And if granted to a nonresident of this state,  
15 he shall be required to execute and file with the clerk  
16 before such order or review shall become effective, a  
17 bond, with security to be approved by the clerk,  
18 conditioned to perform any judgment which may be  
19 awarded against him thereon. The commission may  
20 certify to the court and request its decision of any  
21 question of law arising upon the record, and withhold  
22 its further proceeding in the case, pending the decision  
23 of court on the certified question, or until notice that the  
24 court has declined to docket the same. If a review be  
25 granted or the certified question be docketed for  
26 hearing, the clerk shall notify the board and the parties  
27 litigant or their attorneys and the commission of the fact  
28 by mail. If a review be granted or the certified question  
29 docketed, the case shall be heard by the court in the  
30 manner provided for other cases.

31 The appeal procedure contained in this subsection  
32 shall be the exclusive means of review, notwithstanding  
33 the provisions of chapter twenty-nine-a of this code:  
34 *Provided*, That such exclusive means of review shall not  
35 apply to any case wherein an appeal or a petition for  
36 enforcement of a cease and desist order has been filed  
37 with a circuit court of this state prior to the first day  
38 of April, one thousand nine hundred eighty-seven.

39 (b) In the event that any person shall fail to obey a  
40 final order of the commission within thirty days after  
41 receipt of the same, or, if applicable, within thirty days  
42 after a final order of the supreme court of appeals, a  
43 party or the commission may seek an order from the  
44 circuit court for its enforcement. Such proceeding shall  
45 be initiated by the filing of a petition in said court, and  
46 served upon the respondent in the manner provided by  
47 law for the service of summons in civil actions; a hearing  
48 shall be held on such petition within sixty days of the  
49 date of service. The court may grant appropriate  
50 temporary relief, and shall make and enter upon the  
51 pleadings, testimony and proceedings such order as is  
52 necessary to enforce the order of the commission or  
53 supreme court of appeals.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

KENNETH LOUDERMILK, JR.,

Complainant,

v.

DOCKET NO.: EH-45-86

EASTERN ASSOCIATED COAL,

Respondent.

FINAL ORDER

On the 10th day of December, 1987, the West Virginia Human Rights Commission reviewed the proposed order and decision of Hearing Examiner, James Gerl, in the above-captioned matter. After consideration of the aforementioned, the commission does hereby adopt said proposed order and decision, encompassing findings of fact and conclusions of law as its own, with modifications and amendments set forth below.

In the subsection titled Conclusions of Law, language in the paragraph enumerated as 4, is modified by adding the word "not" following the word "has."

In the subsection titled Merits, following the first paragraph contained therein, the following inserted language is added as the next paragraph:

"In handicap discrimination cases, the complainant must prove that he is a qualified handicapped person. This initial prima facie burden may be met by requiring the complainant in a discharge case to prove: he is handicapped; that he was qualified to perform the duties of the job in question despite the handicap; and that he was terminated because of the handicap.

Alternatively, in a discharge case involving an individual who becomes handicapped in the course of employment, the complainant may establish a prima facie showing of unlawful handicap discrimination by proving that he is handicapped and that with reasonable accommodation he could have performed the essential elements of the job in question or that he could have been reassigned to a position for which he was qualified, or for which with training he might be qualified for. Under either theory, complainant has failed to establish a prima facie case. Although the evidence establishes that complainant has a physical impairment which substantially limits at least one major life activity, ambulation; and the complainant has established that he was terminated, the complainant has failed to prove that he is a qualified handicapped person, to wit, that he could perform the duties of the job of general laborer despite his handicap or that the respondent had an obligation to make reasonable accommodation related to the job in question or related to reassignment or training.<sup>1</sup>"

Arguendo, even if the commission agreed, under the Hearing Examiner's analysis, herein incorporated by reference, that the complainant established a prima facie case, respondent's defense or articulation as set forth in the proposed decision, absent reasonable accommodation as a grounds for a findings of pretextuality, compels a conclusion that the respondent did not discriminate on the basis of complainant's handicap.

---

<sup>1</sup>. It was the position of the complainant that reasonable accommodation was not necessary."

It is hereby ORDERED that the Hearing Examiner's recommended order, encompassing findings of fact and conclusions of law, be attached hereto and made a part of this final order except as modified by this final order.

It is finally ORDERED that this case be dismissed with prejudice.

By this final 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 final order and that they may seek judicial review.

Entered this 22nd day of December, 1987.

RESPECTFULLY SUBMITTED

BY Beth A. Hamilton  
CHAIR/VICE CHAIR  
WV HUMAN RIGHTS COMMISSION

STATE OF WEST VIRGINIA  
HUMAN RIGHTS COMMISSION

RECEIVED

SEP -8 1987  
W.V. HUMAN RIGHTS COMM.

KENNETH LOUDERMILK, JR.,

Complainant,

vs.

DOCKET NUMBER: EH-455-86

EASTERN ASSOCIATED COAL,

Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on March 26-27, 1987 in Beckley, West Virginia. Commissioner Nate Jackson served as Hearing Commissioner. On August 10, 1987 the parties' counsel and the Hearing Examiner toured respondents Lightfoot Mine No. 2. The complaint was filed on March 7, 1986. The notice of hearing was issued on September 24, 1986. A telephone Status Conference was convened on October 30, 1986. Subsequent to the hearing, both parties filed 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 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 findings as stated herein, it is not credited.

#### CONTENTIONS OF THE PARTIES

Complainant contends that respondents fired him because of his handicap, an amputated leg. Respondents maintain that complainant was not able to perform the duties of a laborer in an underground mine and that he would pose a safety risk in an underground mine.

#### FINDINGS OF FACT

Based upon the parties stipulations of uncontested facts as set forth in the joint pre-hearing memorandum, the Hearing Examiner has made the following findings of fact:

1. Complainant began employment with respondent in December, 1970, and at all times during his employment, complainant was a member of the United Mine Workers of America and covered by the various collective bargaining agreements to which respondents and the union are signatory.

2. At the time of plaintiff's termination of employment with respondent, complainant was covered by the National Bituminous Coal Wage Agreement (NBCWA) of 1984.

3. Complainant was terminated from his employment with respondent pursuant to Article III, Section (j) of the NBCWA of 1984.

4. At all times pertinent to this action, complainant was classified as a general laborer in underground mining.

5. The last day complainant performed work for respondent was May 10, 1983 when he was diagnosed as having a lower back anomaly, a condition which precluded complainant from performing the job duties of a general inside laborer.

6. On August 22, 1983, complainant was involved in a motorcycle accident wherein he suffered extensive injuries resulting in the amputation of his left leg approximately four inches above the knee.

7. Complainant has a prosthesis applied to his left leg and has undergone gait training through the West Virginia Department of Vocational Rehabilitation.

8. Complainant's prosthesis is a left AK prosthesis with quadral ischial weight bearing socket and Bach safety knee and such foot.

9. X-rays of complainant's left proximal femur in the AP and lateral view shows that there is above knee amputation to the distal third of the left femur.

10. On or about August 29, 1985, complainant's physician, Dr. Majesto reported to respondent through respondent's standard form that complainant would not be able to return to work in underground coal mining and should be referred for vocational rehabilitation services.

11. On September 6, 1985, complainant was informed by respondent that it intended to remove his name from the employee list and that if complainant objected to this action, he would be scheduled for a physical examination in accordance with Article III, Section (j) of the NBCWA of 1984.

12. Complainant objected to the action described in respondent's letter of September 6, 1985, and accordingly, was scheduled for an examination with Dr. Ramas on October 15, 1985.

13. Dr. Ramas examined complainant and reported to respondent that complainant would be unable to return as a general laborer in underground mining.

14. By letter dated October 28, 1985, complainant was advised that his employment with respondent was terminated in accordance with Article III, Section (j) of the NBCWA of 1984.

15. On January 15, 1986, complainant presented respondent with a return-to-work slip without restrictions which was issued by Dr. Majestro.

16. Complainant was examined by Dr. Orphanos on January 24, 1986, and Dr. Orphanos reported that he concurred with the opinion of Dr. Ramas that complainant would be unable to return to his former position as a general laborer in underground mining.

17. On March 7, 1986, complainant filed with the West Virginia Human Rights Commission a charge of unlawful handicap discrimination in violation of the West Virginia Human Rights Act.

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

18. The job of laborer at respondent requires the ability to stand and walk on uneven surfaces with many stumbling hazards present, the ability to lift 25 to 50 pounds, and, the ability to bend and stoop while handling supplies. The duties of a laborer include the following: setting mine timbers, shovelling belts, scattering 50 pound bags of rock dust, track work, laying blocks, hanging ventilation material, and hanging oil in 35 gallon drums. The general laborer position requires lifting, bending, stooping or carrying most of the time.

19. Respondent has no light duty positions. Respondent's job classification system is determined by its collective bargaining agreement.

20. Because of his amputation, complainant is unable to crawl, kneeling is very dangerous, he should engage in only minimal stooping or bending, and he should not shovel for any period of time. Complainant would have great difficulty carrying supplies for any period of time, especially up inclines. Dust or dirt in the mine, if it became lodged in complainants' prosthesis mechanism would cause binding and seizing of the artificial joints. Fatigue of complainant because he would have to expend a significantly higher amount of energy than a non-amputee, would constitute a safety hazard. Similarly, any attention to his prosthesis would direct complainant's attention from his work, thereby constituting another potential safety problem. Because of complainant's prior history of back problems, it is also significant that any lifting by complainant would involve lifting with

stomach rather than his knees, thereby making a re-injury of his back a significant danger. Because of the high level of energy complainant must exert, he uses oxygen much more quickly than a non-amputee and, therefore, he would consume all of the oxygen in the emergency self rescuer in 40-45 minutes rather than one hour.

21. While demonstrating his ability to squat, at the hearing, complainant had obvious difficulty keeping his balance. After demonstrating his ability to walk rapidly at the hearing, complainant was visibly out of breath. Although complainant contends that he can now do anything that he did before the amputation, he admits that he is a little slower now.

22. Respondent employs several handicapped individuals. One employee, who is a double amputee, is employed at a research facility where respondent has lowered his workbench and restructured its restrooms. Other handicapped employees in recent years include one with an amputation of a leg below the knee, and one with an amputated foot.

#### CONCLUSIONS OF LAW

1. Kenneth Loudermilk 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. Eastern Associated Coal Corporation 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. The complaint in this matter was timely filed.

4. Complainant has established a prime facie case of handicap discrimination.

5. Respondent has articulated a legitimate non-discriminatory reason for its termination of complainant.

6. Complainant has not demonstrated that the reason articulated by respondent for firing him is pretextual.

7. Respondent has not discriminated against complainant on the basis of his handicap by firing him. West Virginia Code, §5-11-9(a).

### DISCUSSION OF CONCLUSIONS

#### I. TIMELINESS OF COMPLAINT

Respondent maintains that the complaint was not timely filed because complainant was informed on October 28, 1985, that he was discharged but his complaint was not filed until March 7, 1986, more than 90 days after the notice of discharge. Respondents argument is rejected.

The Human Rights Act required during the time frame relevant to the filing of the instant complaint that a complaint be filed within ninety days of the alleged act of discrimination. West Virginia Code §5-11-10. This requirement is jurisdictional.

Human Rights Commission v. U. T. U., 280 S.E. 2d 653 (W.Va. 1982).

Respondent cites authority for the proposition that the ninety days begins to run from complainant's knowledge of the alleged act of discrimination. Respondent equates knowledge of the act with notice of the act. Respondent asserts that the ninety days should begin to run from the first notice of termination. The Hearing

Examiner strongly urges the Commission to reject this proposition.

The West Virginia rule is that a statute of limitations does not begin to run until the cause of action accrues. Handley v. Town of Shinston, 289 S.E. 2d 201 (W.Va. 1982). See also 4A Corbin, Contracts, §989. Thus, in a case such as the instant case, which alleges discriminatory termination, the ninety-day period should begin to run from the effective date of the termination. Indeed, the alleged discriminatory act is the termination, not the notice of termination. A complainant may not seek reinstatement until he no longer works for respondent. The ninety-day period, therefore, should begin to run when the termination is complete. Any other rule would encourage employees to forgo any in-house grievance procedures and flood the Human Rights Commission with complaints.

The decision in Delaware State College v. Ricks, 449 U.S. 250 (1980), noted in complainant's brief, is distinguishable from the present case. There the alleged discriminatory act involved was denial of academic tenure. Denial of tenure to a faculty member is not merely a notice of termination. Rather, denial of tenure is a significant adverse employment action with severe employment consequences. Although denial of tenure is generally followed by termination, the consequences of tenure denial are not dependent upon a subsequent termination. In such cases, the last day of work bears no genuine relationship to the alleged discriminatory act.

Thus, denial of tenure in an academic setting is fundamentally different from a notice of discharge. In any event, Ricks is an interpretation of federal law, and is, therefore, not binding upon the Commission in interpreting the West Virginia Human Rights Act.

In the instant case, respondent terminated complainant when it considered Dr. Orphanos opinion which was rendered on January 24, 1986. Thus the complaint, which was filed on March 7, 1986, was filed within 90 days of the alleged discriminatory act complained of therein.

## II. MERITS

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.W.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 non-discriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunteer Fire Department, 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 established a prima facie case of discrimination by proving facts, which if 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).

Complainant has proven that he has a handicap within the meaning of the Human Rights Act. The parties have stipulated that complainants left leg has been amputated above the knee. The record evidence reveals that as a result of the amputation, one of the complainant's major life activities, ambulation, has been impaired. Thus, complainant has a handicap. Interpretive Rules Governing Discrimination on the Handicapped, §2.01. In addition, complainant has presented evidence that although he produced a release to return to work without restriction from Dr. Majestro, respondent fired him.

Respondent has articulated a non-discriminatory reason for complainants discharge.

Respondent has presented testimony that complainant is unable to perform the duties of the general laborer position which he sought, and, therefore, he is not a qualified handicapped person within the meaning of the Interpretive Rules Governing Discrimination on the Handicapped, §4.02.

Complainant has not demonstrated that the reason articulated by respondent is pretextual. The weight of the evidence in this matter clearly supports the conclusions that complainant is unable to perform the job and that if he were to perform the job, he would pose a safety hazzard to himself and to his co-workers. Respondent presented the credible testimony of three expert wtinesses, two doctors and an ergonomics expert, that complainant was not able to perform the demanding duties of a general laborer in the adverse

condtions of respondents' underground mine. The testimony of Dr. Majestro, who released complainant to return to work does not rebut the testimony of respondents' experts. Dr. Majestro admits that complainant cannot crawl, should not kneel, stoop or bend and should do no shovelling for long periods of time. Dr. Majestro would have restricted complainant to light duty but for his understanding that the coal mines would not honor light duty requests. Even Dr. Majestro, therefore, does not support complainants contention. Also credible was the testimony of Ritchie, the United Mine Workers of America field representative, who advocated that complainant be permitted to try to do the job, but candidly admitted that complainant would likely encounter problems in doing the job. Complainant himself testified that his amputated leg has slowed him down considerably. Complainant's loss of balance while demonstrating his ability to stoop and complainant's difficulty catching his breath after demonstrating rapid walking in themselves compel the conclusions that complainant is unable to perform the duties of a laborer and that he would pose safety problems in an underground coal mine.

The Hearing Examiner greatly admires complainant. Complainant has demonstrated character in the face of adversity and an ability to bounce back from tragedy while retaining his sense of humor. Few of us could rehabilitate ourselves to the degree that complainant has. Nonetheless, the Hearing Examiner cannot permit his

admiration of complainant to influence the proposed order and decision.  
The record evidence reveals no handicap discrimination.

PROPOSED ORDER

Based upon the foregoing, the Hearing Examiner hereby recommends that the Commission dismiss the complaint in this matter, with prejudice.

  
\_\_\_\_\_  
JAMES GERL  
Hearing Examiner

ENTERED:   
\_\_\_\_\_

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:

Charles A. Gage  
Gene W. Bailey  
Jackson, Kelly, Holt & O'Farrell  
P. O. Box 553  
Charleston, WV 25322

Heidi A. Kossuth  
Special Assistant  
District 17  
United Mine Workers of America  
P. O. Box 1313  
Charleston, WV 25325

on this 4th day of September, 1987.

  
\_\_\_\_\_  
James Gerl