



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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15 August 1990

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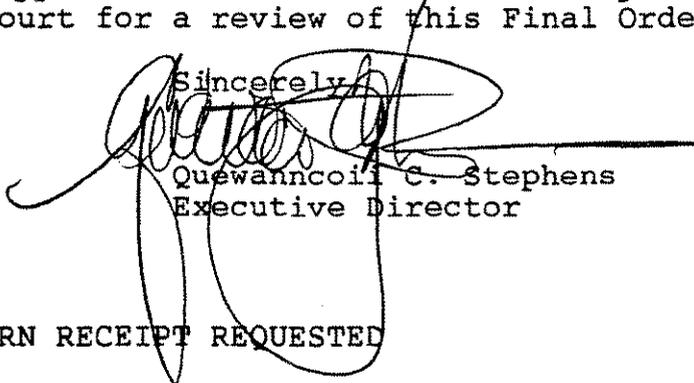
Kanawha Mining Company, Inc.
Post Office Box 4046
Charleston, WV 25364

Re: Lucas v. Kanawha Mining Company, Inc.
Docket No. ES-16-88

Dear Parties and Counsel:

Herewith please find the Final Order of the West Virginia 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. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for a review of this Final Order.

Sincerely,


Quewanncoii C. Stephens
Executive Director

Enclosures

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

cc: Secretary of State

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 nonresident of this state, the nonresident 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 § 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

MARLENE S. LUCAS,

Complainant,

v.

DOCKET NO. ES-16-88

KANAWHA MINING COMPANY, INC.,

Respondent.

FINAL ORDER

On 9 May 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 Gail Ferguson. After consideration of the aforementioned, and a thorough review of the transcript of record, arguments and briefs of counsel, the Commission decided to, and does hereby, adopt said proposed order and decision as its own, encompassing the findings of fact and conclusions of law therein, without modification or amendment.

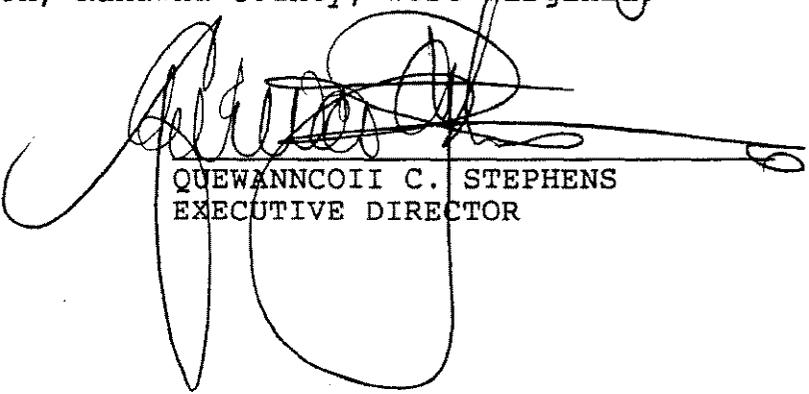
It is, therefore, ADJUDGED, ORDERED, and DECREED that the hearing examiner's proposed order and decision, encompassing findings of fact and conclusions of law, be attached hereto as this Commission's Final Order and that as a result thereof the complaint filed in this matter by Marlene S. Lucas against Kanawha Mining Company, Inc., be, and the same is hereby, DISMISSED with prejudice.

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 State of West Virginia, the parties are hereby notified that 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 14th day of August, 1990 in Charleston, Kanawha County, West Virginia.



QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

MARLENE S. LUCAS,

Complainant,

v.

DOCKET NUMBER: ES-16-88

KANAWHA MINING COMPANY, INC.,

Respondent.

HEARING EXAMINER'S RECOMMENDED DECISION

A public hearing, in the above-captioned matter, was convened on September 19 & 20, 1988, at the office of the West Virginia Human Rights Commission. The Hearing Panel consisted of Gail Ferguson, Hearing Examiner, and Jack McComas, Hearing Commissioner.

The complainant, Marlene S. Lucas, appeared in person and by counsel, Sharon Mullens, Deputy Attorney General. The respondent, Kanawha Mining Company, Inc., appeared in person and by counsel, William M. Herlihy, 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.

ISSUES

1. Whether the respondent engaged in an unlawful discriminatory employment practice based upon sex in rejecting the complainant for employment.
2. If so, what should the remedy be for said unlawful discrimination?

STIPULATIONS OF FACT

1. The complainant, Marlene Sue Lucas, is a female.
2. The complainant applied for the positions of rock truck driver and drill helper with the respondent, Kanawha Mining Company, on May 28, 1987, the date of her employment application.
3. The complainant was interviewed on June 5, 1987, by Robert Gunter, Assistant Superintendent of Production, for respondent.
4. Kanawha Mining Company, Inc., is a surface or strip mining company.
5. The complainant was not hired by Kanawha Mining Company.
6. The complainant applied for and was hired by Princess Susan Coal Company, as a red hat apprentice miner.

7. Complainant was employed by Princess Susan Coal Company for a total period of approximately 9 1/2 months, during which employment she spent six months as an apprentice red hat miner before being laid off due to lack of work.

8. When complainant filled out her employment application for Kanawha Mining Co., she read the following statement in the experience questionnaire portion of that application:

"At this project employees will be utilized based on the multiple skill job assignment basis. Hiring preference will be given to local applicants able to perform the work in more than one of the skill areas listed below."

9. In her interview with Robert Gunter, On June 5, 1987, Gunter stated to complainant that Kanawha Mining was hiring employees on a multiple skill job assignment basis.

10. Kanawha Mining, respondent herein, was engaged in a contract with Cannelton Industries to construct a drag line mining operation at the Hughes Creek Facility in West Virginia.

11. The Hughes Creek project involved preparation work, strip mining, assembly and operation of a drag line, and respondent accordingly sought as employees persons possessing multi-skills to insure stability and continuity within the workforce should the need arise.

12. Respondent initially enlisted the service of the Charleston Job Service of the West Virginia Department of Employment Security. Respondent submitted the employment application and experience questionnaire prepared by its Industrial Relations Manager, Gary Kilstrom, to the Charleston Job Service for approval. Respondent

further initially relied on the Job Service to distribute, collect and to screen applications for it.

13. The various skills listed on the job descriptions submitted to the Charleston Job Service evidenced respondent's desire to hire multi-skilled employees.

14. Ann Offatt, Manager of the Charleston Job Service, credibly testified that Mr. Kilstrom impressed upon her respondent's desire to hire multi-skilled employees as well as respondent's encouragement of women as applicants for craft positions.

15. By February, 1988, respondent received 1,468 applications for craft positions, of which only 1.16% were from females. According to Mr. Kilstrom, respondent contacted other miners in the area to see if they had qualified female employees who were laid off, as well as the Boone County Vocational Center, in order to determine if they had any qualified female graduates.

16. Ms. Offatt testified that Kilstrom asked for her help in securing the applications of female applicants.

17. Craft positions mean employees that are actually involved in the actual surface mining or strip mining process, not clerical or supervisory personnel.

18. The evidence reveals that, when the complainant filled out her job application and employment questionnaire at the Charleston Job Service Center, she listed in the employment questionnaire, which sought multi-skills possessed by an applicant, only her experience as a truck driver. The complainant did list on her application for employment her interest in positions as either truck driver or drill helper.

19. After the complainant's application was reviewed, she was not considered for hire initially because she was perceived as a single-skilled applicant. However, because of the low number of female applicants the respondent re-examined the applications of females it had previously obtained. After this re-examination, complainant was invited for an interview with Robert Gunter, Assistant General Superintendent of Production.

20. When Mr. Gunter, interviewed the complainant on June 5, 1987, she advised him that she had work experience as a truck driver and a drill helper.

21. During the meeting with Mr. Gunter, there was no discussion as to any skills possessed by complainant other than truck driver, which matched respondent's multi-skilled hiring criteria.

22. Although respondent's experience questionnaire and job description listed driller as a skilled position, respondent did not categorize drill helper as a skilled position on either document.

23. The position of drill helper was listed in respondent's training plan. The position was included so that the plan would not have to be resubmitted if the position was created at a later date.

24. Respondent's questionnaire and job description did list truck driver as a skilled position.

25. At the end of the complainant's interview, Mr. Gunter concluded that, based upon her employment application, her experience questionnaire and her interview, that the complainant was a single-skilled applicant, as a truck driver, and she was not considered further for employment.

26. Even though the complainant maintains that at the time of her application for employment with respondent that she had experience as a truck driver, school bus driver, public transit bus driver, drill helper and mechanic helper, the questionnaire, application and interview of the complainant reveals that the complainant did not possess the multi-skills required by respondent's job criteria.

27. Complainant credibly testified that Mr. Gunter informed the complainant that she would be called "if she fit in."

28. At the time of her application with respondent, the complainant possessed a permanent surface miner's card which she had received in 1981, and was referred to as a "black hat" or experienced surface miner.

29. A "red hat" surface miner or apprentice miner, had to have six months of supervised experience at a mine before being qualified to get a permanent surface miner's card.

30. Although five males offered employment by respondent were apprentice miners or red hats, status as a "red hat" or "black hat" was not indicative of the skills possessed by an individual applicant and was not a factor considered by respondent in considering applicants for craft positions.

31. Respondent's hiring criteria was, notwithstanding the status of an applicant as either a red hat or black hat, that the applicant must present multi-skills.

32. The questionnaire and applications of the five males hired: Brent Miller, Bruce Mahon, Donnie Earle Sumpter, Ronald Lee Stanley and Douglas Scarborough, reveal on their faces that these

applicants possessed the multi-skills required by respondent's job criteria.

33. Brent Miller was hired by respondent as a laborer based upon his employment application, his experience questionnaire and his interview. Brent Miller's employment history indicated that he was an experienced off-highway truck driver, an experienced highway truck driver, and a bulldozer operator. He also possessed skills experience in truck maintenance, and in coordinating equipment maintenance. Mr. Miller was a multi-skilled applicant who was more qualified for employment than was complainant.

33. Bruce Mahon was hired by respondent as a laborer based upon his employment application, experience questionnaire and his interview. Mr. Mahon possesses various skills in the underground coal industry, many aspects of which would be transferable to surface mining. Additionally, Mr. Mahon operated a front endloader, helped on maintenance, ran an off-road coal truck, was an electrician's helper, operated a backhoe, and had experience in welding and repairing different kinds of mining equipment.

34. Donnie Earle Sumpter was hired by respondent as a laborer based upon his employment application, experience questionnaire, and interview. Mr. Sumpter possesses skills as a laborer, a mechanic, a truck driver and a maintenance man for bulldozers, endloaders, and trucks. Additionally, Mr. Sumpter was familiar with explosives and blasting operations, and was experienced in the repair and maintenance of other mine equipment, including drills.

35. Ronald Lee Stanley was hired by respondent as a truck driver based upon his employment application, experience

questionnaire and interview. Mr. Stanley had attended the MTA Truck Driving School and had a current Department of Transportation certification of road tests and a Department of Transportation certification of written examination. Mr. Stanley had also graduated from the Carver Career Center where he had a six month course in mine maintenance and a six month course in machine shop. Mr. Stanley possesses mine labor experience and was a veteran who had training in tracked vehicle maintenance which was transferable to the tracked vehicles of respondent. Mr. Stanley possesses the skills of tow truck driver, and an articulating type truck driver which Mr. Kilstrom testified required more skill than driving a basic coal truck. Mr. Stanley also had electrical training, hydraulic training, and some experience in welding and cutting torches.

36. Douglas Arnold Scarborough was hired by respondent as a mechanic. Mr. Scarborough was an apprentice miner, or red hat, who had experience in precision welding. Mr. Scarborough had worked on nuclear power plant projects, which required skill in welding because the welds were checked by ultrasound and x-ray technology. Additionally, Mr. Scarborough was able to operate a forklift, and had prior experience in both erecting and maintaining respondent's drag line as a former employee of F & E Erection Company. This experience combined with Mr. Scarborough's welding training in the military made Mr. Scarborough not only a multi-skilled employee, but an employee with very specialized skills. Mr. Scarborough's status as a red hat when he was hired was no indication of any lack of skills on his part.

37. Ray Long, President of UMW Local 8843, testified on behalf of the complainant that in June, 1987, he was invited to attend a communications meeting with respondent where he met with Tom Schneider, the superintendent of the mine. Mr. Long stated that while riding with Mr. Schneider in Schneider's truck prior to the communications meeting, Schneider replied to a question by Long about women applying for jobs at Kanawha Mining, with the statement "what I am really looking for is a woman Viet Nam Veteran." Mr. Schneider testified that this conversation did not take place.

38. Mr. Long also testified about a second meeting he attended with respondent on July 13, 1987. Mr. Long stated that he was called to the mine site by Mr. Gunter to help deal with a possible strike situation, at which time, he asked Mr. Gunter about the hiring of red hats and women. According to Mr. Long Mr. Gunter replied "we have lawyers to take care of those women" and "they did not have any bath house facilities for them."

39. Mr. Long signed a sworn statement dated August 6, 1987, in which he described the two meetings about which he testified at the administrative hearing. In that statement, Mr. Long attested that he spoke to a man named Mr. Saunders at a communications meeting regarding the hiring of women in June, 1987. At the administrative hearing, Mr. Long initially identified the man at the June, 1987, meeting as Mr. Saunders. In his testimony, Mr. Long said, contrary to his previous statement, that the discussion took place, in Mr. Schneider's truck where they were alone.

40. Mr. Long's sworn statement also describes the July 13, 1987, meeting. In contrast to Long's testimony, his sworn statement

makes no mention of Mr. Gunter's alleged comment that respondent would not hire women because they did not have bath house facilities for them.

41. On cross examination, the respondent raised the issue of bias on the part of this witness. Both Mr. Long and the complainant admitted that Mr. Long is a friend of complainant's husband and brother. Further, at the time Mr. Long gave his initial statement, he was running for the office of president of the local union in which complainant's husband and brothers were members. Finally, Mr. Long did not deny that respondent had not, on prior occasions, followed his advise on hiring individuals.

42. The lack of consistency between Mr. Long's testimony and his prior sworn statements, especially when coupled with the appearance of bias, diminishes the credibility of this witness and his testimony is given little probative weight.

43. The evidence shows that the females who were hired for the craft positions were multi-skilled applicants who fit respondent's hiring criteria.

44. In August of 1987, respondent hired as its first female craft employee, Alicia Cantley, based upon Ms. Cantley's employment application, experience questionnaire, and interview. Ms. Cantley possessed the skills of a truck driver, a small loader operator, and a bulldozer operator. Additionally, she was skilled as a shooter and a powder crewman. Ms. Cantley had also acted as an auger loaderman, a thin seam mine helper, a mechanic's helper, a service oiler, and a general laborer.

45. In April of 1987, Ms. Cantley had initially applied for employment with respondent as a craft employee. According to respondent, during the initial deluge of applications, Ms. Cantley's application was mistakenly filed.

46. Both of Ms. Cantley's employment applications and experience questionnaires reveal, on their faces, that Ms. Cantley possessed the multi-skills required by respondent's job criteria.

47. Teresa Bradley was hired by respondent on September 22, 1987, based upon her employment application, experience questionnaire and interview. A combination of these sources of information demonstrated Ms. Bradley to be a multi-skilled applicant. Ms. Bradley's history showed that she was a graduate from the Boone County Vocational School where she received six months of training as a heavy equipment operator. Ms. Bradley possesses the skills and experienced of a loader operator, a dozer operator, a grader operator, a dump truck driver, and a backhoe operator.

48. Jan Cooper was hired by respondent on October 9, 1987, based upon her employment application, experience questionnaire and interview. Ms. Cooper's history indicated that she was a graduate of the Boone County Vocational School where she received a certificate as a heavy equipment operator. Ms. Cooper possesses the skills of a loader operator, a dozer operator, a grader operator, and backhoe operator. Additionally, Ms. Cooper possesses skills as a highway truck driver and had experience in warehousing.

49. Diana O'Neal was hired by respondent on April 22, 1988, based upon her employment application, experience questionnaire and interview. Ms. O'Neal's history indicated that she possessed skills

of a grader operator, a service oiler and a rock truck driver. Additionally, Ms. O'Neal had experience as a laborer and a mechanic's assistant.

50. After her interview of June 5, 1987, the complainant attempted to contact Mr. Gunter on several occasions to determine the status of her application and to schedule another appointment to no avail.

51. According to the complainant, Mr. Gunter would not have a second meeting with complainant, yet he requested and held a second meeting with Diana O'Neal to discuss her absenteeism problem. However, Ms. O'Neal's application, experience questionnaire and initial interview revealed her to be multi-skilled which gave rise to a subsequent meeting.

52. After the complainant was not hired by respondent, she sought surface mining positions at several coal companies including HighPower Energy, Hawks Nest Mining Co., Lum Coal Company, B & G Coal Co., and Appalachian Mining.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to West Virginia Code §5-11-8, §5-11-9 and §5-11-10.

2. At all times referred to herein, the respondent, Kanawha Mining, Inc., is an employer as that term is defined by the West Virginia Human Rights Act {West Virginia Code §5-11-3(d)}.

3. At all times referred to herein, the complainant, Marlene S. Lucas, is and has been a citizen and resident of the State of West Virginia, and is a person within the meaning of Section 3(a), Article 11, Chapter 5 of the West Virginia Code.

4. The complaint in this matter was properly and timely filed in accordance with West Virginia Code §5-11-10.

5. The complainant has failed to establish a prima facie case of sex discrimination.

6. Even arguendo, if the complainant were determined to have established a prima facie case, the respondent has articulated legitimate nondiscriminatory reasons for its failure to hire complainant.

7. Complainant has not demonstrated, by a preponderance of the evidence, that the reasons, articulated by the respondent for its actions toward the complainant, were a pretext for unlawful discrimination.

8. The respondent did not unlawfully discriminate against the complainant on the basis of her sex in violation of West Virginia Code §5-11-1 et seq.

DISCUSSION

The United States Supreme Court established a framework for evaluating cases involving discrimination in the hiring process in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). In Burdine, the court re-emphasized the principles set forth in the case of McDonnell-Douglas Corp. v. Green, 411 U.S. 792

(1973), and adapted these principles to the context of discrimination in the hiring process. Under Burdine, the complainant alleging discrimination must first establish, by a preponderance of the evidence, a prima facie case of discrimination. Burdine, 450 U.S. at 253. If the complainant is successful, the respondent must articulate a legitimate nondiscriminatory reason for its actions. Once the respondent has articulated its legitimate reason, the complainant must prove by a preponderance of the evidence that the respondent's reason is merely a pretext for discrimination. The ultimate burden of persuasion remains with the complainant throughout the process. Burdine, 450 U.S. at 253.

The West Virginia Supreme Court of Appeals expressly adopted the framework set forth in Burdine in the case of Shepherdstown Volunteer Fire Department v. The West Virginia Human Rights Commission, 309 S.E.2d 342 (WV 1983). In Shepherdstown, the court held that in order for the complainant to prove its prima facie case of discrimination, she must show by a preponderance of the evidence:

- (1) That the complainant belongs to a protected group under the statute;
- (2) That he or she applied and is qualified for the position or opening;
- (3) That he or she was rejected despite his or her qualifications; and
- (4) That after the rejection, the respondent continued to accept the applications of similarly qualified persons. Shepherdstown, 309 S.E.2d at 352.

Applying that proof scheme to the case at bar, the complainant, Marlene S. Lucas, has failed to meet her burden of proving a prima facie case of discrimination. Although the parties have stipulated

that the complainant is a member of a protected group and that she applied for a position with respondent, Kanawha Mining, Inc., the complainant has failed to produce any evidence to show that she was qualified for employment at Kanawha Mining or that similarly qualified individuals were employed in her place.

In order to establish a prima facie case, the complainant has to prove that she was qualified for a position with respondent; that she was rejected despite her qualifications; and that respondent subsequently hired similarly qualified individuals for a like or similar position. Shepherdstown, 309 S.E.2d at 352. Complainant has the threshold burden of proving qualifications possessed by her and the qualifications for the job.

The evidence presented at the hearing in this case, reveals that respondent intended to hire multi-skilled applicants. Ann Offutt from Charleston Job Service testified that this requirement was made clear by respondent from her first meeting with Mr. Kilstrom, respondent's Industrial Relations Manager. Respondent's intent to employ multi-skilled applicants was also apparent from the job descriptions for openings which respondent provided to Job Service. The record reveals unrebutted testimony that the multi-skill criteria was necessary in order to maintain continuity and to keep a stable work force due to the evolving nature of the work at the Hughes Creek facility. The experience questionnaire filled out by each applicant specified the multi-skill criteria, and this job qualification was made clear to anyone involved in the hiring process, including applicants: In fact, the complainant herself does not dispute that respondent was seeking multi-skilled employees or that she was not

apprised of this by respondent; however, the complainant maintains that she is a multi-skilled individual, and should, therefore, have been offered employment.

The complainant has not met her burden of proving a prima facie case because she has failed to establish that she was qualified for a position for which respondent was seeking applicants. She presented no information to respondent at the time she applied which showed she was a multi-skilled applicant, for a position for which respondent was seeking employees, as manifest on its experience questionnaire. The only skill possessed by the complainant, as reflected on her job application and her experience questionnaire, was that of rock truck driver. Although, it is undisputed that the complainant also listed her experience as drill helper on her application, and during an interview with respondent, there is simply insufficient evidence adduced by the complainant to conclude that drill helper was a skilled position for which respondent was seeking applicants.

The complainant testified that she did not understand the meaning of the multi-skill requirement in the experience questionnaire. Although Charleston Job Service personnel were available to assist anyone having difficulty with their application, the complainant testified that she did not ask anyone for help when she completed her questionnaire at the Job Service office, nor did she ask Mr. Gunter to explain it to her after he had reviewed this policy in her interview.

Further, during her interview, the complainant admits that she did not discuss any skills she possessed other than truck driver

because her mind kept going blank due to Mr. Gunter's loquaciousness and interruptions.

During the public hearing, the complainant sought to present evidence of her own multi-skills. The complainant testified that she had experience as an endloader operator and mechanic's helper. The complainant testified that her total experience as an endloader operator was on an occasion when she backed an endloader. Complainant's testimony as to her experience as a mechanic's helper is of little significance because this was not a position for which respondent was seeking applicants. The complainant's testimony regarding her skills suffers probatively on a variety of grounds. The most important is that she admitted that this information was not presented to respondent prior to its decision not to offer her employment. In addition, the complainant did not call any witnesses to support her assessment of her skills, and therefore, without more, her own perception of her abilities must be given limited weight. Finally, the complainant's own ambivalence about her skills is echoed by her response to respondent's inquiry as to why she omitted listing these skills in her questionnaire, which was that she believed she had so little experience in these areas as she did not think it would matter. Overall, the evidence of record insufficiently supports or establishes complainant's claim of being a multi-skilled applicant, and hence, qualification for a position as a craft employee..

In addition to failing to prove that she was multi-skilled, complainant failed to establish that applicants who possessed qualifications similar to her own were hired by respondent. Shepherdstown, 309 S.E.2d at 352. Complainant claims that male

apprentice miners were hired after respondent decided not to employ her. Complainant admitted that she did not know these male apprentice miners personally, and is not aware of what skills they possess. Complainant did, however, introduce in evidence the employment applications and experience questionnaires of Bruce Mahon, Brent Miller, Donald Earle Sumpter, Ronald Lee Stanley and Douglas Scarborough. On their face, these questionnaires and applications show that each one of these male apprentice miners hired by respondent possessed the multi-skills required by respondent's job criterion. The complainant offered no evidence to rebut the qualifications on any of these individuals' employment applications or experience questionnaires. She did not call as witnesses either those individuals or their supervisors at respondent's work site, to inquire about the skills they possessed, preferring to adopt the position that the experience questionnaires and employment applications speak for themselves. The only evidence complainant presented was her own testimony that, even though she did not know the skills and qualifications of any of these individuals, she believed that she was more qualified for a job with respondent because these individuals were apprentice miners and she was a certified miner.

The record evidence reveals unrebutted testimony that the terms "red hat" and "black hat" or "apprentice miner" and "certified miner" have nothing to do with the skill level of the individual. Both Mr. Kilstrom and Mr. Green testified that the terms "red hat" and "black hat" only indicate the amount of time an individual has spent at that actual mining operation. The terms do not indicate the relative

skills of the individuals. The complainant presented no evidence to rebut this. To the contrary, the complainant testified that despite the fact that her husband is a very skilled individual, he would be considered a red hat at a surface mine. The complainant relies on the West Virginia Surface Mine Safety Regulations for the argument that because the regulations require apprentice miners to be under the supervision and control of at least one person who holds a certificate of competency and qualification, they are somehow less skilled than certified miners. The complainant came forward with no evidence to support this theory. These safety regulations merely require red hats to be within the sight or sound of a certified miner. Both black hats and red hats are routinely supervised by forepersons or other supervisors.

Based upon complainant's failure to present evidence of her qualifications, the qualification for a position in issue and the comparison of her qualifications to other individuals which respondent hired, the complainant failed to prove her prima facie case.

Assuming, arguendo, that complainant was successful in showing a prima facie case of discrimination, respondent articulated a legitimate nondiscriminatory reason for its decision not to hire complainant by explaining that complainant did not meet its multi-skilled job criteria, and that those applicants hired by respondent possessed superior qualifications.

Under the holding in Shepherdstown, if the complainant is successful in showing a prima facie case of discrimination, the burden then shifts to the respondent to articulate a legitimate and

nondiscriminatory reason for failing to hire the complainant. Shepherdstown, 309 S.E.2d at 52. The burden on the respondent is not onerous. To be successful in rebutting the complainant's prima facie case, the respondent must merely explain clearly the nondiscriminatory reasons for its actions. Burdine, 450 U.S. at 260; Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423, 430 (WV 1986).

It is the position of respondent that, while hiring for its Hughes Creek Mine, that it maintained a policy of employing individuals with multiple skills; that the employment application and experience questionnaire of complainant listed her only viable skill as that of rock truck driver; that the complainant failed to inform respondent of any additional skills she possessed during her interview or prior to the time it declined to employ her. It was the further contention of respondent that the complainant did not possess multiple skills or otherwise meet its multi-skilled job criteria. The respondent testified that the applicants hired by it possessed minimum if not superior qualifications when compared with the complainant. By affirmatively stating that those employees hired presented and possessed qualifications superior to those of the complainant, respondent has met its burden of articulating a legitimate reason for its failure to hire complainant.

The complainant then bears the ultimate burden of proving, by a preponderance of the evidence, that respondent discriminated, against her because of her sex. Burdine, 450 U.S. at 253. To satisfy her burden, the complainant must prove that respondent's articulated reason for denying her employment was pretextual and that its actions

were motivated by intentional discrimination. Complainant argued that respondent's reasons are pretextual because she was more qualified for the position she applied for than the male miners hired; that the respondent never intended to hire female miners because they would have to build shower facilities for them; that the respondent only hired female miners after she filed her discrimination complaint as a pretext for their policy; that statement made to her during her interview demonstrate the discriminatory policy of respondent; and that statements made by respondent's superintendent and assistant superintendent of production indicate a discriminatory intent.

The complainant bore the burden of proving, by a preponderance of the evidence, that she was more qualified for employment with respondent than those individuals actually hired. Young v. Lehman, 748 F.2d 194 (4th Cir. 1984); cert. denied, 471 U.S. 1061 (1985). Complainant applied for the positions of drill helper and rock truck driver.

Although, as argued by complainant, the position of drill helper is listed in respondent's training plan, respondent's witness, Mr. Kilstrom, testified that he included the position in the training plan so that it would not have to be resubmitted if the position was created at a later date. The complainant provided no evidence, that at the time she applied for employment that a position of drill helper was categorized in respondent's experience questionnaire; that respondent filled a position as drill helper, that a position for drill helper was available, or that respondent hired any other applicant who listed drill helper on the experience questionnaire.

The evidence reveals that when the position of drill helper was created in January, 1988, months after the complainant sought employment and had been rejected, it was bid upon by respondent's current employees pursuant to the bidding procedure in the National Bituminous Coal Wage Agreement. There was no evidence adduced by complainant that the position of drill helper was ever available to the complainant or any other job applicant. In addition, the complainant produced no evidence that the respondent hired any other applicant who was single skilled in contravention of its articulated job criteria.

In the absence of any openings for drill helper, the complainant sought to prove that she was more qualified than the male apprentice miner hired as a truck driver, Ronald Lee Stanley.

Mr. Stanley's employment application and experience questionnaire reveals him to be a multi-skilled applicant. Mr. Stanley's employment application and experience questionnaire show that he had attended the MTA Truck Driving School, and held a current DOT certificate of road test and written examination. Mr. Stanley also possessed training in mine maintenance and machine shop from the Carver Career Center. Mr. Stanley possessed mine labor experience, and was a United States military veteran who had training in tracked vehicle maintenance. Mr. Stanley also had experience as a tow truck driver, and a driver of articulating type tractor trailers. Mr. Stanley possessed electrical training, hydraulic training, and some experience in welding and cutting torches. This evidence was further supported by the testimony of Mr. Gunter and Mr. Kilstrom that Mr. Stanley possessed multiple skills, and was more qualified for hire by

respondent than complainant. The complainant presented no evidence to dispute any of Mr. Stanley's skills and qualifications. Complainant failed to prove, by a preponderance of the evidence, that she was a more qualified applicant than Mr. Stanley.

The complainant submitted the employment application and experience questionnaires of four other male apprentice miners. This evidence is questionably relevant because three of these miners were hired as laborers and one was hired as a mechanic. The record contains no evidence that complainant applied for either a laborer position, or a mechanic's position, or would have been willing to work in either of those positions had they been offered. Complainant submitted this documentation because she alleges that, as a certified miner, she was more qualified for employment with respondent than apprentice miners. However, the only evidence the complainant submitted in support of this contention, was her own opinion regarding this qualification, and without more, this testimony is given little weight. Smith, supra.

By way of example, the complainant also submitted in evidence the employment application and experience questionnaire of Douglas Scarborough. Mr. Scarborough was an apprentice miner who was hired by respondent as a mechanic. Again, the record contains no evidence that complainant either applied for the position of mechanic, possessed the skill of mechanic, or would have been willing to work as one if the position were offered. When Mr. Scarborough was hired, he possessed not only multi-skills but very specialized skills. While in the military, Mr. Scarborough received extensive training in welding. He had worked on nuclear power plants as a welder, which

required a high degree of skill because of x-ray and ultrasound technology. Additionally, Mr. Scarborough had previously worked with F & E Erection Co. on assembling and maintaining the drag line. When these specialized skills are combined with Mr. Scarborough's experience in operating a forklift, it is clear, as testified by respondent, that Mr. Scarborough is a multi-skilled employee who also has highly specialized skills. Mr. Scarborough's employment experience shows that the difference between a red hat and a black hat has nothing to do with an individual's level of skill.

Complainant argued that respondent never intended to hire female miners because they would have had to build shower facilities for them. Complainant introduced the testimony of Ray Long to support this contention. As a factual determination, the testimony of Mr. Long on this point was not consistent with previous statements made by him, and, therefore, is of questionable probative value. Further, respondent submitted the testimony of Mr. Green, who stated that female shower facilities were provided for in the original blueprints of respondent's office which were drawn prior to the date of complainant's employment application. This testimony was supported by a copy of the actual blueprints showing the female shower facilities dated May 26, 1987. Additionally, respondent's intent to hire women from the initial stages of its hiring procedure was credibly confirmed by Ms. Offutt of Charleston Job Service. Mr. Long's testimony is insufficient to allow complainant to carry her burden of proving, by a preponderance of the evidence, that respondent's reason for denying her employment is pretextual. Burdine, 450 U.S. at 253.

Next, the complainant contends that the respondent hired four female craft employees, Alicia Cantley, Jan Cooper, Teresa Bradley and Diana O'Neal, only after she filed her discrimination complaint as a pretext in order to compensate for its lack of female employees and to cover its discriminatory animus toward females. In support of this contention, complainant presented an application of Alicia Cantley, dated April 1987, to show that, had respondent been eager to hire females, it could have hired Ms. Cantley earlier than August of 1987, which was shortly after she submitted a second application for employment. Although the complainant's argument has persuasive value, the respondent's explanation was that Ms. Cantley's original application was mistakenly filed in the first deluge of applications it initially received. The complainant did not call Ms. Cantley as a witness or elaborate or interrogate further upon this point. It should be noted that both of Ms. Cantley's applications reveal, on their faces, that she was a multi-skilled applicant. However, complainant's effort to show respondent's omission in considering Ms. Cantley on the basis of her first application as revealing evidence of pretext, without more, is insufficient. More generally, responding to complainant's contention on this point, it is the position of the respondent that the timing of its employment of female craft workers was dictated by the lack of female applications respondent initially received. And further that, the initiative to acquire more qualified female applicants was set into motion prior to the filing of Ms. Lucas' complaint. Mr. Kilstrom, testified that he telephoned other mining companies in the area inquiring as to whether or not they had any qualified females who were currently laid off.

Additionally, Mr. Kilstrom stated that he initially contacted the Charleston Job Service and asked for their help in securing more female applications. This testimony was confirmed by Ann Offutt. Mr. Kilstrom also contacted the Boone County Vocational Center to see if they had any graduates who fit respondent's multi-skilled job requirements. Complainant's argument, that these actions were taken as a pretext, is unsupported.

Complainant claims that she was discriminated against during her interview because Mr. Gunter told her that she would be contacted if "she fit into the program." Mr. Gunter testified that he conducted complainant's interview as he did all the others, and that he meant by his statement that complainant would be contacted if she gained the multi-skills required by respondent's hiring criteria. Complainant failed to come forward with sufficient evidence to show that Mr. Gunter's explanation was false or belied a predisposition against females or discriminatory animus toward her.

The complainant's final attempt to show discriminatory intent on the part of respondent consisted of the evidence presented by her witness, Ray Long, President of the United Mine Workers Local.

Introduced into evidence was a sworn statement dated August 6, 1987, in which Mr. Long describes two meetings he attended at respondent's worksite which he allegedly heard discriminatory statements. Mr. Long's statement initially describes a communications meeting he attended on June 30, 1987. The statement alleges that, at the meeting, the superintendent of the mine stated respondent was not going to hire any women because they did not have multiple skills. Mr. Long testified, however, that the conversation

he had with the superintendent did not occur at the communication committee meeting he attended, but rather, it occurred prior to the meeting when they were alone. Mr. Long also embellished the statement made by the superintendent to include a reference to a female Viet Nam Veteran, which was not mentioned in his prior sworn statement. Mr. Schneider denied making the statement to Mr. Long.

Next, Mr. Long's sworn statement describes a meeting he attended at respondent's worksite on July 13, 1987. In the statement, Mr. Long attests that Mr. Gunter stated respondent was not going to hire women because they didn't have multiple skills and that the respondent had lawyers to take care of the women. Mr. Long testified, however, that Mr. Gunter had stated they were not going to hire women because they did not have shower facilities for them. Both Mr. Gunter and Mr. Green, who were present at the July 13 meeting, denied that any such statements were made.

The record of evidence reveals, as raised by respondent, that Mr. Long is a friend of complainant's husband and brothers. Further, that at the time Mr. Long gave his sworn statement, he was running for the presidency of the Local Union where complainant's husband and brothers are members. Respondent points out, additionally, that Mr. Long testified that he had attempted to get respondent to hire several miners which they failed to do, and because of this, Mr. Long harbored animosity toward the respondent. When coupled with the appearance of bias and his prior inconsistent statements, this witness' testimony raises a credibility issue which minimizes its probative weight as persuasive evidence of discriminatory motive on the part of respondent.

In summation, it is the determination of the undersigned examiner that the complainant has failed to prove that respondent discriminated against her on the basis of her sex. The complainant has failed to make out a prima facie case of discrimination. However, even assuming that the complainant met her initial prima facie burden, respondent has articulated legitimate reasons for its failure to hire complainant. The complainant, in turn, has not met her ultimate burden of proving that these reasons were a pretext for unlawful discrimination.

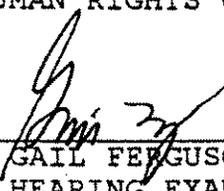
PROPOSED ORDER

Based upon the foregoing, the undersigned hearing examiner hereby recommends that the commission dismiss the complaint in this matter with prejudice.

Entered this 12 day of April, 1990.

WV HUMAN RIGHTS COMMISSION

BY



GAIL FERGUSON
HEARING EXAMINER

CERTIFICATE OF SERVICE

I, Gail Ferguson, Hearing Examiner for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing RECOMMENDED DECISION by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 19th day of April, 1990, to the following:

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