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STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE, JR.
Governor

TELEPHONE: 304-348-2616

October 4, 1985

Pamela Lucas
104 138th Street
Chesapeake, WV 25315

Donald L. Darling, Esquire
Assistant Attorney General
Room E-26, State Capitol
Charleston, WV 25305

Joseph M. Price, Esquire
Robinson & McElwee
P. O. Box 1791
Charleston, WV 25326

RE: Pamela Lucas v. Cedar Coal Company
ES-164-79

Dear Ms. Lucas, Mr. Darling and Mr. Price:

Enclosed please find a copy of the Order of the WV Human Rights Commission in the above-styled and numbered case of Pamela Lucas v. Cedar Coal Company/Docket No. ES-164-79, Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,

Howard D. Kenney
Howard D. Kenney
Executive Director

HDK/kpv

Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

CC: Roxanne Rogers, Attorney
David G. Hanlon, Hearing Examiner

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

Pamela Lucas
Complainant,

v.

Docket No. ES-164-79

Cedar Coal Company,
Respondent.

ORDER

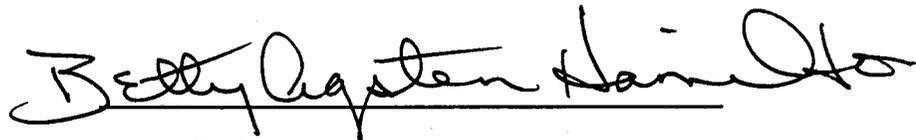
On the 19th day of September, 1985, the Commission reviewed Hearing Examiner, David G. Hanlon's Findings of Fact and Conclusions of Law. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own.

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order.

By this Order, a copy of which to be sent by Certified Mail, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 4th day of October, 1985

RESPECTFULLY SUBMITTED,



Chair /Vice Chair
West Virginia Human Rights
Commission

It appearing that notice as required by law, setting forth the time and place of the hearing and the matters to be heard, had been duly-served upon the respondent and respondent appearing by its representatives, the hearing was convened at the aforesaid time and place, the same being completed on the 14th day of May, 1985.

Motion was made by the respondent to limit the hearing to matters raised by the Amended Complaint and exclude matters considered by the West Virginia Human Rights Commission in the case of Pamela Lucas v. Cedar Coal Company, bearing Case No. REP 426-79. The respondent made a motion to the effect that since the Human Rights Commission had heretofore in Case No. REP 426-79 found no probable cause regarding the allegations of Pamela Lucas that she had suffered reprisals from respondent after filing her original discrimination charge, evidence regarding the alleged acts of reprisals should not be considered.

This issue having been discussed at the pre-hearing conference in this matter on the 8th day of March, 1985, at which time the parties indicated that these matters were res-judicata and, the Hearing Examiner believing it proper so to do, sustained the motion and the hearing was limited to those matters raised in the Complaint dated the 5th day of November, 1978, and the Amended Complaint dated the 14th day of November, 1978.

Upon due consideration of the evidence, the stipulation of the parties, and of the briefs of counsel, the Hearing Examiner hereby makes the following Findings of Fact and Conclusions of Law:

ISSUES

Two issues were presented in this cause: (1) Was complainant denied a job as a surface miner by the respondent because of her sex; and (2) did respondent hire a male employee to perform the same job as complainant at a higher wage, without legitimate business reasons for such higher wage.

FINDINGS OF FACT

(1) The complainant, PAMELA LUCAS (now Pamela Estes), is a female high-school graduate, born on the 18th day of January, 1956.

(2) At the time of the filing of the Complaint herein, the respondent was engaged in surface and deep coal mining operations in Kanawha County, West Virginia, and continued mining operations until July, 1984, when mining operations ceased.

(3) Complainant applied for a surface mining job with the respondent on or about the 28th day of August, 1976, and was

hired shortly thereafter as a part-time communications clerk, a position she held until the 31st day of January, 1977, when she became a "full-time" employee.

(4) At the time of her initial application, complainant was advised that respondent did not employ females in surface mining positions.

(5) Prior to complainant's application for a surface mining position with the respondent, the respondent had never employed a female in a surface mining position.

(6) Prior to the acquisition of Cedar Coal Company by American Electric Power, it was the express policy of the respondent not to hire females in surface mining positions.

(7) After the acquisition of Cedar Coal by American Electric Power, an affirmative action program was instituted, whereby the hiring of females and minorities was made company policy.

(8) The complainant held the job of communications clerk with the respondent until the 4th day of June, 1977, when she was promoted to Environmental Technician B, a position she held until she was promoted to Environmental Technician A on the 3rd day of June, 1978.

(9) Complainant held the position of Environmental Technician A until the termination of her employment by the

respondent on the 16th day of July, 1979.

(10) The duties of Environmental Technicians A and B were to pick-up dust samples at various locations and to take noise level readings, package and ship the same to the Mine Safety and Health Administration for analysis.

(11) Shortly after beginning her duties as an Environmental Technician B, the complainant was required to take certain training regarding the job in Beckley, West Virginia, at the Mine Health & Safety Academy. The complainant traveled to and from Beckley in a company-owned vehicle, accompanied by her immediate supervisor, James Tackett.

(12) During these trips, James Tackett made sexual advances toward the complainant, which she refused. Complainant communicated these events to her mother, but did not file a formal discrimination charge regarding the same or report them to the respondent.

(13) During her employment with the respondent, complainant made oral requests for a surface mining position. On the 2nd day of June, 1978, a written request was made. At this time, complainant had acquired a surface mining apprentice certification and was qualified for an entry-level surface mining job.

(14) Prior to the June 2, 1978 written application for a surface mining position, the personnel record of the complainant contained no written reprimands or notations of inadequate job performance, and the records of her immediate supervision, James Tackett, contained three adverse notations - one regarding a date missed due to illness, and two for tardiness.

(15) Complainant was given a two-day trial as a drill-helper on a surface mining job and was advised her job performance was satisfactory.

(16) Following complainant's trial period as a drill-helper, John Goddard, personnel supervisor for respondent, discussed the matter with complainant's immediate supervisor, James Tackett, who recommended that complainant not be hired for the surface mining positions.

(17) John Goddard advised complainant that she was turned down for the surface mining job as a result of the recommendation of James Tackett.

(18) Surface mining positions with the respondent continued to be filled by male employees after complainant was refused a surface mining position. In November, 1978, the respondent employed its first female surface miner.

(19) Complainant filed a discrimination charge against the respondent on the 5th day of November, 1978, within ninety (90) days of having asked to again be hired as a surface miner on the 18th day of August, 1978.

(20) On or about the 14th day of August, 1978, the respondent hired Donald Rhodes for the position of Environmental Technician B. At the time Rhodes was hired, complainant was an Environmental Technician A and Sue Hope Bumgardner was an Environmental Technician B. Rhodes was a college acquaintance of John Goddard, respondent's personnel supervisor, and had a college degree. Neither complainant nor Sue Bumgardner were college graduates.

(21) The job of Environmental Technician A or B does not involve actual laboratory work, however, Donald Rhodes had laboratory experience at the time he was hired.

(22) Complainant and Sue Bumgardner trained Rhodes on the duties of an Environmental Technician. Complainant, apparently opening the payroll check envelope of Donald Rhodes, learned that he had been hired at a salary greater than her salary as an Environmental Technician A. At the time Donald Rhodes was hired by the respondent, the job of Environmental Technician A and B had minimum/maximum salary ranges, with discretion given the personnel department as to the salary to be paid to individuals within this range. Rhodes' salary was \$0.01

more per hour than the complainant's.

(23) An Amended Complaint was filed by the complainant with the Human Rights Commission on the 14th day of November, 1978, alleging pay discrimination with regard to Donald Rhodes, and was filed within ninety (90) days of complainant learning of the same.

CONCLUSIONS OF LAW

The complainant is an individual within the meaning of Chapter 5, Article 11, Section 3(a) of the West Virginia Code.

The respondent is an employer within the meaning of Chapter 5, Article 11, Section 3(d) of the West Virginia Code.

On the 5th day of November, 1978, the complainant filed a verified Complaint against the respondent, alleging that the respondent had engaged in unlawful discriminatory practices, prohibited under Chapter 5, Article 11, Section 9(a) of the West Virginia Code. The said Complaint was amended on the 14th day of November, 1978, alleging another separate act of discrimination.

The Complaint and the Amended Complaint were both timely filed within ninety (90) days of the alleged acts of discrimination.

The West Virginia Human Rights Commission has jurisdiction over the parties and the subject matters contained in the Complaint and the Amended Complaint.

Insofar as the complaint filed relates to the respondent's refusal to employ complainant in a surface mining position is concerned, the evidence established that

(a) the complainant is a member of a protected group under the West Virginia Human Rights Act;

(b) the complainant applied for a job with the respondent as a surface miner, for which she was qualified and for which the respondent was seeking applicants; and

(c) the complainant was rejected despite her qualifications, but the position remained open and respondent continued to seek applicants for such position.

See McDonnell Douglass Corporation v. Green, 411 U.S. 792 (1973).

Chapter 5, Article 11, Section 9 of the West Virginia Code, makes it an unlawful discriminatory practice "for any employer to discriminate against an individual with respect to compensation, hire, tenure, term, condition or privileges of employment, if the individual is able and competent to perform the services required, even if such individual is blind or handicapped".

Complainant has shown that she possessed the qualifications for a job with the respondent as a surface miner,

but the respondent refused to hire her as such. Respondent's defense to the charge is that the complainant had a poor work record and used that defense as a basis for its refusal to give her the job as a surface miner.

The evidence is clear that the basis for respondent's refusal to transfer complainant to the surface miner position was because her immediate supervisor, James Tackett, told John Goddard, personnel supervisor, that complainant was undependable.

While the charge of sexual harrassment by James Tackett is not the basis for the present complaint, I find from the evidence that complainant's testimony regarding the incident, together with the testimony of her mother, are more credible than the denial by James Tackett that the incident did not occur.

I further find that the evidence establishes that there was a feeling of hostility between the complainant and James Tackett, which may or may not have been the result of complainant's rejection of Tackett's sexual advances, but which may have caused James Tackett to refuse to take complainant's desire to obtain a surface mining position seriously. The evidence further shows that James Tackett did not believe females were suited for surface mining positions.

The evidence presented failed to show that at the time the complainant applied for the surface mining position in June,

1978, her work record was such as to justify the refusal by respondent to employ her in such a position.

I accordingly find that while the respondent has attempted to show a non-discriminatory reason for its refusal to employ complainant as a surface miner, for the reasons heretofore stated, such refusal was an act of discrimination, as defined under Chapter 5, Article 11, Section 3(h) of the West Virginia Code. See McDonnell Douglass Corporation v. Green, supra; Texas Department of Community Affairs v. Berdine, 450 U.S. 248 (1981).

The action of the respondent caused the complainant to suffer embarrassment and humiliation, resulting in her becoming emotionally upset.

Insofar as the Amended Complaint alleges unequal pay on the basis of sex, the evidence establishes and it is found that:

(a) On August 14, 1978, respondent hired a male, Donald Rhodes, for the position of Environmental Technician B at a salary greater than complainant was receiving as an Environmental Technician A, a position of greater responsibility.

(b) This action on the part of respondent appears to make a prima facie case of discrimination as defined under Chapter 5, Article 11, Section 9(a) of the West Virginia Code.

(c) Respondent attempted to rebut this by establishing that Donald Rhodes was a college graduate with considerable work experience, which made him a more valuable employee, justifying a higher salary.

(d) At the time Rhodes was hired, the position of Environmental Technician had minimum/maximum salary ranges and employees were paid at a point between these figures based upon various factors.

Considering the evidence as a whole, I find that respondent had a legitimate business purpose in paying Donald Rhodes a higher wage and that there is no credible evidence in the record to show that Donald Rhodes was paid a higher wage because he was male, and it is accordingly recommended that the wage discrimination charge be dismissed.

ACTION

Inasmuch as the respondent is no longer engaged in coal mining, the only remedy available to complainant and the only action recommended is the payment of monetary damages.

The parties have stipulated that had the complainant obtained the surface mining position, she would have earned \$2,146.31 more in wages than she earned as an Environmental Technician A.

In addition, under the authority of Chapter 5, Article 11, Section 8(h) of the West Virginia Code and the holding in State Human Rights Commission v. Pearlman Realty Agency, 161, W.Va. 1, 239 S.E.2d 145 (1977), the respondent shall pay unto the complainant a sum in the amount of Five Thousand Dollars (\$5,000.00) as compensatory damages to the complainant for humiliation and embarrassment she endured as a result of the discriminatory conduct of the respondent.

GIVEN under my hand this 17th day of July, 1985.



DAVID G. HANLON
HEARING EXAMINER