



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Herman H. Jones
Executive Director

March 20, 1998

**Certified Mail/Return
Receipt Requested**

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Re: Clark A. Miller v. Fairmont State College
Docket Nos. EA-483-92 and EH-484-92

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled case. Pursuant to W. Va. Code § 5-11-11, 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 review of this Final Order.

Sincerely,

HERMAN H. JONES
EXECUTIVE DIRECTOR

HHJ/mst
Enclosures

cc: The Honorable Ken Hechler
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 West Virginia Human Rights Commission and the adverse party as respondents. The employer or the person or entity 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, person or entity 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

CLARK A. MILLER,

Complainant,

v.

DOCKET NO. EA-483-92
EH-484-92

FAIRMONT STATE COLLEGE,

Respondent.

FINAL ORDER

On March 12, 1998, the West Virginia Human Rights Commission reviewed the Administrative Law Judge's Final Decision in the above-styled action issued by Administrative Law Judge Mike Kelly. After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer filed in response to the Administrative Law Judge's Final Decision, the Commission decided to, and does hereby, adopt said Administrative Law Judge's Final Decision as its own, without modification or amendment.

It is, therefore, the order of the Commission that the Administrative Law Judge's Final Decision be attached hereto and made a part of this Final Order.

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 they 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 20th day of March, 1998, in Charleston, Kanawha County, West Virginia.



HERMAN H. JONES, EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION

**BEFORE THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION**

CLARK MILLER,

Complainant,

v.

Docket Nos. EA-483-92 & EH-44-92

FAIRMONT STATE COLLEGE,

Respondent.

**FINAL DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

THIS MATTER matured for public hearing on 16 October 1996 at Fairmont, Marion County, West Virginia. Additional proceedings were held, by consent of the parties, in Charleston, Kanawha County, West Virginia, on 4 November 1996. The complainant appeared in person and his case was presented by the West Virginia Human Rights Commission and its counsel Assistant Attorney General Stephanie C. Schultz and Deputy Attorney General Mary Catherine Buchmelter. Assistant Attorney General John McFerrin appeared on the brief. The respondent appeared by its representative and by Senior Assistant Attorney General Brentz H. Thompson. Assistant Attorney General Andrew G. Dimlich appeared on the brief.

I. ISSUES TO BE DECIDED

A. Whether respondent discriminated against complainant because of his age or handicap when it rejected his application for the position of full time grounds service worker posted as vacancy no. 92-13.

B. Whether respondent discriminated against complainant because of his age or handicap when it rejected his application for the position of full time grounds service worker posted as vacancy no. 92-18.

II. FINDINGS OF FACT

Based upon the credibility of the witnesses, as determined by the Administrative Law Judge, taking into account each witness' motive and state of mind, strength of memory, and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and the bias, prejudice and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence; and upon thorough examination of the transcript of the proceedings, the exhibits introduced into evidence and the written recommendations and argument of counsel, the Administrative Law Judge finds the following facts to be true¹:

¹ To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain

A. Complainant's Work History with Respondent

1. Clark A. Miller was born on 5 July 1936. He has been employed as a part time grounds worker at Fairmont State College (FSC) since 1985. His duties include planting flowers, maintaining shrubbery and trees, mowing grass, moving furniture and equipment and running machinery. Mr. Miller was still employed as a part time grounds worker at the time of hearing.

2. Mr. Miller is considered a part time employee because his hours are limited to 1,100 work hours per fiscal year. When he reaches the maximum hours allowed, he is laid off until the next year. He is paid \$5.35 per hour and is not eligible to receive fringe benefits. As of the date of hearing, Mr. Miller was the only part time worker on respondent's grounds crew.

3. Mr. Miller has asthma and allergies. He takes medication and occasionally uses an inhaler at work. When suffering an asthma or allergy attack at work, he uses his inhaler, stops work for a few minutes and then resumes his duties. There was no evidence that Mr. Miller's maladies prevent him from performing the essential functions of the position of grounds worker as set forth in Finding of Fact 1.

4. It was basically undisputed that Mr. Miller does a good job for FSC and is a hardworking employee.

proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issue as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

B. Mr. Miller Applies for Vacancy No. 92-13

5. In Fall 1991, Mr. Miller applied for vacancy no. 92-13, a ground service worker position. He was interviewed on 10 October 1991. The interview committee consisted of Brent Hughes (Supervisor of Roads/Grounds), Larry Lawrence (Assistant Director of Physical Plant) and James "Woody" Whitlach (Grounds Worker Lead).

6. Complainant was not selected for vacancy no. 92-13.

7. Mr. Hughes, a manager and supervisory agent of respondent, testified credibly that he recommended that Sheila Warnick, a female, be selected for vacancy no. 92-13. He testified that Mr. Lawrence, a panel member also voted in favor of Ms. Warnick. It is unclear who Mr. Whitlach supported.

8. Mr. Hughes further testified credibly that the selection of Ms. Warnick was forwarded to Kenneth W. Dillon, Mr. Hughes' boss and Director of the Physical Plant. According to Mr. Hughes, Mr. Dillon "said he wouldn't have a female working in the grounds department and we wound up with Mr. [Matthew] Love. Mr. Lawrence and myself both chose Ms. Warnick."

9. Mr. Dillon rejected Mr. Hughes' allegation of discrimination against Ms. Warnick. He testified that all three interviewers recommended Mr. Love. Mr. Lawrence, however, corroborated Mr. Hughes' version of events and testified that he "... recommended Sheila Warnick, the girl . . . I

recommended her to the director." Mr. Lawrence also testified that when he told Mr. Dillon about his recommendation in favor of Ms. Warnick , Mr. Dillon "... just didn't think that was a good idea ... I don't know what his reason was, he just didn't."

10. Based on the above testimony, and after assessing the general credibility of the above witnesses by observation of their demeanor and manner while on the witness stand, I credit Mr. Hughes as telling the truth about the events at issue and find Mr. Dillon's testimony to be unworthy of belief.

11. While there was evidence the interviewers may have taken Mr. Miller's minor physical limitations into account when assessing his candidacy for vacancy no. 92-13, I find that a preponderance of the evidence establishes that Ms. Warnick, not Mr. Miller, would have been selected in the absence of unlawful discrimination and that Mr. Miller would not have been selected even if his physical limitations had not been taken into account. There was no evidence at all that his age was a factor in his rejection for this vacancy.

C. Mr. Miller Applies for Vacancy No. 92-18

12. On 3 December 1991 Mr. Miller was interviewed for a second vacancy in the position of grounds service worker. This time the interviewers were Mr. Lawrence, Mr. Whitlach and Steven

Newbraugh, a grounds service worker. Brent Hughes did not serve as an interviewer for this vacancy.

13. Once again complainant was not recommended for the position. This time all three interviewers recommended Terry Rinehart, a male. At the time of his selection, Mr. Rinehart was 39 years of age. Mr. Miller was 55. The recommendation of Mr. Rinehart was accepted by Mr. Dillon and Terry Rinehart was hired for the job.

14. The interview notes of both Mr. Whitlach and Mr. Newbraugh indicate that in evaluating Mr. Miller they considered the minor limitations on his physical abilities caused by his asthma and allergies. Such notations include "can't carry up steps" and "bad weather bothers breathing". The credible evidence from Mr. Miller and his supervisors, however, shows that such limitations never prevented him from getting the job done.

15. * While Mr. Hughes did not sit in on the interviews for vacancy no. 92-18, he testified that he was at a desk outside of the lunchroom where the interviews occurred and overheard Mr. Newbraugh and Mr. Whitlach discussing the candidates as they exited the lunchroom. Mr. Hughes was not within their view. He testified credibly that he heard one of the men, probably Mr. Newbraugh, state that Clark Miller was too old for the job. Both interviewers then expressed a desire to hire their "buddy", Terry Rinehart.

16. Mr. Hughes did not confront the men about the statement referring to complainant's age, but he did later report what he had overheard to Ms. Toni Christian, who was then respondent's Director of Human Resources. There was no evidence offered that Ms. Christian investigated or otherwise acted upon the information brought to her by Mr. Hughes.

17. While Messrs. Newbraugh and Whitlach denied making or hearing any comment related to complainant's age, I credit the testimony of Mr. Hughes as being candid, forthright and truthful. He is a supervisor for respondent and appeared to have no personal stake or interest in falsely testifying in complainant's favor and against his employer. Suspicions that Mr. Hughes was a "disgruntled" boss using this case as a means to settle a personal score were laid to rest when respondent attempted, but failed to discredit him.

18. Based on evidence of the whole record, I find as fact that unlawful discrimination because of age was a factor in respondent's decision to reject Mr. Miller for vacancy no. 92-18. This finding is based on the testimony of Mr. Hughes and after an assessment of credibility in his favor and against Messrs. Newbraugh and Whitlach.

19. I find as fact that complainant's minor physical limitations were considered in the selection process for vacancy no. 92-18, but were not factors in the decision to reject him and that he was rejected because at least two of the interviewers, Messrs. Newbraugh and Whitlach, considered him too old for the job.

20. As a result of the complainant's rejection for the position of full-time grounds keeper and the discrimination which resulted in that rejection, he suffered lost wages and benefits, and humiliation, embarrassment and emotional distress.

CONCLUSIONS OF LAW

1. The complainant, Clark A. Miller, is an individual aggrieved by an unlawful discriminatory act, and is a proper complainant under the West Virginia Human Rights Act, W.Va. Code §5-11-10.
2. The respondent, Fairmont State College, is a person and an employer as those terms are defined by W.Va. Code §§ 5-11-3(a) and 5-11-3(d), respectively, and is subject to the jurisdiction of the West Virginia Human Rights Commission.
3. The Commission failed to show that unlawful discrimination because of age or disability was a factor in complainant's rejection for job vacancy no. 92-13.
4. The Commission showed by a preponderance of the evidence that Mr. Miller's age, but not his alleged disability, was a factor in the decision to reject him for job vacancy no. 92-18.

5. The Commission having shown that an impermissible criterion, complainant's age, was a factor in his rejection for job vacancy no. 92-18, the burden of persuasion switched to respondent to prove by a preponderance of the evidence that the same result (the hiring of Terry Rinehart) would have occurred even in the absence of the unlawful motive. *Skaggs v. Elk Run Coal Co.*, 479 S.E. 2d 561 (1996).

6. Respondent failed to show that Mr. Miller would not have been hired even in the absence of unlawful discrimination. Mr. Hughes, who I found extremely credible, had rated both Mr. Miller and Mr. Rinehart a "7" on a one-to-ten scale for job vacancy no. 92-13. His rating took place just two months prior to the December hiring of Mr. Rinehart. Mr. Lawrence, who used the most elaborate scoring system, gave Mr. Rinehart a 13 score on vacancy no. 92-18, Ms. Warnick a 12 and Mr. Miller a 11.5, but then gave a final overall score of "2" (on a scale of 0-to-3) to each of them. A "2", according to Mr. Lawrence, meant that the applicant was a "good" candidate for the job.

7. * An objective review of the entire record does not support a conclusion that Mr. Miller would have been rejected for the position even if his age had not impermissibly entered into the decisionmaking process. To the extent that their qualifications are ascertainable, Mr. Miller and Mr. Rinehart appear equally qualified and were so rated by Mr. Hughes, who was the most credible witness to testify. Unlike in the first vacancy, there was no evidence that Ms. Warnick was rejected for the second position because of unlawful discrimination or that the interviewers thought she was more qualified than both Mr. Rinehart and Mr. Miller.

8. To the extent that the issue of causation is made difficult by lack of a uniform scoring system and lack of uniformity in the cast of decisionmakers, and to the further extent that this case may be tainted by alleged discrimination against Ms. Warnick, that is a burden that may properly be laid on respondent once the Commission has established that a discriminatory animus was at play. *Skaggs*, 479 S.E. 2d at 586.

9. Respondent committed a discriminatory act within the meaning of W. Va. Code § 5-11-9 by discriminating against complainant because of his age when it rejected his candidacy for job vacancy no. 92-18.

10. Respondent is liable for back pay, benefits and prejudgment interest for the illegal discrimination against the complainant.

11. As a result of the discriminatory and illegal actions of respondent, complainant and Commission are entitled to the following relief:

(a) Back pay and benefits in the amount of \$82,133.49, plus prejudgment interest thereon at the rate of ten percent (10%) per annum in the amount of \$28,971.52, for a total of \$111,105.01, as of 31 December 1997;

(b) Back pay and interest from 1 January 1997 up to the day of this decision;

(c) Placement into the next available full-time grounds keeper position and front pay equivalent to that provided by the respondent to its full-time grounds keeper employees, including all benefits, until the complainant is placed into said position;

(d) Incidental damages in the amount of \$3,277.45 for humiliation, embarrassment and emotional distress;

(e) Reimbursement of costs and expenses associated with prosecuting this claim, including expenses incurred by the West Virginia Human Rights Commission for transcribing the hearing record and witness fees in the amount of \$748.95, and travel expenses incurred by the Office of the Attorney General, Civil Rights Division, in the amount of \$383.80; and

(f) A cease and desist order aimed at preventing the respondent from continuing its discriminatory employment practices.

12. The allegations in Docket No. EH-483-92 are DISMISSED, WITH PREJUDICE.

13. The allegations in Docket No. EA-484-92 are DISMISSED, WITH PREJUDICE in regard to the job vacancy no. 92-13 and SUSTAINED in regard to job vacancy no. 92-18.

WV HUMAN RIGHTS COMMISSION

ENTER: 10 September 1997

BY: Mike Kelly

MIKE KELLY
Administrative Law Judge
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