



COPY

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

1/2/86

~~December 20, 1985~~

Jack McClung, Esquire
Deputy Attorney General
1204 Kanawha Boulevard, E.
Charleston, WV 25301

Joseph C. Hash, Jr., Esquire
P. O. Box 368
Ravenswood, WV 26164

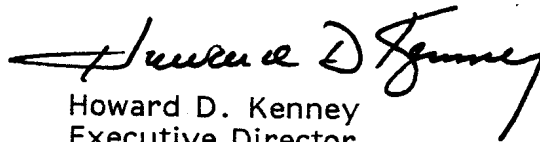
RE: Minney V Green Hills Country Club
ES-633-82

Dear Mr. McClung and Mr. Hash:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Minney V Green Hills Country Club.

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
Executive Director

HDK/kpv

Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

HAZEL K. MINNEY,
Complainant,

V.

DOCKET NO. ES-633-82

GREEN HILLS COUNTRY CLUB,
Respondent.

FINAL ORDER

At the regularly scheduled meeting held on November 13, 1985, the Commission examined the record in this case and upon review of the same decided to adopt the Hearing Examiner's proposed order and decision.

It is, therefore, ORDERED that the Hearing Examiner's proposed order and decision be and the same is hereby incorporated as a part of this final order for all pertinent purposes. In view of the foregoing, it is further ORDERED that the complaint in this matter be dismissed with prejudice.

Entered this 5 day of December, 1985.

WV HUMAN RIGHTS COMMISSION

BY ITS: Belle Gaston Hamilton
CHAIR/VICE CHAIR

WEST VIRGINIA SUPREME COURT OF APPEALS
FOR THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

*Approved
H.R.S.
9/28/85*

HAZEL K. MINNEY,

Complainant,

v.

Case No. ES 633-82

GREEN HILLS COUNTRY CLUB,

Respondent.

HEARING EXAMINER'S PROPOSED FINDINGS
OF FACT, CONCLUSIONS, DECISION
AND RECOMMENDED ORDER

INTRODUCTION

A public hearing was held in this matter on June 12, 1985. After a full day of hearing, it was recessed until July 10, 1985 and was concluded that day. Both sessions were held at the Jackson County Courthouse, Ripley, West Virginia.

Complainant was represented by counsel, Jack McClung, Deputy Attorney General. Respondent was represented by counsel, Joseph C. Hash, Jr.

The complaint stated that complainant, Hazel K. Minney, had been terminated from her employment as a bartender/waitress because she had refused the sexual advances made upon her by the respondent's manager/chef. The complaint further stated

that the manager/chef (Robert Milam) had continually harassed complainant because of her refusal to accommodate him sexually. Finally, complainant alleged that she had been denied hospitalization benefits and had received unequal tips; however, these latter accusations were dropped prior to hearing. The sole issue tried at the hearing was whether complainant had been fired because of her refusal to submit to Milam's sexual advances and suggestions.

In addition to her own testimony, complainant presented five witnesses in her case-in-chief and two rebuttal witnesses. Ten witnesses, including Robert Milam, testified on behalf of respondent.

PROPOSED FINDINGS OF FACT

1. Complainant, Hazel K. Minney, is a 27-year-old female who was employed as a bartender/waitress by respondent from March 16, 1981 to April 30, 1982. Another employee, Janet Dean Cather, was terminated at the same time but was notified a day earlier than this complainant.

2. Green Hills Country Club is a private country club located near Ravenswood, West Virginia in Jackson County. Robert Milam, the person accused of sexual harassment in this case, was the club's manager and chef from October, 1981 to October, 1983. Milam during that period ran the day-to-day

operations of the club but was responsible to the club's governing board, which hired him and had ultimate responsibility for the management of the club. Milam did not have general authority to hire and fire employees, but could only recommend and act with the approval of the board.

3. A number of witnesses for respondent testified -- and the Hearing Examiner so finds -- that complainant was not an energetic employee. Although the descriptions of her work performance varied with each such witness, there was evidence to the effect that complainant was unprofessional in her appearance and attitude, not as responsive to dining room customers as to "bar" customers, "poor", "lackadaisical", "not bad but not good", " a little worse than some others", and words to similar effect.

4. Prior to and during the period from January to April, 1982, the club's financial situation turned unfavorable. This was primarily due to two factors: (1) The club membership was made up in large part of employees of the Kaiser Aluminum plant in Ravenswood, which was undergoing extensive layoffs and cutbacks at that time; (2) a feeling among the membership that the club did not offer sufficient incentive to get members to use its facilities including the restaurant.

5. The club managing board determined to increase patronage and membership by, among other things, upgrading the quality

of the service offered by the hired staff. To this end, the board decided to institute a dress code for employees, to meet with the employees about their attitude, appearance and performance, and generally make the club more attractive to members and guests.

6. Whereas waitresses and other employees who worked within sight of patrons had formerly been allowed to wear "jeans", the new dress code prohibited jeans except for the kitchen staff. The board also discussed the use of black and white attire for Kaiser functions held at the club, and uniforms on other occasions. This evidence is not clear as to whether the latter measures were permanently or consistently instituted.

7. There is a conflict in the evidence as to whether complainant complied with the new dress code, or whether in fact the code absolutely forbade the wearing of jeans. Complainant seems to concede that she did continue to wear jeans on occasions but that she did so with permission of the management and that others did likewise, including Milam. Respondent presented evidence from numerous witnesses to the effect that they understood the code to prohibit jeans and that they saw complainant violate the code on one or more occasions. The Hearing Examiner finds that the club's board had instituted a dress code; the board believed there was a prohibition against waitresses wearing jeans, and that complainant did wear jeans after the dress code was instituted.

8. Complainant testified that Robert Milam sexually harassed her in the following ways: He made sexually suggestive remarks, pinched, fondled and brushed up against her in a suggestive manner, and he would purposely stand in a narrow passageway in the bar area so that complainant would have to squeeze between him and the bar to get through. She indicated that not long before she was fired, Milam made a particular remark about the size of his sexual apparatus, and that on another occasion shortly before her termination, he indicated that complainant "would not be around much longer". She testified that she had complained to a board member (not the board as an entity) about this harassment and that Milam became upset when he found out about it. Neither side called this particular board member to confirm or deny that testimony.

9. Respondent presented testimony that complainant was once seen to "pat Milam on the rear", once put her arm around him while talking to him, and that she was somewhat of a "flirt".

10. Complainant presented evidence from other witnesses tending to corroborate her accusations against Milam. Several witnesses said they heard his remark about the size of his genitals and also that they had seen him touching and rubbing against her. Complainant also presented testimony from an employee of Edgewood Country Club in Charleston, where Milam

had previously worked as a chef, to the effect that Milam had once sexually fondled a female kitchen employee at Edgewood but that the female had participated willingly on that occasion.

11. Testimony presented by respondent's witnesses generally tended to agree that they observed no improprieties between Milam and complainant. Milam himself admitted that when things got hectic in the kitchen he and others would tell dirty jokes and "kid around" to relieve the tension, but he denied sexual harassment of complainant. It is relevant to note that Milam's wife and daughter resided with him in a house on the club premises. Mrs. Milam filled in as an employee of the club in various capacities and frequented the clubhouse even when not working.

12. Janet Dean Cather, who was terminated at the same time (one day before complainant) testified that Milam did not engage in sexual advances or harassment with her. Testimony from several of respondent's witnesses indicated that Cather was also a less than energetic employee and that she too continued to wear jeans after the institution of the dress code.

13. Testimony from both sides indicated that the relationship between complainant and Milam fluctuated from friendly to bickering. At times they seemed to work well together, but on other occasions they argued about tips, the use of a "tip jar" at the bar and other matters. One of respondent's witnesses, Dale Barr, now unemployed, worked at the club from 1981 to 1984 as a dishwasher

and short-order cook. He testified that at times, the complainant and Milam were friendly and were patting each other on the back, but that complainant would always "back-talk" when Milam would tell her to do something; "she always had to say something". Barr also saw complainant make derisive gestures toward Milam when his back was turned. The same witness recalls the institution of the dress code and that complainant did not always follow it. Finally, Barr recalls Milam coming upstairs to the kitchen with a copy of the Human Rights complaint and saying "you won't believe this, but Hazel has filed suit against me for sexual abuse". The witness indicated he and other employees were shocked and that no one had "known anything about that". The Hearing Examiner notes that this witness, Dale Barr, had been laid off by the club in 1984, is not now employed there and is a disinterested witness. His testimony, although at times in crude terminology, is credible not only because of his demeanor but because his employment with the club as dishwasher and short order cook placed him at the scene during the period in question.

14. It is undisputed that because of the club's financial difficulties, the wages of most, if not all of the club's employees were reduced during the period in question. In addition, employees other than complainant and Janet Dean Cather were terminated in 1982. Grace Boggess, one of complainant's witnesses, was

a cook at the club, was laid off in March, 1982, and was not rehired. Ann Swift, another former employee of the club and one of complainant's witnesses, was laid off in August, 1982, and apparently not rehired. The club golf pro at the time, Charles Furbee, appeared as one of respondent's witnesses. He testified that he too left the club in 1982, in part because of the club's financial difficulties. It is obvious that many personnel changes were occurring during the period material to this case and that the club's management was taking action to try to improve the situation. There is no indication that the terminations of the female employees Cather, Boggess and Swift were due to any sort of sex discrimination or impermissible motivation on the part of Milam or any board member. As previously noted, Cather was terminated along with complainant, but she did not at this hearing accuse Milam of making sexual demands on her or firing her for that reason.

15. Minutes of two club board meetings in March, 1982, were admitted as evidence. These minutes corroborate the testimony that a dress code had been discussed and established and that there had been concern and criticism expressed by club members concerning the performance and lack of professionalism of the staff. The board's minutes of March 4, 1982, state that "A dress code has been established prohibiting the wearing of jeans by the bartender and waitresses in an effort to present

a more professional appearance ". Milam testified that he held a meeting with the employees on March 11, 1982 (one week after the board's meeting) to discuss improvements of the services. His personal notes about that meeting were admitted into evidence (Respondent's Exhibit No. 16). The notes state in part: "2) Dress Code... B. No Jeans in the Bar. C. Cooks dress good (sic) when in front of members. * * *5) Get Professional. A. Service B. Attitude * * * 7) When asked to do something do it."

16. Respondent presented three witnesses who were club officers and board members at the time in question. Ed Carr was a board member and "house chairman" (referring to the "club-house"). Bobby Cline was and still is treasurer and a board member. David Kessell was and still is a board member and has served as club president since 1982. He apparently was secretary of the club in April, 1982. These witnesses indicated that complainant (and Cather) had violated the dress code, and that they had either seen such violations or received complaints about them. At a board meeting in April, 1982, the subject of dismissing these two employees was a major subject of discussion. At that meeting, the board authorized Milam to dismiss the two if they did not improve compliance with the dress code. Milam did terminate them shortly thereafter (April 29th and 30th). Prior to the termination, Milam had made notes on scrap paper during the month of April of several instances

when complainant had been seen wearing jeans or committing some other infraction. (Respondent's Exhibits No. 6-15). Five of these notations related to the wearing of jeans.

17. Complainant presented as a rebuttal witness an investigator from the Attorney General's office, who testified that he visited the club in May and June of 1985, and on both occasions the bartenders were wearing jeans.

18. Complainant seeks back pay in the amount of \$15,553.00 and incidental damages of \$10,000.00.

DECISION, PROPOSED CONCLUSIONS AND ORDER

The Hearing Examiner does not believe it is necessary to recite a detailed analysis of the burden of proof or "burden of going forward" imposed upon the respective parties. Suffice it to say that complainant has alleged she was terminated for refusing the sexual demands of respondent's manager/chef. Complainant had the ultimate burden of proving by a preponderance of the evidence that sexual demands were made and that there was a causal connection between complainant's refusal of those demands and her firing.

In this case, even if complainant is given the benefit of every doubt as to whether she has proven a prima facie case -- and I have considerable doubt that she did -- the respondent's evidence clearly established a legitimate nondiscriminatory

reason for complainant's termination. If Robert Milam had been respondent's only witness, I would not have been inclined to give his testimony much weight. A number of respondent's witnesses, however, corroborated Milam's explanation of the events. Several of those witnesses are no longer employed by or affiliated with the club. The termination of complainant and Janet Dean Cather was not solely Milam's idea. At least three board members, Carr, Cline and Kessell, believed that these two female employees left something to be desired in appearance and professionalism. They specifically noted what they believed were violations of the dress code that had been established in early March. This concern came to a head at the April board meeting. There is no question that Milam did not have authority to hire and fire; that authority resided in the board, which delegated it to Milam in the case of complainant and Cather. So far as the board was concerned, the two were fired for reasons related to their performance as employees and for no other reason. Minutes of the board's March meetings, recorded at a time prior to any delegation of authority to fire the two, reflect the board's concern over the quality of service at the club. Specific reference was made in the minutes to the appearance of the bartenders and waitresses. These were the capacities in which complainant and Cather served.

I also find it significant that three female employees who had worked under Milam's management at the club had nothing bad to say about Milam but were generally not complimentary about complainant (Respondent's witnesses Blackshire, Speese and Cottle). Blackshire and Cottle no longer work at the club. Since Milam is no longer in a position of authority over them, and their employment is not dependent on the club, it is reasonable to conclude that they would not have been reluctant to tell of improprieties in Milam's behavior toward female employees if such improprieties had occurred.

Inasmuch as respondent came forward with a legitimate reason for complainant's termination, it became necessary for complainant to respond with evidence demonstrating that reason to be a pretext or otherwise overcoming it. The complainant has failed to carry that burden. The fact that an investigator from the Attorney General's office saw employees wearing jeans some three years after the events in question is insufficient to show pretext. Mr. Milam is no longer the club manager; the board's concern for appearance may not be as strong as it was in 1982; or the board's attention may not yet have been called to those instances. In any event, I have considerable doubt that events so remote in time can be considered in this proceeding.


The Hearing Examiner recommends the following conclusions

and order:

1. Complainant has failed to prove by a preponderance of evidence that she was fired for refusal to submit to the sexual demands of respondent's manager/chef or that such sexual demands were made.

2. The complaint should be dismissed.

Dated this 30th day of September, 1985.



Victor A. Barone
Hearing Examiner