



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

August 18, 1987

Phyllis A. Mace
930 Wiley Ave.
Belpre, OH 45714

Joseph D. Froehly
District Manager
Pizza Hut District Office
1531 B Garfield Ave.
Parkersburg, WV 26101

Steve Barclay
Assistant Attorney General
Capitol Complex
Bldg. 3, Room 630
Charleston, WV 25305

L. Anthony George, Esq.
Jackson, Kelly, Holt & O'Farrell
1400 Laidley Tower
P.O. Box 553
Charleston, WV 25322

RE: Mace v. Pizza Hut, Inc.
REP-576-86

Dear Parties:

Herewith, please find the final order of the WV Human Rights Commission in the above-styled and numbered case.

Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective April 1, 1987, any party adversely affected by this final order may file a petition for review with the supreme court of appeals within 30 days of receipt of this final order.

Sincerely,

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

Howard D. Kenney
Executive Director

HDK/mst
Enclosures

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE

AMENDED AND EFFECTIVE
AS OF APRIL 1, 1987

Enr. H. B. 2638]

8

116 this article.

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

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

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

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

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

PHYLLIS A. MACE,

Complainant,

v.

DOCKET NO. REP-576-86

PIZZA HUT, INC.
DISTRICT OFFICE,

Respondent.

FINAL ORDER

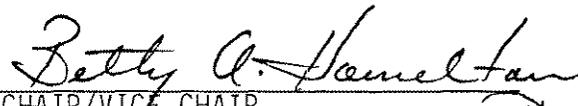
On the 12th day of August, 1987, the Commission reviewed the recommended order encompassing findings of fact and conclusions of law of Hearing Examiner Theodore R. Dues, Jr. After consideration of the aforementioned, and exceptions thereto, the Commission does hereby adopt said recommended order as its own.

It is hereby ORDERED that the Hearing Examiner's recommended order 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, the parties are hereby notified that they have ten days to request a reconsideration of this final order and that they have the right to judicial review.

Entered this 18th day of August, 1987.

RESPECTFULLY SUBMITTED,



CHAIR/VICE CHAIR
WV HUMAN RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

PHYLLIS A. MACE,
Complainant,

v.

DOCKET NO.: REP-576-86

PIZZA HUT, INC.
DISTRICT OFFICE,
Respondent.

RECOMMENDED ORDER

This matter matured for public hearing on the 27th and 28th day of May, 1987. The hearing was held in the Wood County Courthouse, Parkersburg, West Virginia. The hearing panel consisted of Theodore R. Dues, Jr., Hearing Examiner and Russell Van Cleve, Hearing Commissioner.

The Complainant appeared in person and by her counsel Steve Barclay. The Respondent appeared by its representative, Mike Goodwin, and by its counsel, L. Anthony George and Roger Wolfe.

At the conclusion of the Complainant's case the Respondent made a Motion for Directed Verdict. The Examiner heard argument on the Motion for Directed Verdict and deferred ruling on the aspect of the motion pertaining to the Complainant's allegations that she was required to provide documentation for medical excuses from work that was not required of others. The Examiner concluded the hearing with the Respondent's case and at this time renders a decision on the Respondent's motion.

After a review of the record, any exhibits admitted in evidence, any stipulations entered into by the parties, any matters for which the Examiner took judicial notice during the proceedings, assessing the credibility of the witnesses and weighting the evidence in consideration of the same, the Examiner makes the following findings of fact and conclusions of law submitted by the parties, to the extent the same are consistent to these findings and conclusion, the same are adopted by the Examiner, and conversely, to the extent the same are inconsistent to these findings and conclusions, the same are rejected.

ISSUES

1. Whether the act by the Respondent of requesting the Complainant's keys was in retaliation to her having previously filed a complaint with the West Virginia Human Rights Commission.

2. Whether the Respondent required the Complainant to provide medical excuses upon her return from medical leave at times not required of other employees.

3. If so, was this inconsistent treatment in retaliation for the Complainant's filing of a complaint against the Respondent with the West Virginia Human Rights Commission.

FINDINGS OF FACT

1. The Respondent is a corporation licensed to do business within the State of West Virginia.

2. The Complainant is a female.

3. The Complainant is right handed.

4. The Complainant's duties required the use of a calculator and logging entries. The Complainant performed these tasks with her right hand.

5. On or about February 24, 1986, the Complainant contended that she injured her right ring finger while at work.

6. Subsequent thereto, the Complainant filed a Workers' Compensation claim with the Workers' Compensation Fund.

7. The Workers' Compensation Fund denied the Complainant's claim.

8. The Complainant's Workers' Compensation appeal is still pending determination.

9. On or about March 17, 1986, the Complainant submitted a doctor's excuse to local management for Respondent.

10. Pursuant to, and consistent with a need for additional manpower, local management contacted Complainant's physician to determine whether she could return to work with some limitations attached.

11. As a result of this phone contact with Complainant's physician, Respondent's local management was provided information that the Complainant could return to work with some restriction.

12. Subsequent to receiving this information from Complainant's physician, Respondent's local management contacted the Complainant to return to work. The Complainant indicated that she was not to return to work as per her doctor's orders. It was then disclosed to the Complainant that the Complainant's understanding was inconsistent to the information provided to the Respondent by her physician. The Complainant advised

Respondent's local management that she would contact her physician and get back in touch with them.

13. As a result of Complainant's representations during the aforementioned phone conversation, she was told that the doctor's excuse tendered to it dated March 17, 1986 was insufficient and would need to be supplemented.

14. The Complainant was requested to return her keys for the reason that certain persons were entering the Respondent's place of business and an investigation and crack down was being ordered. It was explained to Complainant that to preclude her from being a part of the investigation and crack down it would be necessary for her to return her keys.

15. Several of the keys which were returned by the Complainant to Respondent's management were given to a new hire.

16. Accordingly, the Complainant supplemented her March 17, 1986, doctor's excuse with an excuse dated March 31, 1986, which indicated that the status of the Complainant's condition was that her physician was awaiting authorization for surgery and that the Complainant would be off work until after the surgery.

17. The Complainant filed the underlying charge on March 17, 1986.

18. The persons with whom the Complainant interacted regarding the return of the keys and the supplemental medical excuse was not aware of her filing a complaint with the West Virginia Human Rights Commission until after the conduct in question.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the subject matter and the parties herein.

2. The reprisal complaint in this case was filed on June 4, 1986.

3. The reprisal complaint alleges that the Respondent engaged in retaliation against the Complainant as a result of her filing the age discrimination complaint reflected in docket number EA-459-86, the reprisal complaint contended that the Complainant was requested to submit or provide a doctor's excuse when other employees were not required to do the same. In addition, the complaint alleged the Respondent retaliated against the Complainant by requesting her to return her keys to the office.

4. To prove a prima facie case of retaliation the Complainant must prove:

1) that she engaged in protected activity;

2) That her employer was aware of the protected activity;

3) that she was subsequently treated disparately as a result of engaging in the protected activity. Frank's Shoe Store v. West Virginia Human Rights Commission and Kathy Varney, (West Virginia Supreme Court of Appeals, Case Number 16913, Decided July 10, 1987)

The Complainant established that she had filed a complaint of age discrimination against the Respondent. However, there was no evidence of record to indicate that the Respondent's

local management was on notice of the filing of the complaint at the time of the questioned conduct. In addition, even if such evidence had been a part of the record, the Complainant failed to introduce evidence which would lead to a more likely inference that the challenged conduct was motivated by retaliation for the filing of the underlying complaint with the Commission than for other unrelated reasons.

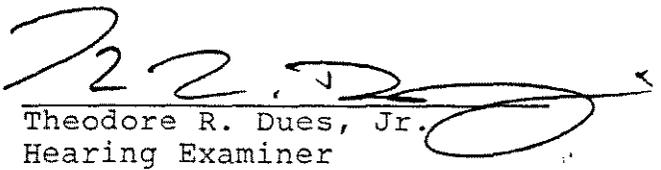
5. The evidence was unchallenged, and in the opinion of the Examiner, credible, that the reason for the return of the keys was for the reason provided by the Respondent. And that the medical excuse which was reflected in the March 31, 1986, doctor's slip was required due to the inconsistent information between the Complainant's physician's statement to local management that the Complainant could perform restricted duties, and the Complainant's subsequent phone conversation, indicating that she was not to return to work until released from her physician. Further, upon receiving the March 31, 1986, excuse from the Complainant's physician the Respondent did not continue to press her to return to work to perform limited duties. Frank's Shoe Store.

PROPOSED ORDER

Accordingly, it is the conclusion of this Examiner that the Complainant has failed to make a prima facie showing of retaliatory action by the Respondent and the Commission is recommended to dismiss this case with prejudice.

DATED: June 17, 1987

ENTER:


Theodore R. Dues, Jr.
Hearing Examiner

CERTIFICATE OF SERVICE

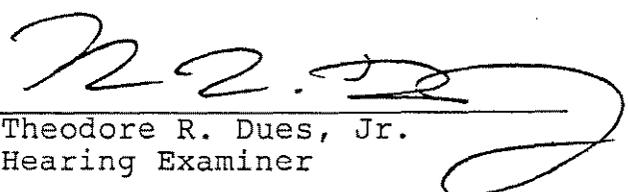
I, Theodore R. Dues, Jr., Hearing Examiner, hereby swear and say that I have served a true and exact copy of the foregoing RECOMMENDED ORDER upon the following:

Steve Barclay, Esq.
Assistant Attorney General
Bldg. 3, Room 630
Capitol Complex
Charleston, WV 25305

and

L. Anthony George, Esq.
Jackson, Kelly, Holt & O'Farrell
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322

by mailing the same by United States Mail on this 17th day of June, 1987.


Theodore R. Dues, Jr.
Hearing Examiner