

MIKE KELLY

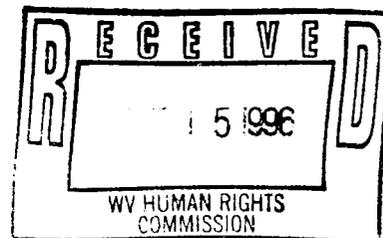
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NOTICE OF FINAL DECISION

PLEASE TAKE NOTICE that pursuant to W.Va. Code §5-11-8(d) and 6 WVCSR §77-2-10, any party aggrieved by the attached final decision shall file with the executive director of the West Virginia Human Rights Commission, **WITHIN THIRTY (30) DAYS OF RECEIPT OF THE DECISION**, a petition of appeal setting forth such facts showing that the party is aggrieved, stating all matters alleged to have been erroneously decided herein, the relief to which the party believes they are entitled and any argument in support thereof.

The filing of an appeal to the Commission from the final decision shall not operate as a stay of the decision unless specifically requested by the appellant in a separate application for the same and approved by the Commission or its executive director.

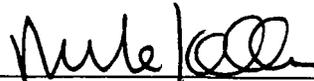
All documents shall be directed to:

Herman Jones, Executive Director
West Virginia Human Rights Commission
1321 Plaza East, Room 104-106
Charleston, WV 25301

Dated this 14th day of October, 1996.

WV HUMAN RIGHTS COMMISSION

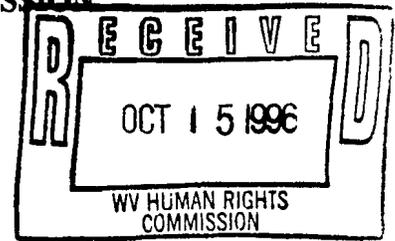
BY:



MIKE KELLY
Administrative Law Judge
Post Office Box 246
Charleston, West Virginia 25321
(304) 344-3293

cc: Herman Jones, Executive Director
West Virginia Human Rights Commission

BEFORE THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION



ZONA W. MESKINISH,

Complainant,

v.

Docket No. EH-376-92

FAIRMONT SUPPLY COMPANY,

Respondent.

**FINAL DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

THIS MATTER matured for public hearing on 5 October 1995 at Bluefield State College, Bluefield, Mercer County, West Virginia. The complainant appeared in person and by her counsel, Carole L. Scotti and Scotti & Gerl. The respondent appeared by its representative Charles Heldreth, and its counsel, Daniel Stickler and Jackson & Kelly, with Erin Elizabeth Magee on the brief.

I. ISSUE TO BE DECIDED

Whether respondent discriminated against complainant by laying her off from work in 1991 because of her handicap or perceived handicap in violation of W.Va. Code §5-11-9(1).

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 true*:

A. Complainant's Work History with Respondent

1. Complainant Zona Meskinish began working for respondent on 22 June 1981 as a secretary in the warehouse at its Bluefield Service Center. In 1987 she moved into a data processing position and in June 1989 became the group leader of data processing. She was laid off on 16 September 1991.

* 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 proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issue as presented.

2. Respondent is in the mine supply business. It sells and delivers approximately 13,000 different mine-related products. Its Bluefield outlet serves customers in Southern West Virginia and parts of Virginia and Kentucky. Respondent is a division of Consolidation Coal Company.

3. Respondent's fortunes are necessarily tied to those of the coal industry. As the coal industry declined from its peak in the 1970's, employment at respondent's Bluefield operation dropped from 50 jobs to about 25 jobs in 1991.

4. In 1991 complainant supervised two other data processors, Kathy Williby Cook and Reba Hurt. Each of the three women were assigned roughly similar duties. As group leader, Ms. Meskinish had the responsibility to control the flow of work.

5. In 1991 Ms. Meskinish had less work seniority than either Ms. Cook or Ms. Hurt. She was considered to be a productive and efficient worker by management.

B. Complainant's Illness

6. In or about 1983 complainant was diagnosed as having breast cancer. She was not hospitalized for the cancer, but did go into the hospital in 1983 for breast reconstructive surgery. Ms. Meskinish testified that her cancer has been in remission since 1983 and that she has not been hospitalized at all since that year.

7. While complainant's co-workers expressed sympathy for her during the period of her illness in 1983, Ms. Meskinish testified that in the years leading up to her layoff in 1991, comments were made about cancer, mastectomy and breast implants that she found to be offensive. The comments were made by co-workers and she could not recall any member of management making an offensive statement regarding cancer or her surgery.

8. It was after her surgery in 1983 that Ms. Meskinish transferred into data processing and then became group leader. Other than her allegations regarding the 1991 layoff, Ms. Meskinish produced no evidence that she suffered any adverse consequences regarding the terms and conditions of her employment as a result of the 1983 cancer and surgery, despite the fact that respondent had two layoff episodes between complainant's surgery and 1991.

C. The 1991 Layoffs

9. Ms. Meskinish admitted that she knew in 1991 that respondent's sales were down and that a "layoff was probably necessary at that time."

10. Charles Heldreth, manager of the Bluefield Service Center, testified credibly that his outlet had deteriorating sales in 1991. He, along with Larry Laxton, who Mr. Heldreth reported to, and Rick McMillan, respondent's director of Human Resources, made the decision to cut two

positions. Mr. Laxton and Mr. McMillan work out of respondent's headquarters in Washington, Pennsylvania.

11. Mr. McMillan testified credibly that in determining who to layoff, he and Mr. Heldreth went down a "seniority listing" that consisted of seventeen individuals. (See, Complainant's Exhibit 3). They looked at each name to determine whether his or her job was needed and whether he or she had the seniority and qualifications to retain the position. They used the principal of "senior qualified", which Mr. McMillan explained meant that the most senior person was kept in the position if he or she was qualified to do the retained job, even if they were not the best performer at that position.

12. When Mr. Heldreth and Mr. McMillan came to complainant's name they decided to eliminate the "group leader" position. It was next determined that Ms. Meskinish was not qualified to do the jobs of the two persons with less seniority, Mike Cook, an inside sales representative, and Ernie Szakacs, an outside sales representative. Finally, it was determined that complainant did not have the seniority to "bump" the other data processors, Ms. Cook and Ms. Hurt, both of whom were found to be qualified. Since there were three data processors, but only two data processing positions, one of the three had to be laid off.

13. Based on the "senior qualified" method of downsizing, Ms. Meskinish was selected for layoff. Mr. Cook, an inside sales representative, was also laid off.

14. At about 4:05 p.m. on 16 September 1991, complainant was informed that she would be laid off as of 5:00 p.m. that day.

D. Allegations of Pretext

15. Ms. Meskinish alleges that she was selected for layoff because two of her coworkers, who had made allegedly offensive or insensitive comments about cancer, had sexual relationships with management officials and served as "conduits" for information about complainant and discriminatory attitudes about cancer victims. This allegation is rejected as not credible. Complainant produced no evidence, direct or circumstantial, that the co-workers influenced in any way management's decision or that the coworkers themselves had discriminatory feelings toward complainant because of her cancer. As presented, the statements of the coworkers do not reflect anything other than normal workplace banter.

16. Complainant also alleges that respondent, in fact, did not make its layoff selections on the basis of "senior qualified". This allegation is supported by Mr. Heldreth's inability to articulate the standard and the fact that the standard has not been reduced to writing. However, I find that, on the whole, the testimony in support of the "senior qualified" standard outweighs the evidence against it. I find support for respondent's position that it used "senior qualified" in the credible testimony of Mr. McMillan, who made the layoff decision with Mr. Heldreth. He explained "senior qualified" in

a coherent and rational manner and credibly described how it was applied to make the decision regarding complainant. I credit his testimony as being true.

17. Complainant also alleges that her performance was so superior to Ms. Hurt's that Ms. Hurt would not have been retained absent a discriminatory motive to get rid of Ms. Meskinish. However, the evidence against Ms. Hurt consisted of minor and/or ancient violations that I find would not cause a rational employer to consider her unqualified for her position. Based on an assessment of creditability described infra, I also reject as not true Ms. Meskinish's testimony that Mr. Heldreth told her that she would not be laid off because she was "the best worker we have" and that the company "can lay off anyway we want to."

18. Finally, complainant sought to prove pretext through evidence that Mike Cook, who had health problems, was laid off despite his having greater seniority than Ernie Szakacs, who was retained. The seniority difference between the two men, however, was only three months and Mr. Szakacs had held that position of outside sales rep for a year and had more than eight years experience with the particular customer sales base. Mr. Cook had only recently transferred into the Bluefield operation from Kentucky and, for that reason, was determined by respondent to be not qualified for the outside sales rep job. Respondent showed convincingly that despite Mr. Cook's health problems, it made a consistent effort to keep him on the payroll up until his layoff. I credit as true respondent's reasoning and explanation for choosing Mr. Szakacs over Mr. Cook.

19. On the whole, I found the testimony of Ms. Meskinish to be not credible. I base this finding on the following considerations:

(a) Prior to alleging that she was a victim of discrimination due to handicap, Ms. Meskinish complained to the owners of respondent that she had been laid off because of favoritism, not discrimination;

(b) In a charge filed with the EEOC she alleged discrimination due to sex and age, but not handicap;

(c) Handicap was not raised as a motivating factor in the layoff until after the EEOC issued a "no probable cause" ruling and complainant then filed with the West Virginia Human Rights Commission;

(d) She offered absolutely no evidence that anyone in management had at any time harbored a discriminatory animus towards her because of her cancer;

(e) She sought to prove her "conduit" theory through grossly attenuated, highly speculative testimony that appeared to be purposely designed to embarrass and humiliate several older workers; and,

(f) Her whole premise that she was laid off in 1991 because she had cancer and reconstructive breast surgery in 1983, when she had not been medically treated at all for cancer in more than seven years, must, at best, be considered disingenuous and a last ditch effort to challenge an economic outcome that was not favorable to her.

20. I find as fact that respondent did not discriminate against Ms. Meskinish in violation of the West Virginia Human Rights Act.

III. CONCLUSIONS OF LAW

1. The respondent is an employer within the meaning of W.Va. Code §5-11-3(d), and a person within the meaning of §5-11-3(a) and is subject to the jurisdiction of the West Virginia Human Rights Commission.

2. The complainant is a citizen of the State of West Virginia and a person within the meaning of W.Va. Code §5-11-3(a).

3. The West Virginia Human Rights Act is violated when an employer makes a reduction in force decision on the basis of an employee's handicap or perceived handicap.

4. The burden is on the complainant to show that an illicit discriminatory reason was a factor in the employment decision to lay her off and retain other, nonhandicapped workers.

5. The complainant failed to show that her handicap or the perception of her having a handicap was a factor in respondent's decision to lay her off in September 1991.

6. The complaint filed by Zona Meskinish against Fairmont Supply Company is
DISMISSED.

WV HUMAN RIGHTS COMMISSION

ENTER this 14th day of October, 1995.

BY: Mike Kelly
MIKE KELLY
Administrative Law Judge
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(304) 344-3293