



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

September 5, 1985

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Assistant Attorney General
Dept. of Human Services
Bldg. 6, Room 617
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P.O. Box 1791
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RE: ER-140-76 & ER-321-76

Dear Counsel:

Herewith please find the Order of the WV Human Rights Commission in the case of Penn v. Appalachian Power Company.

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 thirty (30) days, the Order is deemed final.

Sincerely yours,

Howard D. Kenney
Howard D. Kenney
Executive Director

HDK/mst
Enclosure

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

cc: Clayborne D. Penn
Anne B. Charnock, Esq.
Charlie Brown, Attorney General
Appalachian Power Co.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

Claybourne Darnell Penn
Complainant,

v.

Docket Nos.: ER-140-76
ER-321-76

Appalachian Power Company,
Respondent.

ORDER

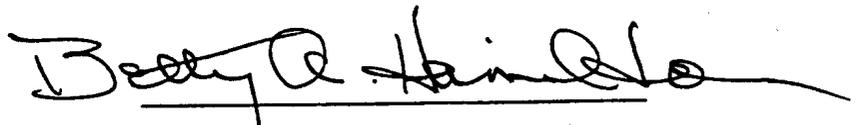
On the 14th day of August 1985, the Commission reviewed Hearing Examiner Anne B. Charnock's Findings of Fact and Conclusions of Law. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own.

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 14th day of August, 1985.

RESPECTFULLY SUBMITTED,



CHAIR/VICE CHAIR
WEST VIRGINIA HUMAN RIGHTS
COMMISSION

*approved
July 6, 1985
ARH*

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CLAYBOURNE DARNELL PENN,

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Complainant,

Vs.

JUL 1 1985

ER 140-76

ER 321-76

APPALACHIAN POWER COMPANY,

W.V. HUMAN RIGHTS COMM.

Respondent.

[Handwritten signature]

FINDINGS OF FACT, CONCLUSIONS
OF LAW, RECOMMENDATIONS AND ORDER

Pursuant to notice issued to the Respondent, this matter came on for hearing on the 13th day of May, 1985 in Conference Room A of the Capitol Complex, Charleston, West Virginia. Anne B. Charnock, hearing examiner, presided. The presence of a hearing commissioner was waived.

The complainant, Claybourne Darnell Penn, appeared in person and by his counsel, Robert G. Clarke, Jr., Esquire, Assistant Attorney General, State of West Virginia and the respondent, Appalachian Power Company, appeared in person by John LaRue and by its counsel Thomas T. Lawson, Esquire, of Woods, Rogers and Hazelgrove, Roanoke, Virginia. Local counsel for Respondent was Joseph M. Price, Esquire, of Robinson and McElwee, Charleston, West Virginia.

It appearing to the hearing examiner that notice as required by law, setting forth the time and place of the hearing and the matters to be heard, had regularly been served upon the respondent and that the same appeared by their representatives, the hearing was convened at the aforesaid time and place.

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ADMINISTRATIVE
SUPREME COURT

Upon due consideration of the pleadings; the testimony, demeanor and credibility of the witnesses; a review of the exhibits entered as evidence at the hearing and a review of the transcript of the hearing; the hearing examiner makes the following findings of fact, conclusions of law and recommendations;

FINDINGS OF FACT

1. The Complainant, Claybourne Darnell Penn, is black and was employed by Respondent, Appalachian Power Company, as a laborer in mid-July 1974. His shift was 7:00 a.m. to 3:00 p.m., Monday through Friday.

2. Upon the completion of a six-month probationary period Complainant was offered and accepted full-time employment.

3. Complainant's work history was erratic. His attendance record is punctuated by tardiness and absenteeism. His yearly performance reviews vary dramatically. (Exhibits 1, 2, 3, 4)

4. On August 19, 1975 Complainant was warned, by letter, that his conduct at work was unacceptable. On two consecutive days complainant was very late, not reporting until 11:40 a.m. and 10:00 a.m. respectively, and did not notify his supervisor. (Exhibit 5)

5. On September 18, 1975, Complainant was suspended and told, by letter, that any further misconduct would be the subject of discharge. Complainant had been found away from his work station and had threatened a supervisor. (Exhibit 6)

6. On January 5, 1976 Complainant was again warned, by letter, that his conduct was unacceptable and any subsequent misconduct

would result in discharge. Complainant had not reported to work until 9:30 a.m. claiming to have overslept. (Exhibit 7)

7. On January 29, 1975 Complainant was notified, by letter, that he was discharged. Complainant had been found reading a newspaper on worktime and was suspended. (Exhibit 8) Based on his cumulative record, he was dismissed.

8. Two other employees, both white, were also found reading a newspaper. Both were suspended but neither was discharged. Neither had an unsatisfactory work record (Transcript p. 70)

9. When asked about these various incidents Complainant explained that it was not his fault or beyond his control; i.e. car trouble or malfunctioning alarm clock. Another excuse was that he was too closely supervised.

10. Complainant was replaced on February 2, 1979 by a black male.

CONCLUSIONS OF LAW

1. The Complainant is a "person" within the meaning of the West Virginia Human Rights Act. W. Va. Code §5-11-3(a).

2. The Respondent is an "employer" within the meaning of the West Virginia Human Rights Association. W. Va. Code §5-11-3(d).

3. It is the public policy of the State of West Virginia to provide all of its citizens equal opportunity for employment. Equal opportunity in the areas of employment is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness or handi-

cap. W. Va. Code §5-11-2.

4. On September 17, 1975 and February 6, 1976 Complainant filed complaints against Respondent (ER140-76, ER321-76 respectively) alleging that Respondent had engaged in unlawful discriminatory practices prohibited by West Virginia Code §5-11-9(a).

5. Said complaint was timely filed as within ninety days of the alleged act of discrimination. W. Va. Code §5-11-10.

6. Pursuant to the mandate issued by the court in Edith Allen, et al v. State of West Virginia Human Rights Commission, et al., 324 S. E. 2d 299 (W. Va. 1984) the public hearing was held.

7. Following the standard as outlined in McDonnell-Douglas v. Green 411 U.S. 792 (1973) Complainant has presented a prima facie case-Complainant is a member of a protected minority and he was accorded different treatment than his white co-workers who were also found reading a newspaper while on work time.

8. Again following the McDonnell-Douglas analysis Respondent has met his burden by articulating a legitimate nondiscriminatory reason for firing Complainant. Clearly Complainants work record prior to the newspaper incident was poor and he had been threatened of discharge on numerous occasions. Thus when Complainant was finally dismissed it was the result of his performance and not race.

9. Again following the McDonnell-Douglas analysis Complainant has failed to show that Respondents acts were merely pretextual and thus racially discriminatory. Complainant did not attempt to show that the white co-workers had similar work records as Complainant. Thus Respondents' act was not a pretext and upon considering the circumstances Complainants dismissal was proper.

10. As Respondents' acts were found to be non-discriminatory

the jurisdictional questions will not be discussed.

THEREFORE, based on the foregoing, I make the following recommendations:

1. That these complaints, ER 140-76 and ER 321-76, filed by Complainant against Respondent be dismissed by the Commission with prejudice.

Respectfully submitted this 2nd day of July, 1985.



ANNE B. CHARNOCK
Hearing Examiner

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CLAYBOURNE DARNELL PENN,

Complainant,

Vs.

ER 140-76

ER 321-76

APPALACHIAN POWER COMPANY,

Respondent.

O R D E R

Based upon the findings of fact, conclusions of law and recommendations of the Hearing Examiner;

It is hereby ORDERED that the above referenced complaints be dismissed with prejudice, from the Commissions docket.

Chairperson,
West Virginia Human
Rights Commission

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ADMINISTRATIVE
SUPREME COURT