



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING

1036 QUARRIER STREET

CHARLESTON, WEST VIRGINIA 25301

TELEPHONE: 304-348-2616

ARCH A. MOORE, JR.
Governor

February 7, 1986

Mike Kelly, Esquire
Appalachian Research &
Defense Fund, Inc.
1116-B Kanawha Blvd., E.
Charleston, WV 25301

Lacy I. Price, Jr., Esquire
P.O. Box 808
Martinsburg, WV 25401

COPY

RE: Nancy Cheryl Redman v Grant Memorial Hospital: ER-106-83

Dear Mr. Kelly and Mr. Price:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Redman v Grant Memorial Hospital, ER-106-83.

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/jcp
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

RECEIVED

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAN 16 1986

NANCY CHERYL REDMAN,

W.V. HUMAN RIGHTS COMM.

Complainant,

vs.

Docket No. ER-106-83

GRANT MEMORIAL HOSPITAL,

Respondent.

ORDER

On the 8th day of January, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner, Christine M. Hedges. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own with the exceptions set forth below.

The Commission hereby amends the Findings of Fact and Conclusions of Law on page 14 thereof, in the section entitled "F. PROPOSED ORDER" by deleting from paragraph 3 thereof the figure "\$500.00" and substituting therefor the figure "\$5,000.00" and by deleting from paragraph 4 thereof the work "quarterly" and substituting therefor the word "semi-annually."

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 except insofar as they are amended by this Order.

By this 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 ORDER AND THAT

THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 4 day of Feb., 1986.

Respectfully Submitted



CHAIR/VICE CHAIR
West Virginia Human
Rights Commission

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

NANCY CHERYL REDMAN, /
Complainant, /
vs. /
GRANT MEMORIAL HOSPITAL, /
Respondent. /

CASE NO. ER-106-83

Approved
M.R.S. 12/15/85

RECEIVED

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W.V. HUMAN RIGHTS COMM.

RECOMMENDED DECISION

[Signature]

A. Preliminary Matters

The complainant charged the respondent with a violation of the Human Rights Act on July 23, 1982, by a complaint signed on August 15, 1982, and subsequently filed with the West Virginia Human Rights Commission. A public hearing was scheduled on September 12, 1985, by notice from the Human Rights Commission dated July 12, 1985. The respondent filed an answer on July 20, 1985, denying the allegations of the complaint. A pre-hearing conference was held by phone with counsel for the parties on August 15, 1985. A pre-hearing conference order issued on August 15, 1985, rescheduled the hearing on September 27, 1985. Counsel for each party filed pre-hearing memoranda and a final pre-hearing order based upon those memoranda was issued September 25, 1985. A public hearing was held on September 27, 1985, in Petersburg,

Grant County, West Virginia. The complainant was present in person and by Mike Kelly, her counsel, and the respondent by its agent, Robert Harmon, hospital administrator, and by counsel, Lacy I. Rice, Jr. On November 15, 1985, counsel submitted their proposed findings of facts and conclusions of law. Upon consideration of all of which, the hearing examiner makes the following findings of fact and conclusions of law.

B. Issues

1. Whether the respondent unlawfully discriminated against the complainant on the basis of her race with respect to hiring her.

2. If the respondent unlawfully discriminated against the complainant, what relief should be granted.

C. Findings of Fact

Based upon the credible evidence adduced at hearing, the stipulation of the parties and the joint exhibits of the parties, the hearing examiner makes the following findings of fact.

1. The complainant, Nancy Redman, is a black female and a "person" as that term is defined by W. Va. Code §5-11-3(a).

2. The respondent, Grant Memorial Hospital, is an "employer" as that term is defined by W. Va. Code §5-11-3(d). The hospital is a publicly owned health facility governed by a Board of Trustees appointed by the Grant County Commission.

3. Complainant, a native of Petersburg, West Virginia, was at the time this action arose, 21 years of age, a 1979 graduate of Petersburg High School, and had completed one year at Fairmont State College.

4. After returning to the Petersburg area from Fairmont, complainant was employed as a laborer for Hester Industries. Complainant quit such employment on August 27, 1981, due to recurrent illnesses which she believed were caused by the cold working conditions at the Hester plant.

5. On September 20, 1981, Ms. Redman completed and submitted an application for employment in respondent's business office because she had heard an opening might be coming up.

6. The application in use by respondent at that time solicited, among other information, the applicant's religion, sex, marital status, race, and age. In identifying her race, an applicant was required to check either "w", which stood for "white", or "c", which stood for "colored." When completing her application, Ms. Redman changed the race category applicable to her by handwriting a "b" over the "c."

7. At the time she completed the application, Ms. Redman was unemployed and was interested in either full-time or part-time work.

8. Ms. Redman's qualifications for the job, as indicated on the job application included one year at Fairmont State College in the medical secretary program. The training received by complainant

consisted of courses in advanced typing, medical terminology, anatomy, and physiology. She also had a "college" typing course in high school. At the time of her application, complainant had no employment experience as an office worker.

9. Respondent has, and had at all times relevant hereto, a position in its business office which is a combination admitting clerk/cashier/switchboard operator. The written job analysis for the position of admitting clerk, in effect in 1981, requires that an employee be a high school graduate with courses in typing and business areas. It also lists as a required worker trait a "verbal ability...to communicate effectively with patients, doctors, and hospital staff members exercising high degree of tact and poise and occasionally overcoming language barrier." An employee is "Also required to understand and apply knowledge of medical terminology." (emphasis supplied).

10. In September, 1981, and in July, 1982, the months relevant to this proceeding, respondent employed four persons, two full time and two part time, as admitting clerks/cashiers/switchboard operators.

11. Rebecca Catherine Alt, the business office manager for the respondent, at the time of the incident through the time of the hearing, was responsible for hiring for the position for which Ms. Redman applied.

12. Ms. Alt testified that upon receipt of an employment application, she usually places it in a folder which is kept in her office. Under hospital policy an application will considered "active" for a period of one year and that during that period an applicant need not renew the application in order to have it considered for an

open position. Ms. Alt refers to all applications submitted within the past year when making hiring decisions.

13. The first available position in respondent's business office after complainant filed her first application occurred in July, 1982. It was for the job of admitting clerk/cashier/switchboard operator, and was for part-time work. According to Ms. Alt, when the employee holding that position told her that she was leaving, Ms. Alt perused the 52 applications then on file and selected at least four persons to be interviewed, based upon "information on their applications." Of the 52 applicants, two were black.¹

14. When hiring for the admitting clerk position available in July, 1982, Ms. Alt did not use any type of objective test or examination (typing, filing, medical terminology, or otherwise) and instead relied on the applicant's references and alleged ability to type, and her subjective evaluation of their qualifications.

15. Ms. Alt testified that though the job description for admitting clerk states that an employee is "required to understand and apply knowledge of medical terminology," such a skill is merely "helpful," not necessary. She alleged that in requiring a knowledge of medical terminology, the job description was inaccurate. Her testimony, however, is contradicted by respondent's Answer 10 set forth in Joint Exhibit 10, wherein respondent states, in part, that "When a vacancy occurred, the applications contained in the Hospital file would be reviewed for individuals who might be suitable for the vacancy based on the job description." (Emphasis added).

1. Alt said at the hearing that she reviewed 52 applications. In J.E. 11, Ans. 3 the respondent said there were 42 other applications on file. Attached as J.E. 15 are 58 applications.

16. The applicants Ms. Alt recalled interviewing for the position were Nancy Rotruck, Patricia Smith, Virginia Rohrbaugh, and Pamela Feaster, all of whom are white.

17. At first, Ms. Alt testified that she did not recall reviewing the application of Ms. Redman when hiring in July, 1982, but she later stated that she reviewed the complainant's application at that time and rejected it for interview on the ground that complainant was overqualified because her application indicated that she had medical secretary training.

18. Of the four persons Ms. Alt remembers interviewing:

a. Nancy Rotruck had just graduated from high school the previous June and had no employment experience listed on her application, although Ms. Alt knew that she had done volunteer work in the respondent's lab. Her application shows no secretarial training, typing classes, or any classes in the business area.

b. The application of Patricia Smith states that she was looking for employment because her current job as a bookkeeper-secretary was part-time and that she needed "more hours." Her application is dated June 29, 1981, indicating that she applied three months prior to complainant.

c. The application of Virginia Rohrbaugh indicated that she was attending Shepherd College part time, had a permanent job as a teacher's aide and was only interested in work on weekends and holidays. Her application was dated September 7, 1981, 23 days prior

to complainant's application.

d. The application of Pamela Feaster states that she had just completed a year of post-secondary business training.

19. From the four applicants interviewed, Ms. Alt selected Nancy Rotruck to fill the position and Rotruck began work July 19, 1982, at a wage of \$3.45 per hour.

20. On July 24, 1982, Ms. Redman learned that Rotruck had been hired. Upon discovering that Rotruck had been hired while she had not even afforded an interview, Ms. Redman felt humiliated, hurt, and embarrassed.

21. That same day, Ms. Redman went to the hospital, completed a second application and asked to speak with Ms. Alt. She asked Ms. Alt to describe the procedure that resulted in Rotruck being hired and Ms. Alt responded, smiling, that she had just reached into her folder and picked one out. Ms. Redman inquired if her first application was still active and Ms. Alt assured her that it had not expired. Ms. Redman explained that she completed a second application as a means of getting Ms. Alt to speak with her.

22. Ms. Alt also testified that on July 24, she told Ms. Redman about a soon to be filled position which involved collecting delinquent accounts. When Ms. Alt described the position as "hard" and "not very nice", Ms. Redman replied that "I can do anything you hand me." Ms. Alt made no attempt subsequent to that conversation to communicate with Ms. Redman about the collection job and did not interview her for the position when it became available. She stated that Ms. Redman has never been offered a job by respondent. The job was eventually filled by interdepartmental transfer.

23. After July 19, 1982, complainant continued to look for work. She was unsuccessful in seeking employment, except for a job of one week duration from which she was laid off.

24. In July, 1983, Ms. Redman discovered that she was pregnant and voluntarily ceased her search for work. Her total employment earnings between July 19, 1982, and July 1, 1983, were \$121.61.

25. Nancy Rotruck worked an average of 24 hours per week from July 19, 1982, until February 19, 1983. Beginning on February 20, 1983, she was reclassified as a full-time employee, working 40 hours per week. Her wage was raised from \$3.45 per hour to \$3.55 in January, 1983, and she continued to earn that amount until July, 1984.

26. During the four-year period of September, 1981, until the date of this hearing, no blacks were employed in respondent's business office. All three openings (among the minimum of 10 positions over which Ms. Alt had hiring authority) occurring during said period were filled with whites. Moreover, all persons interviewed for an open position in the business office during this time were white. In September, 1981, and in July, 1982, the respondent had no blacks among its 194 employees, although in response to the question of number of blacks in interrogatory No. 12, J. E. 10, the respondent listed one Asian-American.

27. The hospital administrator, Robert Harmon, testified that during his 20 years in that position the hospital had employed a total of only six blacks, even though 40% to 50% of all positions at the hospital require no special training beyond a high school education. Blacks who were employed at the hospital tended to not remain very long.

28. On September 27, 1985, the respondent had one black nurse's aid out of 190 employees.

29. The population of Grant County in 1980 was 1.2% black, with 68 black residents between the ages of 18 and 64 years and thus more likely than not available to participate in the workforce.

30. The respective 1980 black populations of Hardy and Pendleton Counties, which are adjacent to Grant and from which the hospital draws a portion of its workforce, were 2% and 2.2%, with 119 and 103 black adults between the ages of 18 and 64 years.

31. A review of the applications submitted by respondent indicates that complainant was the only applicant with both secretarial training and exposure to medical terms, both requirements given in the job description.

32. Had complainant been hired instead of Nancy Rotruck, she would have earned wages in the amount of \$5,281.20, as indicated

below:

<u>Dates</u>	<u>Hourly Wage</u>	<u>Hours Per Week</u>	<u>Amount Earned</u>
July 19-Dec. 31, 1982	\$3.45	24	\$1,986.80
Jan. 1-Feb. 19, 1983	\$3.55	24	596.40
Feb. 20-July 1, 1983	\$3.55	40	<u>2,698.00</u>
		<u>TOTAL</u>	<u>\$5,281.20</u>

D. CONCLUSIONS OF LAW

1. The respondent is an employer within the meaning of West Virginia Code §5-11-3(d).

2. The complainant was a citizen of the State of West Virginia at the time this action was filed and is a person within

the meaning of West Virginia Code §5-11-3(a).

3. Complainant filed a timely complaint and the West Virginia Human Rights commission has jurisdiction over the parties and subject matter of this action pursuant to West Virginia Code §§5-11-8, 9 & 10.

4. The West Virginia Human Rights Act is violated when an employer denies an applicant an equal opportunity in regard to hire because of the applicant's race. W. Va. Code §5-11-9(a).

5. The complainant made a prima facie showing that respondent unlawfully discriminated against her because of her race by failing or refusing to extend to her an equal opportunity in regard to hire. The equal opportunity denied to complainant was the right to be considered for an admitting clerk/cashier/switchboard operator position solely on the basis of her qualifications and without regard to race. The elements of the prima facie case were adopted by the West Virginia Supreme Court. Shepherdstown Volunteer Fire Dept. v. W. Va. Human Rights Commission, 309 S.E. 2d 342 at 352 (1983). The complainant established by a preponderance of evidence the four elements of a prima facie case: (a) that she was a member of a protected group; (b) that she applied for and was qualified for an employment position or opening for which the employer was seeking applicants; (c) that she was rejected despite her qualifications; and, (d) that simultaneously with her rejection the respondent considered the applications of other, non-minority persons of similar qualifications.

6. The respondent's contention that there was no discrimination because no vacancy existed on September 30, 1981, or on July 24, 1982, the two dates on which complainant filed applications, is without merit. A vacancy does not need to exist on the exact date an applicant applies for a job, as long as there is an opening during the time the application remains active. McLean v. Phillip-Ramsey, Inc., 624 F.2d 70, 72 (9th Cir. 1980). Phillips v. Joint Legislative Committee, et., 637 F.2d 1014, 1029, n.34 (1981); East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975). Harrell v. Northern Electric Company, 672 F.2d 444, 449 (5th Cir. 1982), cert. den., 459 U.S. 1037 (1982).

Furthermore, the respondent's policy was to keep applications on file as active for one year and the respondent's hiring agent testified that she reviewed the complainant's application when a position became available in July, 1982.

7. The respondent articulated two legitimate, nondiscriminatory reasons for failing to hire complainant: (a) complainant was over qualified; and (b) complainant did not show interest in her application after the date the same was filed. The respondent met its burden of production at this stage in the three step inferential proof formula set out in McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973) and adopted in Shepherdstown Volunteer Fire Dept. v. W. Va. Human Rights Commission, supra.

8. The complainant showed by a preponderance of the evidence that the reasons articulated by respondent were pretext and that respondent was more likely motivated by an unlawful discriminatory reason.

Evidence found persuasive in determining that respondent's reasons were pretext includes: the inconsistency in respondent's answer to interrogatories that it compared job applications to job description and Ms. Alt's testimony that the job description was not accurate; the fact that the complainant had training as a medical secretary and that the person who was hired had no typing or business training or experience; the characterization of the complainant's experience and education as "over qualified" when it was so much more close to the job description than the experience and education of the person hired; the subjective nature of the hiring criteria; the lack of black persons in respondent's workforce; the use of a racecoded application in blatant violation of W. Va. Code §5-11-9(b)(1); and the continued interviewing of only white applicants for positions which became available after July, 1982. The Hearing Examiner also found complainant to be more credible than respondent's witnesses.

9. The complainant, having shown that she was a victim of intentional discrimination in that she was denied an equal employment opportunity, is entitled to full relief unless the respondent showed by a preponderance of the evidence that it would not have hired her even in the absence of discrimination. Respondent produced no evidence in this regard and thus failed to carry its burden. Respondent likewise failed to show that complainant was not diligent in mitigating her damages.

10. Complainant is entitled to back pay for the period of July 19, 1982, through July 1, 1983. Her earnings would have been

\$5,281.20 had she been hired, minus the \$121.61 she earned in that period.

11. Complainant is entitled to prejudgment interest at the rate of 10% per annum. W. Va. Code §56-6-31; Bell v. Inland Mutual Insurance Co., 332 S.E.2d 127 (1985). The interest should accrue commencing with the last day of each calendar quarter of the back pay period on the total amount then due and owing. Walters v. City of Atlanta, 610 F. Supp. 715 (N.D. Ga. 1985). In this case that rate and formula yields total interest of \$1,508.95.

12. Complainant has a right to incidental damages for the humiliation, embarrassment, emotional and mental distress and loss of personal dignity suffered by her as a result of the respondent's unlawful acts. Pearlman Realty Agency v. West Virginia Human Rights Commission, 239 S.E.2d 145 (1977); State v. Logan Mingo Area Mental Health, 329 S.E.2d 77 (1985).

Here, complainant testified that upon learning that she had been rejected without even being afforded an interview she was upset, angry, and humiliated. Additionally, complainant was required to confront a job application which referred to her race in a term complainant considered to be demeaning and insulting. Complainant is entitled to compensation in the amount of \$500.00 for this humiliation.

13. A cease and desist order is appropriate in this case.

14. Complainant is entitled to attorney fees.

E. Determination

Complainant has proven by a preponderance of the evidence, under the three-step inferential proof formula that there was a prima

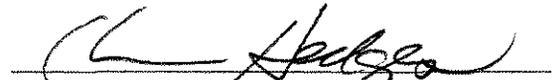
facie case of discrimination, and that the employer's articulated reasons for not hiring her were a pretext. The plaintiff is therefore entitled to the relief she requests.

F. PROPOSED ORDER

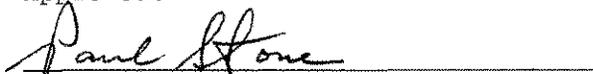
The hearing examiner recommends the Commission take the following action:

1. That the complainant be awarded backpay in the amount of \$5,159.59.
2. That the complainant be awarded prejudgment interest on back pay in the amount of \$1,508.95.
3. That the complainant be awarded incidental damages in the amount of \$500.00 for the humiliation, embarrassment, and loss of personal dignity suffered by complainant as a result of respondent's unlawful acts.
4. That an order be issued directing the respondent to cease and desist from discriminating against applicants on the basis of race and requiring respondent to report to the Human Rights Commission, on a quarterly basis for a period of two years, concerning its efforts to recruit minority employees.
5. That based upon the affidavit submitted by complainant's counsel, attorney fees should be awarded in the amount of \$3,188.67.

Dated: Dec 3, 1985


Christine M. Hedges
Hearing Examiner

Approved:


Paul Stone
Chief Administrative Law Judge
Supreme Court of Appeals of West Virginia

12/5/85

AFFIDAVIT FOR ATTORNEY FEES AND COSTS

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

I, Mike Kelly, counsel for the complainant in this action, hereby state under oath as follows:

1. The following is a true and actual summary of my time spent in litigating this action as compiled from my time records routinely kept throughout the duration of this matter:

<u>Date(s)</u>	<u>Activity</u>	<u>Hours</u>
July 30	Review file, intern's notes	1.0
July 31	Draft Interrogatories	1.0
August 15	Phone calls to counsel, client	0.5
August 21	Review discovery, call client	1.0
August 23	Draft Second Interrogatories	0.5
September 4	Answer discovery	2.0
September 11	Calls to client	0.5
September 12	Prepare Memo/research	1.5
September 17	Answer discovery	1.0
September 26	Prepare for hearing	1.5
September 26	Meet with client	1.0
September 26	Prepare for hearing	2.5
September 27	Hearing	2.0
October 7	Research	2.0
October 9	Research	2.5
October 10	Research	3.0
November 1	Review record and exhibits	3.0
November 9	Findings of Fact	5.0
November 10	Finish first draft	5.0
November 13	Re-write draft	8.0
November 14	Finalize Brief	<u>7.0</u>
	<u>TOTAL HOURS</u>	<u>51.5</u>

2. I have been a member of the Bar of the State of West Virginia for eight years and have been engaged in the practice of civil rights law for a combined period of two years.

3. Given the time and labor required in this action, the difficulty of the questions involved, the results obtained, and the fee customarily charged in the Kanawha Valley area for similar legal services by attorneys of similar experience, a fee of \$60 per hour in this action is reasonable.

4. The costs expended in this action on behalf of complainant are \$30.87 for telephone calls, \$7.80 for the transcript, and \$60 in travel, for a total of \$98.67.

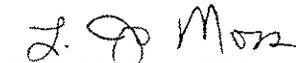
5. That the total amount due and owing to the Appalachian Research and Defense Fund, Inc., for attorney fees and costs is:

Attorney fees (51.5 hours x \$60/hr.)	\$3,090.00
Costs	<u>98.67</u>
<u>TOTAL AMOUNT DUE</u>	<u>\$3,188.67</u>


 MIKE KELLY
 1116-B Kanawha Blvd., East
 Charleston, WV 25301

Taken, sworn to, and subscribed before me this 15th day of November, 1985.

My Commission expires January 25, 1993.


 NOTARY PUBLIC