

*Before Change in Procedure of Final Order*



**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 3, 1985

Samuel Roberson  
Rt. 1, Box 190  
Oak Hill, WV 25901

Re: Roberson v. Mountaineer, Inc.  
ER-339-85

Dear Mr. Roberson:

Enclosed please find a copy of the Order of the WV Human Rights Commission in the above-styled and numbered case of Sam Roberson v. Mountaineer, Inc. 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,

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

Howard D. Kenney  
Executive Director

HDK/kpv

Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

*James H. Anderson*  
*207 Huber St.*  
*Drawer 1459*  
*Beckley, WV 25802-1459*

*Ex. Office*  
*Mountain Ave.*  
*Scand Branch Rd.*  
*Bradley, WV 25818*

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

Samuel Roberson,  
Complainant,

v.

Docket No.: ER-339-85

Mountaineer, Inc.  
Respondent.

ORDER

On the 13th day of August, 1985, the Commission reviewed Hearing Examiner James Gerl'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 14<sup>th</sup> day of August, 1985.

RESPECTFULLY SUBMITTED,



CHAIR/VICE CHAIRMAN  
WEST VIRGINIA HUMAN  
RIGHT COMMISSION

STATE OF WEST VIRGINIA  
HUMAN RIGHTS COMMISSION

SAMUEL ROBERSON,

Complaint,

v.

DOCKET NO. ER-339-85

**RECEIVED**

MOUNTAINEER INC.,

Respondent.

JUL 15 1985

W.V. HUMAN RIGHTS COMM.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing was convened for this matter on May 24, 1985 in Fayetteville, West Virginia. The complaint was filed on December 14, 1984. A notice of hearing was served on March 26, 1985. A status conference was held on April 22, 1985. A motion to amend the complaint was granted by the Hearing Examiner on May 20, 1985. Subsequent to the hearing, both parties have submitted written briefs and proposed findings of fact.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions, arguments as advanced by the parties are in accordance with the findings, conclusions and views 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 not necessary to a proper

determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

#### CONTENTIONS OF THE PARTIES

Complainant contends that respondent discriminated against him on the basis of his race by not hiring him and by not giving him an equal opportunity to prosecute his bid for employment. Respondent contends that complainant was not qualified for the position which he had applied and that a more qualified applicant was hired.

#### FINDINGS OF FACT

Based upon a preponderance of the evidence, the Hearing Examiner has made the following findings of fact:

1. Complainant is black.
2. Complainant applied for open position for an Air Trac Driller with respondent.
3. The Air Trac Driller position for which respondent advertised in the Beckley newspapers in September, 1984 required a minimum of five years experience.
4. Complainant had had four and one half years of experience as an Air Trac Driller at the time of his application with respondent.
5. Complainant was not hired by respondent for the Air Trac Driller position in September, 1984.

6. Billy Holdren, a Caucasian, also applied for the open Air Trac Driller position with respondent.

7. At the time of his application, Holdren had had nearly six years experience as an Air Trac Driller.

8. On October 15, 1984 respondent hired Holdren for the Air Trac Driller position.

9. Holdren was better qualified than complainant for the Air Trac Driller position.

10. Respondent lost the application filed by the complainant in September, 1984.

11. Respondent lost the application filed by Walker, who is black, in 1984.

12. It is respondent's policy to retain applications for employment and notify applicants of open positions for which they may be qualified, even if the applicants are not selected for a specific position for which they had applied.

13. All employees hired by respondent in 1984 were Caucasian.

14. In 1984, respondent's entire work force consisted of Caucasian employees.

15. Respondent did not provide complainant with an equal opportunity to prosecute his bid for employment

### CONCLUSIONS OF LAW

1. Samuel Roberson is an individual claiming to be aggrieved by an alleged unlawful discriminatory practice and is a proper complainant for the purposes of the Human Rights Act. West Virginia Code, Section 5-11-10.

2. Mountaineer, Inc. is an employer as defined in the West Virginia Code, Section 5-11-3 (d) and is subject to the provisions of the Human Rights Act.

3. Complainant has not made out a prima facie case that respondent discriminated against him on the basis of his race by failing to hire him for the Air Trac Driller position in October, 1984.

4. Respondent has not discriminated against complainant on the basis of his race by failing to hire him for the Air Trac Driller position in October, 1984.

5. Respondent failed to provide complainant with an equal opportunity to prosecute his bid for employment because of his race in violation of West Virginia Code, Section 5-11-9 (a).

### DETERMINATION

In so far as complainant contends that respondent discriminated against him on the basis of his race by failing to hire him for Air Trac Driller position in October, 1984, the complaint is not supported by the preponderance of the evidence. The preponderance of the evidence sustains ~~the~~ complaint in so far

as the complainant contends that respondent discriminated against him on the basis of his race by not providing him an equal opportunity to prosecute his bid for employment.

#### DISCUSSION

##### I. Air Trac Driller position.

In fair employment, disparate treatment cases, the initial burden is upon the complainant to establish a prima facie case of discrimination. Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission 309 S.E.2d 342, 352-353 (WVa 1983); McDonnell Douglas Corporation v. Green 411 U.S. 792 (1973). If the complainant makes out a prima facie case, respondent is required to offer or articulate a legitimate non-discriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra; if respondent articulates such a reason, complainant must show that such reason is pretextual.

In the instant case, complainant has failed to establish a prima facie case of discriminatory failure to hire. Complainant has proven that he is black; and that he applied for an open position with respondent as an Air Trac Driller; and that a Caucasian applicant was hired for the Air Trac Driller position. Complainant has not established that he was qualified for the Air Trac Driller position. The want ad which respondent ran in the Beckley Newspapers in September, 1984 stated that the position required a minimum of five years experience. At the

time of his application, complainant had had only four and one half years experience as an Air Trac Driller. Thus complainant did not meet the qualifications for the position for which he had applied. The successful applicant for the Air Trac Driller position, Holdren, had nearly six years of experience as an Air Trac Driller. Therefore, even in the event that complainant could be considered to have been qualified for the position of Air Trac Driller, the successful applicant was more qualified than complainant and respondent has established a legitimate, non-pretextual reason for not hiring complainant for the Air Trac Driller position. Complainant has failed to establish a prima facie case of discriminatory failure to hire.

II. Failure to Provide Complainant an Equal Opportunity to Prosecute his Bid for Employment.

It is a violation of the Human Rights Act to fail to provide an applicant for employment with an equal opportunity to prosecute his bid for employment because of his race. Baker v. Dunbar Junior High School and Kanawha County Board of Education E.S.-96-73 (WVa HRC). See, Moss-American Inc. v. FEPC (5th DIST 1974) 22 ILL. APP.3d 248, 317 N.E.2d 343.

In the instant case, it is respondent's policy to retain applications and keep them on file. Even if an applicant does not receive the position for which he had applied, respondent will notify an applicant of an open position for which he may be qualified. Thus, if any general laborer positions or other positions for which complainant may have been qualified



opened up after complainant's application, respondent would have notified him of the open positions. Instead, respondent, lost the complainant's application. The record also indicates that respondent lost the application of another black applicant, Walker, in 1984. It seems that respondent somehow loses the applications filed by its black applicants. This loss of applications for black applicants may explain why all of the new hires by respondent in 1984 were Caucasian and why all employees of respondent are Caucasian, with the exception of one employee who was hired less than thirty days before the hearing herein.

Prior to the hearing, respondent had maintained that complainant had not filed an application for employment with respondent. At the hearing, however, respondent admitted that complainant had in fact filed an application. Respondent has no explanation, however, for the fact that it did not retain complainant's application. The fact that respondent can not articulate any reason for its loss of employment applications filed by blacks mandates a conclusion that respondent does not afford black applicants an equal opportunity to prosecute their bids for employment.

Complainant has not demonstrated that he would have received any particular job had his application been properly processed. Accordingly, any award of back pay would necessarily be speculative and, therefore, improper. However, a cease and desist order requiring respondent to keep complainant's application on file and to afford him an equal opportunity for future openings in good faith without regard to race is

appropriate.

PROPOSED ORDER


In view of the foregoing, the Hearing Examiner recommends the following:

1. That the complaint of Samuel H. Roberson, Docket No. ER-339-85, be sustained in so far as complainant contends that he was not afforded an equal opportunity to prosecute his bid for employment, and that his complaint be dismissed, with prejudice, to the extent that he contends that respondent failed to hire him for Air Trac Driller position in October, 1984.

2. That respondent be ordered to cease and desist from failing to keep complainant's application for employment on file and from failing to give such application equal consideration for future open positions in good faith and without regard to race.

3. That respondent be ordered to cease and desist from failing to provide black applicants for employment with an equal opportunity to prosecute their bids for employment.

4. That respondent report to the Commission, within ninety days of the entry of the Commission's Order, the steps it has taken to comply with the Order.

  
James Gerl  
Hearing Examiner

Entered: July 15, 1985

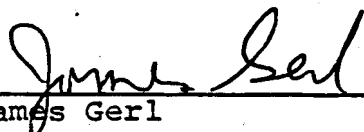
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served  
the foregoing **PROPOSED ORDER AND DECISION**  
by placing true and correct copies thereof in the United States  
Mail, postage prepaid, addressed to the following:

Roxanne Rogers  
Human Rights Commission  
1036 Quarrier Street  
Charleston, WV 25301

James G. Anderson  
Anderson & Sines  
Drawer 1459  
Beckley, WV 25802

on this 15th day of July, 1985.

  
\_\_\_\_\_  
James Gerl