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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.

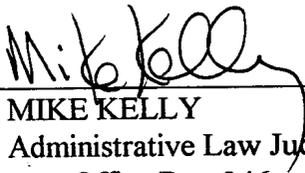
The filing of an appeal to the Commission from the final decision shall not operate as a stay of the decision unless specifically requested by the appellant in a separate application for the same and approved by the Commission or its executive director.

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 28th day of May, 1997.

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**

ANTOINETTE SPINO,

Complainant,

v.

Docket No. ESA-90-94

SALLY BEAUTY COMPANY, INC.,

Respondent.

FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

This matter matured for public hearing on 21 August 1995 at the Harrison County Courthouse, Clarksburg, Harrison County, West Virginia. Complainant was present in person and the case was presented on her behalf by the West Virginia Human Rights Commission and its counsel, Assistant Attorneys General Leah Griffith and Sandra K. Henson. Respondent was present by its agent, Douglas W. Garrett, and by its counsel, Ricklin Brown and Bowles, Rice, McDavid, Graff and Love.

I. ISSUES TO BE DECIDED

1. Whether Sally Beauty Company, Inc. ("Sally" or "SBC") unlawfully discriminated against Antoinette Spino in violation of W.Va. Code §5-11-9(1) by discharging her as store manager of its Clarksburg, West Virginia outlet because of her age.

2. Whether SBC unlawfully discriminated against Antoinette Spino because of her sex, and in violation of W.Va. Code §5-11-9(1), by discharging her in order to promote to the position of store manager a female who engaged in a consensual sexual relationship with Ms. Spino's supervisor.

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 true¹:

¹To 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. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

A. Preliminary Facts and Background

1. Complainant Antoinette Spino was, at time of hearing, a resident of Hepzibah, Harrison County, West Virginia. Her date of birth is 27 January 1937. She was first hired by respondent in August 1990, when she was 53 years of age. Ms. Spino currently resides in the State of Kansas.

2. Sally Beauty Company, Inc. is a national beauty supply distributor and is an "employer" as that term is defined by W.Va. Code §5-11-3(d). At all times relevant herein, Sally's district manager and Ms. Spino's immediate supervisor was Douglas W. Garrett. Mr. Garrett oversees operations at about a dozen Sally stores. Mr. Garrett became district manager in April 1991.

3. Ms. Spino was originally hired by Sally for a part time inside sales position. Within two months of her hire, Ms. Spino was promoted to outside sales.

4. In July 1991, when she was fifty-four years old, Ms. Spino was promoted to the position of store manager. The decision to promote her was initiated by Mr. Garrett, who at that time had been with Sally only three months, and approved by his boss, Linda Sizemore.

5. Prior to employment with Sally, Ms. Spino had managed a family business for eighteen years and considered herself knowledgeable in the areas of sales and store management.

6. Complainant was discharged from her employment with Sally on or about 19 March 1993, when she was 56 years of age. She served as store manager for roughly 21 months.

B. Ms. Spino's Performance as Manager

7. On 11 May 1992, some ten months after Ms. Spino was promoted to store manager, Mr. Garrett completed a performance appraisal form which was signed by both individuals. (HRC Ex. 5, Resp. Ex. 4). It appears to be her first evaluation as a store manager. Mr. Garrett gave Ms. Spino a rating of "Very Good" in the areas of store operations and customer service, a rating of "above average" in the areas of merchandising and staffing, and a rating of "average" in the area of "communication". He rated her performance in relation to business objectives as follows: "very good" in sales, "below average" in gross profit and "average" in both purchasing budget and cost of sales.

8. The May 1992 evaluation also notes such various strengths and weaknesses in Ms. Spino's performance as: "Follow up is weak and needs to improve. Assumes too much"; "Customer service is handled as though the customer is king"; "Employees feel comfortable working and learning from Toni"; "Time management is poor at this time"; and "Toni has the ability to do anything she desires. Effort is always there. Needs to plan work better." According to Ms. Spino, she and Mr. Garrett got along well that first year.

9. In July 1992, just two months after Mr. Garrett evaluated complainant, James T. Maher, Sally's vice president of field sales, visited the Clarksburg store. He found it to be in relatively poor condition, noting the following serious deficiencies:

- (a) "The front checkstand is in very poor shape. The merchandise on the cap shelf of the checkstand is very weak;"
- (b) "The area behind the checkstand is in very rough shape. There are twenty-three empty peg hooks in the cutlery section;"
- (c) "There are numerous holes throughout the store. Perm rod section is 20% out-of-stock. Clairol and Wella color are in terrible shape with an excessive number of outs. Merchandise is on order, but the manager seems satisfied because the merchandise is on order. I am directing Doug Garrett to get back in here and spend the appropriate amount of time training this manager on how to properly merchandize and order the store;"
- (d) "There are numerous holes in the shampoo and conditioner section;"
- (e) "Basic shop is 20% out-of-stock and there are four empty bins in the bottle section of the store. We just need an overall re-education of the manager on the proper way to order for the store;" and
- (f) "I checked the professional flyer and three items on the front page did not have self talkers. There are five items on the back page that were completely out-of-stock. So in addition to showing the manager how to merchandise the store on an everyday basis from the Order Book, we need to make sure we are properly covered on ad goods."

(Resp. Ex. 21).

10. Mr. Maher also noted that Ms. Spino appeared to be an enthusiastic employee willing to learn how to do a better job:

"The manager seems to be very interested in doing a good job and shows a great deal of desire, we just need to make certain that we get

back in and do the proper job of educating her on staying in-stock on key items."

(Id.)

11. Mr. Maher, who oversees operation of 550 stores, seven territory managers and 40 district managers, testified credibly that, being in the "beauty" business, Sally expects its stores to appear full, attractive and busy, adhering to the concept of "controlled clutter". Presence of "holes", which means that particular shelf or pegboard areas are empty of merchandise, is anathema to Sally management.

12. Mr. Maher and other witnesses, such as Betty Ann Doan, who manages a Sally store in Wood County, West Virginia, testified credibly that correctly ordering from the Sally warehouse is crucial to a store's operation and appearance. Each store is on an individualized ordering plan correlated to the store's sales history. Since each store carries about 4,500 different items, ordering is a long and tedious process that often takes four or five days to complete. The complete order is to be communicated to Sally's headquarters once per week on a certain day and prior to a certain time.

13. Mr. Maher testified credibly that his first impression of Ms. Spino's store was "we're going out of business". While Ms. Spino testified that he congratulated her on the appearance of the store and commended her for doing a good job, I reject that testimony as not credible and, instead, credit as true Mr. Maher's statement that the overall condition of the store ". . . was in very poor

shape. I was embarrassed." One of Mr. Maher's final comments in his dictated notes is that "Doug will spend the necessary time with her so she is able to be successful." (Resp. Ex. 21).

14. There was no credible explanation offered by either side as to how or why Ms. Spino's performance appeared to be acceptable to Mr. Garrett in May 1992, but totally unacceptable to Mr. Maher in July 1992. Ms. Spino did note that Mr. Garrett's attitude toward her became a problem shortly after the Maher visit.

15. Mr. Garrett soon began working with Ms. Spino to address the concerns raised in Mr. Maher's notes, which he received in approximately late July 1992.

16. Mr. Garrett's immediate supervisor, territory manager Linda Sizemore, reinspected the Clarksburg store in December 1992. She found that conditions had not substantially improved since Mr. Maher's visit the previous July. She directed Mr. Garrett to work closely with Ms. Spino to improve the store's appearance and, if that did not work, to discharge her.

17. On 8 December 1992, Mr. Garrett issued the first "corrective action" disciplinary measure against Ms. Spino. (Resp. Ex. 14). It could be fairly called a "written warning". The document notes the following concerns, among others:

- (a) Orders were not being properly placed;
- (b) The store was out of stock on several key items;
- (c) There were "holes" on the shelves and the pegboards;

- (d) The standard store display plan was not being followed; and
- (e) The store had burned out light bulbs.

Most, if not all, of these deficiencies had been previously pointed out by Mr. Maher and Ms. Sizemore.

18. Mr. Garrett made follow-up visits to the store on 17 December, 30 December, 6 January, 8 January, 26 January and 29 January. During these visits, he reviewed and corrected Ms. Spino's order book. Tension between Mr. Garrett and Ms. Spino increased with each visit and both of them became angry and used foul language. Given the large volume of items in the store, it was not possible for Mr. Garrett to review and correct a full and complete order in one visit.

19. On 29 January 1993, a second "corrective action" or written warning was completed by Mr. Garrett and tendered to Ms. Spino. She refused to sign it. The document outlines continued problems with her performance:

A corrective action was given to you on 12/8/92 concerning unacceptable standards of your store. Follow up DM visits were conducted on 12/17, 12/30, 1/6, 1/8, 1/26 & 1/29 showing some improvement in areas of concern but no overall consistency at acceptable Sally standards. You are still not maintaining proper stock levels due to improper ordering. Attached is another list of areas of concern that still need immediate improvement.

20. Mr. Garrett concluded the second disciplinary document with a clear warning that Ms. Spino's job was on the line:

I am giving you 30 days to show immediate improvement to maintain consistency in all areas of concern that I have talked with you about. If this does not occur & your store is not ordered & merchandised properly & not at acceptable Sally standards in all areas noted, you will be terminated.

21. Mr. Garrett inspected the store on 10 February 1993, 11 February, 19 February, 25 February, 1 March and 5 March. On the latter date, he issued a third written warning. An additional warning was given, instead of discharge or suspension, because Ms. Spino had suffered a recent death in the family. The warning states as follows:

On 2/5/93 DM [district manager] checked order book & found over 300 adjustments needed to correct order. Similar results were found on visits on 2/19 & 2/25.

* * *

I am giving you 2 weeks to order store properly using current rate of sales and maintain proper stock levels.

(Resp. Ex. 16).

22. On 19 March 1993, Mr. Garrett reinspected the store, noted numerous continuing deficiencies and terminated Ms. Spino. (Resp. Ex. 17). Her allegation that Mr. Garrett threatened "to call the law" on her if she did not leave the store is rejected as not credible.

C. Allegations of Discrimination

23. Ms. Spino alleged that she was an acceptable, if not exemplary, manager and that Mr. Garrett's criticisms of her performance were largely fabrications designed to cover up his desire to

fire her and replace her with 19 year old Jennifer Quinn. Unfortunately, I must reject such testimony as not credible for the following reasons:

(a) Mr. Maher's contemporaneously dictated trip notes indicate a store in poor condition as of July 1992. I found Mr. Maher, on the whole, to be credible and the Commission offered no evidence that would indicate bias or prejudice on his part against Ms. Spino in July 1992.

(b) According to Mr. Garrett, his boss, Ms. Sizemore, similarly criticized the operation of the store in December 1992, five months after Mr. Maher's visit, and ordered him to step-up his presence in the store until the situation was corrected or Ms. Spino was fired.² Mr. Garrett's inspections of the store dramatically increased beginning shortly after Ms. Sizemore's early winter visit;

(c) During cross-examination, Ms. Spino admitted that she often based her orders not on what the company documents indicated the store needed, but on her own belief that she knew which products would sell and which wouldn't. She believed that she knew better than the home office the quantity of stock that was needed;

(d) Ms. Spino's testimony that Mr. Garrett suddenly "turned on" her, without valid reason, and her description of his sudden change in behavior after August 1992, appeared so exaggerated and vindictive as to be unbelievable; and

(e) Betty Ann Doan, a Sally manager who came into Ms. Spino's store shortly after the discharge, found it to be in "terrible" shape and "really, really bare", with a simultaneous overstock of some items. I credit Ms. Doan's testimony as truthful.

² I make this finding regarding Ms. Sizemore's criticisms on the basis of Mr. Garrett's testimony and not on the basis of Resp. Ex. 28, which was not admitted into evidence.

24. Based on the evidence of the whole record, and after an assessment of credibility, I find as fact that Ms. Spino exhibited poor managerial skills in the areas of ordering and assuring that there were no "holes" in the store. Thus, I further find that respondent had legitimate non-discriminatory reasons to terminate her employment.

25. After Ms. Spino was discharged, she was initially replaced by a considerably younger female, Jennifer Quinn, who was 19 years old in March 1993. Ms. Quinn was hired in July 1991 as a cashier and inside sales clerk. She was later promoted to outside sales.

26. At the time of Ms. Spino's discharge, Sally employed the following individuals:

<u>Name</u>	<u>Position</u>	<u>Age in March 1993</u>	<u>Hire Date</u>
Jennifer Quinn	Full time, outside sales	19	July 1991
Beverly Bolick	Full time, inside sales	40	October 1992
Judy Boyce	Part time, inside sales	46	March 1992
Judith Coulson	Part time, inside sales	49	January 1993

As is obvious, in March 1993 Ms. Quinn had more seniority with the company and a more responsible position than the other three employees. Nonetheless, she had considerably less experience in the job world and had never managed a business or supervised other employees.

27. After carefully sifting through all of the allegations regarding personal and/or intimate relationships, I find as fact as follows:

(a) For a period of time, Jennifer Quinn, while an employee of Sally and reporting to complainant, lived in Ms. Spino's home and rented a portion of the home for her personal use;

(b) Ms. Spino eventually asked Ms. Quinn to move out, probably because the latter was entertaining her boyfriend on site on a regular basis;

(c) Ms. Spino hired longtime close, personal friend Judy Boyce and was also friends with Judy Coulson;

(d) By early 1993, Ms. Spino considered the two part time employees, Ms. Boyce and Ms. Coulson, to be on her side and the two full time employees, Ms. Quinn and Ms. Bolick, to be on Mr. Garrett's side; and

(e) Ms. Quinn and Mr. Garrett, who was forty-one years of age in 1993, carried on a flirtatious, if not sexual, relationship prior to Ms. Spino's discharge.

28. As stated above, after Ms. Spino was fired, Mr. Garrett chose Mr. Quinn to be the new store manager. He immediately sent her out-of-state for management training. When Mr. Maher learned that Mr. Garrett had promoted Ms. Quinn to manager he blocked the promotion and ordered it rescinded, telling Mr. Garrett "I am not going to have a 19 year-old store manager. She doesn't have the maturity to manage the store."

29. When Ms. Quinn returned from management training Mr. Garrett took her into the store office and told her that she would not be the manager. She was disappointed, upset and began to cry. At some point, Ms. Coulson unexpectedly entered the office. There was considerable testimony and speculation at hearing as to what Ms. Coulson saw. I find as fact as follows:

- (a) Ms. Coulson did not see Mr. Garrett and Ms. Quinn engaging in oral sex or any sexual act;
- (b) Ms. Coulson did not see any exposed intimate bodily areas;
- (c) Ms. Coulson did not see them in a passionate embrace or pulling, zipping or buttoning up their clothes; and
- (d) Ms. Coulson did not see their bodies touching.

30. Based on the evidence elicited at hearing, and on my observation of Ms. Quinn and Mr. Garrett, I find that more likely than not Mr. Garrett was comforting Ms. Quinn with a hug or non-intimate embrace just prior to Ms. Coulson briefly entering the room.

31. Mr. Garrett eventually promoted Beverly Bolick to the store manager position. Within a year of her promotion, Ms. Bolick fired Jennifer Quinn. Ms. Bolick testified credibly that she had to inform Mr. Garrett of her intent to fire Jennifer and that he did not discourage or interfere with her plans.

32. In regard to the Commission's allegation that Ms. Spino was discharged in order to promote Ms. Quinn as a benefit for having a consensual sexual relationship with Mr. Garrett, I find as fact as follows:

- (a) Complainant was discharged for poor performance as initially noted by Mr. Maher and Ms. Sizemore;

(b) Though she had greater experience and responsibility when compared to the remaining employees, Ms. Quinn was nonetheless promoted to take Ms. Spino's place primarily because of her flirtatious relationship with Mr. Garrett or because of his desire to have a future intimate relationship with her; and

(c) I find no unlawful connection between Ms. Spino's discharge and Ms. Quinn's promotion. While Ms. Quinn was more likely than not promoted because of her then current or expected "relationship" ties to Mr. Garrett, Ms. Spino was discharged because of her clear inability to adhere to Sally policy, specifically in the areas of ordering and store appearance. The Commission produced no evidence that Mr. Maher and Ms. Sizemore, who were very critical of Ms. Spino's skills, were aware of Mr. Garrett's alleged ties to Ms. Quinn and sought to remove complainant in order to further Mr. Garrett's relationship with the younger woman, or that they harbored any prejudice or bias whatsoever against complainant.

D. Miscellaneous Relevant Facts

33. I found Beverly Bolick to be mature, straight forward and credible. She testified that she was mostly trained by Jennifer Quinn, not complainant, and that she observed that Ms. Spino spent only one day a week for an hour or two ordering stock. She found Ms. Spino to be a temperamental and erratic boss who "called me whore, she's called me bitch, she's called me fucking bitch . . . It was cussing like they say a sailor does."

34. I found Betty Ann Doan to be similarly credible. Ms. Doan, who is in her late 40's, stated that she does ordering in her store four days a week. When she came in to manage the Clarksburg store while Ms. Quinn was being trained she formed the opinion that the employees had not been properly trained since they did not know how to assist in ordering and were unfamiliar with an associate's regular duties other than waiting on customers and running the register.

35. Mr. Maher testified credibly that in December 1992 he received a telephone call from Ms. Spino during which she complained that Mr. Garrett was coming to her store too often and supervising her orders. Mr. Maher related Ms. Spino's concerns to Ms. Sizemore, who informed him of her recent inspection of the store and its continued problems. During Ms. Spino's call to Mr. Maher, she did allege that Mr. Garrett didn't like her, but she made no mention of any preferential treatment allegedly afforded Jennifer Quinn.

36. Ms. Spino called Mr. Maher a second time in January 1993, stating Mr. Garrett was "out to get me." Again, however, she made no mention of Ms. Quinn or possible age discrimination, but stated that he was criticizing her abilities to do ordering.

37. The credibility of Ms. Boyce, Ms. Coulson and Ms. Spino were severely damaged by their insistence that Judith Coulson "caught" Mr. Garrett and Ms. Quinn in a sexual act when, at best, all she saw were "skirts flying" and Mr. Quinn retreating to the bathroom. Ms. Coulson's observations was described by Ms. Boyce, who saw nothing herself, as "Doug was sitting in the chair, turned, and Jennifer was down on her knees," implying that they were engaged in a sexual act. Ms.

Spino reported that Ms. Coulson told her that she [Ms. Coulson] had caught them engaging in oral sex. Ms. Coulson claimed that she never told anybody that she saw Ms. Quinn on her knees or performing a sexual act and didn't want to discuss what she saw "because it's smut".

38. Other than brief and passing references to age, there was no evidence that Mr. Garrett harbored an animus toward Ms. Spino because of her age. In fact, he hired her to be the manager when she was over fifty years of age.

39. In regard to Ms. Spino, much of her testimony was unclear, contradictory, evasive, hyperbolic and selective and, for those reasons, unworthy of belief. For example, Ms. Spino dramatically testified how she missed an event being held in honor of her birthday because she had to work late that evening to get her orders corrected. She stated she did not leave the store until 10:30 p.m. Ms. Bolick, however, recalled that Ms. Spino ordered her to leave and close the store at 5:25 p.m., but to mark on her time sheet that she left at the regular time, 7:30 p.m. When Ms. Bolick refused, Ms. Spino cursed her. Ms. Bolick recalled that all the employees left at 7:30 p.m., including Ms. Spino, and that the store was dark as she drove out of the parking area.

40. I found the testimony of Ms. Quinn and Mr. Garrett, as it relates to their personal relationship, to be less than candid.³

³ I make this finding independent of any consideration of the testimony of Victoria McMaster as to Mr. Garrett's credibility, which testimony was properly excluded.

E. Summary of Findings

41. I find as fact that Antoinette Spino was discharged from her employment for reasons related to her job performance and not for reasons related to her age or the relationship between Mr. Garrett and Ms. Quinn.

42. I find as fact that respondent did not commit an unlawful discriminatory act under the West Virginia Human Rights Act.

III. CONCLUSIONS OF LAW

1. Under the West Virginia Human Rights Act (HRA), it is unlawful for an employer to use an employee's age as a reason to discharge her. W.Va. Code §5-11-9(1).

2. Under the West Virginia Human Rights Act and the regulations promulgated pursuant thereto, it is a form of unlawful sex discrimination to grant a benefit (such as a promotion) to an employee who submits to a supervisor's sexual advances, while denying that benefit to other persons who were qualified to receive or maintain the benefit, provided that the sexual relationship between the supervisor and the favored party was a substantial factor in the employment decision. W.Va. Code §5-11-9(a); 77 WVCRR §4-3.5.

3. This case having been heard in its entirety, with all evidence submitted and considered, it is not necessary to address whether the Commission established a *prima facie* case of discrimination. Once all the evidence has been heard, and the "defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether plaintiff really did so is no longer relevant." *U.S. Postal Service v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482 (1983). The job of the fact finder, after taking all of the evidence, is to address "the ultimate question of discrimination *vel non*." 103 S.Ct. at 1481. *See, Barefoot v. Sundale Nursing Home*, 193 W.Va. 475, 457 S.E. 2d 152 (1995).

4. The burden on the Commission was to show by a preponderance of the evidence that an unlawful reason, sex or age, was a motivating factor in the decision of respondent to discharge Ms. Spino. *Skaggs v. Elk Run Coal Co.*, ____ W.Va. ____, 479 S.E. 2d 561 W.Va. Lexis 107 (1996). It is not necessary to show that an unlawful factor was the only factor causing the decision, but merely that an unlawful factor entered into the decision making in any degree.

5. The Commission failed to show by a preponderance of the evidence that the reason given by respondent for its discharge of Ms. Spino was not the true reason for its action, but only a pretext for unlawful discrimination.

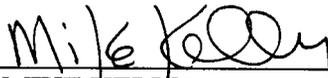
6. The Commission failed to show that complainant's age was a factor in the decision to discharge Ms. Spino.

7. The Commission failed to show that Mr. Garrett's relationship with Ms. Quinn was a factor in the decision to discharge Ms. Spino.

8. This case is ordered DISMISSED.

WV HUMAN RIGHTS COMMISSION

ENTER this 27th day of May, 1997.

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