



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION

1321 Plaza East

Room 104/106

Charleston, WV 25301-1400

GASTON CAPERTON
GOVERNOR

TELEPHONE (304) 348-2616
FAX (304) 348-2248

Quewannoii C. Stephens
Executive Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

September 18, 1992

Claude Swanson
700 - 27 Westburke St.
Martinsburg, WV 25401

Merchants & Farmers Bank
131 S. Queen St.
Martinsburg, WV 25401

Barry Beck, Esq.
119 S. College St.
PO Box 1286
Martinsburg, WV 25401

Ron Tucker, Esq.
301 Security Bldg.
211 Adams St.
Fairmont, WV 26554

Re: Swanson v. Merchants & Farmers Bank
ER-552-88 & ES-553-88

Dear Parties:

Enclosed, please find the final decision of the undersigned hearing examiner in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the hearing examiner's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all

matters alleged to have been erroneously decided by the examiner, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

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

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the hearing examiner, or an order remanding the matter for further proceedings before a hearing examiner, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a hearing examiner, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the examiner on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the hearing examiner's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a hearing examiner's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the examiner's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,


Gail Ferguson
Hearing Examiner

GF/mst

Enclosure

cc: Glenda S. Gooden, Legal Unit Manager
Mary C. Buchmelter, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CLAUDE SWANSON,

Complainant,

v.

DOCKET NUMBER(S): ER-552-88
ES-553-88

MERCHANTS AND FARMERS BANK,

Respondent.

HEARING EXAMINER'S FINAL DECISION

A public hearing, in the above-captioned matter, was convened on August 28, 1991, in Berkeley County, West Virginia, before Gail Ferguson, Hearing Examiner.

The complainant, Claude Swanson, appeared in person and by counsel, Ron L. Tucker, Esq. The respondent, Merchants and Farmers Bank, appeared by its representatives, Karen Butcher, Branch Manager, and Ernie Weidman, Vice President, and by counsel, Barry Beck, Esq.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the hearing examiner and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings,

conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

FINDINGS OF FACT

1. Merchants and Farmers Bank, respondent herein, is engaged in the business of banking and finance in Martinsburg, Berkeley County, West Virginia. The complainant, Claude Swanson, is a black male presently residing in Westover, West Virginia. On January 11, 1988, the complainant submitted an application for employment with the respondent for a teller position in response to its advertisement in the Martinsburg Journal.

2. On January 25, 1988, Karen Butcher, assistant branch manager for the respondent, interviewed the complainant, Mr. Swanson, Lisa Ringle, and Debra Michael for the position of part-time teller. Both Ms. Ringle and Ms. Michael are white females. The position paid \$6.00 per hour for approximately 20 to 25 hours per week during the afternoon or evening hours. The threshold qualification for the position was a high-school diploma. The complainant, Lisa Ringle and Debra Michael all met the minimum qualifications for the position. On January 27, 1988, Ms. Butcher, selected Debra Michael to fill the part-time teller position.

3. The job duties of a part-time teller were to accept deposits, cash checks, wait on customers or refer them to other

areas. According to Ms. Butcher, respondent provided on-the-job training. Therefore, although experience was helpful, it was not essential.

4. During the period in question, respondent did not have any black male or female employees with the exception of a janitor and no male tellers either full or part time.

5. According to the respondent, Debra Michael indicated on her application and during her interview that she was interested in a part-time teller position. Ms. Michael was especially interested in a position with afternoon or evening hours because she was attending vocational training school during the day. She also had recent experience in retail business and was studying office management at a local vocational training school.

6. At the time Lisa Ringle was working as a part-time teller at another local bank, and had other banking experience. According to respondent, Ms. Ringle indicated during her interview that her husband might be transferred to another area in the near future.

7. The complainant had worked as a teller for three banks between 1978 and 1980. The complainant's first experience in banking was for 18 months as a teller for Suburban National Bank at Berkeley Plaza, Martinsburg, from June 1978 to December 1979. Complainant's next experience was again with Suburban National Bank for four months between February 1980 and June 1980. Finally, the complainant worked in Bethesda, Maryland for approximately six months with Government Services Savings and Loan.

8. The complainant had not had any banking experience during the eight year period immediately preceding his interview with the respondent.

9. Although the complainant indicated on his application that he was interested in a full-time teller position or new accounts, he also indicated during his interview that he would accept part-time work and that he was interested in a position in the loan department.

10. Ms. Butcher testified that she selected Ms. Michael for the position because she believed Ms. Michael was the best qualified candidate. Ms. Butcher believed that Ms. Michael was particularly suitable for the position because she was primarily interested in part-time employment and had a schedule that was conducive to evening work.

11. On the other hand, Ms. Butcher testified she did not select the complainant because he indicated that he was most interested in a full-time position in the loan department. In addition, according to Ms. Butcher during the selection process, she considered information supplied to her by respondent's vice president Ernie Weidman that the complainant had been hired as a teller by respondent on a previous occasion but immediately prior to beginning work had called and rejected the job.

12. According to the complainant, sometime in 1980 he applied for a teller position with respondent; he was offered a position as teller with respondent but he rejected it, because he was offered a position elsewhere.

13. Neither Mr. Weidman, respondent's representative, Ms. Ringle nor Ms. Michael were called as witnesses. Ms. Butcher was the

sole witness for the respondent and Mr. Swanson testified solely on his own behalf.

14. On May 23, 1988, the complainant filed a complaint with the West Virginia Human Rights Commission alleging that he was not selected for the part-time teller position because of his race and sex.

15. After the selection for the part-time teller position was made, the complainant worked with Citicorp in Hagerstown, Maryland, from February 1988 to June 1988. He worked approximately 30 hours a week. The complainant was paid approximately \$135.00 per week during his employment with Citicorp.

16. The complainant was unemployed from July 1988 to sometime in 1989, when he began employment with the Roses Department Store in Front Royal, Virginia. He was employed full-time as a management trainee, and earned approximately \$6.00 per hour. The complainant left this position after two months because of a personal matter.

17. Following his employment with Roses, the complainant was unemployed until 1990, at which time he began working for the Coordinating Council for Independent Living and Valley Community Health.

DISCUSSION

The prohibitions against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act, WV Code §5-11-1 et seq. Section 5-11-9(a)(1) of the Act makes it unlawful "for any employer to discriminated against an individual with respect

to compensation, hire, tenure, terms, conditions or privileges of employment...."

The term "discriminate" or "discrimination" as defined in §5-11-3(h) means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of race...sex...."

Given this statutory framework, a complainant may prove a case by direct evidence of discriminatory intent or, as is more often done in disparate treatment cases, such as sub judice, by the three-step inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and adopted by our Supreme Court in Shepherdstown Volunteer Fire Dept. v. State Human Rights Commission, 309 S.E.2d 342 (1983). See also State ex rel State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d 77 (1985). This method of proof of discriminatory intent requires that the complainant first establish a prima facie case of discrimination. The burden of production then shifts to respondent to articulate a legitimate, nondiscriminatory reason for its action. Finally, the complainant must show that the reason proffered by respondent was not the true reason for the employment decision, but rather a pretext for discrimination. The ultimate burden remains with the complainant to establish an illegal motive by the preponderance of the evidence.

Although in Conaway v. Eastern Associated Coal, S.E.2d 423 (1986)^{1/} the West Virginia Supreme Court of Appeals proposed a general test for determining a prima facie case of illegal employment discrimination in situations where McDonnell Douglas and its progeny Shepherdstown is unadaptable, the facts in the instant case lend themselves easily to the more specific Shepherdstown analysis. Applying that standard, the complainant has established a prima facie case of race and sex discrimination.

It is undisputed that the complainant, a black male, is a statutorily protected class member under the Human Rights Act. It is also clear that the complainant applied for a teller position with respondent and that he was qualified for that position based on the objective qualification of possessing a high school diploma. Finally it is undenied that the complainant was rejected in favor of a similarly qualified applicant--a white female.

Having established a prima facie case, the complainant creates a presumption of unlawful discrimination thereby shifting the burden of production to the respondent to articulate a legitimate nondiscriminatory reason for its action toward the complainant. The explanation must be legally sufficient to justify a judgment for respondent. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

^{1/} Under the Conaway test, the complainant must show: (1) that the complainant is a member of a protected class; (2) that the respondent made an adverse decision concerning the complainant; (3) but for the complainant's protected status, the adverse decision would not have been made.

The respondent advances two explanations for its decision not to hire the complainant: First, it did not believe the complainant was very interested in a part-time position, since he had manifested an interest primarily in a full-time teller or loan department position; as opposed to the successful candidate who indicated a strong interest in part-time employment, and secondly, that during the selection process, it was revealed that the complainant had been offered a position as teller by the respondent eight years earlier which he had accepted and then turned down.

The complainant has failed to show that the reasons presented by the respondent are pretext for unlawful discrimination, to wit, that the proffered are not worthy of belief or that discriminatory reasons more than likely motivated the respondent. The complainant has presented no evidence that it was not legitimate or that it was discriminatory to consider an applicant's interest in and probable dedication and reliability for a position.

It is clearly a nondiscriminatory reason, without compelling evidence to dispel its legitimacy, for an employer to consider that an applicant for employment has refused a previous position.

The complainant argues that he was the most qualified in terms of prior banking experience and that banking experience was or should have been the most important consideration for the part-time position, notwithstanding his primary interest in full-time employment. However, the complainant offers no proof in support of this contention. The respondent counters by pointing to the other unsuccessful candidate, a white female, who was at the time of her application working as a teller at another Martinsburg bank and who

it maintains would have been hired if banking experience was the only criteria. This candidate, according to respondent, indicated during the interview that she might be leaving the area soon, and that is why she was not considered. In other words, respondent believed that the successful applicant would stay with the part-time position longer than the complainant or the other white female. The complainant also argues, without more, that respondent's reliance on his earlier rejection of a teller position as the basis for its non-selection is a pretext for race and sex discrimination. Perhaps, paradoxically, respondent points out that if it had some desire to exclude the complainant on the basis of his race or sex from employment as a teller, then it would not have selected him for the previous position. Put simply, the complainant presented insufficient evidence to rebut respondent's articulated reasons.

Complainant's effort to establish racial and gender discrimination by statistical proof falls short. Respondent argues that complainant's statistics cannot be probative of race or sex discrimination because they do not adequately compare respondent's workforce with the qualified population in the relevant labor market. While fine-tuned statistics are crucial in disparate impact cases or in pattern and practice cases which both depend on a challenge to systemic employment practices; Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975); Hazelwood School District v. U.S., 433 U.S. 299 (1977); and Guyan Valley Hospital, Inc. v. WV Human Rights Commission, 382 S.E.2d 88 (WV 1989), in a disparate treatment case such as is presented here, statistical precision is less important but must be relevant to the issue of motive.

While the complainant has shown that the the bank hired eight white females and no blacks or males during the six-month period preceding his non-selection, this information without more is not enough. Wards Cove Packing Co. v. Antonio, 109 S.Ct. 2115 (1989); Watson v. Forth Worth Bank & Trust, 108 S.Ct. 2777 (1988). Thus, the complainant has failed to infer statistically that the respondent discriminated against him. To be sure, respondent's workforce profile raises questions both as to employment of African Americans and to males, and in a proper case may be deserving of close statistical scrutiny in light of the respondent's hiring decisions which appear to be highly subjective. Rowe v. General Motors Corp, 457 F.2d 348 (5th Cir. 1972).

However, upon the facts of this case, the complainant has not carried his ultimate burden of establishing by a preponderance of the evidence that the respondent discriminated against him based on his race or sex.

CONCLUSIONS OF LAW

1. The complainant, Claude Swanson, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the West Virginia Human Rights Act, WV Code §5-11-10.

2. The respondent, Merchants and Farmers Bank, is an employer as defined by WV Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act,

3. The complaint in this matter was properly and timely filed in accordance with WV Code §5-11-10.

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to WV Code §5-11-9 et seq.

5. Complainant has established a prima facie case of race and sex discrimination.

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has not established, by a preponderance of the evidence, to be pretext for unlawful race and sex discrimination.

RELIEF AND ORDER

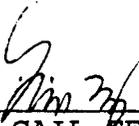
Pursuant to the above findings of fact and conclusions of law, it is ORDERED that this case be dismissed with prejudice and be closed.

It is so ORDERED.

Entered this 18 day of September, 1992.

WV HUMAN RIGHTS COMMISSION

BY


GAIL FERGUSON
HEARING EXAMINER