



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
1321 Plaza East
Room 104/106
Charleston, WV 25301-1400

GASTON CAPERTON
GOVERNOR

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Quewanncoi C. Stephens
Executive Director

29 May 1992

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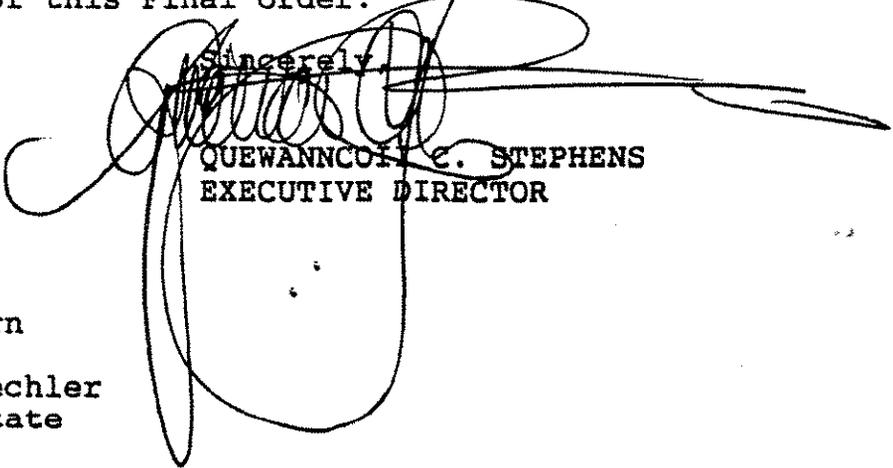
Robert Williams, Esquire
McGuiness & Williams
1015 - 15th Street, N.W.
Washington, D.C. 20005

Re: Sizemore v. Bankers Life and Casualty Co.
Docket No. EA-544-82A

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled ad numbered case. Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 1990, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for review of this Final Order.

Sincerely,


QUEWANNCOI C. STEPHENS
EXECUTIVE DIRECTOR

QCS/jm
Enclosure
Certified Mail/Return
Receipt Requested
cc: The Hon. Ken Hechler
Secretary of State

Mary Catherine Buchmelter
Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JACK N. SIZEMORE,

Complainant,

v.

DOCKET NO. EA-544-82A

BANKERS LIFE AND
CASUALTY COMPANY,

Respondent.

FINAL ORDER

On May 14, 1992, the West Virginia Human Rights Commission reviewed the Hearing Examiner's Final Decision in the above-styled action issued by Hearing Examiner Pro Tempore Mike Kelly. After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer filed in response to the Hearing Examiner's Final Decision, the Commission decided to, and does hereby adopt said Hearing Examiner's Final Decision as its own, without modification or amendment.

It is, therefore, the order of the Commission that the Hearing Examiner's Final Decision be attached hereto and made a part of this Final Order.

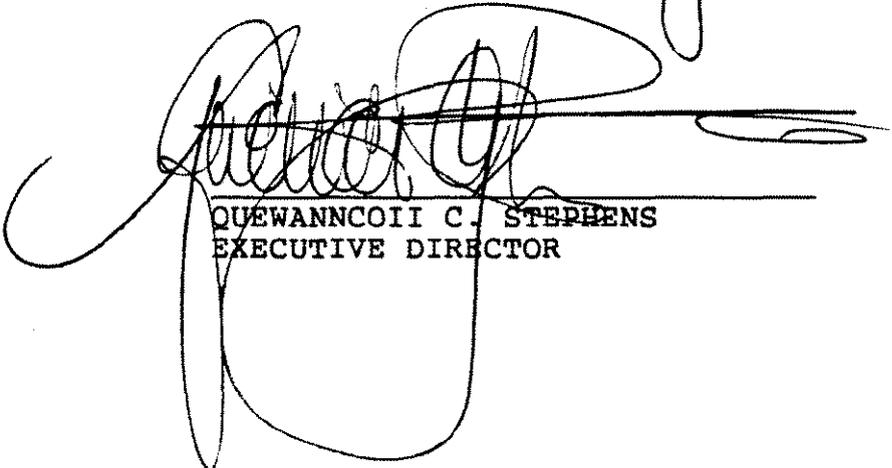
By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review

as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 29th day of May, 1992 in Charleston, Kanawha County, West Virginia.



QUEWANNCOLL C. STEPHENS
EXECUTIVE DIRECTOR

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the Clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the Clerk of the Supreme Court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the Commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the Commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code § 5-11-11, and the West Virginia Rules of Appellate Procedure.

RECEIVED

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ATTORNEY GENERAL
CIVIL RIGHTS DIV.



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Quewanncoii C. Stephens
Executive Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

December 24, 1991

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1015 15th St., NW
Washington, DC 20005

Re: Sizemore v. Bankers Life and Casualty Co.
EA-544-82A

Dear Parties:

Enclosed, please find the final decision of Hearing Examiner Pro Tempore Mike Kelly in the above-referenced 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;

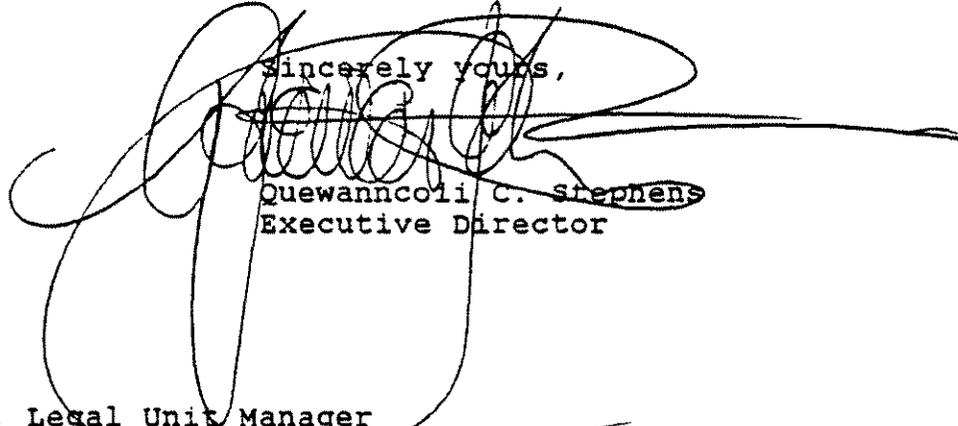
10.8.4. Supported by substantial evidence on the whole record; or

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, please feel free to contact me at the above address.

Sincerely yours,



Quewanncoli C. Stephens
Executive Director

QCS/GSG/mst

Enclosure

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

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JACK N. SIZEMORE,

Complainant,

v.

DOCKET NO. EA-544-82A

BANKERS LIFE AND
CASUALTY COMPANY,

Respondent.

HEARING EXAMINER'S FINAL DECISION

A public hearing in the above-styled matter was held on 16 and 17 January 1991 and on 7 and 8 March 1991 at the City Hall of the City of Huntington, Cabell County, West Virginia. Hearing Examiner Pro Tempore Mike Kelly presided.

The complainant, Jack N. Sizemore, appeared in person and by counsel, Herbert H. Henderson and Sharon M. Mullens. The respondent was represented by its agent, Bruce Turner, and its counsel, Robert E. Williams, Garren E. Dodge and Patricia Mullin. Both parties were exceptionally well-represented by their respective counsel.

All proposed findings of fact and conclusions of law submitted by the parties have been considered and reviewed. The hearing examiner additionally certifies that he has read the entire transcript, and has reviewed his contemporaneously taken notes and all exhibits admitted into evidence. To the extent

that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings and conclusions of the hearing examiner, and are supported by a preponderance of the evidence, they have been adopted. 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 a witness is not in accord with the findings as stated herein, it is not credited.

I. FINDINGS OF FACT

Based upon the credibility of the witnesses, 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 examination of the exhibits introduced into evidence; the hearing examiner finds the following facts to be true:

A. Introductory Facts

1. Complainant, Jack N. Sizemore, is a male who was born on 28 January 1927.

2. Respondent Bankers Life and Casualty Company (hereinafter "Bankers") is an employer as that term is defined by W. Va. Code § 5-11-3(d), and is in the business of selling policies of insurance.

3. Complainant and respondent had a business relationship from 4 March 1957 until 22 February 1982, when their relationship was severed by respondent. Complainant characterizes their relationship as having been one of "employer and employee," while Bankers asserts that Mr. Sizemore was an "independent agent" and not an employee.

4. Based on the totality of the evidence, and careful consideration of the voluminous testimony of the witnesses as to this issue, the hearing examiner finds as fact that complainant was an employee of respondent and respondent was his employer. The credible facts supporting such a finding include, but are not limited to, the following:

(a) Complainant was prohibited from selling the products of other insurers, regardless of whether the other company's products were competitive or non-competitive with the policies offered by Bankers.

(b) On more than one occasion, complainant was instructed to cease all of his business activity with other insurers and was pressured to abandon his licenses to sell insurance in Ohio and Kentucky.

(c) Complainant was assigned a specific geographical area in which he could sell policies and was required to share and/or forfeit commissions earned on sales outside of that area.

(d) Complainant was required by Bankers to file daily activity reports, attend weekly sales meetings and meet a monthly sales quota.

(e) Bankers' management personnel would call or visit the Sizemore home on occasion to determine if complainant was working, and would otherwise closely monitor his work activities.

5. The above-listed restraints and controls exercised by Bankers are inconsistent with a truly "independent" business relationship and substantially outweigh the evidence produced by respondent (e.g., complainant's tax status and returns) in support of its position.

B. Work History of Complainant

6. During his 25 year relationship with respondent, complainant served primarily as a sales agent. His main responsibility was to procure applications for insurance policies from customers and to submit those applications to Bankers' Huntington office.

7. The quarter of a century relationship between complainant and respondent was marked by repeated clashes over certain of respondent's policies which Mr. Sizemore felt were

unduly restrictive of his significant abilities to sell insurance. A highly productive salesman, Mr. Sizemore complained loud and often about inadequate commission rates, lack of remuneration for "servicing" existing policies, and the prohibition on his representation of other insurance companies.

8. At hearing, Bankers' representatives testified that it prohibited its agents from being licensed with other companies in order to protect its "lead" system. A "lead" is the name and address and/or telephone number of someone who has indicated an interest in purchasing insurance. Leads are given to agents to assist them in contacting persons likely to buy respondent's products. Bankers went to great expense to generate the leads and became concerned about agents who accepted leads, but were in a position to use them for the benefit of another insurance company.

9. The conflict between the parties regarding licenses with other companies was recurring and contentious. In early 1981, Walter Salvado, branch manager of Bankers' Huntington office, warned Mr. Sizemore for at least the second time that he had to terminate his other contracts or risk discharge from Bankers. Mr. Sizemore, at this time, complied with Mr. Salvado's order.

10. In late 1981, however, respondent learned that Mr. Sizemore had again taken out licenses to represent other

insurance companies and that he had become licensed to represent Iowa State Travelers Mutual Assurance Company on 18 November 1981 and Union Fidelity Life Insurance Company on 25 November 1981.

C. Complainant's Discharge

11. At roughly the same time that Mr. Sizemore had again obtained licenses from other companies, his production for Bankers noticeably slowed. During November 1981 he produced only one application for insurance, and in December 1981 and January and February 1982 he produced none at all.

12. On 22 February 1982, branch manager Salvado called Mr. Sizemore into his office and terminated his contract. Mr. Salvado testified that he discharged complainant because of the latter's low productivity over the preceding three to four month period. The complainant introduced no evidence showing that similar inactivity had been tolerated in younger agents. The respondent, on the other hand, produced some evidence indicating that younger agents had been discharged for similar periods of inactivity.

13. Mr. Sizemore testified that his low productivity was due to the illness of both his wife and himself. However, the degree of such illnesses during the crucial period in question was left unclear, and it was equally unclear as to whether respondent's management personnel were aware of the illnesses.

The hearing examiner found no evidence showing that Mr. or Mrs. Sizemore directly communicated the nature or degree of their illnesses to respondent's management personnel.

14. Given the nine year gap between the dates of the critical events of late 1981 and early 1982, and the 1991 dates on which this matter was finally heard, it was extremely difficult for the parties and their witnesses to present testimony that the hearing examiner could find unquestionably reliable and trustworthy. Evidence offered by both sides was made suspect by the passage of time and the limits of memory. Nonetheless, the hearing examiner finds that based on the evidence adduced at hearing one can reasonably conclude that complainant was, more likely than not, discharged for the following reasons:

(a) Complainant and respondent had a troubled employment relationship;

(b) Complainant desired to be a truly independent agent (which he later became) with the ability to offer to his customers a wide range of products from various companies and the opportunity to dramatically increase his annual income;

(c) Respondent's interest in protecting its "lead" system mandated that it restrict Mr. Sizemore to selling its products exclusively; and

(d) The combination of Mr. Sizemore's low productivity during the period from November 1981 until 22 February 1982, and the discovery that he had once again taken out licenses with

other companies, caused respondent to reasonably assume that complainant was using its "leads" to establish his own business.

D. Other Evidence

15. The complainant offered evidence that on at least two occasions top personnel of respondent made statements which could be construed as harboring a bias against older employees. Again, due to the passage of time, the proffered testimony was so vague and unsure that the hearing examiner must reluctantly grant it little weight. It was simply unclear what was said, when it was said and what the speaker intended to communicate. Even if the statements are credited as offered by complainant, the hearing examiner remains unconvinced that a general bias against older employees was a motivating factor in the case at bar.

16. Complainant's statistical evidence is similarly inconclusive. A careful review of the expert testimony offered by both sides reveals some evidence of age bias, but also, when scrutinized from a different perspective, a contradictory tilt in favor of veteran employees. Complainant's statistics simply do not compel a finding in his favor in the absence of sufficient evidence that Mr. Sizemore was himself unlawfully discriminated against because of his age.

17. The evidence clearly showed that respondent was a difficult, demanding and, perhaps, deceitful employer. The Human

Rights Act, however, does not prohibit harsh, arbitrary or reprehensible conduct on the part of an employer, only discrimination.

II. CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action.

2. At all times referred to herein, Bankers Life and Casualty Company was an "employer" as that term is defined by the West Virginia Human Rights Act, W. Va. Code § 5-11-3(d).

3. At all times referred to herein, the complainant, Jack N. Sizemore, was and is a citizen and resident of the State of West Virginia, and is a person within the meaning of W. Va. Code § 5-11-3(a).

4. On or about 2 May 1982, Jack N. Sizemore, a fifty-five (55) year old male, filed a verified complaint properly alleging that the respondent had engaged in one or more unlawful discriminatory practices within the meaning of W. Va. Code § 5-11-9.

5. During the course of the parties' 25 year business relationship, complainant was an employee of respondent and not an independent contractor.

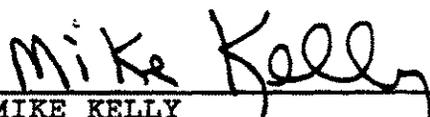
6. Complainant established a prima facie case of unlawful discrimination on the basis of age, in response to which respondent articulated legitimate and nondiscriminatory reasons for its discharge of Mr. Sizemore.

7. Weighing all of the testimony and exhibits, complainant failed to prove by a preponderance of the evidence that the reasons articulated by respondent to explain Mr. Sizemore's discharge were pretextual.

8. Weighing all of the testimony and exhibits, the hearing examiner must conclude that more likely than not respondent's motivation to discharge complainant was not based upon his age, but, instead, was based upon the parties' troubled history, complainant's low productivity between November 1981 and February 1982 and respondent's discovery that complainant had once again become licensed with other insurers.

9. The complaint that Bankers Life and Casualty Company discriminated against Jack N. Sizemore because of his age, Case No. EA-544-82A, is DISMISSED, with each side to bear its own costs and fees.

Respectfully submitted,


MIKE KELLY
HEARING EXAMINER PRO TEMPORE