



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

**215 PROFESSIONAL BUILDING
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CHARLESTON, WEST VIRGINIA 25301**

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January 9, 1986

ARCH A. MOORE, JR.
Governor

George P. Stanton, III, Esquire
Assistant Attorney General
Room E-26, Capitol Building
Charleston, WV 25305

Charles L. Keith, Esquire
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Roger L. Sabo, Esquire
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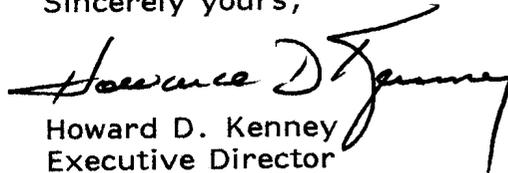
RE: Smith v Geupel Construction, ER-328-84

Dear Mr. Stanton, Sabo, and Keith:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Roger W. Smith v Guepel Construction Company, ER-328-84.

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
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

RECEIVED

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W.V. HUMAN RIGHTS COMM.

Answered.....

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ROGER W. SMITH,

Complainant,

v.

Docket No. ER-328-84

GUEPEL CONSTRUCTION CO.,

Respondent.

ORDER

On the 14th day of November, 1985, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Charles A. Riffie, II. 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 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 19 day of Dec., 1985.

Respectfully Submitted,



CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

*Approved
Aug 21, 1985
SRA*

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

ROGER W. SMITH,

Complainant

vs:

Case No. ER-328-84 SEP 26 1985

GEUPEL CONSTRUCTION COMPANY,

Respondent

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W.V. HUMAN RIGHTS COMM.

**FINDINGS OF FACTS, CONCLUSIONS OF LAW
AND RECOMMENDATIONS OF HEARING EXAMINER**

Pursuant to a Notice issued to the Respondent and the granting of a joint Motion by Complainant and Respondent to continue the public hearing initially set for March 8, 1985, to July 2, 1985, this matter came on for hearing on July 2, 1985, at 9:00 a.m. in Room E-260, State Capitol Building, East Wing, Charleston, West Virginia, at which time the Complainant appeared in person and by Counsel, George P. Stanton, III, Assistant Attorney General of the State of West Virginia; the Respondent appeared in the person of certain company representatives and by Counsel, Roger L. Sabo of the firm of Knepper, White, Arter & Hadden, 180 East Broad Street, Fourth Floor, Columbus, Ohio 43215-3736; there was also in attendance the Hearing Examiner, Charles A. Riffie, II; and the Electronic Recording Technician, Joanne Thurman, assigned by the Supreme Court of Appeals of West Virginia to record the proceedings. Witnesses for both Complainant and Respondent also were in attendance. Both the Complainant and the Respondent, by and through Counsel waived the necessity of the appearance of a Commissioner at the hearing.

It appearing that Notice as required by law, setting forth the time and place of the hearing and the matters to be heard had regularly been served

upon the Respondent, and that this matter was properly set for hearing in accordance with the procedural regulations adopted by the West Virginia Human Rights Commission (hereinafter "Commission"), and the Complainant and Respondent appearing in person and by their representatives, the hearing was convened at the aforesaid time and place.

After hearing the testimony of witnesses and evidence presented on behalf of both the Complainant and Respondent, and upon consideration of proposed Findings of Fact and Conclusions Of Law, the Hearing Examiner recommends that the Commission adopt the following proposed Findings Of Fact and Conclusions Of Law and enter an Order in accordance with the same.

FINDINGS OF FACT

1. Respondent is engaged in highway and heavy construction contracting in Ohio and in West Virginia.
2. Respondent is subject to a labor contract in West Virginia, which includes the requirement that Respondent utilize the hiring hall provisions of the Unions, including the Laborers Unions to obtain its employees.
3. Respondent has a written equal employment and affirmative action policy. (Exhibits 4 and 5 introduced into evidence and the testimony of Mark Potnik, Respondent's Equal Employment Officer).
4. In April of 1980, Geupel Construction Company was awarded a Contract as a joint venture with Mosser Construction, Inc., on a West Virginia Department of Highways Turnpike Project in Marmet, Kanawha County, West Virginia.
5. Under the Joint Venture Agreement between Mosser and Geupel, both would hire their own employees and be responsible for their own employment

policies.

6. The Contract with the Department of Highways for the Marmet, West Virginia, Project required the Contractor (Respondent) to comply with both State and Federal laws with respect to equal employment and affirmative action policies, which provisions were attached to and made part of the Construction Contract. (Exhibit 7, 8, 9, 10, 11, 12, 13, and 14)

7. The Contract for the Marmet, West Virginia, Project had a special provision for on-the-job-training requiring trainees on each of the type of work classifications for the Project. Training and upgrading minorities and women was the primary objective of this training provision. (Exhibit 16)

8. Under the Training Provision, the Contractor was reimbursed eighty cents (80¢) per hour, with pay to the trainees to be a percentage of the wage rate specified in the Union Contract.

9. On July 13, 1981, Project Superintendent, Charles Smith, of Respondent requested that the Laborer's Union furnish the Respondent with both a power tool trainee and a pipe layer trainee. Complainant was referred by Laborer's Union and placed in the Training Program as a power tool trainee operator receiving the full wage rate of Ten and 02/100 Dollars (\$10.02) as opposed to the authorized lower rate to be paid trainees during the training period.

10. Complainant stayed at the same job training classification until the completion of his program approximately one year later when he received the power tool classification of "Whacker/Tamper". He was paid the wages called for by the Union Contract for this classification including wage increases.

11. Complainant worked for the Respondent in the 1981, 1982, and 1983 construction seasons subject to seasonal lay-offs.

12. Complainant was assigned to Foreman Danny Harrison in his initial work assignment in 1981 where he assisted on grading operations by stringing line with the assistance of another laborer.

13. In 1982, Complainant was assigned to the pipe laying crew headed by Jim Casto. Also on the crew were individuals who had been hired prior to Complainant identified as follows with their job classification: Casto, pipe layer; Lawrence Sloan, pipe layer; Randal Pauley, air tool operator; and Leonard Phillips, air tool operator.

14. Neither Complainant nor Randal Pauley were recalled by the Respondent in 1984. Testimony supports Respondent's position that there was less need for employees in 1984 as the construction operations were winding down.

15. In 1983, Respondent had twelve (12) laborers on the Project, including two blacks. In May, 1984, Respondent employed eight (8) laborers, including one black.

16. No employees of Respondent were on the Project after July of 1984.

17. Respondent received "comprehensive equal employment opportunity review" by the West Virginia Department of Highways each year which included site visits by EEO Compliance Officers with interviews of employees on the Project. Respondent received notification of EEO Compliance following each review. (Exhibits 20-25, inclusive)

18. On November 29, 1983, Complainant filed a Complaint of Discrimination against the Company with the Commission; alleged he received "lower pay" than his co-workers with the same job classification as pipe layers, and that he was assigned to perform more difficult jobs than "Caucasian"

co-workers who received higher wages. On August 15, 1984, Complainant filed an Amended Complaint with identical allegations and the additional statement that he had been subjected to racial jokes and racial slurs.

19. On December 14, 1984, the Commission issued a determination that there was probable cause to believe that discrimination was engaged in on the basis that witness testimony verified Complainant was made to perform the most menial tasks on the Project and that Complainant was subjected to racial slurs and jokes from both of his foremen.

20. Complainant received the wages required by the Union Contract for his job classification. White employees received the same wage rate. Another black employee, Ed Wesley in a different wage classification received a wage rate as high as other white employees.

21. Testimony supports the fact that laborer jobs often contains hard, dirty work. Complainant testified that he more so than other laborers performed the hardest and dirtiest work sometimes without provisions for boots in mud and water covered areas, and while working as a flagger, having to take a position farther from the Project than other employees on a more regular basis and having to walk back to the site without the benefit of a ride. Complainant's testimony is supported by that of Fred Higginbotham, a truck driver at the Project who saw Complainant about every day, but only when he would drive a truck into the area. Higginbotham testified that it appeared Complainant was always doing the hard work while others were sitting around.

22. Leonard Phillips, a white co-laborer on the Project, testified that he believed he performed the hardest, dirtiest work on the Project in back-filling pipe and digging ditches, often working in water and mud covered

areas. Mr. Phillips' testimony was supported by Respondent's witnesses, Danny Harrison and Jim Casto.

23. There is no evidence that Complainant complained of being subject to racial slurs and performing menial tasks to Charles Smith, the job Superintendent, or with any of the EEO Compliance Examiners of the West Virginia Department of Highways. Further, there is no evidence of any grievance filed by Complainant with the Union concerning working conditions.

24. Leonard Phillips testified that Complainant informed him that Complainant was filing a Human Rights Case and offered to pay Phillips the sum of Five Thousand and 00/100 Dollars (\$5,000.00) for testimony in support of Complainant. This testimony is un rebutted.

25. There is evidence from the testimony of Complainant and other parties that Foreman Danny Harrison told jokes on and about the Project concerning blacks, Polish people, and West Virginians. Complainant testified that he felt that these jokes were personally demeaning, directed toward him, and caused him mental pain, suffering, and anguish. Complainant worked primarily under Harrison in 1981 and his initial Complaint alleging race discrimination did not mention the racial slurs and jokes.

26. Complainant testified that Jim Casto called Complainant a "dumb nigger" and that Casto hated "niggers". Casto denied ever using the word "nigger". No other witness who testified at the hearing and working on the Project remembered Casto making such derogatory racial comments.

27. Those people were retained and recalled on the Project in

1984, although in previous years on the Project Complainant was recalled when others hired after Complainant were not recalled.

28. After Complainant was laid off, Complainant did not seek work prior to the expiration of his unemployment benefits and did not actively seek work after his December, 1983, lay off until August, 1984.

CONCLUSIONS OF LAW

1. The Complainant is a black man and within the protected class of those belonging to a racial minority within the meaning of the West Virginia Human Rights Act, hereinafter referred to as the "Act". (W.Va. Code 5-11-1, et seq).

2. Respondent is an "Employer" within the meaning of the Act. (W. Va. Code 5-11-1, et seq).

3. A prima facie case, Complainant must prove, (a) that the Complainant belongs to the protected class; (b) that he was qualified for the position he held; (c) that he was discharged; and (d) that after his termination or layoff, the position remained open and the employer filled the position with a person of another race or took some other action from which discriminatory conduct can be inferred. (McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L Ed 2d 668 93 S Ct 1817 (1973)).

4. In rebuttal, the employer need not prove a non-discriminatory reason nor even persuade the Court that it was motivated by its stated reason, but must only articulate a reason. Once a reason is offered the Complainant bears the ultimate burden of proof and must show why the employer's explanation for its actions are a mere pretence. (McDonnell Douglas Corp. v. Green, supra; Fleming v. Marion County Board of Education, WVHRC Case EA-171-77).

5. The Act requires the employer to maintain a working environment free of racial intimidation where positive action is necessary to redress or eliminate employee intimidation. (Powers v. Kaiser Aluminium & Chemical Corporation, WVHRC Case No. EAN-171-25.) Racially derogatory remarks which do not "set a tone of what is approved" by the employer are not sufficient, in and of themselves, to substantiate finding of prima facie unlawful discrimination. (Abnathy v. Western Elec. Co., WVHRC Case No. _____). Complainant must demonstrate that management had the opportunity and failed to take adequate steps to remedy the situation. (Bundy v. Jackson, 641 F. 2d 934, 943-944 (D.C. Cir. 1981); Criddy v. Kansas City Chiefs Football Club, Inc., 568 F. 2d 87 (8th Cir. 1977).

6. Complainant has failed to demonstrate that Respondent's failure to recall him was merely pretext for or discriminatory in application from a review and consideration of the evidence as a whole.

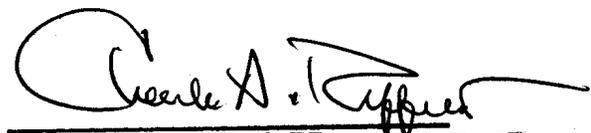
7. Complainant has failed to establish that racially derogatory remarks were such as to set a tone of what is approved by the employer or that he was discriminated against in any manner, inclusive of job assignments and payment of wages.

8. There is no evidence that Complainant has been discriminated against in payment of wages because of his race.

RECOMMENDATION

On the basis of the foregoing, it is the recommendation of the Hearing Examiner that the Commission enter an Order dismissing the Complaint filed in these proceedings with prejudice to the Complainant.

DATED this 30th day of August, 1985.


HEARING EXAMINER