



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

215 PROFESSIONAL BUILDING  
1036 QUARRIER STREET  
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE 304-348-2616

ARCH A MOORE, JR.  
Governor

April 27, 1987

Barbara Theierl  
4205 Washington Ave. SE  
Charleston, WV 25304

Heck's, Inc.  
P.O. Box 158  
Nitro, WV 25143

J. David Cecil, Esq.  
P.O. Box 129  
Charleston, WV 25321

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113 Goff Mountain Rd.  
Charleston, WV 25313

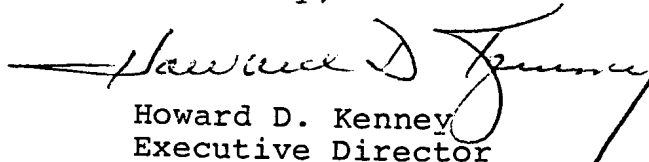
RE: Theierl v. Heck's, Inc.  
EA-111-86

Dear Parties:

Herewith please find the order of the WV Human Rights Commission in the above-styled and numbered case.

Pursuant to WV Code Chapter 5, Article 11, Section 11, amended and effective April 1, 1987, any party adversely affected by this final order may file a petition for review with the supreme court of appeals within 30 day of receipt of this order.

Sincerely,

  
Howard D. Kenney  
Executive Director

HDK/mst

Enclosures

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE

AMENDED AND EFFECTIVE  
AS OF APRIL 1, 1987

Enr. H. B. 2638]

3

116 this article.

§5-11-11. Appeal and enforcement of commission orders.

1 (a) From any final order of the commission, an  
2 application for review may be prosecuted by either  
3 party to the supreme court of appeals within thirty days  
4 from the receipt thereof by the filing of a petition  
5 therefor to such court against the commission and the  
6 adverse party as respondents, and the clerk of such  
7 court shall notify each of the respondents and the  
8 commission of the filing of such petition. The commis-  
9 sion shall, within ten days after receipt of such notice,  
10 file with the clerk of the court the record of the  
11 proceedings had before it, including all the evidence.  
12 The court or any judge thereof in vacation may  
13 thereupon determine whether or not a review shall be  
14 granted. And if granted to a nonresident of this state,  
15 he shall be required to execute and file with the clerk  
16 before such order or review shall become effective, a  
17 bond, with security to be approved by the clerk,  
18 conditioned to perform any judgment which may be  
19 awarded against him thereon. The commission may  
20 certify to the court and request its decision of any  
21 question of law arising upon the record, and withhold  
22 its further proceeding in the case, pending the decision  
23 of court on the certified question, or until notice that the  
24 court has declined to docket the same. If a review be  
25 granted or the certified question be docketed for  
26 hearing, the clerk shall notify the board and the parties  
27 litigant or their attorneys and the commission of the fact  
28 by mail. If a review be granted or the certified question  
29 docketed, the case shall be heard by the court in the  
30 manner provided for other cases.

31 The appeal procedure contained in this subsection  
32 shall be the exclusive means of review, notwithstanding  
33 the provisions of chapter twenty-nine-a of this code:  
34 *Provided*, That such exclusive means of review shall not  
35 apply to any case wherein an appeal or a petition for  
36 enforcement of a cease and desist order has been filed  
37 with a circuit court of this state prior to the first day  
38 of April, one thousand nine hundred eighty-seven.

39 (b) In the event that any person shall fail to obey a  
40 final order of the commission within thirty days after  
41 receipt of the same. or, if applicable, within thirty days  
42 after a final order of the supreme court of appeals, a  
43 party or the commission may seek an order from the  
44 circuit court for its enforcement. Such proceeding shall  
45 be initiated by the filing of a petition in said court, and  
46 served upon the respondent in the manner provided by  
47 law for the service of summons in civil actions; a hearing  
48 shall be held on such petition within sixty days of the  
49 date of service. The court may grant appropriate  
50 temporary relief, and shall make and enter upon the  
51 pleadings, testimony and proceedings such order as is  
52 necessary to enforce the order of the commission or  
53 supreme court of appeals.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

BARBARA THEIERL,  
Complainant,

v.

DOCKET NO. EA-111-86

HECK'S, INC.,  
Respondent.

FINAL ORDER

On the 9th day of April, 1987, the Commission reviewed the proposed order and decisions of Hearing Examiner, James Gerl, and exceptions thereto. After consideration of the aforementioned, the Commission does hereby adopt said proposed order and decision, encompassing proposed 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.

It is further ORDERED as follows:

1. The complaint of Barbara Theierl is sustained.
2. Respondent shall cease and desist from discriminating in employment decisions based on age in violation of WV Code 5-11-1 et. seq.
3. The respondent shall reinstate complainant into her former position or its equivalent at a rate of pay comparable to what she would be receiving but for the discriminatory termination, or \$22,800.00 per year plus any increases she would have received.
4. The respondent shall pay complainant a sum equal to the wages she would have earned but for respondent's unlawful termination of her employment. Such wages for the period from the date of complainant's

discharge to the date of the Hearing Examiner's decision are \$26,740.00. For each month hereafter until the complainant is offered reinstatement, an additional \$860.00 should be added to the sum. Respondent shall also pay complainant interest on the amount of backpay at the statutory rate of ten percent.

5. The respondent shall pay to complainant the sum of \$1,000.00 for incidental damages for humiliation, embarrassment, distress and loss of personhood and dignity as a result of the discriminatory termination of her employment.

6. The respondent shall pay complainant's reasonable attorney's fees in the amount of \$10,163.25.

7. The respondent shall pay complainant the sum of \$1,076.61 for costs reasonably expended by complainant and reasonably necessary to the litigation of this matter.

It is finally ORDERED that respondent provide to the Commission proof of compliance with the Commission's order within 35 days of service of said order by copies of cancelled checks, affidavits or other means calculated to provide such proof.

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/or that they may seek judicial review.

Entered this 23rd day of April, 1987.

RESPECTFULLY SUBMITTED,

BY Betty A. Hamilton  
BETTY A. HAMILTON  
VICE CHAIR  
WV HUMAN RIGHTS COMMISSION

STATE OF WEST VIRGINIA  
HUMAN RIGHTS COMMISSION

BARBARA THEIERL,

Complainant,

vs.

DOCKET NO. EA-111-86

HECKS, INC.,

Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing was convened for this matter on September 24 and 25, 1986, in Charleston, West Virginia. The complaint was filed on August 30, 1985. The notice of hearing was served on February 18, 1986. An answer was filed on February 24, 1986. A pre-hearing conference was held on July 25, 1986. Subsequent to the hearing, complainant submitted a written brief and proposed findings of fact. Respondent has submitted a set of proposed findings of fact and no brief, only after a long delay.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views 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 the proper determination of the material issues as 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 her on the basis of her age by discharging her. Respondent maintains that complainant was discharged because her position was eliminated.

## FINDINGS OF FACT

Based upon the parties' stipulations of uncontested facts, the Hearing Examiner has made the following findings of fact:

1. Complainant was born on December 27, 1940, and at all times material hereto was over forty years of age.
2. Respondent provided the following fringe benefits for each of its associates at the date of complainant's termination:
  - a. Associate discounts of merchandise;
  - b. Birthday pay (Associate's birthday as a paid holiday);
  - c. Group health benefits and life insurance;
  - d. Disability income protection (both short and long term);
  - e. Retirement benefits after ten years of continuous service;
  - f. Stock purchase plan.

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

3. Respondent, a West Virginia corporation, is a discount store chain with corporate offices, warehouse facilities and stores located in West Virginia.

4. Complainant was hired by respondent on April 15, 1964.
5. During her entire tenure with respondent, complainant was employed as a clerk in respondent's payroll department.
6. Complainant was a salaried employee. She worked thirty hours per week at the office and additional hours at her home.
7. On January 27 or 28, 1985, complainant was offered a position in respondent's Human Resources Department. Such position would require forty hours per week and included a \$2,200.00 per year salary increase. Complainant declined the offer because the position required travel to new stores to assist in hiring new employees, to coordinate local employment offices and to attend a few seminars.
8. On April 1, 1985, respondent's new ADP payroll system took effect.
9. On June 11, 1985, complainant was fired by respondent.
10. During the relevant time frame, there were 115 employees over the age of forty out of a total of 346 associates. 33.2% of said associates in 1985 were forty or older.
11. Seven of the eight associates or 87.5% of the associates terminated by respondent in 1985 for position elimination, reorganization or services no longer needed were forty years of age or older.
12. The odds of such a disparity occurring for age neutral reasons is one in 438.
13. In 1984, complainant received an order from Isaacs, respondent's chairman of the Board, to prepare a list of employees with fifteen or more years of service and a list of employees who were fifty years of age or more.



14. As a result of respondent's new ADP payroll system, respondent reduced the payroll department from nine to four employees. The four employees who remained in the payroll department were forty years of age or older.
15. Four of the five employees who left the payroll department as a result of the new ADP system were permitted to transfer. Baldwin, in her late twenties, accepted a computer job. Herndon, in her early thirties, accepted a position in the Expense Department. Mace, in her early twenties, accepted a position at M & W Distributors. Simmons, approximately sixty-four years old, was offered a position as a store clerk, but she resigned. Only complainant was terminated.
16. During her tenure with respondent, complainant received no complaints about her job performance.
17. Complainant's supervisor, Mitchell, was very pleased with complainant's work.
18. As of the date of her termination by respondent, complainant's salary was \$22,800.00 per year.
19. On April 1, 1986, complainant obtained employment as an office manager. She is paid at the rate of \$6.00 per hour, or \$12,480.00 per year.
20. Complainant's attorney, J. David Cecil, reasonably expended 75.29 hours of attorney time in litigating this matter.
21. A reasonable hourly rate for the legal services rendered by complainant's attorney is \$135.00 per hour.
22. Complainant has expended \$1,076.61 for costs reasonably necessary to the litigation of this matter.

### CONCLUSIONS OF LAW

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

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

3. Complainant has established a prima facie case that respondent discriminated against her on the basis of her age by firing her.

4. Complainant has shown that the reasons articulated by respondent for the termination of complainant's employment are pretextual.

5. Respondent discriminated against complainant on the basis of her age in violation of West Virginia Code, Section 5-11-9(a) by terminating her employment.

### DISCUSSION OF CONCLUSIONS

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. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra.

In the instant case, complainant has established a prima facie case of discrimination by proving facts, which if otherwise unexplained, raise an inference of discrimination. Furnco Construction Company v. Waters, 438 US 567, 577 (1978); Texas Department of Community Affairs v. Burdine, 450 US 248 (1981). The parties have stipulated that complainant was born on December 27, 1940, and that at all times material hereto she was over forty years of age. Complainant has proven that she was terminated by respondent on June 11, 1985. Complainant also offered testimony that she was asked to prepare two lists by high level management employees of respondent, one designating employees with fifteen or more years of service with respondent and one designating employees fifty years of age or more. Respondent's witnesses dispute that complainant was asked to compile such a list. The preponderance of the evidence, however, compels the conclusion that the complainant was in fact requested to make such lists. First, respondent's answers to interrogatories make it clear that such lists were in fact requested. Second, complainant's demeanor was more credible than the demeanor of the respondent's witnesses who denied that such request was made.

In addition, complainant presented the testimony of an expert statistician that 33% of the associates employed by the respondent in 1985 were forty years of age or older and that seven of eight associates, or 87.5% of the associates terminated by the respondent in 1985 because of position elimination, reorganization or services no longer needed were forty years of age or more. Using the hypogeometric probability distribution, the expert witness concluded that the odds were one in 438 that such a disparity would have occurred for age-neutral reasons. Accordingly, the expert witness rejected the hypothesis that the

termination was age-neutral. The conclusions of the expert witness are challenged by respondent because of the smallness of the sample. The expert witness testified, however, that because of the large disparity, the smallness of the sample did not result in invalid conclusions. The respondent did not call any expert witness to counter the testimony of complainant's expert. It is concluded that the statistics and opinions given by the expert witness are valid.

Respondent has articulated a legitimate non-discriminatory reason for complainant's termination. Specifically, respondent has presented evidence that complainant's position was eliminated when respondent transferred to its new ADP payroll system. Respondent has failed to comply with the direction of the Hearing Examiner to submit a post-hearing brief, and it is, therefore, extremely difficult to determine respondent's legal argument with regard to this case. Because of respondent's proposed conclusions of law, the Hearing Examiner assumes that respondent is arguing that position elimination was the reason for complainant's termination.

Complainant has demonstrated that the reason articulated by respondent for her termination is pretextual. Complainant has proven that three other employees of respondent who were removed from the payroll department because of the new ADP payroll system, and who were in the age range between their early twenties and their early thirties, were offered positions in other departments of respondent to which they were transferred. Complainant, on the other hand, who was over forty years of age, was the only employee who was terminated when the new ADP payroll system took effect. This fact is even more suspicious when coupled with the testimony of complainant that her work was never criticized by respondent and the testimony of Mitchell, complainant's

supervisor, that he was very pleased with complainant's work. Respondent has offered absolutely no explanation as to why complainant was singled out for discharge. When these facts are taken in conjunction with the fact that respondent was conscious of its employees ages during this timeframe, as evidenced by the request that complainant prepare the above-discussed lists; and the opinion of the expert witness that the large disparity in respondent's firing of its older employees was not for age-neutral reasons, necessarily cause one to conclude that the reason articulated by respondent for complainant's discharge is pretextual.

#### RELIEF

Complainant is entitled to back pay. There is, however, an arithmetic error in the back pay calculation set forth in complainant's proposed findings of fact. The figure of \$1,900.00 per month for the first ten months is correct. After complainant's hire as office manager in April, 1986, the amount of the monthly difference should be \$860.00 rather than the figure of \$940.00 suggested by complainant. The amount of back pay as of January, 1987, therefore, would be \$26,740.00 ( $=\$19,000 = \$860 \times 9 = \$7740$ ). An amount equal to \$860.00 should be added to this figure for each month until this matter is finally resolved.

Complainant requests that she be compensated for loss of fringe benefits in an amount equal to 27% of lost wages. Complainant has provided no explanation, and no citation to the record evidence in this case, to support her conclusion that fringe benefits constitute 27% of salary. Although compensation for loss of fringe benefits is appropriate, complainant has not supported her contention that her fringe benefits were 27% of her wages.

Complainant has requested incidental and consequential damages for distress and embarrassment in the amount of \$32,486.60. Once again, however, complainant provides no explanation as to where these figures

came from. Accordingly, it is recommended that the award of incidental damages not be so high. The Hearing Examiner recommends an award of \$1,000.00 as incidental damages.

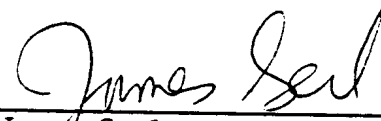
PROPOSED ORDER

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

1. That the complaint of Barbara Ann Theierl, Docket No. EA-111-86 be sustained.
2. That respondent rehire complainant into her former position or its equivalent at a rate of pay comparable to what she would be receiving but for the discriminatory termination, or \$22,800.00 per year plus any increases she would have received.
3. That respondent pay complainant a sum equal to the wages she would have earned but for respondent's unlawful termination of her employment. Such wages for the period from the date of complainant's discharge to the date of this decision would be \$26,740.00. For each month hereafter until the final decision herein, an additional \$860.00 should be added to the sum. Respondent should also be ordered to pay complainant interest on the amount of back pay at the statutory rate of ten percent.
4. that respondent pay to complainant the sum of \$1,000.00 for incidental damages for humiliation, embarrassment, distress and loss of personhood and dignity as a result of the discriminatory termination of her employment.
5. That respondent be ordered to pay complainant's reasonable attorney's fees in the amount of \$10,163.25.
6. That respondent be ordered to pay complainant the sum of \$1,076.61 for costs reasonably expended by complainant and reasonably necessary to the litigation of this matter.

7. That respondent be ordered to cease and desist from discriminating against individuals on the basis of their age in making employment decisions.

8. That respondent report to the Commission within thirty days of the entry of the Commission's Order, the steps taken by respondent to comply with the Order.



James Gerl  
Hearing Examiner

ENTERED:

January 19, 1987

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:

J. David Cecil, Esq.  
P. O. Box 129  
Charleston, WV 25321

Charles F. Haley, Esq.  
P. O. Box 158  
Nitro, WV 25143

Sharon Mullens, Esq.  
Assistant Attorney General  
1204 Kanawha Blvd.  
Charleston, WV 25301

on this 20th day of January, 1987.

  
James Gerl