



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

**215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301**

ARCH A. MOORE, JR.
Governor

TELEPHONE: 304-348-2616

August 18, 1987

Ellen L. Truax
3725 Marlamount Way
Weirton, WV 26062

Weirton Steel Corp.
400 Three Springs Dr.
Weirton, WV 26062

Carolyn A. Wade, Esq.
Industrial Relations Counsel
Weirton Steel Corp.
400 Three Springs Dr.
Weirton, WV 26062

Tom Hindes
Deputy Attorney General
812 Quarrier St.
Charleston, WV 25301

RE: Truax v. Weirton Steel Corp.
EH-183-87

Dear Parties:

Herewith, please find the final 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 days of receipt of this final 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

ELLEN L. TRUAX,

Complainant,

v.

DOCKET NO. EH-183-87

WEIRTON STEEL COMPANY,

Respondent.

FINAL ORDER

On the 12th day of August, 1987, the Commission reviewed the proposed order and decision encompassing findings of fact and conclusions of law of Hearing Examiner James Gerl. After consideration of the aforementioned, the Commission does hereby adopt said proposed order and decision as its own.

It is hereby ORDERED that the Hearing Examiner's proposed order and 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, 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 18th day of August, 1987.

RESPECTFULLY SUBMITTED,



CHAIR/VICE CHAIR
WV HUMAN RIGHTS COMMISSION

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

ELLEN L. TRUAX,

Complainant,

v.

Docket No. EH-183-87

WEIRTON STEEL COMPANY,

Respondent.

RECEIVED

JUN 25 1987

W.V. HUMAN RIGHTS COMMI.
Enclosed

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on May 5, 1987 in New Cumberland, West Virginia. Commissioner Nathaniel Jackson served as Hearing Commissioner. The complaint was filed on October 13, 1986. The notice of hearing was issued on January 13, 1987. Respondent answered on February 2, 1987. A telephone Status Conference was convened on February 11, 1987. Subsequent to the hearing, both parties filed written briefs and proposed findings of fact.

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 not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

CONTENTIONS OF THE PARTIES

Complainant contends that respondent failed to re-hire her because of her handicap, heart attack. Respondent maintains that complainant was not hired because she is physically unable to perform the work for which she would be hired.

FINDINGS OF FACT

Based upon the parties stipulations of uncontested facts as set forth in the joint pre-hearing memorandum, the Hearing Examiner has made the following findings of fact:

1. Complainant was not hired as a laborer by respondent following a pre-employment physical on May 16, 1985.

2. By releases dated July 3, 1986, and July 9, 1986, Dr. Hanson released complainant to return to work.

3. Dr. Hanson is complainant's treating physician. On February 14, 1985, complainant suffered an acute sub-endocardial myocardial infraction. On March 27, 1985, complainant had a triple vessel angioplasty performed.

4. Complainant reported to respondent for a pre-employment physical on May 16, 1985. Dr. McCabe, respondent's Medical Director, approved complainant for clerical work only.

5. Hawken was hired by respondent on March 30, 1986. Complainant was not extended a job offer.

6. Dr. McCabe approved complainant for hourly employment following re-examination on September 22, 1986, and successful completion of a treadmill test in Dr. Hanson's office.

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

7. Complainant worked for respondent from June 28, 1978 to May 18, 1980. In accordance with the provisions of the collective bargaining agreement regarding seniority, complainant lost her recall rights on May 18, 1982.

8. In early 1985, respondent's chief executive officer made a commitment that because many former employees were active in respondent's E.S.O.P. program, former employees who had lost their seniority rights would be considered for recall before hiring of employees who had not previously worked for respondent.

9. Hawken was first employed by respondent on September 6, 1978.

10. Thirteen employees were hired by respondent on July 20, 1986.

11. Respondent contacted complainant regarding potential re-hire. Complainant was informed that she should report for a physical on May 16, 1985.

12. On June 12, 1985 and on July 8, 1985, respondent informed complainant by letter that she could reapply and request an updated physical after she had had more time to recuperate from

her heart attack.

13. If complainant had passed the pre-employment physical in May 1985 she would have been employed as a laborer in the Sinter Plant or Blast Furnace.

14. Laborers in respondent's Sinter Plant and Blast Furnace must be able to do heavy physical labor. A laborer in respondent's blast furnace spends 60 to 70 percent of her time shovelling and wheeling heavy materials. A laborer in respondent's Sinter Plant spends over 90 percent of her time shovelling and wheeling heavy materials. When using a wheelbarrow, the laborer must support 1/3 of the total weight being transported, often from 80 to 100 pounds.

15. Laborers in respondent's Blast Furnace and Sinter Plant work in extremely adverse environmental conditions.

16. Dr. Hanson placed restrictions on complainant that she not lift more than 50 pounds and that she not be exposed to hot and cold.

17. Respondent's Blast Furnace has a high level of carbon monoxide. Cardiac damage makes exposure to carbon monoxide more dangerous.

18. Respondent again contacted complainant in May 1986 concerning potential rehire. Complainant was asked to appear for a pre-employment physical. Complainant did not appear for said physical.

19. As a part of the conciliation process herein, complainant appeared for a pre-employment physical on September 26, 1986.

20. In April 1987 complainant was again contacted by respondent concerning possible reemployment. In a pre-employment physical on April 20, 1987 there appeared to be some changes in complainant's electrocardiogram. All doubts concerning complainant's heart condition were resolved when complainant took a treadmill test with radioactive thallium in Dr. Hanson's office.

21. In complainant's employment with respondent, she had trouble wearing a respirator and had been restricted from working in dusty areas.

22. Respondent has no light duty jobs for entry level laborer positions.

23. Respondent did no hiring after September, 1986.

CONCLUSIONS OF LAW

1. Ellen L. Traux 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, §5-11-10.

2. Weirton Steel Corporation is an employer as defined by West Virginia Code Section 5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. The complainant herein was timely filed.

4. Complainant has established a prima facie case of handicap discrimination.

5. Respondent has articulated a legitimate non-discriminatory reason for its failure to recall complainant.

6. Complainant has not demonstrated that the reason articulated by respondent for failing to recall her is pretextual.

7. Respondent has not discriminated against complainant on the basis of her handicap by failing to recall her. West Virginia Code, Section 5-11-9(a).

DISCUSSION

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 otherwise unexplained, raise an inference of discrimination. Furnco Construction Company v. Waters 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981). The parties have stipulated that complainant suffered an acute sub-endocardial myocardial infraction, or a heart attack, on February 14, 1985. Because a heart attack quite clearly substantially limits one or more major life activities, it constitutes a handicap.

Interpretive Rules Governing Discrimination on the Handicapped, §§2.01, 2.05. Because complainant now has a record of having a heart attack, she is a handicapped person. Interpretive Rules Concerning Discrimination on the Handicapped, §2.07(b), n.8.

In addition the parties have stipulated that complainant's physician released her to return to work. Complainant has proven that respondent made a commitment to give prior employees consideration for new jobs even though their seniority rights may have lapsed. Complainant also proved that respondent rehired Hawken and not complainant even though complainant was hired prior to Hawken.

Respondent has articulated a legitimate non-discriminatory reason for failing to rehire complainant. Respondent demonstrated that complainant flunked her May 1985 physical because she had not had a sufficient period of recuperation following her heart attack. Complainant was invited to submit to another physical at a later time after she had had more time to recuperate. Complainant did not take advantage of this offer until September 1986. Complainant did not provide respondent a release from Dr. Hanson until July 1986.

Respondent has also proven that if complainant were hired by respondent, she would have been employed as a laborer in respondent's Blast Furnace or Sinter Plant. Such laborers are required to do very heavy lifting as the bulk of their job and they work in adverse environmental conditions. Dr. Hanson has placed restrictions on complainant that she not lift more than 50 pounds

or be exposed to hot or cold. Thus, in the opinion of her treating physician, complainant was not qualified to perform the laborer job.

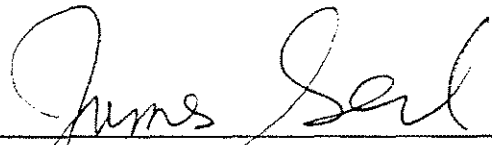
Complainant has not demonstrated that the reasons articulated by respondent are pretextual. Dr. Hanson's release of complainant is apparently based upon a lack of information regarding the duties of a laborer at respondent.

Complainant offered the testimony of various witnesses that complainant occasionally lifted 50 pound items at a convenience store where she is employed. This does not mean that complainant could perform the exhausting duties of the laborer job. In any event, this non-expert testimony regarding complainant's physical ability is not accorded as much weight as the medical testimony of complainant's treating physician. Complainant was not qualified to perform the duties of a laborer.

Complainant has not demonstrated that respondent could make any reasonable accommodation of her handicap within the meaning of §.4.03 of the Interpretive Rules Governing Discrimination on the Handicap. The assistance of another employee full time for complainant would greatly increase respondent's labor costs and, therefore, would pose an undue hardship upon respondent. The use of forklifts or other such devices is not a feasible alternative in respondent's Blast Furnace and Sinter Plant because the terrain is uneven and because large beams make it impossible to bring in such equipment. Moreover, such devices are very expensive.

PROPOSED ORDER

Based upon the foregoing, the Hearing Examiner hereby recommends that the Commission dismiss the complaint in this matter, with prejudice.



James Gerl
Hearing Examiner

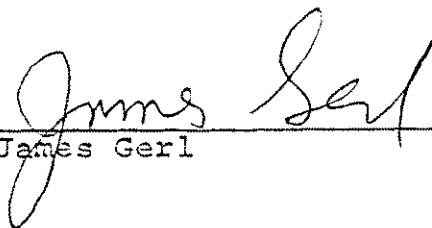
ENTERED: June 24, 1987

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:

Heidi Kossuth, Esq.
Asst. Attorney General
1600 Washington Street, East
Building No. 6, Room B-637
Charleston, WV 25301

Carolyn Wade, Esq.
Mill Administrative Building
Main & Pennsylvania Ave.
Weirton, WV 26062

on this 24th day of June, 1987.


James Gerl