



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

September 3, 1986

Frank Tolli
Rt. 1, Box 958
Scarbro, WV 25917

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The Ohio Brass Co.
P.O. Box 450
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Huntington, WV 25726

John Pollack
Assistant Attorney General
E-26 State Capitol Bldg.
Charleston, WV 25305

RE: Tolli v. Ohio Brass Co.
EA-605-85

Gentlemen:

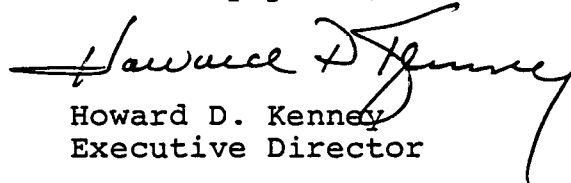
Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case.

Pursuant to Article 5, Section 4 of the 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, West Virginia 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 thirty (30) days, the Order is deemed final.

Frank Tolli
September 3, 1986
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The Respondent is required to provide to the Commission proof of compliance with the attached Order by affidavit, cancelled check or other means calculated to provide such proof within thirty-five (35) days of service of the enclosed Order.

Sincerely yours,


Howard D. Kenney
Executive Director

HDK/mst

Enclosure

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

FRANK TOLLI,

Complainant,

v.

DOCKET NO. EA-605-85

OHIO BRASS CO.,

Respondent.

ORDER

On the 13th of August, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner, James Gerl. After consideration of the aforementioned and the entire record, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own, with the exceptions and amendments set forth below.

The Commission hereby amends the recommended decision of the Hearing Examiner by adding to the section titled Conclusions of Law the following:

"6. Complainant is entitled to backpay plus interest as well as to incidental damages for humiliation, embarrassment and mental anguish as a result of the acts of discrimination perpetrated against him by Respondent."

The Commission further amends the recommended decision in the section titled Proposed Order, paragraph 3 as follows:

"3. Respondent pay Complainant the sum of six thousand, five hundred and eight dollars and seventy-six cents (\$6,508.76) as backpay plus eight hundred and fifty-nine dollars and nineteen

cents (\$859.19) which latter amount represents interest compounded at 10% per annum on the principal sum, for the period April 30, 1985 through August 15, 1986, inclusive."

The Commission further amends the recommended decision in the section titled Proposed Order by deleting in paragraph 4 the figure "\$2,500.00" and substituting, therefore, the amount "five thousand dollars (\$5,000.00)."

The Commission finally amends the recommended decision in the section titled Proposed Order by deleting in paragraph 6 the number "45" and substituting, therefore, the number "35".

It is hereby Ordered that the Hearing Examiner's proposed order and decision including findings of fact and conclusions of law be attached hereto and made a part of this order except as amended by 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 (10) to request a reconsideration of this Order, and that they have the right to judicial review.

Entered this 28 day August, 1986.



CHAIR/VICE CHAIR
WV HUMAN RIGHTS COMMISSION

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

FRANK TOLLI,

Complainant,

V.

DOCKET NO. EA-605-85

OHIO BRASS CO.,

Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on March 5, 1986 in Fayetteville, West Virginia. The complaint was filed on June 3, 1985. The notice of hearing was issued on December 17, 1985. Respondent answered the complaint December 31, 1985. A telephone Status Conference was convened on January 21, 1986. 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 findings as stated herein, it is not credited.

CONTENTIONS OF THE PARTIES

Complainant contends that respondent discriminated against him on the basis of his age by terminating him. Respondent maintains that complainant was terminated because respondent had experienced a business decline.

FINDINGS OF FACT

Based upon the parties stipulations of uncontested fact as stated on the record, the Hearing Examiner has made the following findings of fact:

1. Complainant was terminated from his employment with respondent on April 30, 1985.

2. Respondent eliminated the night shift at its plant in Oak Hill, Fayette County, West Virginia, on April 30, 1985.

3. Complainant was employed by respondent as a night shift foreman.

4. Complainant was born on June 26, 1934, and was fifty (50) years old at the time of his discharge.

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

5. Respondent's manufacturing facility in Oak Hill, West Virginia produces electrical components for the mining and transit industries.

6. Complainant was employed by respondent in 1968. Beginning in March, 1971, complainant served as night shift foreman.

7. Complainant's job duties as night shift foreman included overseeing electrical and fabrication work performed on the night shift; shipping, packing and ordering products; welding; machine work; providing plant security, and supervising the janitorial crew.

8. Respondent has suffered a decline in business in recent years. In 1985, respondent lost \$722,000.00

9. As a result of respondent's decline in business, respondent began laying off employees at its Oak Hill facility.

10. Respondent anticipates that its Oak Hill facility will be closed down in April, 1986.

11. On April 30, 1985, Preston, respondent's Vice President and General Manager of the Oak Hill facility, called complainant's daughter, who is also the personnel clerk at respondent's Oak Hill facility and asked her what complainant's age is.

12. In November or December, 1984, Preston called a meeting. Present at said meeting were Preston, complainant, Reed, Williams, Charnobay, Gwinn, and Creed. At the meeting, Preston informed the foremen that at other locations, respondent had laid off personnel over the age of 50 who had received raises and, therefore, had large salaries.

13. On April 30, 1985, respondent terminated both of the employees at its Oak Hill facility who had reached the age of 50 or more.

14. Subsequent to April 30, 1985, sufficient work existed at the Oak Hill facility so that there was a need to bring employees of respondent onto overtime duty. Said overtime was worked between October 14, 1985 and January 2, 1986. An average of 15 employees per week worked overtime an approximately four days per week.

15. Complainant was employed by Mining Controls, Inc., of Beckley, West Virginia, from July 8, 1985 to September 30, 1985, at which time he was laid off.

16. Complainant earned \$5,530.91 from Mining Controls, Inc., for said employment.

17. Had complainant worked until April of 1985 as a supervisor for respondent, he would have received \$20,166.67 in salary from April 30, 1985 until March 21, 1986.

18. As a result of his termination by respondent, complainant suffered from physical and emotional stress and depression.

19. Complainant also suffered from listlessness, nervousness, insomnia, loss of appetite, and anxiety.

20. Because of his termination by respondent, complainant suffered the following monetary loss:

	Loss of Salary	\$20,166.67
minus	Severance Pay Received	8,127.00
minus	Interim Earnings	<u>5,530.91</u>
		\$ 6,508.76

CONCLUSIONS OF LAW

1. Frank Tolli 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. The Ohio Brass Company is an employer as defined by West Virginia Code §5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. Complainant has established a prima facie case of age discrimination.

4. Complainant has demonstrated that the reason articulated by respondent for its failure to hire complainant is pretextual.

5. Respondent discriminated against complainant on the basis of his age by terminating him in violation of the Human Rights Act, West Virginia Code §5-11-9(a).

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 v. West Virginia Human Rights Commission 309 S.E.2d 342, 352-353 (W.Va. 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 nondiscriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunteer Fire Department., 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. Complainant was employed by respondent as a night shift foreman. Complainant's employment with respondent was terminated April 30, 1985. Complainant was born on June 26, 1934, and he was 50 years old at the time of termination. On the date of complainant's termination, Preston, respondent's Vice President and General Manager of the Oak Hill facility, telephoned complainant's daughter, who was respondent's personnel clerk, to ask what complainant's age was. Such facts are sufficient to make a prima facie case of discrimination because, if otherwise unexplained, they raise an inference of discrimination. Furnco Construction v. Waters 438 U.S. 567 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981).

Respondent has articulated a legitimate nondiscriminatory reason for complainant's termination. Because of the declining economy, respondent experienced a decline in its business. Because it was losing money, respondent laid off several employees in April, 1985.

Complainant has demonstrated that the reason articulated by respondent for complainant's termination is pretextual. Because of their demeanor, the testimony of complainant and his witnesses was more credible than the testimony of respondent's witnesses.

It is most significant that the person who made the decision to terminate the complainant, Preston, placed a telephone call

to the personnel clerk, who incidentally happened to be complainant's daughter, and asked what complainant's age was on April 30, 1985. Preston evidenced a concern regarding complainant's age on the same day Preston terminated complainant. The testimony of Cathy Tolli with regard to this point is credible. None of respondent's witnesses denied that Preston made this telephone call requesting complainant's age. Preston himself testified at the hearing herein, yet he did not deny making this telephone call. The only possible conclusion is that complainant's age was the reason that he was terminated.

Moreover, complainant testified of a meeting the foremen called by Preston in late 1984 wherein Preston stated that because respondent was experiencing economic problems, employees more than 50 years old at its other plants were being terminated. This statement was denied by Preston. The meeting was not recalled by the only other witness at the meeting testified on behalf of respondent, that is Charnobay. Complainant's testimony in this regard is much more credible than that of Preston. Complainant's testimony is also corroborated by the fact that respondent terminated the only two employees at the Oak Hill facility other than Preston, who were fifty years of age or older. Complainant's termination was caused by his age.

RELIEF

Complainant's backpay calculation errs two regards. First, complainant appears to be requesting compensation for the loss

of severance pay. Complainant provides no explanation for this novel theory, and the Hearing Examiner can think of no basis upon which to repay complainant's severance pay which he has already received. Accordingly, loss of severance pay is not considered in the backpay calculation herein.

Second, complainant deducts money received for unemployment compensation from the amount due in backpay. In Human Rights cases, however, unemployment compensation benefits should not be offset because they are considered a collateral benefit. See, Varney v. Frank's Shoe Store Docket Nos. ES-222-77, ES-298-77 (W.V. HRC).

The record reveals that complainant suffered extreme distress, humiliation, and embarrassment as a result of his wrongful termination. His problems included very high blood pressure and depression. It is recommended that complainant be awarded \$2,500.00 for incidental damages.

The evidence in this case revealed that respondent was planning to close its Oak Hill facility in April, 1986. If in fact the plant has been closed, complainant cannot be reinstated. The reinstatement remedy, therefore, must be conditioned upon the existence of a plant that is in operation. Similarly, if no work for complainant as a foreman is available, respondent need only provide work for complainant in some other capacity for which complainant is qualified.

PROPOSED ORDER

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

1. That the complaint of Frank Tolli, Docket No. EA-605-85, be sustained.

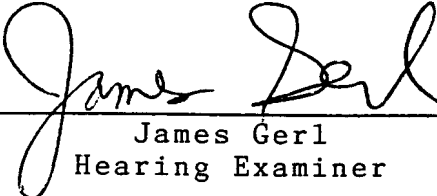
2. That respondent rehire complainant, if its Oak Hill facility is still in operation, as a foreman or in the alternative that no foreman work is available in some other capacity for which complainant is qualified.

3. That respondent pay complainant the sum of \$6,508.76 as backpay.

4. That respondent pay complainant the sum of \$2,500.00 as incidental damages for humiliation, embarrassment and distress resulting from his wrongful termination.

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

6. That respondent report to the Commission within 45 days of the entry of the Commission's Order, the steps taken to comply with the Order.



James Gerl
Hearing Examiner

ENTERED: May 16, 1986

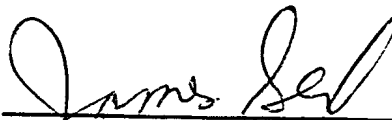
CERTIFICATE OF SERVICE

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:

Paul A. Billups, Esq.
P. O. Box 2688
Huntington, WV 25726

John Polak
E-26 State Capitol
Charleston, WV 25305

on this 16th day of May, 1986.



James Gerl