

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

GENTRY A THOMPSON

Complainant,

v.

Docket No. EA-292-75
ER-293-75

BLOUNT BROTHERS CORPORATION

Respondent.

FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

I
PROCEEDINGS

This case came on for hearing on April 1, 1982, and continued until May 14, 1982. The record was closed by Order of this Examiner on August 15, 1983. The hearings were held at the Public Service Hearing Room, Capitol Building, Charleston, West Virginia and St. John's Episcopal Church, 1105 Quarrier Street, Charleston, West Virginia, respectively; before Hearing Examiner, Theodore R. Dues, Jr., and the Honorable Russell Van Cleve, Commissioner. The Complainant appeared in person. The Human Rights Commission was represented by Eunice Green and Mary Lou Newberger, Assistants to the Attorney General of West Virginia. The Respondent appeared by its representative, Dick Wright and by counsel, Robert K. Spotswood.

On May 28, 1975, the Complainant filed verified complaints alleging that the Respondent, Blount Brothers Corporation, had discriminated

against him on the basis of race and age by not retaining him on the job when the bargaining agreement in force at the time required that a person sixty years of age or more be on the job at all times and recalling a white with less seniority than he to work, respectively.

The Human Rights Commission issued a Letter of Determination on each complaint.

The Human Rights Commission, by Howard D. Kenney, Executive Director, served written notice of public hearing upon the parties pursuant to West Virginia Code §5-11-10. On the 31st day of March, 1982, pursuant to §7.10 of the Administrative Regulations of the Human Rights Commission, a Pre-Hearing Order was entered by this Examiner. Present at the Pre-Hearing Conference were Robert K. Spotswood, counsel for Respondent, Eunice L. Green and Mary Lou Newberger, counsel for Commission. The stipulations reached at the Pre-Hearing Conference were read into the record at the first day of hearing.

The Complainant and Respondent were afforded every opportunity to present evidence and to call witnesses relevant to these complaints. The Commission called the Complainant, Gentry A. Thompson; Phillip Wayne Mallett; Elmore W. Thompson; and, Edward Long. The Respondent called John L. Jarrett; Ruth Church Cox; Raymond J. Hammarth; David Arnold Moss; Charles W. Pauley; Richard J. Hart, St.; William G. Jurca; and, Debra Harris, by evidentiary deposition taken in accord to the procedural rules for the courts of record for the State of West Virginia.

After full consideration of the testimony, evidence, and arguments of counsel, and the Hearing Examiner's Findings of Fact and Conclusions of Law, the West Virginia Human Rights Commission makes the following Findings of Fact Conclusions of Law and Order.

II
ISSUES

1. Whether the failure of the Respondent to recall the Complainant prior to recalling a white with less seniority constituted discrimination.
2. Whether the layoff of the Complainant and failure to recall by the Respondent was a result of age discrimination on the part of the Respondent.

III
FINDINGS OF FACT

1. By Stipulation: The relevant bargaining agreement governing the parties for all times relevant to these complaints is the agreement between Respondent and the Chemical Valley District Council of Carpenters, Local 1207 between June 1, 1973 and May 31, 1976. That Article 15 of the said agreement pertaining to pensions reads: Collective bargaining clause 2. The employers agree to pay into a pension fund the sum of 25 cents per hour worked by all employees covered by this agreement. (TR. 3).
2. By Stipulation: Complainant is a member of the Chemical Valley District Council of Carpenters, Local 1207, in Charleston, West Virginia. (TR. 4).
3. By Stipulation: The bargaining agreement stipulated to by the parties reads: Article 6. Safety and Sanitary Conditions: Section 5 - Construction carpenters shall not be required to submit to medical examination as a condition of employment, unless otherwise agreed by employer and union, and one man out of seven hired shall be 60 years of age or over, if available. (TR. 4).

4. By Stipulation: In April 1975, Gentry A. Thompson was 61 years old and was, therefore, within the statutory definition of age contained in the statutory definition of age contained in West Virginia Code §5-11-3(q). (TR. 4).
5. By Stipulation: In April 1975, the ages of the following carpenters employed by Respondent were: Edward Long, 38; W. E. Kelly, 46; P. W. Mallett, 23; M. H. Townsend, 41; G. O. Pauley, 43; T. S. Antille, 59; and J. R. Coleman, 21. (TR. 4-5).
6. By Stipulation: In April 1975, the Respondent, Blount Brothers Corporation, employed one black male as a laborer, in addition to Complainant, Gentry Thompson. (TR. 5).
7. Complainant has been a carpenter for 47 years and a member of Local 1207 of the Chemical Valley District Council of Carpenters since 1947. (TR. 22).
8. Complainant was employed by Respondent from July 1, 1974 to April 19, 1975, and performed carpentry work; in particular, from building scaffolding, ditch shoring, underpinning trailers; mostly done outside. (CTR. 25-28, 36, 37-90, 123, 127-131, TR2. 29, TR2. 51-54). The scaffolding work went as high as 20 feet. (TR. 27, 87).
9. The Complainant had no limitations on his duties at the time of his hiring by Respondent. (TR. 29).
10. On December 20, 1974, the Complainant took ill at work and was transported to the infirmary where he was treated. Among the treatment received was oral medication thought to be "digestive" and two EKGs. (TR. 29-32, 71, 76, 77; TR2. 40-43). At the time he took sick, all the carpenters, including Mr. Dodd was in the "Shack" and knew he was sick (TR. 81-82).

11. The attending physician at the Dupont infirmary initially recommended the Complainant to go to the hospital, but after the medication and second EKG, advised Complainant this was not necessary. The Complainant went home instead. (TR. 32, 79).
12. Complainant missed one day's work to submit the EKG tapes to his physician. (TR. 33).
13. Complainant returned to work and never indicated to Respondent he was to work subject to restrictions and was never asked about the same by agents of Respondent. He also was not asked to submit a medical report after he returned to work (TR. 33-36, 131; TR2. 62-63, Jurca 75) and was assigned his regular duties. (Jurca 87).
14. Complainant was laid off for reasons unknown to him on April 19, 1975. (TR. 37, 86, TR2. 69, Jurca TR. 43, 82).
15. At least three persons were continued in employment with the Respondent after the Complainant was laid off; all were hired after Complainant and were white. (TR. 36-40).
16. There were two other black carpenters employed by Respondent during Complainant's tenure, but neither were employed at the time of his layoff. (TR. 40).
17. The business agent during Complainant's employment with Respondent was Mr. Jarrett and Complainant's general foreman was Mr. Dodd. (TR. 61, 66; TR2. 38). William Jurca assumed the position of superintendent in early 1975 (TR2. 38).
18. Attempts were made to contact the Complainant the mid or latter part of 1975 for reemployment at Blount. (TR. 82-83, 240-242; TR2. 66; TR2. 105-106; Jurca 53, 58-59).

19. In 1976, Complainant worked for FMC performing similar duties to those he had performed with the Respondent. (TR. 85, 123).
20. Respondent recalled a previous laid-off employee through the business agent of the local union. (TR. 143). Calls were also made by the Steward (TR. 23, 187). Some of these calls were received as late as 8:00 p.m. (TR. 188). The bargaining agreement placed the responsibility on the business agent to contact unemployed members. (TR. 235).
21. The union was responsible for referring members to Respondent within 48 hours of requests or the Respondent could seek employees elsewhere. (TR. 229). R. BV. #10.
22. That Mr. Pauley, job steward for the union and carpenter for Respondent, participated in the meeting wherein he advised Mr. Dodd and Mr. Jurca of the recommendation made by the Dupont physician to the Complainant on December 20, 1974. (TR. 45, 62).
23. During the time of consideration for layoffs by Mr. Jurca, Mr. Dodd and Mr. Pauley, the only work available for carpenters employed by Respondent, was in the "spent acid" area. As the union representative, Mr. Pauley made no objection to Complainant's layoff. (TR2. 46-50).
24. The layoff policy utilized by the Respondent and the union consisted of last hired - first fired, other things being equal, i.e., the senior person was qualified to do the work, was not a disciplinary problem, etc. With the exception, there can only be one apprentice for every six men on the job. Stewards were to be kept on the job at all times. (TR2. 54-56, 64; Jurca 14-15, 16 70).

25. Of those persons employed by Respondent in the same craft as Complainant, Mr. Townsend, Mr. Antille and Mr. Mallett were hired after the Complainant, and Mr. Antille and Mr. Mallett were still working for Respondent at the time the Complainant was laid-off. (TR. 36-40; Jurca 76).
26. That Mr. Mallett and Mr. Osborne were apprentices in 1975. (TR2. 59; TR 28).
27. Complainant never complained or inquired through the union after his layoff for reemployment. (TR2. 59, 79-80).
28. After the 1975 layoff, two white employees who were initially hired after Complainant and were younger in age than Complainant were recalled. (TR. 4-5; TR2. 66).
29. The bargaining agreement relevant to this action required one man out of every seven hired to be sixty years or older, if such person was available. (TR2. 76-78).
30. The bargaining agreement relevant to this action provided for no "hiring hall" practice for Local 1207. (TR2. 78).
31. There were four black members of Local 1207, including Complainant, of which all but one were employed at one time with the Respondent. (TR2. 83).
32. The "callback" policy was that Respondent would call the business agent and designate the craft, and on some occasions, the particular person desired to be recalled.
33. At the time of the decision to layoff the Complainant, the Respondent had no information before it other than the comments of Mr. Pauley, the union steward, pertaining to the medical condition of the Complainant. (TR2. 98; Jurca 25-27, 71, 83).

34. The layoff determination of the Complainant was the responsibility of William Jurca and was made by him based upon what he personally viewed to be the Complainant's physical restrictions; more particularly, a heart problem. (Jurca 32).
35. Complainant was not consulted about his physical condition/restrictions at the time the determination was made to lay him off. (Jurca 43, 71, 87).
36. At the time of Complainant's termination, he was perceived by the Respondent as being competent at his work. (Jurca 45, 69).
37. Respondent hired no new carpenters at the Belle project site at which Complainant was employed during the period of April 18, 1975 to July 9, 1975. (Jurca 65).
38. William Jurca knew the relative ages and races of the carpenters at the Belle project working for Respondent at the time he made the layoff determination. (Jurca 77-82).
39. Complainant never refused to work in the "spent-acid" area. (Jurca 101).
40. Complainant received unemployment benefits in the amount of \$494.00 from March 22, 1975 to July 12, 1975.
41. Lost wage evidence is insufficient to make accurate determination. (An Order entered October 6, 1983, directs the parties to file a Stipulation with the Commission Chairman as to the amount of pay that the Complainant would have earned during the period of April 19, 1975 to the present).

IV
DOCUMENTARY EVIDENCE TREATMENT

All admitted documentary evidence was considered by the Examiner in reaching his Findings of Fact in this matter.

V
CONCLUSIONS OF LAW

1. At all times referred to herein, the Respondent, Blount Brothers Corporation, is and has been an employer within the meaning of Section 3(d) Article 11, Chapter 5 of the official Code of West Virginia.
2. At all times referred to herein the Complainant, Gentry Thompson, was a citizen and resident of the State of West Virginia and is a person within the meaning of Section 3(a), Article 11, Chapter 5 of the official Code of West Virginia.
3. On May 28, 1975, the Complainant filed two verified complaints alleging that the Respondent had engaged in one or more discriminatory practices against him as an individual in violation of Section 9, Article 11, Chapter 5 of the official Code of West Virginia.
4. A discriminatory failure to recall the Complainant must be viewed as a continuing violation until such time as the Complainant is in fact recalled or his recall rights lapse. Any other interpretation of the law would place the burden upon the Complainant to know when and if the employer has or intends to recall employees from layoff. Therefore, a Complainant alleging that a layoff was discriminatory may file a complaint under the West Virginia Human Rights Act as long as he or she has recall rights and has not been recalled, or within 90 days of the time that his or her recall rights lapse or he or she has in fact been recalled.
5. The complaints in these matters were timely filed within 90 days of the alleged actions of discrimination.

6. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to Sections 8, 9 and 10, Article 11, Chapter 5 of the official Code of West Virginia.
7. To prevail, the Complainant must prove that race was a factor in the decision of the Respondent not to recall him before February 1978. This Commission has consistently followed the lead of the federal courts in holding that a Complainant may prove his prima facie case inferentially or through the presentation of direct evidence of discrimination, or through a combination of evidence. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973); Texas Department of Community Affairs v. Burdine, ___ U.S. ___, 101 S. Ct. 1089 (1981); U.S. Postal Services Board of Governors v. Aikens, ___ U.S. ___, 103 S. Ct. 1478 (1983).
8. Complainant made an initial prima facie case showing that the Respondent discriminated against him on the basis of race by demonstrating he was a black male; that he was laid off prior to white co-workers with less time on the job; and that all of his white co-workers were recalled and he wasn't.
9. Complainant made an initial prima facie case showing the Respondent discriminated against him based upon age by demonstrating that he was laid off and younger men with less time on the Belle project were recalled before him.
10. Once Complainant has established a prima facie case of discrimination, the burden shifts to the employer to rebut the presumption of discrimination by articulating a legitimate non-discriminatory

reason or reasons for its actions. The employer need not prove the legitimate non-discriminatory reason but must only articulate it. Texas Department of Community Affairs v. Burdine, 101 S. Ct. at 1094; Furnco Construction v. Waters, 438 U. S. 567 (1978). Respondent did not articulate legitimate non-discriminatory basis for its failure to recall the Complainant. Respondent maintains that the decision to layoff Complainant resulted in the consideration for the Complainant's physical problem that is presumed to be heart related. However, no restrictions had been placed upon Complainant by Respondent nor requested by him, after his return to work following the incident of illness resulting in him missing a day's work. At no time did the Respondent consult the Complainant about his health or possible physical inability to work in the "spent-acid" area. In addition, the Respondent had not availed itself of the medical records pertaining to the nature of the Complainant's illness on the date in question.

The Respondent asserts that it attempted to recall the Complainant on several occasions in 1975 during the day. The union steward also attempted to call the Complainant in mid to latter 1975.

11. Once the Respondent has articulated a legitimate non-discriminatory reason for its action, the Complainant may show that the discriminatory reason more likely than not motivated the Respondent, or that the Respondent's explanation is unworthy of credence. Based upon the entire record the Commission finds that the Complainant has shown the Respondent's reasons to be pretextual. The Commission bases this conclusion upon the following considerations.

At no time did the Respondent advise or consult the Complainant about its concern for his physical inability to work in the "spent-acid" area. In addition, the Respondent based its opinion on the status of the Complainant's health condition solely on representations from a lay person who indicated that the Dupont physician referred the Complainant to his family physician. There was no substantive data or information sought by the Respondent to determine the Complainant's fitness to perform in the "spent-acid" area. As for the recall explanation, the evidence supports that an effort was made to contact the Complainant in mid 1975 after his white counterparts had been recalled. The Respondent's implication that the Complainant failed to contact the union or appear at its worksite for possible reemployment is inconsistent to the normal procedures reflected by the evidence.

12. The Respondent unlawfully discriminated against the Complainant on the basis of race and age in violation of the West Virginia Human Rights Act, Section 9, Article 11, Chapter 5 of the Code of West Virginia.
13. No pattern or practice of discrimination by Respondent with regard to black employees has been alleged or proven.
14. The Complainant is entitled to monetary relief in the form of back pay and mental anguish and humiliation damages. W.Va. Code, §5-11-10; State Human Rights Commission v. Pearlman Realty Agency, 211 S.E. 2d 349 (W.Va. 1975). The Complainant was unemployed as a result of Respondent's discriminatory actions from April 19, 1975, to May 1, 1978; at which time he retired. As a

result of this period of unemployment he lost wages in an amount to be stipulated by the parties on or before October 20, 1983, by Order of this examiner dated October 6, 1983. He further suffered anxiety and frustration in the amount of \$1,000.00.

It has been held that unemployment compensation need not be deducted from a back pay award in situations of this kind. Varney v. Frank's Shoe Store, West Virginia Human Rights Commission Docket No. ES-222-77 and 298-77, Final Order issued March 10, 1982; Kaufman v. Sidereal Corp., 28 FEP Cases 1605 (9th Cir. 1982); EEOC v. Ford Motor Co., 645 F. 2d 183 (4th Cir. 1981); Pedreyra v. Cornell Prescription Pharmacy, 465 F. Supp. 936 (D. Colo. 1979); Abron v. Black & Decker Mfg. Co., 439 F. Supp. 1095 (D. Md. 1977); Inda v. United Airlines, Inc., 405 F. Supp. 426 (N.D. Cal. 1975), modified on other grounds, 565 F. 2d 554 (9th Cir. 1971), cert. denied, 435 U. S. 1007 (1976); Tidewell v. American Oil Co., 332 F. Supp. 424 (D Utah 1971). Therefore unemployment compensation collected by the Complainant during this period is recommended not to be deducted from his back pay award.

VI ORDER

Therefore, pursuant to the above Findings of Fact and Conclusions of Law, it is hereby ORDERED as follows:

1. That the Respondent CEASE and DESIST immediately from engaging in employment practices which discriminate against all persons on account of their race or age.

2. That Respondent shall pay to the Complainant back pay, less interim earnings excluding unemployment compensation, in the amount of thirty four thousand seven-hundred fifty five dollars and sixty one cents (\$34, 755.61).
3. That Respondent shall pay to the Complainant, for mental suffering and emotional distress, the sum of one thousand dollars (\$1,000.00).
4. That Respondent will develop and disseminate a clear and direct policy statement to all supervisory personnel within the Respondent's work force forbidding discrimination against any individual with respect to hiring, recall, and other terms of employment as provided in Chapter 5, Article 11 of the official Code of the State of West Virginia.
5. That the Respondent will pay to the Complainant a sum equal to eight per cent (8%) per annum on the sum herein above mentioned in paragraph two (2) for the period from April 20, 1975 to May 1, 1978.

It is so ORDERED

August 2, 1984
DATE

Enter:

Russell Van Cleve

Russell Van Cleve
Chairperson
WV HUMAN RIGHTS COMMISSION