

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

February 14, 1986

Mrs. Carrie Young
General Delivery
Falling Rock, WV 25079

Sharon Mullens, Esquire
Assistant Attorney General
1204 Kanawha Boulevard, East
Charleston, WV 25301

Ricklin Brown, Esquire
Bowles, McDavid, Graff and Love
P.O. Box 1386
Charleston, WV 25325-1386

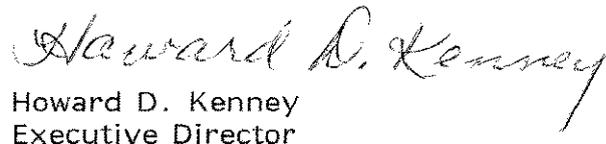
RE: Ben T. Young v Clendenin Lumber and Supply Company, EA-5-77

Dear Mrs. Young, Ms. Mullens and Mr. Brown:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Young v Clendenin Lumber and Supply Company, EA-5-77.

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 / jcp
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

BEN T. YOUNG,

Complainant

vs

CLENDENIN LUMBER AND SUPPLY CO.,

Respondent

Approved
ARS
12/10/85 EA 5-77

RECEIVED
DEC 13 1985
W.V. HUMAN RIGHTS COMM.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, RECOMMENDATION AND ORDER

Pursuant to notice issued to the Respondent, this matter came on for hearing on the 22nd day of July, 1985 and the 5th day of August, 1985 in the Conference Center of the State Capitol Complex, Charleston, West Virginia. Anne B. Charnock, hearing examiner presided and the presence of a hearing commissioner was waived by the parties.

The Complainant, Ben T. Young, being deceased, was represented by his widow, Carrie Marie Young and by her counsel, Sharon M. Mullins, Assistant Attorney General, State of West Virginia and the Respondent, Clendenin Lumber and Supply Co. by its President, Gene T. Gandee and at the second hearing by Mr. Gandee and its counsel, Ricklin Brown, Esq., Bowles, McDavid, Graff and Love of Charleston, West Virginia.

It appearing to the hearing examiner that notice as required by law setting forth the time and place for the hearing and the matters to be heard had regularly been served upon the Respondent and that the same appeared by their representatives the hearing was convened at the aforesaid times and places.

RECEIVED
DEC 13 1985
W.V. HUMAN RIGHTS COMM.
[Signature]

Upon due consideration of the pleadings, the testimony, demeanor and credibility of the witnesses; a review of the exhibits entered as evidence at the hearing and a review of the transcript of the hearing; the hearing examiner makes the following findings of fact, conclusions of law and recommendation:

FINDINGS OF FACT

1. The Complainant, Ben T. Young, was, in the spring of 1976, 59 years old. Complainant died in 1983 and this action is being maintained by his estate through his widow, Carrie Marie Young.
2. The Respondent, Clendenin Lumber and Supply Company is a building supplies company which has been operating for a number of years. In 1976 Respondent operated two Stores; one in Clendenin and one in Blue Creek. Gene Gandee was secretary-treasurer of the Respondent in 1976 and is now president.
3. Complainant was employed by Respondent from 1950 until August 29, 1975 as a mill operator at its Clendenin store. At that time Complainant and most other employees of Respondent struck the company. As a result of the strike Complainant lost his job as did other striking employees.
4. In February 1976, the National Labor Relations Board conducted a representative election. The union lost the election.
5. Respondent did not immediately rehire the striking employees. Rather Respondent agreed to consider former employees for positions as job vacancies arose.

6. Said Complaint was timely filed as within ninety days of the alleged act of discrimination. W. Va Code §5-11-10.

7. Pursuant to the mandate issued by the court in Edith Allen, et al v. State of West Virginia Human Rights Commissioner, et al, 324 S. E. 2d 99 (W. Va. 1984) the public hearing was held.

8. Age discrimination need not be proved by direct evidence. Rather a multi-point standard has been adopted in both federal and state courts. McDonnell-Douglas v. Green 411 U.S. 792 (1973), Sheperdstown Volunteer Fire Department v. West Virginia Human Rights Commission 309 S.E. 2d (W. Va. 1983). This scheme requires the Complainant to meet certain requirements to establish a prima facie case. The criteria are: 1) that Complainant was a member of the protected age class. 2) that he was qualified for the position. 3) that he was rejected despite his qualifications. 4) that following the rejection respondent continued to accept the applications of similarly qualified persons.

If Complainant meets these requirements he has established a prima facie case. A prima facie case must be made by the Complainant. Complainant has failed to do so. Undoubtedly Complainant was in the protected age class as he was 59 years old. Admittedly Complainant spoke to Mr. Gandee about a job. However, no job vacancy actually existed Respondent had filled the mill operator position after the strike. During a strike an employer may hire replacements to continue its operations. NLRB v. MacKay Radio and Telegraph Co. 304 U.S 333(1938) Furthermore, those replacements may be retained after the strike is over since the employer is under no duty to dismiss the new employees in order to make positions available for the strikers. NLRB v. Fleetwood Trailer Co. 389 U.S. 375 (1967).

9. On May 8, 1976 Complainant went to the Blue Creek store seeking a job. Apparently Thurman Duane Young, Complainants son, who was also a striker, had been approached about a job at the store. At the Blue Creek store Complainant was instructed to go to the Clendenin store. While at the Clendenin store Complainant was advised that no mill operators were needed. Additionally, he spoke to Gene Gandee. During this discussion Mr. Gandee told Complainant that "it's going to be hard for you to find work because of your age." (Transcript p. 49, 35).

10. Mr. Gandee and Complainant were friends and had been for more than twenty years. (Transcript, p. 50). Gandee considered Complainant to be a "good mill worker". (Transcript p.41).

CONCLUSIONS OF LAW

1. The Complainant is a "person" within the meaning of the West Virginia Human Rights Act. W. Va. Code §5-11-3(a).

2. The Respondent is an "employer" withing the meaning of the West Virginia Human Rights Act. W. Va. Code §5-11-3(d).

3. It is the public policy of the State of West Virginia to provide all of its citizens equal opportunity for employment. Equal opportunity in the areas of employment is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or handicap. W. Va. Code §5-11-2.

4. On July 9, 1976, Complainant filed a formal complaint against Respondent (EA 5-77) alleging that Respondent had engaged in unlawful discriminatory practices prohibited by law. W. Va. Code §5-11-9(a).

5. As Complainant has failed to establish a prima facie case, further discussion of other matters is not necessary. Although the West Virginia Human Rights Act is liberally construed, (W.VA.Code §5-11-15), even in its most favorable light Complainant has not constructed a prima facie case.

DETERMINATION

The Respondent has not conducted illegal, discriminatory hiring practices against the Complainant.

THEREFORE based on the foregoing, I make the following recommendation.

1. That this matter be dismissed with prejudice.

Respectfully submitted this 5th day of December, 1985

Annabell

Hearing Examiner