STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
1321 Plaza East
Room 104/106
Charleston, WV 25301-1400

GASTON CAPERTON
GOVERNOR

TELEPHONE (304) 348-2616
FAX (304) 348-2248

Quewanncoii C. Stephens
Executive Director

October 12, 1990

John Young
5 Chestnut St.
PO Box 933
Pineville, WV 24874

Zee Medical Service Co.
Inc.
4320 Washington St.
West Dunbar, WV 25064

Brian M. Kneafsey, Jr., Esq.
PO Box 2506
Charleston, WV 25329-2506

F & S Beehive, Inc.
5203 Preston Highway
Shepherdsville, KY 40165

Mike Kelly
Deputy Attorney General
L & S Bldg. - 5th Floor
812 Quarrier St.
Charleston, WV 25301

Re: Young v. F & S Beehive, Inc. dba Zee Medical Services, Inc. EH-29-88

Dear Parties:

Enclosed, please find the recommended decision of the undersigned hearing examiner, in the above-styled and numbered case. Pursuant to the West Virginia Administrative Regulations, Rules and Regulations Pertaining to Practice and Procedure Before the West Virginia Human Rights Commission, any party affected by this recommended decision shall be given (15) days within which to file, in written form only, exceptions to said proposals and findings; and present, in written form only, argument in support of said exceptions to the commission.

Yours truly,

Gail Ferguson/mst

Gail Ferguson
Hearing Examiner

GF/mst
Enclosure

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JOHN J. YOUNG,

Complainant,

v. DOCKET NUMBER(S): EH-29-88

F & S BEEHIVE, INC. DBA
ZEE MEDICAL SERVICES, INC.,

Respondent.

HEARING EXAMINER'S RECOMMENDED DECISION

A public hearing, in the above-captioned matter, was convened on December 20, 1988, in Kanawha County, at the office of the West Virginia Human Rights Commission, Charleston, West Virginia, before Gail Ferguson, Hearing Examiner and Hearing Commissioner, Russell Van Cleve. The record in this matter remained open to allow for the evidentiary deposition of a medical expert. Thereafter, the record was closed in December of 1989.

The complainant, John J. Young, appeared in person and by counsel, Donna S. Quesenberry, Assistant Attorney General. The respondent, F & S Beehive, Inc., dba Zee Medical Services, Inc., appeared by its representative, Shirley Wight, and by counsel, Brian M. Kneafsey, Jr..

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to

applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the hearing examiner and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

ISSUES

1. Whether the complainant was discriminated against on the basis of handicap.

2. If such discrimination on the basis of handicap occurred, what should the remedy be?

FINDINGS OF FACT

1. Respondent, Zee Medical, is a sales and service company which provides medical supplies such as oxygen, cabinets, hearing and eye protection and which services customers in a geographic territory which encompasses several counties in West Virginia

2. The complainant, John Young, was employed by respondent, Zee Medical Services, from May 3, 1987 until June 1, 1987 as a sales

representative. The duties of a sales representative which involved extensive traveling in an assigned area, included servicing existing accounts and selling new ones. A sales representative was responsible for inventory control; completing required paperwork; loading and delivering medical supplies such as kits, cabinets and mine boxes; and attending required meetings.

3. Prior to his employment with respondent, complainant served in the United States Air Force from September 1971 to July 1979, where he worked in the sight development career field.

4. The complainant was honorably discharged from the U.S. Air Force with a 30% service connected disability because he was experiencing problems physically performing his required duties.

5. Complainant's medical condition was diagnosed during his period of military service when he began to experience pain in his feet after standing for long hours without rest. The complainant also suffered from a chronic back problem, which was diagnosed during complainant's term of military service.

6. An operation was performed on complainant's right foot at Clark Air Force Base in the Philippine Islands.

7. Complainant's 30% service-connected disability refers to a 20% back disability and a 10% foot disability.

8. After complainant's discharge from military service, an operation was performed on complainant's left foot, by Dr. John Carter, an orthopedic surgeon, at Beckley Veteran's Hospital, Beckley, West Virginia.

9. Complainant's condition has been diagnosed, by Dr. Carter, as coalition of the anterior and navicular bones, which is a

congenital anomaly that causes the feet to be very flat and painful, and a malformation of the head and neck of the talus.

10. Dr. Carter testified that as a result of a surgical procedure he performed on the complainant, called a triple arthrodesis, the complainant's chronic back problem became exacerbated and indirectly linked to the problems with his feet.

11. Complainant applied for his job with respondent through the Beckley Job Service; complainant indicated his 30% service-connected disability on his forms provided by the Beckley Job Service.

12. Complainant completed an application for employment with respondent upon which he indicated a 30% U.S. Service-connected disability.

13. Complainant was interviewed for his job by Dan Cantley, a representative of respondent, at the Beckley Job Service office.

14. The complainant informed Mr. Cantley that he could physically perform the job requirements and responsibilities of a sales representative at Zee Medical Services.

15. According to the respondent the position as a sales representative involved "quite a bit of bending, stooping, climbing and lifting."

16. A mine box, weighing approximately between 70-100 pounds, is the heaviest object which a sales representative at Zee Medical is required to lift.

17. If a sales representative experienced difficulty in lifting the mine box, he could request assistance from a co-worker or a worker at the mine site.

18. During his two year and eight month employment with respondent, Greg Tucker, complainant's supervisor, was never required to lift a mine box by himself.

19. On at least one occasion while out in the field, the complainant lifted a towbar from a truck without assistance in order to extricate a company vehicle from a ditch. Towbars weigh upwards of 150-250 lbs.

20. Shortly before complainant's termination, complainant was asked by Greg Tucker, to assist him in removing another towbar, the complainant declined to do so, stating that he had a bad back.

21. According to the respondent, complainant's physical condition was brought to the attention of Shirley Wight, respondent's president, by Greg Tucker because of the towbar incident.

22. Lifting a towbar was not a duty of a sales representative.

23. Complainant experienced no physical difficulty and required no accommodation performing any of his duties while he was employed by respondent.

24. Complainant was not under any medical or physical restriction of his work activities at the time of his termination in May, 1987.

25. During complainant's tenure of employment, he received one written warning concerning damage to the company vehicle he drove. The complainant maintained at that time that he had no knowledge of how the damage had occurred. The complainant was also orally advised of being late for two meetings and missing one completely by Mr. Tucker, but was not formally reprimanded.

26. The complainant received no verbal or written reprimands or warnings from the respondent regarding any alleged inability to perform the physical functions of his job as sales representative.

27. Complainant was unaware that his job as a sales representative with respondent was in jeopardy until his date of termination on June 1, 1987.

28. On June 1, 1987, Dan Cantley and Greg Tucker arrived at complainant's home with orders to fire complainant for lying on his application about his physical condition.

29. After being informed of his dismissal by Cantley and Tucker, complainant telephoned Shirley Wight, respondent's president, to inquire as to the reason he had been fired from his job. Wight responded by commenting that "had we known of your disability we would not have hired you in the beginning."

30. According to the respondent, complainant misrepresented on his application about his back disability.

31. In a letter dated September 11, 1987, to the West Virginia Human Rights Commission, Shirley Wight, admitted that "if we had been told of his [John Young's] back disability, we would not have hired him due to his job requirements."

32. In the September 11, 1987 letter, Shirley Wight, admitted that upon learning of complainant's back disability, that she made the decision to terminate his employment.

33. Greg Tucker was asked by Shirley Wight to give additional reasons for the complainant's termination after the complainant had filed his discrimination charge against the respondent.

34. Complainant still experiences some pain in his back and feet under certain conditions, i.e., if he remains on his feet continually for an extended period of time.

35. Complainant is examined biannually by Dr. John Carter at the veteran's Administrative Hospital in Beckley, West Virginia.

36. Complainant received $270.00 per month from the United States Government as compensation for his disability; complainant received this compensation while employed with respondent.

37. After his termination from respondent's employ, complainant was employed temporarily through the Beckley Job Service with the Wyoming County Opportunity Council.

38. Complainant earned minimum wage for a period of ten weeks while employed by the Wyoming County Opportunity Council for a total of $1,142.35, this represents complainant's total interim earnings.

39. While employed by the Wyoming County Opportunity Council, complainant was required to lift 50 to 75 pounds on a daily basis.

40. Complainant actively sought employment in the period subsequent to his discharge from respondent's employ.

41. On October 13, 1989, the complainant secured full time employment at $900.00 a month.

42. During his month of employment with respondent, complainant earned approximately $670.00, or $165.50 per week. Had the complainant continued his employment with respondent through October 13, 1989, his earnings would have been as follows:

$167.50 wk. x 127	=	$21,272.50
less interim earnings	=	1,142.00
TOTAL earnings less interim earnings		$20,130.50

DISCUSSION

The West Virginia Human Rights Act provides in pertinent part that:

> "[I]t shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification... for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is handicapped...." WV Code 5-11-9(a) 1987.

The seminal case establishing the order, allocations of burdens, and standard of proof is McDonnell Douglas v. Green, 411 U.S. 792 (1973), adopted by the West Virginia Supreme Court of Appeals; Shepherdstown Volunteer Fire Dept. v. State of West Virginia, 309 S.E.2d 342 (1983). The plaintiff must demonstrate that he or she (1) belongs to a protected class, (2) applied and was qualified for position for which the employer was seeking applicants, (3) was rejected despite adequate qualifications, and (4) after rejection the position remained open and the employer continued to seek applications from persons with plaintiff's qualifications. Establishment of the prima facie case gives rise to a presumption that the employer unlawfully discriminated against the applicant. The burden of going forward then shifts to the employer to rebut the presumption of discrimination by articulating a legitimate, nondiscriminatory reason for the employee's rejection. The plaintiff then has the opportunity to prove by a preponderance of the evidence that the legitimate nondiscriminatory reason articulated by the defendant was not the true reason for the employment decision but was merely a pretext for discrimination. In such cases the ultimate

burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff; only the burden of going forward shifts. In a handicap case, the basic task usually is not discerning the reason for the discrimination, since that is generally conceded, but rather with examining the reasonableness of the decision under the facts. With these principles in mind, we turn to the specific issues of this case.

Judicial precedent has established that the complainant has the burden of proving each element of a prima facie case of handicap discrimination. Tradwell v. Alexander, 707 F.2d 473 (11th Cir. 1983). Under the instant facts, the complainant must prove: that he is a physically handicapped individual under the West Virginia Human Rights Act; that he was able and competent to perform the job of sales representative despite his handicap; and finally, that he was terminated by the respondent because of his handicap, i.e. when it learned of his handicap.

The definition of handicap is contained in the West Virginia Human Rights Act as follows:

> "any physical or mental impairment which substantially limits one or more of an individual's major life activities."

The record contains ample evidence to sustain a finding that the complainant has a physical impairment, which limits his major life activities.

The evidence reveals that the complainant's medical condition was initially diagnosed during his period of military service, when he began to experience pain in his feet after standing for long hours

without rest. At that time, an operation was performed on the complainant's right foot. It appears that the complainant also sustained a low back problem related to his military service. Both of complainant's conditions resulted in his being granted an honorable discharge from the armed forces with a 30% service related disability; 20% for his back and 10% for his feet. After complainant's discharge, his left foot was operated on at Beckley Veterans Hospital by Dr. James Carter, an orthopedic surgeon. Dr. Carter testified that the complainant suffered from a congenital anomaly which caused his feet to be very flat, painful and malformed, and that a surgical procedure called a triple arthrodesis was performed on the complainant which exacerbated complainant's chronic lower back problem. After his discharge from the Air Force, complainant continued to experience physical problems in a subsequent job he held with an engineering firm. Medical evidence reveals that at that time he experienced "paraspinal mid-thoracic back spasms along the scapula, which seemed to be job related." Dr. Clark, while not placing the complainant under any specific limitations, advised him not to overload his back and feet. The complainant also testified that standing or sitting for extended periods of time causes him to experience some pain and discomfort with his feet and back. The evidence of the record clearly establishes that the complainant's orthopedic impairment places limitations on his physical capabilities; further, that said impairments substantially limit his employability, and other life activities such as ambulation. E.E. Black, Ltd. v. Marshall, 497 F.Supp. 1088 (D. Har.

1980). Complainant is clearly a handicapped individual within the meaning of the Act.

The complainant must next prove that he was physically and generally qualified to perform the essential elements of the job of sales representative despite his handicap. The evidence of record reveals that the duties of a sales representative included driving in a territorial region to service existing accounts and to sell new ones. A sales representative was also responsible for inventory control, completing extensive paperwork and the loading and delivery of medical supplies to respondent's customers.

The complainant has initiated the proofs with respect to his physical and general qualifications for the job as a sales representative. To be sure, as pointed out in an earlier discriminatory discharge decision, while the requirements of qualifications carry primary significance in the hiring sphere, in a termination case, a complainant who is already in the employ of the respondent can for the purpose of a prima face showing, be presumed to be qualified merely by the fact of his employment. State v. Logan Mingo Area Mental Health Agency, 329 S.E. 2d 77 (1985).

Whether the court's logic can be extended by analogy to qualification in the context of handicap discrimination is unclear. However, with regard to complainant's physical capability, the complainant has established, notwithstanding his physical impairment, that he experienced no difficulty in performing the physical requirements of his job which included, driving a van, lifting supplies, stooping, bending and walking over rough terrain. Moreover, the complainant's physician testified that the complainant

was able to perform the physical requirements of the job, which he characterized as "normal working conditions," without limitations. The complainant also established through unrebutted testimony that at no time prior to his termination was he warned or apprised by the respondent as to his inability to perform the physical functions of his job.

The final element necessary to establish a prima facie showing, and in this case, independently survivable as direct evidence of discriminatory animus on the part of the respondent, is proof adduced by the complainant that he was discharged when the respondent learned of his handicap. Credible testimony elicited from complainant's former supervisor, Greg Tucker, that he was directed by respondent to discharge the complainant because of the complainant's back problem is sufficient alone to satisfy this element. However equally compelling and believable was complainant's testimony that he was told by respondent's president, Shirley Wight, that had she known of the complainant's back disability that he would not have been hired. Ms. Wight's remarks to the complainant are blatantly reinforced as contained in respondent's subsequent correspondence with the West Virginia Human Rights Commission; and formally collaborated by respondent's answer to the complaint, wherein respondent admitted in part that:

> "...Mr. Young's disability was not the only reason he was released from his employment, he was going to be terminated anyway."

Significantly, respondent did not initially deny or contest the existence of complainant's disability but rather argued that the complainant would not have been physically able to do the job.

By the foregoing, the complainant has established facts which give rise to a presumption or inference of unlawful discrimination.

Although respondent's justification for its action toward the complainant, to wit "...he was going to be terminated anyway," raises the issue of mixed motive, respondent's admission that complainant's disability was a factor in its decision to terminate him shifts the burden of persuasion to the respondent to show that its decision on that basis was justified.

In the context of this case, judicially recognized defenses available to the respondent are as follows: (1) its decision was based on a bona fide occupational qualification; (2) complainant's impairment precluded him with or without reasonable accommodation from safely and adequately performing the essential elements of the job; 1/ or (3) continued employment of the complainant would impose undue hardship upon the respondent. Prewitt v. U.S. Postal Service, 662 F.2d 292 (5th Cir. 1981).

The Act, WV Code 5-11-9, provides an exception to the prohibition of handicap discrimination when such discrimination is based upon a bona fide occupation qualification. However, in order to establish a bona fide occupational qualification, the respondent must prove that all or virtually all persons with the complainant's particular handicap would be unable to perform the essential physical functions of a job as sales representative; or that the job cannot be safely performed by a person with complainant's handicap even with reasonable accommodation. The record is devoid of any evidence

---

1/The issue of reasonable accommodation was not raised by the complainant.

presented by the respondent which establishes a factual basis for determining that all or substantially all persons with the impairment of the complainant could not safely and efficiently perform the physical standards it required of a sales representative. Weeks v. So. Bell Telephone & Telegraph Co., 408 F.2d 228 (1969).

The respondent next maintains that complainant's impairment precluded him, individually, from safely and adequately performing the essential elements of the job as sales representative. The respondent urges that the physical requirements of the job of sales representative which included bending, stooping, walking over rough terrain and particularly the lifting of medical supplies such as a mine box weighing between 72 lbs. and 100 lbs, were functions the complainant could not handle because of his back disability, without injury to himself or others. The respondent further argued that, there were no light duty jobs as sales representatives, and that it would have been cost prohibitive to provide a helper to the complainant or to otherwise modify or adjust the complainant's job.

The record again totally belies respondent's contentions. The undifferentiated generalities of respondent's president, that in her opinion, the complainant could not perform the physical tasks required is not legally persuasive. The respondent presented no evidence that after it learned of complainant's back disability that it conducted any test that would objectively measure the complainant's individual capacity to function as a sales representative or that it initiated or relied upon any medical expertise to determine the complainant's job suitability for any physical requirements imposed by the job, either prior to or after

it terminated the complainant. In fact, the respondent had no way to determine whether the nature and extent of complainant's handicap reasonably precluded the performance of his duties. Further, the complainant successfully rebutted respondent's allegation that complainant's inability to lift a mine box because of his back disability, posed an insurmountable problem due to the unavailability of helpers, by revealing through the testimony of Greg Tucker, that someone was always available at the mine site to help lift heavy objects; and that during his (Tucker's) tenure with respondent that he had never lifted a mine box by himself. Finally, although there is evidence that on one occasion the complainant did lift a 150 lb. towbar by himself, and that on a subsequent occasion the complainant declined to assist his supervisor in so doing, ostensibly because of his bad back, the record does not support a finding that lifting a towbar was part of the complainant's job as a sales representative, much less an essential element of that job.

Respondent's justification of its decision to terminate the complainant on the basis of a belief that the complainant's disability created a risk of future injury to himself or others is similarly rejected. Exclusion of an employee because of the risk of the future worsening of the employee's condition has been determined in many jurisdictions to constitute illegal discrimination, absent a showing by the employer of undue hardship and of a factual basis to believe to a reasonable probability that continued employment of that employee would be hazardous to the health and safety of the handicapped employee or others. Bucyrus Erie Co. v. DILHR, 280 N.W. 2d 142 (Wis. 1979).

Stated simple, the respondent has failed to meet its burden of persuasion. The complainant has sustained his claim of handicap discrimination.

We next turn to the respondent's argument that the complainant would have been terminated anyway, absent the factor of his disability, because of complainant's deception and poor performance as a sales representative. Such a contention arguably raises the possibility of mixed motives: that respondent's decision was motivated by both legal and discriminatory considerations. Price Waterhouse v. Hopkins, U.S Supreme Ct. No. 87-1167 (May 1, 1989). In a proper case, the issue then becomes whether the discriminatory motive was a substantial or determinative factor. Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979). Arguendo, even if that theory was applicable under the instant facts, the complainant has established the articulated nondiscriminatory reasons of the respondent to be pretextual.

Respondent alleges that the complainant lied about his physical disability during the application process; failed to attend required meetings on time; improperly completed paperwork; damaged a company van; and was subject of customers' complaints.

The evidence on the other hand reveals that the complainant responded to the request "List any physical defects" 2/ contained on respondent's application by plainly stating "30% service connected."

2/The legality of this request is not in issue.

Moroever, on the Beckley Job Service record, through which respondent hired complainant, complainant also indicated a 30% service connected disability. Finally, when asked during his employment interview by respondent's representative if he had any physical problems which would prevent him from performing the job as a sales representative, complainant honestly answered that he did not. And in fact, complainant experienced no difficulty in performing the physical requirements of his job.

While there was uncontroverted evidence presented by complainant's supervisor that on one occasion the complainant did receive a written warning because of damage to a company vehicle; and that there were other instances when the complainant was spoken to about being tardy for two meetings and missing a meeting; Mr. Tucker testified credibly that the complainant's job performance was never acted upon as the basis for a formal reprimand much less mentioned as a grounds for termination until after the fact.

To be sure, the strongest evidence of pretext is Tucker's unrebutted testimony that approximately six months after the complainant's termination, he was contacted by Ms. Wight to compile any and all information concerning any problems that may have occurred during complainant's employment with respondent.

The complainant in this case has clearly made a showing by a preponderance of the evidence that his handicap was the determinative and only factor for his termination.

CONCLUSIONS OF LAW

1. The complainant, John J. Young, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, WV Code §5-11-10, and the Rules and Regulations Pertaining to Practice and Procedure before the West Virginia Human Rights Commission.

2. The respondent, F & S Beehive, Inc. dba Zee Medical Services, Inc., is an employer as defined by WV Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act,

3. The complaint in this matter was properly and timely filed in accordance with WV Code §5-11-10.

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to WV Code §5-11-9 et seq.

5. Complainant has established an unrebutted prima facie case of handicap discrimination.

6. The respondent has articulated legitimate nondiscriminatory reasons for its action toward the complainant.

7. The complainant has established the articulated reasons to be pretextual.

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to backpay in the amount of $20,130.50, plus statutory interest.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 45 days of receipt of this decision, the respondent shall pay to the complainant $20,130.50 plus 10% interest.

It is so **ORDERED**.

Entered this 9th day of October, 1990.

WV HUMAN RIGHTS COMMISSION

BY _____
GAIL FERGUSON
HEARING EXAMINER

CERTIFICATE OF SERVICE

I, Gail Ferguson, Hearing Examiner for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing HEARING EXAMINER'S RECOMMENDED DECISION by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 12th day of October, 1990, to the following:

Brian M. Kneafsey, Jr. Esq.
PO Box 2506
Charleston, WV 25329-2506

MIKE KELLY
DEPUTY ATTORNEY GENERAL
L & S BLDG 5TH FLOOR
812 QUARRIER ST
CHARLESTON WV 25301

John Young
5 Chestnut St.
PO Box 933
Pineville, WV 24874

Zee Medical Service Co., Inc.
4320 Washington St.
West Dunbar, WV 25064

F & S Beehive, Inc.
5203 Preston Highway
Shepherdsville, KY 40165

GAIL FERGUSON
HEARING EXAMINER