BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CARL D. AMOS,

Complainant,

vs. Docket No. EH-531-85

B. F. GOODRICH,

Respondent.

O R D E R

On the 14th day of January, 1987, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner James Gerl. After consideration of the aforementioned, the Commission does hereby adopt, in part only, the Findings of Fact and Conclusions of Law as its own. The amendments and the reasons therefor are set forth below.

The Commission is of the opinion that, because no nexus was shown between the eye infection leading to complainant's absences and the eye disease of Keratoconus which is asserted as his handicap, that complainant's exception to the finding that complainant's discharge (later converted to lay-off) was for legitimate reasons can not prevail.

If it had been shown that the absences were a direct result of the complainant's handicap then a question as to reasonable accommodation may have properly arisen on the issue of the complainant's discharge. However, the Hearing Examiner's finding of failure to accommodate was based on an event which must take

place in the future. The mere statement by the respondent that there was no intention of calling complainant back to work is not, in an of itself, an act of discrimination. If the occasion arises when complainant becomes eligible for recall and respondent then fails to attempt a reasonable accommodation to allow complainant to work, complainant may file a new complaint. But respondent may have a change of heart and not follow the intentions expressed at the hearing. There is nothing in the Human Rights Act that permits a finding of discrimination for an act which has yet to occur.

It is therefore ORDERED that the Findings of Fact and Conclusions of Law be amended by deleting Conclusion of Law No. 7, page 6 and substituting therefor the following Conclusion of Law.

"7. Although respondent did not attempt to accommodate complainant's handicap, since the discharge was for the legitimate reason of absenteeism not shown to be a result of complainant's handicap, no violation of the Human Rights Act has taken place."

In addition it is ORDERED that the proposed decision be amended by deleting therefrom the section under "Discussion" entitled "II. Accommodation" and the section entitled "Proposed Order" for the reasons set forth above.

It is therefore further ORDERED that this case be dismissed.

It is hereby ORDERED that the Hearing Examiner's Proposed

Order and Decision including his Findings of Fact and Conclusions of Law be attached hereto. The Hearing Examiner's Findings of Fact, Conclusions of Law and Proposed Order and Decision shall be 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 DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 26th day of January, 1987.

Betty Co-Hamilton

CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

CARL D. AMOS,

Complainant,

v.

DOCKET NO. EH-531-85

B. F. GOODRICH,

Respondent.

PROPOSED ORDER AND DECISION

A public hearing was convened for this matter on September 16 and 17, 1986, in Union, West Virginia. The complaint was filed on May 2, 1985. The notice of hearing was served on July 31, 1985. Respondent answered on September 9, 1985. A Status Conference was held on October 23, 1985. Subsequent to the hearing, respondent and complainant submitted 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 as 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 herein, it is not credited.

CONTENTIONS OF THE PARTIES

Complainant contends that respondent discriminated against him on the basis of his handicap, keratoconus, by discharging him and by failing to accommodate his handicap. Respondent maintains that complainant was discharged because of his absenteeism and that he could not be accommodated because of the nature of his medical restrictions.

FINDINGS OF FACT

Based upon the parties stipulations of uncontested facts as set forth in the joint prehearing memorandum, on the record during the hearing, and in writing subsequent to the hearing, the Hearing Examiner had made the following findings of fact:

1. Complainant had been previously employed by B. F. Goodrich Company at its Union, West Virginia, plant, from August, 1978, to March, 1982, at which time he was laid off, an event which is not at issue here.

2. Due to the length of time of his layoff in 1982, the complainant was terminated, under the terms of the applicable collective bargaining agreement, an event which is not at issue here.

3. During the period from August, 1978, to March, 1982, the complainant held several differentjobs at the company's Union, West Virginia plant, being Mark VI Builder, Utility, Erosion Shoe Builder, De-Icer Metal Prep, C. G. Builder (floor) and Janitor/ Watchman.

4.Complainant was rehired at the company's Union, West Virginia plant on January 21, 1985, andassigned the entry-level position of De-Icer Builder.

5. Complainant notified the company during his pre-employment physical examination on January 18, 1985, on a "History-Periodic Health Examination-Universal Form" provided by B. F. Goodrich that (a) he had an eye disease, (b) he wore contact lenses and (c) he was handicapped.

6. Complainant was formally counselled and warned on February 19, 1985, about his absences from work.

7. At the time he received the reprimand for absenteeism on February 19, 1985, the complainant acknowledged that he had missed the time from work noted.

8. On February 27, 1985, at his personal physician's advice, the complainant was temporarily removed from work.

9. In March, 1985, the complainant delivered a note to an employee in B. F. Goodrich's personnel office from Dr. Sankar, which note said "Due to eye condition patient cannot work around gas fumes."

10. At the time of his termination, complainant was working on

a De-Icer job, which involved exposure to solvents and fumes.

11. From the time of his rehire in 1985, until the time of his termination, complainant has been scheduled to work 35 days.

12. In January, 1986, the union and the complainant, pursuant to union grievance procedure, agreed with B. F. Goodrich to settle the grievance filed by the complainant concerning his discharge by placing the complainant on the respondent's Union, West Virginia plant layoff list, with the complainant being subject to recall according to normal seniority rights.

13. The complainant suffers from an eye condition known as keratoconus, which is an abnormal bulging of the center of the cornea in the center of both eyes, which causes a blurring of vision, necessitating the wearing of corrective lenses (contact lenses). This eye condition cannot be corrected with eye glasses.

14. Complainant had keratoconus prior to and subsequent to his rehiring by B. F. Goodrich in January, 1985.

15. Since the date of his termination in March, 1985, besides being employed at a family store, complainant has not applied for any other positions or jobs.

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

16. On March 11, 1985, complainant was terminated by respondent.

17. When complainant was rehired by respondent on January 21, 1985, he was required to complete a 90-day probationary period.

18. From complainant's rehire on January 21, 1985, until his discharge on March 11, 1985, complainant was absent from work for reasons other than vacation, for one-third (33.3%) of the time that he had been scheduled to work.

19. Complainant had the worst attendance record of any probationary employee trained at the De-Icer position in at least the last ten years.

20. In January, 1986, the plant's collective bargaining agent at the plant, respondent and complainant agreed to settle a grievance by complainant by converting his discharge to a layoff, with complainant being subject to recall according to normal seniority rights.

21. Respondent made no effort to accommodate complainant's handicap by, for example, contacting complainant's doctor for clarification or by determining the reasonableness and feasability of complainant's performing some job at respondent with a respirator.

22. Deitz, respondent's doctor, did not agree with the conclusion by complainant's doctor that no exposure to gas fumes should be permitted.

23. Respondent's Union, West Virginia plant has suffered lay offs and has reduced the number of shifts from three to one.

24. Employees with much more seniority than complainant have been laid off by respondent since the date of complainant's layoff.

CONCLUSIONS OF LAW

1. Carl D. Amos 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, Section 5-11-10.

2. B. F. Goodrich is an employer as defined in West Virginia Code, Section 5-11-3(d), and is subject to the provisions of the Human Rights Act.

3. Complainant has established a prima facie case that respondent discriminated against him on the basis of his handicap by terminating him.

4. Respondent has articulated a legitimate, nondiscriminatory reason for its termination of complainant.

5. Complainant has not shown that the reason articulated by respondent for his termination is pretextual.

6. Respondent has not discriminated against complainant on the basis of his handicap in violation of West Virginia Code Section 5-11-9(a) by terminating him.

7. Respondent has violated the Human Rights Act, West Virginia Code Section 5-11-9(a) by failing to accommodate complainant's handicap.

DISCUSSION

I. Termination

The issue of complainant's termination is not moot, as respondent has argued. If complainant's termination was done in violation of the Human Rights Act, the fact that it was subsequently converted to a layoff would not render the termination lawful.

In fair employment, disparate treatment cases, the initial burden is upon the complainant to establish a prima facie case of discrimination. Shepardstown 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, nondiscriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunteer Department, supra; McDonnell-Douglas, supra. If respondent articulates such a reason, complainant must show that such reason is pretextual. Shepherdstown Volunteer Department, supra, McDonnell Douglas, supra.

In the instant case, complainant has established a prima facie case of handicap discrimination. The parties have stipulated that complainant has an eye condition called keratoconus, an abnormal bulging of the center of the cornea of both eyes, which causes a blurring of vision, necessitating the wearing of contact lenses.

The parties have further stipulated that complainant notified respondent of his eye disease on January 18, 1985, and the complainant was removed from work on February 27, 1985, upon the request of his physician. The record evidence is undisputed that when complainant returned to work on March 11, 1985, he was terminated by respondent. Such facts are sufficient to establish a prima facie case of discrimination because if otherwise unexplained they raise an inference of discrimination. Furnco Construction Co. 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. Respondent presented evidence that complainant was terminated for excessive absenteeism during his probationary period. Indeed, the record evidence reveals that in addition to five days' vacation during the 35 days he was scheduled to work since his rehire in 1985, complainant was also absent one-third of the time for reasons other than vacation. Because complainant was a probationary employee, it would be expected that he would go out of his way to impress his employer that he was a good employee. Nonetheless, complainant continued to be absent from work even after he was formally counseled and warned about his excessive absenteeism on February 19, 1985. Complainant's attendance record was the worst fora probationary employee at the De-Icer position for at least ten years.

Complainant has not demonstrated that the reason articulated by respondent is pretextual. Indeed, the evidence at hearing revealed that on at least some of the days that complainant was scheduled to work, complainant stayed home to work at the store that he and his wife own. Complainant attempts to establish pretext by arguing that complainant did not have a sufficient number of "occurrences" under respondent's attendance policy to warrant termination. Although complainant presented some evidence that the attendance policy applies to probationary employees, the more credible testimony was that said policy does not apply to employees serving a probationary period. The full course of the attendance policy cannot be completed within a ninety-day probationary period. It cannot be concluded that the employer is barred from firing probationary employees who cannot attend work on a regular basis. Complainant has not demonstrated pretext by a preponderance of the evidence.

II. Accommodation

Because complainant has not shown that his termination violated the Human Rights Act, it is necessary to determine whether respondent has reasonably accommodated complainant's handicap. An employer is required to make reasonable accommodation of known handicaps where such accommodation would not impose an undue hardship upon the employer. Interpretive Rules Governing Discrimination on the Handicapped, §4.03(2).

In the instant case, respondent presented disturbing evidence at the hearing that it will not recall complainant from layoff because complainant's doctor imposed a restriction that complainant cannot work around any fumes. Deitz, respondent's own doctor, testified at the hearing that he disagreed with the conclusion of complainant's doctor for a clarification of this restriction in an attempt to determine whether there might be some job complainant could have performed at respondent's plant, for example, with the aid of a respirator. Respondent did not even investigate this possibility. Although it is true that complainant was certainly less than cooperative in obtaining clarification from his doctor with regard to his medical restriction, it was respondent's duty to accommodate complainant's handicap. By failing to investigate any accommodation, respondent has violated the Human Rights Act.

The relief available to complainant as a result of respondent's failure to accommodate, however, is limited by the fact that complainant is now on layoff and that several more senior employees have been laid off and that complainant would be recalled only after the more senior employees. Complainant does not contest that both production and employment levels at respondent's plant declined from 1985 to the present. Thus, respondent's failure to accommodate will only translate into tangible relief for complainant at such time as complainant is eligible for recall from layoff.

PROPOSED ORDER

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

1. That the complaint of Carl D. Amos, Docket No. EH-521-85, be dismissed with prejudice to the extent that it alleges discriminatory termination, and sustained to the extent that it alleges a failure to accommodate complainant's handicap, and

2. That respondent be ordered to cease and desist from failing to reasonably accommodate complainant's handicap, and that respondent be ordered to present to the Human Rights Commission within fifteen days of complainant's becoming eligible for recall from lay off a plan for reasonably accommodating complainant's handicap.

James Gerl
Hearing Examiner

ENTERED: December 3, 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:

Richard L. Williger
Attorney at Law
1015 Centran Building
Akron, OH 44308

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

on this 30 day of December, 1986.

James Gerl