COPY

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE, JR.
Governor

TELEPHONE: 304-348-2616

June 5, 1986

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

Frank Cuomo, Esq.
800 Main Street
Wellsburg, WV 26070

RE: Arlene Curry V Genpak Corporation
ES-344-85 & ER-345-85

Dear Ms. Mullens and Mr. Cuomo:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Arlene Curry V Genpak Corporation/ ES-344-85 & ER-345-85.

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 (cmp)

Howard D. Kenney
Executive Director

HDK/kpv
Enclosure
CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ARLENE CURRY,

Complainant,

vs. Docket Nos. ES-344-85
ER-345-85

GENPAK CORPORATION,

Respondent.

O R D E R

On the 6th day of May, 1986, 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 the Findings of Fact and Conclusions of Law as its own.

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order.

The respondent is hereby ORDERED to provide to the Commission proof of complaince with the Commission's Order within thirty-five (35) days of service of said Order by copies of cancelled checks, affidavit or other means calculated to provide such proof.

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 23 day of May, 1986.

Respectfully Submitted,

Betty Hamilton

CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

STATE OF WEST VIRGINIA

HUMAN RIGHTS COMMISSION

ARLENE CURRY,

Complainant

vs.

GENPAK CORPORATION,

Respondent

Docket Nos.

ES-344-85
ER-345-85

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing was convened for this matter on September 20 and December 4, 1985 in Wellsburg, West Virginia. The complaint was filed on January 12, 1985. The notice of hearing was served on June 5, 1985. A Status Conference was held on June 17, 1985. Subsequent to the hearing, both parties submitted written briefs and proposed findings as 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 in her post-hearing brief, has narrowed her contentions to three: that respondent discriminated against her on the basis of sex and race with regard to assignment of job duties, that respondent constructively discharged her and that respondent discriminated against her on the basis of race by subjecting her to racially derogatory comments. Respondent maintains that complainant's failure to bid on various promotions caused her problems regarding job assignments, that complainant left respondent's employ voluntarily because of day care problems, and that the supervisor made racially derogatory comments.

FINDINGS OF FACT

Based upon the parties stipulations of uncontested fact as set forth on the record at the hearing, the Hearing Examiner has made the following findings of fact:

1. Complainant is black and female.

2. Complainant was employed by the Respondent on July 16, 1968 to work at the Respondent's predecessor's plant in Wellsburg, Brooke County, West Virginia.

3. Complainant's foreman in the shipping department of the Respondent was Michetti.

4. Complainant initiallly worked the daylight shift from 7:00 a.m. to 3:00 p.m.

5. That among the duties of a forklift operator which complainant was classified to perform were setting up orders, loading trucks, moving stock from one department to another, keeping the area tidy, and unloading trucks.

6. Complainant was one of three forklift operators on the daylight shift and was the only black female working in the shipping department.

7. Complainant had a plant wide seniority ranking of eleven.

8. Two white male employees with lesser plant wide seniority than complainant worked within the shipping department, namely, an individual named Lee Debnar, classified as a basement foreman, employed February, 1972 and Victor Kazelman, classified as a leadman, employed May, 1969, and that said two persons routinely performed as forklift operators.

9. That in the fall of 1984, Clark Beaman, employed in August, 1969, successfully bid, for a leadman position in the shipping department and performed forklift operator duties.

10. That in November of 1984, Complainant was informed by her foreman that she was to report to the afternoon shift the following Monday and was to work that shift from 3:00 p.m. until 11:00 p.m. thereafter.

11. GenPak Corporation is party to a collective bargaining agreement between GenPak Corporation and Local Lodge No. 2493 of the International Assocation of Machinists and Aerospace Workers which agreement governs the relations of GenPak Corporation and its employees, including complainant.

12. Complainant was hired as a set-up operator on July 16, 1968, and had successfully bid on the job of forklift operator in 1981.

13. Article 6 of the agreement and contract between the union of which the complainant is a member, and the Respondent GenPak Corporation, provides as follows:

> Article 6, Equal Employment Opportunity, Section 1
>
> The union of the company agrees that all employees shall receive equal treatment and no employee shall be discriminated against because of race, color, national origin, sex, creed, or age.

14. Section 2 of the collective bargaining agreement provides as follows:

All masculine pronouns of this agreement include feminine gender.

15. Section 10 of the collective bargaining agreement governs the procedure by which complainant could have bid on the job which she desired.

16. Article 14 of the contractual agreement between the company and the

and the union provides the grievance and arbitration procedure by which the complainant could have filed a grievance for any grievance she may have had under the agreement between the complainant and the respondent.

17. Complainant never filed a grievance against the respondent pursuant to the union contract existing between the complainant and the respondent, and the complainant never filed a grievance over sex discrimination, job bidding procedures, nor race discrimination.

18. Complainant never did bid on any job pursuant to the contractual provisions of the agreement between the union and the respondent, of which she now complains.

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

19. The procedure for job bidding at respondent and through its contract with the union, is that when a job opens, a bid sheet is posted through each department, and there are eight (8) bulletin boards throughout the plant that the sheet is posted on. That an employee has three (3) working days in which to bid on said job; that the bid sheet indicates where an employee who is bidding on the job is to sign for the bid and whose offices are to be used to sign for the bid.

20. The basis for bidding on a job that makes an employee eligible of qualified for a job, such as the complainant, is that the employee shall sign a bid sheet and that the one with the most seniority in the plant will get the bid.

21. Shift selection at respondent is determined by seniority within a classification. That is to say, when employees are selecting the shift they will work, the most senior employee in a classification has the first choice.

22. Respondent,at numerous times in the past, has attempted to reduce costs in different work classifications; and when complainant started in the shipping department in 1981, there were a total of nine (9) people in the shipping department and that shipments were between a million and four and a million and six a

went down to $1,000,000.00 a month.

Before the change occurred there were one (1) leadman on the 7 to 3 shift, a basement floorman on the 7 to 3 shift, three (3) forklift operators on the 3 to 11 shift, and two (2) forklift operators on the 11 to 7 shift. There was also a foreman on the 7 to 3 shift and a foreman on the 3 to 11 shift.

After the change, in which the work force was reduced based on the bona fide budgetary requirements, one (1) of the foreman's jobs was eliminated. Because of the elimination of the foreman's job, a leadman's job was added on afternoon turn, and the midnight shift in the shipping department was eliminated altogether leaving one (1) leadman on the 7 to 3 shift, a basement floorman on the 7 to 3 shift, two (2) forklift operators on the 7 to 3 shift, and two (2) forklift operators on the 3 to 11 shift, and a leadman on the 3 to 11 shift, and one (1) foreman who worked a split shift from 11:00 a.m. to 7:00 p.m., all of the aforegoing occurring on or about October, 1984.

23. Prior to the time of the changes described in finding of fact No. 22, there was a white male employee, McCarthy, who was in a similar position to complainant. He had been on the daylight shift and as a result of the changes and shifts, the said male employee was shifted to the afternoon turn. McCarthy, who since 1977 through 1983 had worked a daylight turn as a forklift operator and because of the changes in the requirements of personnel, due basically on efficiency and workload changes, the need and necessity arose to eliminate one (1) of the forklift operators and McCarthy, who occupied the position similar to that of the complainant, was moved to the afternoon shift.

24. McCarthy went to his immediate supervisor and filed a grievance, on the basis the basement floorman was taking part of his job driving a forklift and the union contract did not provide that he was allowed to drive a forklift. As a result, grievance meetings with the union occurred and because of an effort to eliminate a part-time job as a basement floorman, the basement floorman was required to perform other duties and drive a forklift in the shipping department

25. Complainant, Arlene Curry, was placed on the afternoon shift after certain jobs were eliminated and she failed to bid for the daylight job in the shipping department, complainant was the third person in line in seniority in her classification, and accordingly, the first person was given the preference as to what shift that person desired. Since there were two (2) shifts, the 7 to 3 shift and the 3 to 11 shift, and the first two (2) people in the department chose the 7 to 3 shifts and accordingly, complainant wasn't given the option because the only option left was the 3 to 11 shift, and therefore, complainant was assigned to the 3 to 11 shift.

26. Complainant could have obtained the daylight shift job, because in October, 1984, there was a bid sheet posted for a leadman job. If complainant had bid on the job, she having more plant wide seniority that the present leadman, she would have been given the option to work the daylight shift because of the classification of her seniority in that classification. Because she did not bid on the job, another employee recieved that option and although that other employee had less seniority, complainant had to go on afternoon shift. (Tr. No. 2, P. 22).

27. The employees in respondent's shipping department had specific assignments on a routine daily basis. One forklift operator was assigned primarily to the second floor to perform certain duties. Complainant's job for respondent immediately prior to her leaving was that of the second floor forklift operator.

28. Complainant's duties on the second floor where she primarily worked entailed sending production down on the elevator, putting stock away on the second floor, keeping the area clean, and when her duties were done on the second floor she would go downstairs to the first floor and assist there, and occasionally she was required to go on the first floor and help load or unload trucks. All the persons who occupied the position prior to complainant and employees who did the same work on other shifts were required to do exactly the same job that she did. Complainant's duties on the second floor were no different than any

other persons who worked the second floor.

29. All of respondents forklift operators, regardless of sex or race, were required to assist in loading and unloading trucks, were required to lift the heavy 51/60 box manufactured by respondent, were required to occasionally use the handjacks, were required to sweep and clean when necessary, and were permitted to drive the tow motor truck. Complainant was treated the same as all other forklift operators in these respects, with the exception that on occasion complainant, unlike the others, was given assistance with the heavy boxes.

30. Complainant was not required to see foreman before going to the bathroom.

31. Complainant did receive all of the shift differential pay that she was entitled to, including overtime.

32. For at least the past three years, respondent's affirmative action reports have revealed no underutilization of black females.

33. Complainant quit her job at respondent because the afternoon shift was inconvenient for her and caused her daycare problems.

34. Complainant's foreman, Michetti, used the work "nigger" to refer to black employees of respondent.

35. Complainant's foreman, Michetti, once said of complainant that she had "better get her black ass moving."

36. Complainant was upset by the inconvenience of being assigned to the afternoon shift and by her foreman's use of racial slurs. After leaving respondent's employ, complainant has been taking the prescription drug Xanox for her nerves.

CONCLUSIONS OF LAW

1. Arlene Curry 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 S-11-10.

2. GenPak Corporation is an employer as defined by West Virginia Code, Section S-11-3(d), and is subject to the provisions of the Human Rights Act.

3. Complainant has not established a prima facie case of discriminatory job assignments.

4. Respondent has not discriminated against complainant on the basis of her sex or race with regard to her job assignments. West Virginia Code, Section S-11-9(a).

5. Complainant has not established by a preponderance of the evidence that respondent rendered complainant's work environment intolerable.

6. Respondent has not contructively discharged complainant inviolation of the Human Rights Act.

7. By permitting its supervisory personnel to use racially derogatory language, respondent violated the Human Rights Act.

DISCUSSION OF CONCLUSIONS

A. Job Assignments

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 failed to establish a prima facie case of discriminatory job assignments. With regard to the white male employees who also drove a forklift that were assigned to the day shift, the record is clear that with regard to the leadman position, complainant would have received that job if she had bid because she would have been the most senior bidder for

the job, and, under the union contract, complainant would have been awarded the position. Because respondent utilizes seniority within classification to determine shifts selection, complainant, having not bid upon the leadman promotion remained third in her classification, and when a reduction in the force was affected by respondent, complainant was assigned to the evening shift. The record evidence reveals that complainant was treated no differently than any other second floor forklift operator in respondent's shipping department. All of respondent's forklift operators, regardless of their sex or race were required to perform the same functions, and each forklift operator was treated the same with regard to their duties. The only exception to this proposition is that complainant was occasionaly given help with the heavy 50/60 boxes. Complainant's testimony that she was "relegated" to the "undesirable" second floor forklift job is not credited because of complainant's demeanor, and because complainant's testimony in this regard was contradicted by all other witnesses, including one of complainant's own witnesses who testified that complainant was given the second floor job because the second floor was warmer. Complainant's evidence does not raise a prima facie case of sex or race discrimination with regard to the issue of job assignments.

B. Constructive Discharge.

Where a complainant shows that an employer, for discriminatory reasons, deliberately renders an employee's working conditions so intolerable that a reasonable person would be forced to resign, the employer would be liable to the employee under the Civil Rights Laws under the theory of constructive discharge. See, Clark v. Marsh 665 F.2d 1168(D.C. CIR. 1981). In the instant case, however, complainant has not shown by a preponderance of the evidence that respondent rendered her work environment intolerable. Indeed, complainant testified at the hearing, as well as at her unemployment compensation hearing,

that the reason that she quit respondent was that the afternoon shift was inconvenient for her and caused her daycare problems. The evidence in the record reveals nothing that would make a reasonable person conclude that complainant's working conditions or environment were intolerable.

C. Racially Derogatory Language.

Although an employer is not responsible for the racial prejudices of an employee's coworkers, the employer is under a duty to take steps to control or eliminate the overt expression of those prejudices in the employment setting. Anderson v. Methodist Evangelical Hospital, Inc. 3 E.P.D. Paragraph 8282 (W.D.Ky. 1971), aff'd 464 F. 2d 723 (6th Cir. 1972); Fekete v. U.S. Steel Corporation 353 F. Supp. 1177 (W.D. Pa. 1973). Because the acts of a supervisor are construed to be the acts of an employer, an employer is deemed to have notice of actions of its supervisors in any racial insults or racial harrassment of employees by an employer's supervisory personnel is unlawful under the Civil Rights Statutes. Calote v. Texas Educational Foundation, Inc. 578 F. 2d 95 (5th Cir. 1978); Anderson v. Methodist Evangelical Hospital, Inc., supra. In the instant case, complainant testified that her supervisor, Michetti, routinely used the word "nigger" and other racial insults when referring to black employees. Complainant's testimony in this regard was credible. Michetti, in his testimony denied the use of such language. Because of his demeanor, the testimony of Michetti is not credited. Moreover, complainant's testimony in this regard is buttressed by the credible of testimony of co-witness Skaggs, who testified that she heard Michetti say about complainant that she had "...better get her black ass moving." Respondent contends that the testimony of Skaggs should be disregarded because she and complainant are friends. Although it appears that Skaggs and complainant are indeed friends, Skaggs' demeanor was credible. In addition, Skaggs is still employed by respondent, and she has no apparent motive for incurring the wrath of her employer by giving false

testimony. It is concluded from the evidence in the record that Michetti did in fact use racially derogatory language. Because Michetti is one of respondent's supervisory personnel, respondent must accept the legal responsibility for his violations of the Human Rights Act by using such intolerable language.

D. Relief.

Because there has been no finding of constructive discharge, no reinstatement, back pay or similar relief is recommended. Complainant testified that she has been taking prescription medication for nerves since leaving respondent's employ. The record is not clear with regard to the cause of complainant's nervous condition. At least part of her nervous condition appears to have been caused by the inconvenience of being assigned to the afternoon shift. Nonetheless, it must also be concluded that at least a portion of complainant's condition was caused by the gross racial slurs engaged in by complainant's supervisor. Accordingly, it is recommended that complainant be awarded incidental damages for compensation for humiliation, embarrassment, emotional distress, and loss of dignity as a result of the use of racial slurs by complainant's supervisor. Human Rights Commission v. Pearlman Realty Agency 239 S.E. 2d 145 (W.Va. 1977).

DETERMINATION

The complaint in this matter to the extent that it alleges discriminatory job assignments and constructive discharge is not supported by the preponderance of the evidence. The preponderance of the evidence supports the complaint to the extent that is alleges that respondent permitted its supervisory personnel to use racially derogatory language.

that the reason that she quit respondent was that the afternoon shift was inconvenient for her and caused her daycare problems. The evidence in the record reveals nothing that would make a reasonable person conclude that complainant's working conditions or environment were intolerable.

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testimony. It is concluded from the evidence in the record that Michetti did in fact use racially derogatory language. Because Michetti is one of respondent's supervisory personnel, respondent must accept the legal responsibility for his violations of the Human Rights Act by using such intolerable language.

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The complaint in this matter, to the extent that it alleges discriminatory job assignments and constructive discharge is not supported by the preponderance of the evidence. The preponderance of the evidence supports the complaint to the extent that is alleges that respondent permitted its supervisory personnel to use racially derogatory language.

PROPOSED ORDER

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

1. That the complaints of Arlene Curry, Docket Nos. ES-344-85, ER-345-85, be sustained in so far as complainant contends that respondent's supervisory personnel used racially derogatory language, and that her complaint be dismissed with prejudice to the extent that she contends respondent gave her discriminatory job assignments and that respondent constructively discharged her.

2. That respondent be ordered to cease and desist from failing to prevent its supervisory personnel from using racially derogatory language.

3. That respondent be ordered to pay complainant $1,000.00 for incidental damages to compensate for her humiliation, embarrassment, loss of dignity, and emotional distress suffered by her as a result of respondent's supervisory personnel using racially derogatory language.

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

James Gerl
Hearing Examiner

ENTERED: February 7, 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:

Frank Cuomo
800 Main Street
Wellsburg, WV 26070

Sharon Mullens
Asst. AG
1204 Kanawha Blvd, E.
Charleston, WV 25301

on this 7th day of February, 1986.

James Gerl

BEFORE THE STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

ARLENE DELIA CURRY,	:	
Complainant,	:	
vs.	:	DOCKET NOS. ES-345-85 and ER-344-85
GENPAK CORPORATION,	:	
Respondent.	:	

REQUEST OF RESPONDENT GENPAK CORPORATION THAT THE HUMAN RIGHTS COMMISSION NOT ADOPT THAT PORTION OF THE HEARING OFFICER'S FINDING THAT THE RESPONDENT BE RESPONSIBLE FOR RACIALLY DEROGATORY LANGUAGE.

The Respondent, GenPak Corporation, requests that the Human Rights Commission reject the finding of the Hearing Officer that the Respondent is responsible for alleged racially derogatory remarks.

The Respondent states that there is no substantial evidence in the record to support any such finding and that the Hearing Officer's own related findings, preclude any such finding of racially derogatory remarks made to the Complainant.

The Complainant's own witness, Victor Kazelman, stated on Page 61 as follows:

> Q: Would he ever curse her to her face or demean her?
> A: I don't remember in front of me.

The Hearing Officer found that "it is concluded from the evidence in the record that Michetti (foreman) did in fact use racially derogatory language". He relies upon the testimony of

a co-worker named Mitzy Skaggs. A close study of the evidence, and testimony, shows that her evidence is not only not credible, but is represented to be a one (1) time, isolated incident, did not in fact occur with respect to calling the Complainant, Arlene Curry, any racially derogatory remark. The testimony which the Hearing Officer relies on is a statement by Mitzy Skaggs that the Complainant should get her "black ass" moving. The Complainant herself denies this occurred. On Page 198 of the transcript, the question is as follows:

> Q: I see, when did he tell you that you were to get your "black ass" moving?
> A: He didn't tell me I was to get my "black ass" moving, he said "get your ass moving".

Thus, this is denied explicitly and directly by the Complainant herself that there was any reference to her race in that remark. Other evidence clearly shows that the foreman treated everyone equally.

The testimony of Mitzy Skaggs, Complainant's other witness, does not, in fact, state that the foreman (Michetti) said to Mrs. Curry herself, anything racially attributable. Mitzy Skaggs' testimony is not credible because the Complainant herself denies it occurred. Mrs. Skaggs' testimony at Page 109 merely states that Mr. Michetti had made a statement concerning the Complainant's "black ass". It is not in the record that he said this to Mrs. Curry. In fact, at Page 131 of the testimony, Mrs. Skaggs, in

response to a question, stated as follows:

> Q: Made a statement concerning Alphonse Michetti making a slur to her concerning her getting moving. Was she present at the time?
> A: No.
> Q: Who was present?
> A: She was above me.
> Q: Who was present?
> A: Just Alphonse.
> Q: So, it's your word against Alphonse?
> A: No one else was present.

It is thus apparent that there was no such derogatory statement made to the Complainant. There is no support in the record for this. At best, the statement is testified to as an isolated one time occurrence that was allegedly made to a fellow worker, and not to the Complainant. Looking at the record, Lee Debnar, also a fellow worker, at Page 147 of the second transcript, of the second part of the hearing, states as follows:

> Q: Have you ever heard him (Michetti) make any racial slurs to her?
> A: No.

Another fellow worker, Bob Neff, at Page 156 of the second transcript of the second part of the hearing, states as follows:

> Q: Have you ever heard him make any racial slurs?
> A: I could never remember anything that he would say against anybody, really.

In addition, the foreman himself, Alphonse Michetti, denied ever making a statement to her and never made any racial slurs or comments.

The credibility of Mitzy Skaggs is not only questioned because of what is stated above, but she is also the person who misrepresented under oath that Arlene Curry was mistreated to the extent that when she was injured she was taken to a bathroom and never got to see a doctor. At Page 106 of the transcript, in reference to Mrs. Curry getting struck on the head with an apparatus from her job, she said she was present. At Page 107, the following question was asked of her:

> Q: What was his (Michetti) attitude in reference to that?
> A: He just told her to go to the bathroom and see how bad she was cut.

This is clearly contradicted in the evidence as there is an exhibit indicating that she was sent to see Dr. Bombach for treatment. Alphonse Michetti stated at Page 255 as follows:

> A: As soon as I found out she was hit in the head, I ran her in the office and I looked at her head. I called the office for some help and she was crying and I consoled her, and I looked for a piece of gauze, and one of the girls took her down to the doctor, and I told her to quit crying and everything would be all right.

Thus, the testimony of Mitzy Skaggs, is not credible from the evidence and even if it were, it does not attribute a direct derogatory remark allegedly made by Alphonse Michetti to Mrs. Skaggs on a supposed isolated incident. See also the exhibit on Page 49 and 50 of the transcript in which the second hearing was held and which is marked for Exhibit No. 2 for identification which shows that Complainant was treated by a Dr. Bombach when she hit her head on the dock and required stitches, all contrary to the testimony of Mitzy Skaggs which is obviously incredible testimony.

ALLEGED DAMAGES FROM ALLEGED DEROGATORY REMARKS

The Hearing Officer finds, among other things, that the Respondent should pay the Complainant One Thousand Dollars ($1,000.00) for her alleged nervous condition.

In that regard, the Hearing Officer clearly states from his own Findings of Fact:

> D. The record is not clear with regard to the cause of Complainant's nervous condition.
>
> At least part of her nervous condition appears to have been caused by the inconvenience of being assigned to the afternoon shift.

In Section C, the Hearing Officer finds

> The evidence in this record reveals nothing that would make a resonable person conclude

> that Complainant's working conditions or environment were intolerable.

Also, at Paragraph D, the Hearing Officer found as follows:

> Complainant testified that she has been taking prescription medication for nerves since leaving Respondent's employment.

The alleged isolated racial remark was supposedly made to a co-worker, Mitzy Skaggs, and not to the Complainant long before she ever quit her employment, and the Complainant testified, under oath, that her problems with regard to nervousness, etc. arose as a result of her having to be placed on afternoon shift because she failed to bid on the job and that this caused her inconvenience and many problems. (All of which occurred as a result of her own doing in failing to bid on an available job, as found by the Hearing Officer).

Her being placed on afternoon shift, which the Hearing Officer found was not the fault of the Respondent but was because the Complainant failed to bid on the job, cannot be a basis to award her damages of One Thousand Dollars ($1,000.00), especially in light of the findings of the Hearing Officer with respect to problems caused the Complainant because of her day care and inconvenience responsibilities with her children. The employer cannot be responsible for this.

Thus, it is highly speculative as to whether any damages at all should be awarded to the Complainant.

Nothing in the record would stand as a basis for concluding

that substantial evidence exists because of any humiliation or embarrassment or emotional distress or loss of dignity as a result of the use of racial slurs by the Complainant's supervisor. There is no evidence in the record that she suffered any of these matters because of any racial slurs that were made to her, and the same is impossible, for the reason that no racial slurs were made to her, as shown by the evidence quoted above.

It is, thus, respectfully urged by the Respondent that this Commission reject that portion of the determination of the Hearing Officer that One Thousand Dollars ($1,000.00) in damages be awarded to the Complainant for racial slurs.

Respectfully submitted,

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