



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

June 27, 1986

Carmen Chafin
439 Doverwood Drive
Gahanna, OH 43230

F. Winston Polly, Esq.
106 1/2 So. Fayette Street
Beckley, WV 25801

Donald Lambert, Esq.
P. O. Box 4066
Charleston, WV 25304

RE: Carmen Chafin V Massey Stores, Inc.
ES-494-79
EA-495-79

Dear Ms. Chafin, Mr. Polly & Mr. Lambert:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Carmen Chafin V Massey Stores, Inc./ES-494-79 & EA-495-79.

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
(e2m)

Howard D. Kenney
Executive Director

HDK/kpv
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

RECEIVED

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JUN 17 1986

W.V. HUMAN RIGHTS COMM.

CARMEN CHAFIN,
Complainant,

vs.

Docket Nos. ES-494-79 &
ES-495-79

MASSEY STORES, INC.,
Respondent.

O R D E R

On the 11th day of June, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Juliet Walker-Rundle. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own, with the exceptions and amendments set forth below.

The Commission hereby deletes from paragraph 1 of section "V. Determination" the figure \$43,700.00 at the end of said section and substitutes therefor the correct figure "\$53,700.00."

The Commission hereby deletes paragraph 2 of said section V. and substitutes therefore the following paragraph:

"2. Incidental damages for humiliation and embarrassment of \$5,000.00."

The Commission hereby deletes paragraph 3 of said section V. for the reason that there is no showing on the record that the complainant suffered such damages.

The Commission hereby deletes paragraph 4. of said section V. and substitutes therefor the following paragraph:

"3. Prejudgment interest on the award for back pay to be calculated at the rate of 6% per annum from April 16, 1979, to July 4, 1981, and at the rate of 10% per annum from July 5, 1981, to June 25, 1985, the date of the hearing in this matter."

The Commission hereby changes the number of paragraph 5 of said section V. to "4." and deletes in its entirety paragraph 6 of said section as it is apparent that the Attorney General did not represent the claimant in this matter.

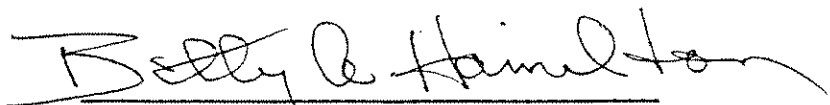
It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order, except as amended by this Order.

The respondent is hereby ORDERED to provide to the Commission proof of compliance 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 27 day of June, 1986.

Respectfully Submitted,



CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION



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

June 25, 1986

Carmen Chafin
439 Doverwood Drive
Gahanna, OH 43230

F. Winston Polly, Esq.
106 1/2 So. Fayette Street
Beckley, WV 25801

Donald Lambert, Esq.
P. O. Box 4066
Charleston, WV 25304

RE: Carmen Chafin V Massey Stores, Inc.
ES-494-79
EA-495-79

Dear Ms. Chafin, Mr. Polly & Mr. Lambert:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Carmen Chafin V Massey Stores, Inc./ES-494-79 & EA-495-79.

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
(cedm)

Howard D. Kenney
Executive Director

HDK/kpv
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

WEST VIRGINIA SUPREME COURT OF APPEALS
FOR THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

CARMEN CHAFIN
Complainant,

COMPLAINANT,

VS.

CASE NO. ES-494-79
EA-495-79

*Conditionally
Approved
at \$100 fee
5/16/86*

MASSEY STORES, INC.,
Respondent.

RESPONDENT.

RECOMMENDED DECISION

I. PROCEDURAL HISTORY

A complaint was filed before the West Virginia Human Rights Commission on the 8th day of May, 1979, alleging Respondent discriminated against complainant in regards to her sex. A pre-hearing was held on April 22, 1985.

A hearing was held on June 25, 1985. The complainant, Carmen Chafin, appear in person and by counsel, F. Winston Polly. The respondent, Massey Stores, Inc., appeared by counsel, Donald Lambert. The testimony of three (3) witnesses was taken. The following individuals appeared on behalf of the complainant, Carmen Chafin: Alice Mounts, Robert Brewer and Carmen Chafin. The Respondent had no witnesses.

Proposed Findings of Fact were to be submitted by counsel for both parties; however, none were submitted although ample opportunity was given.

II. ISSUE

Whether the discharge of complainant constituted sexual discrimination under the West Virginia Human Rights Act.

Whether there was in fact age discrimination.

III. FINDINGS OF FACT

1. The Complainant is a member of two protected classes: female and an older person;
2. That Complainant did timely file her complaints;
3. That the Complainant was employed by Respondent on November 4, 1977;
4. That in January, 1978, Complainant was promoted to head cashier;
5. That Complainant was promoted to Assistant Manager in June, 1978;
6. That Complainant is a female whose age at the time of her discharge was 47;
7. That Complainant was earning \$225.00 per week at the date of her discharge;
8. Complainant was replaced by a male (Hugh Conrad) who was twenty (20) years of age;
9. That Complainant was terminated by Massey Stores, Inc., on April 16, 1979;
10. That Hugh Conrad started work on April 17, 1979;
11. That Complainant earned \$1,600.00 at some period between April 17, 1979 and March of 1982 in Columbus, Ohio;

12. That Complainant exercised reasonable diligence in an attempt to find employment; and,

13. That Complainant eventually found other work in Ohio and has been employed full time since March, 1982.

IV. CONCLUSIONS OF LAW

The guiding principle upon which Complaints are filed with the West Virginia Human Rights Commission is set forth in West Virginia Code Chapter 5, Section 11, Article 2. Section 2 reads in relevant part:

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 and public accommodations is hereby declared to be a human right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness, or handicap. . . .

The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness or handicap is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society. (1967, c 89; 1971, c 77; 1973, 1st Ex. Sess., c 25; 1977, c 107; 1981, c 128) West Virginia Code, Chapter 5, Section 11, Article 2

In an action to redress unlawful discriminatory practices in employment under the West Virginia Human Rights Act, as amended, W. Va. Code, 5-11-1 et seq., the burden is upon the complainant to prove by a preponderance of the evidence a prima facie case of discrimination. If the complainant is successful in creating this

rebuttal presumption of discrimination, the burden then shifts to the respondent to offer some legitimate and nondiscriminatory reason for the rejections. Should the respondent succeed in rebutting the presumption of discrimination, then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for the unlawful discrimination. Shepherdstown VFD v. West Virginia Human Rights Commission, _____ W. Va. _____ 309 S.E. 2d 342 (1983).

A complainant in a disparate treatment, discriminatory discharge case brought under the West Virginia Human Rights Act, Code 5-11-1, et seq., may meet the initial prima facie burden by proving by a preponderance of the evidence (1) that the complainant is a member of a group protected by the Act; (2) that the complainant was discharged, or forced to resign, from employment; and (3) that a nonmember of the protected group was not disciplined or was disciplined less severely, than the complainant, though both engaged in similar conduct. State Ex Rel. State of W. Va. Human Rights Commission and Rose Bradsher v. Logan-Mingo Area Mental Health Agency, Inc. 329 S.E. 2d 77 at page 79 (1985).

Upon a review of all the testimony and all the documentary evidence, this hearing examiner can find no theory upon which a favorable ruling could be made for the Respondent on either issue.

Upon an examination of the facts put forth by the respective parties, this examiner concludes that the Respondent unlawfully discriminated against the Complainant on the basis of sex in vio-

lation of the Law of the State, as defined in the West Virginia Code, Chapter 5, Article 11, Section 9.

Further, it is found that there was age and sex discrimination in that the facts show that with one exception younger males were hired to the exclusion of all others in managerial jobs (TR Comp. Ex. 9) and, that the younger males were given free hand by the Respondent to put asunder the lives of others by firing the old and hiring the young. In addition, the males were paid at a higher rate of pay for the same job classification and experience.

It is the opinion of the hearing examiner that the practice of age discrimination was not as broad-based as the practice of sex-based discrimination. It does appear that one manager, Mr. John J. Hawksin, was 50 years of age. (TR Complainant's Exhibit No. 10).

It is further the finding of this examiner that the complainant suffered humiliation and embarrassment as a result of the Respondent's illegal activities (TR 66 and 68) and that psychic injuries are compensable in West Virginia. State Human Rights Commission v. Pearlman Realty Agency, 239 S.E. 2d 145 (W.Va. 1977).

The whole transcript in this case reveals the Complainant to be an honest worker who was reliable and loyal. (TR 18, 22, 25, 64, and 103). Her devotion to her job duties stopped at the point where she was asked to falsify letters relating to other employees. (TR 72)

V. DETERMINATION

It is the determination of this examiner that the evidence is overwhelmingly in favor of the Complainant on the issue of both sex and age discrimination. This examiner can find no theory upon which a favorable ruling could be made for the Respondent on either issue.

Accordingly, the recommendation is that the Complainant should prevail upon her complaint and that a monetary award should be made to her as follows:

1. Compensatory damages in the amount of \$53,700.00 as back pay. (This was calculated based on the 1978 pay note of John Hawkins which was \$350.00 per week. The Complainant was unemployed for 158 weeks except for an eight (8) week period in which she went to Ohio and earned \$1,600.00. $\$350.00 \times 158 \text{ weeks} = \$55,300.00 - \$1,600.00 = \$43,700.00$)
2. Compensatory damages in the amount of \$99,000.00 for psychic injury.
3. Compensatory damages for benefits such as sickness and accident insurance, dental insurance, and Social Security contributions in the amount of \$5,300.00 based on such benefits having a value of at last 10% of base pay.
4. Pre-Judgment Interest in the amount of \$27,000.00. The law in West Virginia states that interest should be figured at the rate of 6% prior to July 5, 1981, and 10% after July 5, 1981. See Bell v. Miland Mutual Insurance Co. S.E. 2d _____ (W.Va. 1985). However, for ease of calculation, interest was figured at 10% starting at the end of 1982 as follows:

a. \$53,700.00 due to her in March of 1982 (interest figured for whole year but no interest figured for 1979, 1980, or 1981)

1982 interest at 10% = \$5370.00

1983 interest at 10% = 5907.00

1984 interest at 10% = 6497.00

1985 interest at 10% = 7147.00

1986 interest at 10%

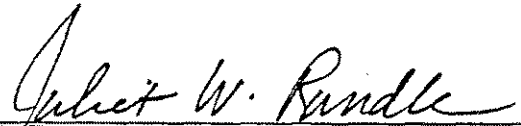
(4 months) = 1965.00

\$26886.00

(rounded to \$27,000.00)

5. No award is made for the fact the Complainant had to move from West Virginia to Ohio in order to find permanent employment. Insufficient information is available in the record as to the actual cost of this move. For the same reason no award is made for the actual cost of seeking other employment.
6. That an attorney fee be awarded to the Office of the Attorney General of West Virginia in the amount of \$5,000.00.

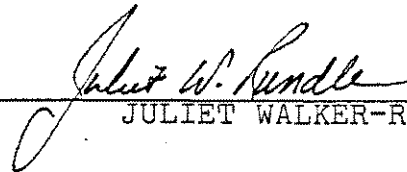
RESPECTFULLY SUBMITTED,



JULIET WALKER-RUNDLE
HEARING EXAMINER
P. O. DRAWER 469
PINEVILLE, WV 24874-0469
304-732-6411

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Recommended Decision was served upon F. Winston Polly, III, 106½ S. Fayette Street, Beckley, WV 25801, and Donald Lambert, P. O. Box 4006, Charleston, WV 25364 by depositing true and correct copies of same in the United States Mail, postage prepaid, this 13th day of May, 1986.



JULIET WALKER-RUNDLE