



COPY

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Executive Director

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

December 20, 1996

Edward J. Cabbell
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Bluefield State College
Bluefield, WV 24701

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Paul R. Sheridan
Senior Asst. Attorney General
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Charleston, WV 25301

Re: Cabbell v. Bluefield State College
ER-250-85A & ES-251-85A

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved,

all matters alleged to have been erroneously decided by the judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before a administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

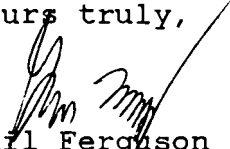
10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,



Carl Ferguson
Administrative Law Judge

GF/mst

Enclosure

cc: Herman H. Jones, Executive Director

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

EDWARD J. CABELL,

Complainant,

v.

DOCKET NUMBER: ER-250-85A

ES-251-85A

BLUEFIELD STATE COLLEGE/

OFFICE OF THE PRESIDENT,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on October 30-31, 1995, in Mercer County, West Virginia, before Gail Ferguson, Administrative Law Judge. Briefs were received through February 9, 1996.

The complainant, Edward J. Cabbell, appeared in person. His case was presented by Paul R. Sheridan, Senior Assistant Attorney General, counsel for the West Virginia Human Rights Commission. The respondent, Bluefield State College, appeared by its representative Libby Belcher, Human Resources Administrator, and by counsel, Rosemary J. Humway, Assistant Attorney General.

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 administrative law judge 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.

A.

FINDINGS OF FACT

1. Respondent, Bluefield State College, is a state institution of higher education, located in Bluefield, West Virginia.

2. Bluefield State College is a historically black college which, following desegregation in the late 1950's, has been progressively transformed into an institution that is predominantly white. By the 1980's, African American students, faculty and staff were a distinct minority.

3. In August 1984, Bluefield State College advertised an opening for the position of financial aid assistant.

4. Complainant, Edward J. Cabbell, an African American male, read the advertisement published in the Sunday, August 12, 1984, edition of the Bluefield Telegraph, and responded by delivering a letter and a copy of his resume to the personnel office of Bluefield State College. The complainant was 38 years old when he applied.

5. Mr. Cabbell's cover letter and resume revealed that he had a bachelor of arts degree from Concord College in education/social studies and a master's degree from Appalachian State College in appalachian studies. He had work experience directing the Concord College Upward Bound and Special Services Programs, directing community and cultural programs and projects, teaching and working as a social worker. His cover letter reflected that he was familiar with financial aid programs.

6. Carolyn Bailey was respondent's financial aid director at Bluefield State College from 1977-1985, and she made the hiring decision to fill the financial aid assistant job.

7. Ms. Bailey knew the complainant well enough at the time of his application to know that he was African American.

8. Mr. Cabbell's August 1984 application for employment with the Bluefield State College financial aid office was not his first application. He had applied previously in 1982 and had been interviewed but not hired. At that time he was told by Ms. Bailey or Personnel Director Audrey Clay, at some point following his initial interview, that he was the second most qualified candidate.

9. Mr. Cabell was not interviewed by respondent following his application for the financial aid assistant position in August 1984. His references were not checked and he was not hired.

10. Only one candidate was interviewed for the position, a white female, Marjie Flanagan, and she was subsequently hired.

11. Respondent maintains that the complainant was not interviewed or considered for the position of financial aid assistant because he was not minimally qualified.

12. Respondent contends that one of the minimum qualifications for the job required a bachelor's degree in a "human services related field." According to the respondent, the complainant did not meet minimum requirements necessary to qualify for the job because Mr. Cabbell's degree was in education/social studies, which respondent claimed is not a human services related field.

13. However, the official job description, which sets forth the written minimum requirements, requires only a bachelor's degree, without specifying a field.

14. The financial aid assistant position is an administrative position within the Financial Aid Office and involves assisting the director with operations of the office, including but not limited to, taking primary responsibility for the college work study program, the law enforcement education program and the student loan program.

15. The official job description requires the successful applicant to possess a general understanding of federal and state program regulations, general familiarity with counseling, a baccalaureate degree and knowledge of the operations of a financial aid office. It further requires that the financial aid assistant be

able to communicate verbally and through the written word. Ms. Bailey admits that she added the language requiring a degree in a "human service related field" which became part of the position advertisement.

16. Ms. Bailey testified that she wanted a person with counseling skills, who was a "work horse," who had done lots of paperwork and was good with figures. Ms. Bailey testified that she assumed someone with a human services related degree could do counseling.

17. In the job description for the financial aid assistant position, out of 12 items under "Duties and Responsibilities," the only reference to counseling duties appears in paragraph 3, where it refers to counseling students with regard to the guaranteed student loan programs. The only other reference to counseling in the job description is paragraph 2 under "Knowledge Required," where it indicates that the financial aid assistant must have "g]eneral knowledge and command of counseling skills."

18. Mr. Cabbell's bachelor's degree in social studies and education establishes that he met the minimum educational requirement, listed in respondent's official job description for financial aid assistant. By any reasonable interpretation, Mr. Cabbell's credentials met the additional requirement imposed by respondent's agent, Ms. Bailey, of a bachelor's degree in a "human service related" field.

19. Mr. Cabbell also held a master's degree in appalachian studies from Appalachian State University. Mr. Cabbell testified that the master's program built on his life-long orientation towards

Social Service. His grade point average while at Appalachian State was 3.9.

20. From 1969 to 1975, Mr. Cabbell had been employed as the Director of Upward Bound and Special Services Programs for Concord College in Athens, West Virginia.

21. Upward Bound is a federal program funded to help area school students from disadvantaged backgrounds to prepare for and apply for college. The program provides assistance in basic areas, including math, science, English, literature and reading. As director of the Upward Bound and Special Services Programs, Mr. Cabell gained extensive supervisory and administrative experience. He supervised as many as thirty to forty employees, including tutors, counselors, teachers and secretarial staff. At any given time, the complainant had about 75 students in his Upward Bound program. During the summer, the Upward Bound Program ran a "bridge" program for graduating seniors to help them make the transition to college.

22. According to Mr. Cabbell, his work with the Upward Bound Program brought him into intimate contact with financial aid programs. As Upward Bound Director, Mr. Cabbell and his staff worked with students to make sure that they understood and met admission requirements and financial aid requirements.

23. The financial aid assistant position also involved maintaining contact with high school guidance counselors. Mr. Cabbell's experience with Upward Board equipped him for this as well.

24. Even after he left Concord College in 1975, complainant continued helping students apply to college in his role as a

community activist, and in this way continued to use his knowledge and skills regarding financial aid and admissions.

25. Carolyn Bailey testified that she reviewed and considered the applicants' cover letters as well as their resumes, but claimed that neither the complainant's cover letter nor resume alerted her to his experience with financial aid.

26. The duties of the financial aid assistant also included collecting data and writing reports. The position description reflects that the ability to communicate verbally and in writing was a necessity. The complainant testified that not only did he have data gathering and reporting experience as Director of Upward Bound, but he had also written the grants which established the special service program at Concord College. In addition, the evidence reveals the complainant to be an accomplished writer who has been published in numerous books, magazines and journals.

27. Mr. Cabbell was well qualified by education and experience for the financial aid assistant position. He was not only more than minimally qualified, his qualifications well matched those of the job description.

28. The application and resume of the successful candidate, Margie Flanagan, reveals that her most recent work experience was in the area of program analysis as well as design and development. The evidence reveals that four years prior to her application for financial aid assistant, that Ms. Flanagan had done some counseling and program supervision. However, nothing in her resume indicates that she had any experience with financial aid programs.

29. Ms. Flanagan's educational background, at the time of her application, included a bachelor of arts degree in rehabilitation counseling as well as a master of arts degree in the same field.

30. At the time of her application, Ms. Flanagan was working at the Greenbrier Center in Lewisburg, West Virginia, as a student service specialist. She had held this position for only seven months. Her resume does not reflect that this job had any direct student contact or involvement with financial aid.

31. Carolyn Bailey testified that Marjie Flanagan met the requirements for the job because her bachelor's degree in rehabilitation counseling qualified as a human services related degree, and because she had been doing financial aid work; that is, she "would fill out forms" and send them in to the financial aid office.

32. Ms. Bailey further claimed that Ms. Flanagan was preferred because of her computer and supervisory experience. However, neither supervisory nor computer experience are apparent upon review of Ms. Flanagan's resume.

33. Ms. Bailey rejected Mr. Cabbell because of his failure to specifically address his financial aid experience in his resume, even though he did address it on his cover letter.

34. On the other hand, no similar action was levied at Ms. Flanagan, who did not mention any financial aid experience in her resume or cover letter.

35. Respondent's witnesses described the process of hiring as involving several steps carried out by the department hiring and the personnel office. According to respondent, when a vacancy occurs,

the personnel office is notified and the hiring sequence begins. The title of the position is listed and the position is advertised. When applications are received, they are gathered by the personnel office. The personnel office attaches a "cover sheet" to each application, and without searching out any of the applications, they are sent to an ad hoc personnel committee. The committee makes a determination of whether or not to interview the candidate, conducts interviews and then makes a recommendation which is reflected on the cover sheet. The file is then returned to the personnel office.

36. Carolyn Bailey testified that the hiring decision was made by the personnel committee. The committee was, according to her testimony, comprised of Sherry Mayes, the current financial aid assistant and Ms. Bailey's subordinate, and David Thompson, who is not identified in the record except as the head of the computer department.

37. The evidence reveals that Carolyn Bailey was the initial decision maker who decided not to hire the complainant and who hired Ms. Flanagan.

38. According to respondent, Bluefield State College has an official policy of encouraging minorities to apply for positions as faculty and staff. Moreover, the job advertisement in issue stated that Bluefield State College "is an Equal Opportunity/Affirmative Action Employer."

39. Ms. Clay explained that as Director of Personnel she reviews the hiring process and recommendation. She testified that this involves a review to see if the recommended selection is consistent with Bluefield State College's affirmative action goals.

According to Ms. Clay if the recommended hiring does not move the college further out of compliance with its own goals in a particular department, it receives her approval before it is passed on to the higher administrative authorities for a formal approval of the decision to hire.

40. In practice, Bluefield State College's hiring policy did not insure that qualified minority candidates would be considered. Ms. Clay testified that her only concern in doing the affirmative action review was to check the "under utilization" grid. If it did not reflect that minorities were under utilized in the category of "managerial, supervisory, and/or administrative," then the selection was acceptable without scrutiny.

41. In 1984, when Mr. Cabbell applied for the position of financial aid assistant, Bluefield State College's affirmative action data reflected that there was not an "under-utilization of blacks in executive, administrative and managerial position." Accordingly, complainant was passed over without consideration.

42. The evidence demonstrates that complainant was the more qualified of the two candidates in terms of the criteria set forth in the job description, and even the criteria testified to by respondent's witnesses.

43. The complainant was distressed as a result of being denied the financial aid assistant position. He testified that he felt especially disheartened because he had worked to establish the credentials for precisely this type of work, and in the end, he believed his race had still precluded him from the position.

44. In August of 1984, annual compensation for a financial aid assistant at Bluefield State College, was \$14,796.00 or approximately \$1,233.00 per month.

45. Respondent, Bluefield State College, offered no evidence on mitigation of damages.

46. The complainant offered no evidence on whether he currently seeks instatement.

47. The West Virginia Human Rights Commission and the West Virginia Attorney General's Office expended \$658.40 and \$48.97 respectively, in the prosecution of this matter.

B.

DISCUSSION

The prohibitions against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act. WV Code §§ 5-11-1 to -19. Section 5-11-9(1) of the Act makes it unlawful "for any employer to discrimination against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment...."

The term "discriminate" or "discrimination" as defined in WV Code § 5-11-3(h) means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of...race...." This includes equal opportunity with regard to hiring. WV Code §5-11-9.

Given this statutory framework, to recover against an employer on the basis of a violation of the Act, a person alleging to be a victim of unlawful race discrimination, or the Commission acting on his behalf, must ultimately show by a preponderance of the evidence that race was a motivating or substantial factor for the employer's failure to extend an equal opportunity.

Under the West Virginia Human Rights Act, a discrimination case may be proved on a disparate treatment theory or by a disparate impact theory. See, Barefoot v. Sundale Nursing Home, syl. pt. 6, 457 S.E.2d 152 (1995); West Virginia University v. Decker, 447 S.E.2d 259 (1994); Guyan Valley Hospital, Inc. v. West Virginia Human Rights Commission, 382 S.E.2d 88 (1989). A disparate treatment case requires proof of discriminatory intent. Discriminatory intent may be established by showing that the decision maker acted out of stereotypical thinking, such as gender stereotypes, and need not involve some type of malice or hatred. Disparate impact has no "intent" requirement, but rather a showing that a facially neutral employment practice has a disproportionate adverse impact on a protected class.

There are three different analyses which may be applied in evaluating the evidence in a disparate treatment discrimination case. The first, and most common, uses circumstantial evidence to prove discriminatory motive. Since discriminating employers usually hide their biases and stereotypes, making direct evidence unavailable, a complainant may show discriminatory intent by the three-step inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, (1973), and adopted by our

Supreme Court in Shepherdstown Volunteer Fire Dept. v. WV Human Rights Commission, 309 S.E.2d 342 (1983). See Barefoot, 457 S.E.2d at 169, n. 19. The McDonnell Douglas method requires that the complainant or commission first establish a prima facie case of discrimination. The burden of production then shifts to the respondent to articulate a legitimate, nondiscriminatory reason for its action. Finally, the complainant or commission may show that the reason proffered by the respondent was not the true reason for the employment decision, but rather a pretext for discrimination.

Cases analyzed under the McDonnell Douglas test often turn on the credibility of the explanation offered by the respondent for its decision. The term "pretext," as used in the McDonnell Douglas formula, has been held to mean "an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance; pretense." WV Institute of Technology v. WV Human Rights Commission, 383 S.E.2d 490, 496 (1989). A proffered reason is pretext if it is not "the true reason for the decision." Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423, 430 (1986). "Pretext may be shown through direct or circumstantial evidence of falsity or discrimination." Barefoot, 457 S.E.2d at 160. Where pretext is shown, discrimination may be inferred, Barefoot, 457 S.E.2d at 164, n. 19, though discrimination need not be found as a matter of law. St. Mary's Honor Society v. Hicks, ___US___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

Second, there is the "mixed motive" analysis. This analysis may also work with circumstantial evidence; the difference is that here the pretext aspects of the McDonnell Douglas analysis are not

applicable. Where an articulated legitimate, nondiscriminatory motive is shown by the respondent to be nonpretextual, but is in fact a true motivating factor in an adverse action, a complainant may still prevail under the "mixed motive" analysis. This analysis flows from the legal requirement that employment decisions must not be motivated, even in part, by discriminatory intent or gender or racial stereotypes.

The mixed motive analysis was established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, (1989), and recognized by the West Virginia Supreme Court of Appeals in WV Institute of Technology v. WV Human Rights Commission, supra. If the complainant proves that his race played some role in the decision, the employer can avoid liability only by proving that it would have made the same decision even if it had not considered the complainant's race. Barefoot, supra.

Finally, a complainant or the commission may prove a disparate treatment claim by direct evidence of discriminatory intent. Proof of this type shifts the burden to the respondent to prove by a preponderance of the evidence that it would have rejected the complainant even if it had not considered the illicit reason. Trans World Airlines v. Thurston, 469 U.S. 111 (1985).

In O.J. White Transfer Storage Co. v. WV Human Rights Commission, 383 S.E.2d (1989), the West Virginia Supreme Court specifically addressed the formulation of the prima facie burden in a failure to hire case,

is upon the complainant to prove by a preponderance of the evidence a prima facie case of discrimination, which burden may be carried by showing (1) that the complainant belongs to a

protected group under the statute; (2) that he or she applied and was qualified for the position or opening; (3) that he or she was rejected despite his or her qualifications; and (4) that after the rejection, the respondent continued to accept applications of similarly qualified persons.

Applying that standard to the instant facts, the complainant has established a prima facie case of race discrimination. It is undisputed that the complainant, Edward Cabbell, is African-American and that he applied for a position with respondent, Bluefield State College, as a financial aid assistant. Although the prima facie element of complainant's qualification is contested by respondent, the complainant has established that he was qualified for the position of financial aid assistant, given the qualifications he possessed by his experience and education and the qualifications for the job.

The qualifications for the position of financial aid assistant are delineated in respondent's official position description. While no requirements are specifically designated as "minimum requirements," the basic requirements of the job included: a general understanding of federal and state programs, regulations, general knowledge of counseling, a bachelor's degree, knowledge of the operation of the financial aid office, the ability to be a self-starter and the ability to communicate verbally and with written word. The job announcement indicated that a bachelor's degree in a human services related field was required.

The duties of a financial aid assistant included: assisting the director with office operations, assuming primary responsibility for administering the college work study program, the law enforcement education program, and the guaranteed student loan program. Other

duties involved record keeping and counseling students and area high schools with regard to guaranteed student loans and financial aid.

The evidence reveals that the complainant held a bachelors degree in social studies and education from Concord College in Athens, West Virginia, and a master's degree in Appalachian studies from Appalachian State University.

Official notice is taken that a degree in education and social studies meets the threshold definition of a human service related field.

The record reveals that from 1969 to 1975 the complainant was employed as Director of the Upward Bound and Special Services Programs at Concord College.

Upward Bound is a federally funded program administered in connection with the college designed to help area school students from disadvantaged backgrounds prepare for and apply for college. The Special Services Program is a campus program designed to help students from disadvantaged backgrounds stay in school. Respondent's position description indicated that the financial aid assistant was required to maintain contact with high school guidance counselors. As Upward Bound Director, complainant routinely performed this role.

Another of the duties of a financial aid assistant was to take primary responsibility for administering the Work Study, Guaranteed Student Loan and Law Enforcement Education programs.

As a former Upward Bound Director, the complainant had attained intimate knowledge of these programs as well as others. To be sure, the complainant had written the grants which developed the Special Services Program at Concord.

Respondent's position description further emphasized verbal and written communicative skills as a requirement, as the job encompassed data gathering, report writing and interfacing with students, counselors, parents and others. The evidence reveals that, not only did the complainant have relevant experience in all these areas, but in addition, the complainant was an accomplished and published writer.

The complainant established that his tenure as a college administrator effectively provided him with a working knowledge of available financial aid programs which translated into assisting students through counseling gain access to college and to otherwise meet their financial needs. After he left Concord College in 1975, complainant continued helping students apply to college in his role as a community activist, and in this way continued to use his knowledge regarding financial aid admissions and counseling.

As the third step in the prima facie case, the evidence establishes that Mr. Cabbell was rejected despite his qualifications. To wit, that he was rejected without even an interview or some inquiry regarding his references.

And finally, the complainant has satisfied the final element of a prima facie case by introducing evidence that respondent selected a white female candidate similarly situated as the financial aid assistant.

The complainant has presented sufficient evidence to prove a prima facie case of race discrimination, thereby shifting the burden to respondent to articulate a legitimate nondiscriminatory reason for its rejection of the complainant. Although the burden on the

respondent is only one of production, a respondent must clearly set forth through the introduction of admissible evidence the reason for the complainant's rejection. The explanation provided must be clearly and reasonably specific and must be legally sufficient to justify a judgment for the defendant. If the respondent clearly articulates a legitimate and nondiscriminatory reason for rejecting the complainant, 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 unlawful discrimination. This may be accomplished either directly by persuading the court that a discriminatory reason more likely motivated the respondent or indirectly by showing that the respondent's proffered explanation is unworthy of credence. Burdine 450 U.S. 248 at 254, 256.

In the case at bar, respondent asserts that the complainant was not considered for the position of financial aid assistant because he failed to meet the minimum job requirements, and therefore was not qualified. According to respondent, the minimum qualifications for the job required a bachelor's degree in a human service related field which in the opinion of respondent, complainant did not have. Although the official job description required only a bachelor's degree without specifying a field, Carolyn Bailey, respondent Financial Aid Director, testified that she wrote the "human services related field" specification in the job advertisement because she needed someone with that background.

In explaining her choice of words in the advertisement, Ms. Bailey testified that she wanted someone who had a slant on things "a little bit toward human services." Moreover, she claimed that she

wanted a person with counseling skills, who was a "work horse," and who had done lots of paperwork and was good with figures. As pointed out by complainant, not a single one of these skills or qualities is reflected in the financial aid assistant position advertisement Ms. Bailey drafted. Moreover, these were all skills possessed by the complainant as reflected on his resume.

When queried, Ms. Bailey defined the human services related field as one "pointed toward assisting people and developing listening skills," but could not explain why an educator would not qualify. According to Ms. Bailey, the candidate had to have a counseling-related degree to meet the minimum job requirements and had to have financial aid experience.

Carolyn Bailey testified that she reviewed and considered applicants' cover letters as well as their resumes, but claimed that neither the complainant's cover letter nor resume alerted her to his experience with financial aid.

According to Ms. Bailey, the successful candidate, Marjie Flanagan, met the requirements for the job because her bachelor's degree in rehabilitation counseling qualified as a human services related degree and because she had been doing financial aid work. In addition, respondent maintained that Ms. Flanagan was preferred because of her computer and supervisory experience. Ms. Bailey further testified that the hiring decision was made by a selection committee of which she and Audrey Clay, respondent's personnel director were members, and that Ms. Clay concurred in the hiring decision.

According to Ms. Clay, the hiring committee would have interviewed the complainant under respondent's affirmative action plan, if its under utilization report had reflected that respondent was underutilizing blacks in the managerial, supervisory and administrative category. Finally, respondent supports its action by an explanation offered for the first time during Ms. Bailey's testimony, that the complainant was not considered because of an unfavorable impression he made at an earlier interview in 1982 and the quality of his resume at that time.

The complainant has convincingly established that the reasons proffered by respondent are not the true reasons for its action, but rather pretext for race discrimination.

It is the duty of the trier of fact to make the ultimate determination whether there was intentional discrimination on the part of respondent. Shepherdstown supra. To that end, the factfinder must decide which party's explanation of the employer's motivation it believes. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983). Considering all the evidence and giving it the weight and credence it deserves, the complainant has established that respondent, Bluefield State College, treated complainant less favorably than others because of his race.

In determining which side to believe, it is up to the factfinder to assess the credibility of witnesses and the persuasiveness of the evidence. Westmoreland Coal Co. v. WV Human Rights Commission, 383 S.E.2d 562 (1989).

The complainant testified credibly regarding his experience and qualifications as well as the steps he took to apply for the

position. There is virtually no dispute as to the facts present through the testimony of the complainant.

When the explanations offered by respondent are examined, they simply lack credence. This is particularly apparent from respondent's claim that the complainant did not meet the minimum qualifications for the position in issue. It is also revealed by the clear disparity used by respondent in evaluating Mr. Cabbell and Ms. Flanagan, and by other inconsistencies.

The evidence establishes that fairly compared, and absent any illicit discriminatory motives, Mr. Cabbell's qualifications should have been preferred in this position by respondent over those of the chosen candidate. Marjie Flanagan's application material reveals that all of her recent work experience was in the area of program analysis and study, as well as design and development. Four years prior to her application, she had apparently done some counseling and program supervision. Ms. Flanagan had been working at the Greenbrier Center in Lewisburg, West Virginia, at the time of her application as a student service specialist. She had held this position for only seven months. Her resume does not reflect whether the job involved any direct student contact.

Ms. Bailey claimed that Ms. Flanagan met the requirements for the job because her bachelor's degree in rehabilitation counseling qualified as a human services related degree, and because she had been doing financial aid work. However, Ms. Bailey later acknowledged that Ms. Flanagan's former position was not in fact a financial aid position. Moreover, nothing in Ms. Flanagan's resume reflects that she has had any experience with financial aid. In

addition, while Ms. Bailey claimed that Ms. Flanagan was preferred because of her computer experience and supervisory experience, neither her alleged supervisory experience nor her alleged computer experience are apparent from her resume.

Respondent's assertion that the financial aid assistant needed to be skilled in counseling in order to address student problems such as drug abuse, alcoholism and abortions, is not credible and appears to be an ex post facto attempt by respondent to justify its decision to hire Ms. Flanagan. This is particularly evident upon review of the job description which only refers to counseling in the context of advising students regarding the financial aid programs.

Moreover, Ms. Bailey was completely inconsistent in the way that she compared the qualifications of Mr. Cabbell and Ms. Flanagan, strongly suggesting that the evaluation was colored by a racial motive.

Ms. Bailey criticized Mr. Cabbell for not tailoring his resume to the job for which he was applying and for not addressing his financial aid experience in his resume even though he did address it in his cover letter. On the other hand, even though Ms. Flanagan knew she was applying for a financial aid position, she did not mention any financial aid experience in her resume or cover letter. On cross-examination, Ms. Bailey had to admit that in fact Mr. Cabbell's application materials referred more explicitly to financial aid work than did Ms. Flanagan's.

Although respondent's defense evolves around its position that the complainant did not meet minimum qualifications for the job, at public hearing, for the first time, respondent raised as a defense

for its actions, an alleged unfavorable impression made by the complainant during an earlier interview for a similar position in 1982. Courts have determined shifting reasons for defense between the time of the adverse action and the hearing to be strong evidence of pretext. Smith v. American Service Co., 611 F. Supp. 321 (N.D. Ga. 1984). Moreover, under the instant facts, this newly asserted reason is blatantly inconsistent with Ms. Bailey's testimony that she had no knowledge of the financial aid background of the complainant; and implausible, given the complainant's unrebutted testimony that either Ms. Bailey or Ms. Clay had informed him that he had been rated the second most qualified applicant during the prior selection process in 1982.

Another example of respondent's shifting explanations involves the decision makers who participated in this particular hiring decision. At hearing, Ms. Bailey indicated that the decision was made by a committee, of which she was one of three. She further testified that Ms. Clay reviewed and concurred with her decision. Ms. Clay, on the other hand, testified that she did not review the decision itself, beyond checking to make sure that minorities were not under utilized in administrative posts; Ms. Clay claimed that she had no role in making the decision.

Finally, the issue of respondent's affirmative action program is of some import in establishing respondent's pretext. According to Ms. Clay, respondent's human resources director, in accordance with respondent's affirmative action program, had there been an under utilization of blacks in this category, Mr. Cabbell would then have been interviewed. The clear inference from this is that he must have

been minimally qualified. If complainant had truly been unqualified, to have interviewed him and considered him for the position under any circumstances would have been unwarranted.

The importance of the affirmative action plan in the context of this case, as pointed out by complainant, is twofold. First, because Mr. Cabbell is a black man who was more than minimally qualified, in accordance with the affirmative action program, he should have been interviewed and considered for the position. Yet, he was not interviewed. Respondent's insistence that Mr. Cabbell was not minimally qualified is designed to explain this breach in policy and to prevent a comparison of candidates based on qualifications. Second, the affirmative action plan was used in this instance implicitly as a way of suggesting that because there was not an "under utilization" of blacks, relatively speaking, Mr. Cabbell did not need to be seriously considered.

Based upon the foregoing and reviewing the record as a whole, respondent's explanations are determined to be pretext and an attempt to cover for its racial bias against the complainant. The evidence clearly establishes that the complainant was not hired much less considered by respondent for the position in issue because of his race. The complainant Edward Cabbell, has sustained his ultimate burden of proving race discrimination on the part of Bluefield State College by a preponderance of the evidence.

C.

CONCLUSIONS OF LAW

1. The complainant, Edward J. Cabbell, is an individual claiming to be aggrieved by an unlawful discriminatory practice, and is a proper complainant for purposes of the Virginia Human Rights Act, WV Code §§ 5-11-3(a) and 5-11-10.

2. The respondent, Bluefield State College, is an employer as defined by WV Code § 5-11-3(d), and is a proper respondent in this action.

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

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of the complaint.

5. The complainant has established that he is a member of a protected class, that he applied for and was qualified for the position of financial aid assistant, that he was rejected despite his qualifications, and that the respondent hired a white female who was less qualified than the complainant.

6. The respondent's articulated reason for not hiring the complainant for the financial aid assistant position, that he did not meet the minimum requirements necessary for the position, has been shown to be pretext.

7. The complainant has established by a preponderance of the evidence that he was denied the financial aid assistant position by respondent because of his race.

8. As a result of respondent's discriminatory action, the complainant is entitled to backpay; benefits and compounded interest for the period September 1984 through October of 1995. The aggregate amount due complainant is \$301,920.37, as set forth in Attachment A.

9. As a result of respondent's discriminatory action, the complainant suffered humiliation, embarrassment and emotional distress. The complainant is entitled to \$2,950.00 as incidental damages.

10. The West Virginia Human Rights Commission and the Attorney General's Office are entitled to \$658.00 and \$48.97 respectively, for costs incurred in prosecuting this matter.

D.

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 employment practices based on race.

2. Within 31 days of receipt of this decision, the respondent shall pay to the complainant backwages and statutory interest in the aggregate amount of \$301,920.37.

3. Within 31 days of receipt of this decision, the respondent shall pay to the Commission \$658.40 as costs and to the Attorney

General's office \$48.97 as costs associated with prosecuting this claim.

4. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of \$2,950.00 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

5. The respondent shall pay ten percent per annum interest on all monetary relief.

6. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Norman Lindell, Deputy Director, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so ORDERED.

Entered this 20 day of December, 1996.

WV HUMAN RIGHTS COMMISSION

BY: 

GAIL FERGUSON
ADMINISTRATIVE LAW JUDGE

EDWARD CABELL v. BLUEFIELD STATE COLLEGE
Docket Nos. ES-250-85A / ER-251-85A

NOTES ON DAMAGE CALCULATION

1. The **lost back wages** are based on what the complainant's average monthly earnings would have been had he been employed by the respondent.
2. **Interest earnings** are calculated on a monthly basis; 10 percent APR divided by 12 months equals .8333 percent monthly interest. Monthly interest for each month is applied to the balance as of the previous month.
3. The **ending balance** indicates that lost back wages and interest as of the end of October, 1995 total \$301,920.37.

HRC83H

EDWARD CARBELL DAMAGE CALCULATION

.10

DATE	YEAR	LOST WAGES	INTEREST	TOTAL
SEPTEMBER	.84	1,233.00	.00	1,233.00
OCTOBER	.84	1,233.00	10.28	2,476.28
NOVEMBER	.84	1,233.00	20.64	3,729.92
DECEMBER	.84	1,233.00	31.08	4,994.00
JANUARY	.85	1,233.00	41.62	6,268.62
FEBRUARY	.85	1,233.00	52.24	7,553.86
MARCH	.85	1,233.00	62.95	8,849.81
APRIL	.85	1,233.00	73.75	10,156.56
MAY	.85	1,233.00	84.64	11,474.20
JUNE	.85	1,233.00	95.62	12,802.92
JULY	.85	1,233.00	106.69	14,142.51
AUGUST	.85	1,233.00	117.85	15,493.36
SEPTEMBER	.85	1,233.00	129.11	16,855.47
OCTOBER	.85	1,233.00	140.46	18,228.93
NOVEMBER	.85	1,233.00	151.91	19,613.84
DECEMBER	.85	1,233.00	163.45	21,010.29
JANUARY	.86	1,233.00	175.09	22,418.38
FEBRUARY	.86	1,233.00	186.82	23,838.20
MARCH	.86	1,233.00	198.65	25,269.85
APRIL	.86	1,233.00	210.58	26,713.43
MAY	.86	1,233.00	222.61	28,169.04
JUNE	.86	1,233.00	234.74	29,636.78
JULY	.86	1,233.00	246.97	31,116.75
AUGUST	.86	1,233.00	259.31	32,609.06
SEPTEMBER	.86	1,233.00	271.74	34,113.80
OCTOBER	.86	1,233.00	284.28	35,631.08
NOVEMBER	.86	1,233.00	296.93	37,161.01
DECEMBER	.86	1,233.00	309.68	38,703.69
JANUARY	.87	1,233.00	322.53	40,259.22
FEBRUARY	.87	1,233.00	335.49	41,827.71
MARCH	.87	1,233.00	348.56	43,409.27
APRIL	.87	1,233.00	361.74	45,004.01
MAY	.87	1,233.00	375.03	46,612.04
JUNE	.87	1,233.00	388.43	48,233.47
JULY	.87	1,233.00	401.95	49,868.42
AUGUST	.87	1,233.00	415.57	51,516.99
SEPTEMBER	.87	1,233.00	429.31	53,179.30
OCTOBER	.87	1,233.00	443.16	54,855.46
NOVEMBER	.87	1,233.00	457.13	56,545.59
DECEMBER	.87	1,233.00	471.21	58,249.80
JANUARY	.88	1,233.00	485.42	59,968.22
FEBRUARY	.88	1,233.00	499.74	61,700.96
MARCH	.88	1,233.00	514.17	63,448.13
APRIL	.88	1,233.00	528.73	65,209.86
MAY	.88	1,233.00	543.42	66,986.28
JUNE	.88	1,233.00	558.22	68,777.50
JULY	.88	1,233.00	573.15	70,583.65
AUGUST	.88	1,233.00	588.20	72,404.85
SEPTEMBER	.88	1,233.00	603.37	74,241.22
OCTOBER	.88	1,233.00	618.68	76,092.90
NOVEMBER	.88	1,233.00	634.11	77,960.01
DECEMBER	.88	1,233.00	649.67	79,842.68
JANUARY	.89	1,233.00	665.36	81,741.04

FEBRUARY	.89	1,233.00	681.18	83,653.22
MARCH	.89	1,233.00	697.13	85,585.35
APRIL	.89	1,233.00	713.21	87,531.56
MAY	.89	1,233.00	729.43	89,493.99
JUNE	.89	1,233.00	745.78	91,472.77
JULY	.89	1,233.00	762.27	93,468.04
AUGUST	.89	1,233.00	778.90	95,479.94
SEPTEMBER	.89	1,233.00	795.67	97,508.61
OCTOBER	.89	1,233.00	812.57	99,554.18
NOVEMBER	.89	1,233.00	829.62	101,616.80
DECEMBER	.89	1,233.00	846.81	103,696.61
JANUARY	.90	1,233.00	864.14	105,793.75
FEBRUARY	.90	1,233.00	881.61	107,908.36
MARCH	.90	1,233.00	899.24	110,040.60
APRIL	.90	1,233.00	917.01	112,190.61
MAY	.90	1,233.00	934.92	114,358.53
JUNE	.90	1,233.00	952.99	116,544.52
JULY	.90	1,233.00	971.20	118,748.72
AUGUST	.90	1,233.00	989.57	120,971.29
SEPTEMBER	.90	1,233.00	1,008.09	123,212.38
OCTOBER	.90	1,233.00	1,026.77	125,472.15
NOVEMBER	.90	1,233.00	1,045.60	127,750.75
DECEMBER	.90	1,233.00	1,064.59	130,048.34
JANUARY	.91	1,233.00	1,083.74	132,365.08
FEBRUARY	.91	1,233.00	1,103.04	134,701.12
MARCH	.91	1,233.00	1,122.51	137,056.63
APRIL	.91	1,233.00	1,142.14	139,431.77
MAY	.91	1,233.00	1,161.93	141,826.70
JUNE	.91	1,233.00	1,181.89	144,241.59
JULY	.91	1,233.00	1,202.01	146,676.60
AUGUST	.91	1,233.00	1,222.31	149,131.91
SEPTEMBER	.91	1,233.00	1,242.77	151,607.68
OCTOBER	.91	1,233.00	1,263.40	154,104.08
NOVEMBER	.91	1,233.00	1,284.20	156,621.28
DECEMBER	.91	1,233.00	1,305.18	159,159.46
JANUARY	.92	1,233.00	1,326.33	161,718.79
FEBRUARY	.92	1,233.00	1,347.66	164,299.45
MARCH	.92	1,233.00	1,369.16	166,901.61
APRIL	.92	1,233.00	1,390.85	169,525.46
MAY	.92	1,233.00	1,412.71	172,171.17
JUNE	.92	1,233.00	1,434.76	174,838.93
JULY	.92	1,233.00	1,456.99	177,528.32
AUGUST	.92	1,233.00	1,479.41	180,241.33
SEPTEMBER	.92	1,233.00	1,502.01	182,976.34
OCTOBER	.92	1,233.00	1,524.80	185,734.14
NOVEMBER	.92	1,233.00	1,547.78	188,514.32
DECEMBER	.92	1,233.00	1,570.96	191,318.88
JANUARY	.93	1,233.00	1,594.32	194,146.20
FEBRUARY	.93	1,233.00	1,617.89	196,997.09
MARCH	.93	1,233.00	1,641.64	199,871.73
APRIL	.93	1,233.00	1,665.60	202,770.33
MAY	.93	1,233.00	1,689.75	205,693.08
JUNE	.93	1,233.00	1,714.11	208,640.19
JULY	.93	1,233.00	1,738.67	211,611.86
AUGUST	.93	1,233.00	1,763.43	214,608.29
SEPTEMBER	.93	1,233.00	1,788.40	217,629.69
OCTOBER	.93	1,233.00	1,813.58	220,676.27
NOVEMBER	.93	1,233.00	1,838.97	223,748.24
DECEMBER	.93	1,233.00	1,864.57	226,845.31
JANUARY	.94	1,233.00	1,890.38	229,969.19
FEBRUARY	.94	1,233.00	1,916.41	233,118.60
MARCH	.94	1,233.00	1,942.66	236,294.26
APRIL	.94	1,233.00	1,969.12	239,496.38
MAY	.94	1,233.00	1,995.80	242,725.18
JUNE	.94	1,233.00	2,022.71	245,980.89
JULY	.94	1,233.00	2,049.84	249,263.73

AUGUST	.94	1,233.00	2,077.20	252,573.93
SEPTEMBER	.94	1,233.00	2,104.78	233,911.71
OCTOBER	.94	1,233.00	2,132.60	259,277.31
NOVEMBER	.94	1,233.00	2,160.64	262,670.95
DECEMBER	.94	1,233.00	2,188.92	266,092.87
JANUARY	.95	1,233.00	2,217.44	269,543.31
FEBRUARY	.95	1,233.00	2,246.19	273,022.50
MARCH	.95	1,233.00	2,275.19	276,530.69
APRIL	.95	1,233.00	2,304.42	280,068.11
MAY	.95	1,233.00	2,333.90	283,635.01
JUNE	.95	1,233.00	2,363.63	287,231.64
JULY	.95	1,233.00	2,393.60	290,858.24
AUGUST	.95	1,233.00	2,423.82	294,515.06
SEPTEMBER	.95	1,233.00	2,454.29	298,202.35
OCTOBER	.95	1,233.00	2,485.02	301,920.37
NOVEMBER	.95	.00	2,516.00	304,436.37
DECEMBER	.95	.00	2,536.97	306,973.34

TOTALS:		163,222.00	141,751.34	306,973.34
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CERTIFICATE OF SERVICE

I, Gail Ferguson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing

FINAL DECISION

by depositing a true copy thereof in the U.S. Mail, postage prepaid, this

20th day of December, 1996, to the following:

EDWARD J CABELL
PO BOX 1172
MORGANTOWN WV 26507

BLUEFIELD STATE COLLEGE
BLUEFIELD WV 24701

ROSEMARY HUMWAY ESQ
STATE COLLEGE & UNIVERSITY SYSTEMS
1018 KANAWHA BLVD E
CHARLESTON WV 25301

PAUL R SHERIDAN
SENIOR ASST ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
L & S BLDG 5TH FLOOR
812 QUARRIER ST
CHARLESTON WV 25301



GAIL FERGUSON
ADMINISTRATIVE LAW JUDGE