STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

September 4, 1996

Freda Conrad
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Union Rescue Mission
107 Jefferson St.
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Sandra Henson
Assistant Attorney General
812 Quarrier St.
Charleston, WV 25301

Re: Conrad v. Union Rescue Mission
EA-191-93

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,

Robert B. Wilson
Administrative Law Judge

RW/mst

Enclosure

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

FREDA CONRAD,

Complainant,

v. DOCKET NUMBER: EA-191-93

UNION RESCUE MISSION,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on June 4, 1996, in Marion County, at the Fairmont State College, Fairmont, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, Freda Conrad, appeared in person and by counsel, Sandra Henson, Assistant Attorney General, and Intern Law Student, Kimberly Williams, representing the West Virginia Human Rights Commission. The respondent, Union Rescue Mission, appeared by its representative, Robert B. Thompson, Executive Director, and by counsel, David R. Janes, of the firm Tharp, Liotta & Janes.

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. The complainant, Freda Conrad, was born November 10, 1913. The complainant worked for the respondent from 1975 until she was terminated on May 12, 1992. The complainant was 78 years old at the time of her termination. Tr. pages 6, 7, 13 and 14.

2. The complainant timely filed a complaint under the West Virginia Human Rights Act alleging that respondent terminated her based upon unlawful considerations of her age and the assumed infirmities accompanying her age.

3. Respondent, Union Rescue Mission is a person and an employer as those terms are defined by W. Va. Code §§ 5-11-3(a) and 5-11-3(d), respectively.

4. Respondent employed cooks and others in its kitchen at the time of complainant's termination, including: the complainant, age 78; Juanita Fetty, age 78; Elizabeth Swisher, age 75 or 76; and Edith Closson, age 60, as cooks; and Mildred Ledsome, Dorothy Carpenter as fill in and other help. Tr. pages 10 and 11.

5. Jim Watson was the Chief Executive Officer or Executive Director at the time of complainant's termination. Mr. Watson prepared a staff reduction proposal for the consideration of the Board of Directors for the respondent. Tr. page 118.

6. That proposal called for the elimination of five positions with the respondent including those of Juanita Fetty, Wilda Doak, Mildred Ledsome, Elizabeth Swisher, and the complainant. The proposal specifically listed the ages of those persons who would be let go. Elimination of all five positions projected savings of $21,550 in salary and $3,706.56 in insurance; while hiring of a full time cook to replace the five part time employees would cost $9,000. Joint Exhibit No. 2.

7. William Phillips was a Board member for the respondent at the time of the adverse employment action. He testified credibly that the matter was referred to the personnel committee for consideration and that he would not have personnel knowledge of whether the personnel committee considered ages in making its recommendation to the Board. Tr. page 132.

8. Ms. Closson testified that she was 60 at the time she was retained by respondent; and that the respondent also retained Dorothy Carpenter, age early 60's at the time, as a substitute cook. Respondent further hired a younger man, Michael Edwards, to take over as a full time cook. All subsequent cooks hired by respondent have similarly been younger than complainant. Tr. pages 80, 81 and 82.

9. Complainant was able to perform her duties as cook at the time she was terminated. She could do her job despite arthritis. People liked what she cooked. There were no jobs that complainant couldn't do, except run downstairs and back to the cooler and freezer. Tr. pages 17, 94 and 108.

10. Although it was suggested that there were limitations associated with cleaning dishes, it is clear that both the complainant and Ms. Closson, who was retained had clients to help clean up pots and pans. Tr. pages 94, 95 and 111.

11. Although it was suggested that complainant sat on stools while performing various duties, all other cooks similarly sat on stools to perform certain duties and complainant was not impaired in her ability to perform her duties as cook, nor did her performance impede the smooth performance of the duties in the kitchen. Tr. pages 101 and 108.

12. Complainant has retained the ability to perform her job duties, as evidenced by the fact that at all times since 1990, except for the six week period during which she convalesced from hip replacement, she has performed all household chores at home despite her arthritic condition. Tr. pages 68, 69 and 75.

13. Shortly before her termination, the complainant met with Mr. Watson, the Executive Director, who explained there would be cutbacks due to financial problems, but he did not explain that he would be expecting those that stayed to work 12 hour shifts. Tr. pages 37 and 38.

14. Ms. Closson told the complainant that Mr. Watson tried going with 12 hour shifts, but that didn't last. Ms. Closson's new hours were 12:30 p.m. to 6:00 p.m. Tuesday through Thursday; and 6:00 a.m. to 6:00 p.m. Friday and Saturday. Tr. pages 40, 41 and 109.

15. Ms. Closson was first employed by respondent in 1969 and had five years seniority over complainant at the time of the termination. Tr. pages 26 and 80.

16. The complainant was able to work for respondent but was not willing or able to work twelve hours per day, as it was her opinion that no person is capable of working twelve hours per day in the respondent's kitchen. Tr. 20 and 41.

17. The complainant did not attempt to mitigate her damages by submitting job applications, or by going to job service or the unemployment office. Tr. page 42.

18. Complainant felt terrible when she was terminated, stating that it felt like the end of the world. The Union Mission was like a home away from home for the complainant. Tr. pages 20 and 21. Other witnesses testified that complainant was upset and still talks about it all the time; and that complainant was shocked, in disbelief and could not understand it; and that it had a very negative financial impact upon her. Tr. pages 56, 66 and 67.

19. At the same time that Mr. Watson recommended the termination of five kitchen employees for the respondent, with a projected savings of $21,550 in salaries (less of course $9,000 for Mr. Watson's younger male hire as full time cook), the respondent was purchasing a house for Mr. Watson for almost $46,000. Tr. page 129, Joint Exhibit No. 2 and Joint Exhibit No. 4, under Cash Disbursements Administrative No. 1136.

B.

DISCUSSION

To make a prima facia case of employment discrimination under the West Virginia Human Rights Act, a complainant must offer proof that:

1. The complainant is a member of a protected class;

2. the employer made an adverse decision concerning the complainant; and,

3. but for the complainant's protected status, the adverse decision would not have been made. Conaway v. Eastern Associated Coal Corp., 178 W.Va. 475, 358 S.E.2d 423 (1986).

The "but for" test of discriminatory motive making up the third prong of the Conaway test is merely a threshold inquiry, requiring only that a complainant show an inference of discrimination. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995). Recently, the United States Supreme Court has held that under the ADEA, discrimination is prohibited on the basis of age and not class membership. Thus, the fact that an older worker is replaced by another member of the protected class does not prevent a complainant

from proving that she was discriminated against on the basis of age. O'Connor v. Consolidated Coin Caterers Corporation, 517 U.S. ___, 116 S.Ct. ___, 134 L.Ed.2d 433, 70 F.E.P. Cases 468 (1996).

A discrimination case may be proven under a disparate treatment theory which requires that the complainant prove a discriminatory intent on the part of the respondent. The complainant may prove discriminatory intent by a three step inferential proof formula first articulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). Under this formula, the complainant must first establish a prima facia case of discrimination; the respondent then has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally the complainant must show that the reason proffered by the respondent was not the true reason for the employment decision, but rather pretext for discrimination.

The term "pretext" has been held to mean an ostensible reason or motive assigned as a color or cover for the real motive; false appearance, or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway, supra. Pretext may be shown through direct or circumstantial evidence of falsity or discrimination. Barefoot, supra. Where pretext is shown discrimination may inferred, Barefoot, supra, though discrimination need not be found as a matter

of law. St. Mary's Honor Society v. Hicks, 509 U.S. ____, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

There is also the "mixed motive" analysis under which a complainant may proceed to show pretext, as established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); and recognized by the West Virginia Supreme Court in West Virginia Institute of Technology, supra. "Mixed motive" applies where the respondent articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the "mixed motive" analysis, the complainant need only show that age played some role in the decision, and 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 age. Barefoot, 457 S.E.2d at 162, n. 16; 457 S.E.2d at 164, n. 18.

The complainant has demonstrated that she was a member of a protected class, in that she was over the age of forty at the time the alleged incident of age discrimination occurred. An adverse employment action was taken, in that she was terminated from her position on May 12, 1992. Complainant was terminated from employment while other younger persons were retained for employment and one younger individual hired to work for respondent. Thus, a prima facia showing of age discrimination has been made.

The respondent has articulated a legitimate nondiscriminatory reason for complainant's termination. That reason advanced by respondent indicates that complainant was let go because a money saving plan had been developed, whereby several part-time cooks would

be terminated; and a second full-time cook would be hired to replace those other individuals. Under the scenario advanced by respondent, complainant was unable to perform her duties as they would be redefined, in that she could not work twelve hour shifts.

It must be stated that the principal involved with making the decision terminating the complainant did not testify and his demeanor or explanation for his actions are unavailable to the fact finder in determining this case. Thus, Mr. Watson's motivations must be inferred based upon the preponderance of the evidence available. The complainant has demonstrated, by a preponderance of the evidence, that although Mr. Watson developed a plan whereby complainant and several other part time staff would be terminated and a new full time cook employed as a cost savings measure in advance of the negative employment action; Mr. Watson did not develope a plan calling for twelve hour shifts until after that plan had been approved. In addition, it is certain that a part time substitute cook was retained at the time of complainant's termination. Respondent has failed to submit evidence that would indicate that the complainant was incapable of performing the duties of the substitute cook. Thus, the reasons advanced for the necessity of terminating the complainant were shown to be pretextual.

The overwhelming direct evidence of discriminatory intent in this case is the staff reduction proposal itself, which specifically lists the ages of those persons to be terminated under the plan. The fact of the matter is that each of the those terminated were older than those retained for employment. The two youngest members of the staff were retained, and a younger man hired to replace the departing

employees. Mr. Watson specifically met with the kitchen staff to discuss this matter and never mentioned specific scheduling requirements with any of those involved, be they those who were terminated or those that were retained. To the extent that some change in duties would be required under his proposal, obviously Mr. Watson simply determined that the youngest staff members were those that would be able to perform those duties, as he certainly made no attempt to independently judge the suitability for those duties beyond the evidence offered by respondent, that he had the opportunity to observe each in the kitchen. From this, it is determined that the respondent's decision was motivated in some part by the relative age of the complainant, and the preponderance of the evidence does not show that the decision as to who would be retained would have been the same without that unlawful consideration of complainant's relative age.

It is found that respondent discriminated against complainant and the others by listing their ages and basing his decision to retain two employees upon their younger age. The preponderance of the evidence indicates that complainant was capable of working the substitute cook position. The twelve hour shift requirement did not last long, nevertheless, complainant was unwilling to work twelve hour shifts. Regardless of her attempt to demonstrate that she should be awarded back pay in this case based upon either of the earnings of those retained by respondent at the time of her discharge, it can not be awarded given her failure to mitigate her damages. In Paxton v. Crabtree, 400 S.E.2d 245 (W.Va. 1990), the West Virginia Supreme Court held that mitigation of damages in a Human Rights Act case, is an

affirmative defense to be raised by the respondent. Under Paxton, 400 S.E.2d at 251, the respondent must show that there were essentially equivalent positions which were available and that the complainant failed to use reasonable care and diligence in seeking such positions. Complainant made no attempt to find alternative employment by her own admission. The reason advanced by complainant is that no-one would hire a person of her advanced age. She had previously been a house-wife and worked for only the respondent in her entire life. The failure to seek work is an act of surrender to the very age discrimination from which complainant seeks redress against respondent and does not justify a failure to attempt mitigation.

Complainant has suffered tremendous humiliation, embarrassment and emotional and mental distress and loss of personal dignity as a result of the respondent's unlawful discrimination. The action has essentially deprived her of her home away from home and has upset her to a degree that remains unabated to this day. The complainant is entitled to incidental damages in the amount of $3,277.45. Pearlman Realty Agency v. West Virginia Human Rights Commission, 161 W.Va. 1, 239 S.E.2d 145 (1977); Bishop Coal Company v. Salyers, 181 W.Va. 71, 380 S.E.2d 238 (1989). Bishop Coal, supra, provided for a cap on such damages at $2,500 to be adjusted from time to time to conform to the consumer price index.

C.

CONCLUSIONS OF LAW

1. The complainant, Freda Conrad, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, WV Code §5-11-10.

2. The respondent, Union Rescue Mission, is an employer as defined by WV Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act.

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

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

5. Complainant has established a prima facie case of age discrimination.

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has established, by a preponderance of the evidence, to be pretext for unlawful age discrimination.

7. Despite the unlawful discriminatory action of the respondent, the complainant is not entitled to backpay as she failed to mitigate her damages after her termination by seeking alternate employment.

8. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of $3,277.45 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

9. As a result of the unlawful discriminatory action of the respondent, the Commission is entitled to an award of reasonable costs in the aggregate amount of $903.59.

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 practices.

2. Within 31 days of receipt of this decision, the respondent shall pay to the Commission costs in the amount of $903.59.

3. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of $3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

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

5. 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 4th day of September, 1996.

WV HUMAN RIGHTS COMMISSION

BY: _____

ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I, Robert B. Wilson, 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 4th day of September, 1996, to the following:

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ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE