STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
1321 Plaza East
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Charleston, WV 25301-1400

GASTON CAPERTON
GOVERNOR

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Quewanncoii C. Stephens
Executive Director

9 September 1991

James R. Crawford
167 Branch Road
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Mary Catherine Buchmelter
Deputy Attorney General
812 Quarrier St., 5th Floor
Charleston, WV 25301

Re: Crawford v. Valley Camp Coal Company
Docket Nos. EH-125-85 and EA-126-85

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled and numbered case. Pursuant to W. Va. Code § 5-11-11, as amended and effective July 1, 1990, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for review of this Final Order.

Sincerely,

QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

QCS/jm
Enclosures
Certified Mail/Return
Receipt Requested
cc: The Honorable Ken Hechler
Secretary of State

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the Clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the Clerk of the Supreme Court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the Commission awards damages other than back pay exceeding $5,000.00; (2) cases in which the Commission awards back pay exceeding $30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code § 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAMES R. CRAWFORD,

Complainant,

v. DOCKET NO. EH-125-85
EA-126-85

VALLEY CAMP COAL COMPANY,

Respondent.

FINAL ORDER

On January 30, 1991, this matter came on for public hearing before John A. Rogers, Hearing Examiner Pro Tempore. On May 24, 1991, after consideration of the testimony and other evidence, as well as the proposed findings and other written submissions of the parties, the Hearing Examiner Pro Tempore issued his Final Decision. This decision directed that the case be dismissed with prejudice and be closed.

No appeal having been filed pursuant to W. Va. Code § 5-11-8(d)(3) and § 77-2-10 of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission, the Final Decision of the Hearing Examiner Pro Tempore attached hereto is adopted, without modification or amendment, as the Final Order of the West Virginia Human Rights Commission, in accordance with § 77-2-10 of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 12th day of December, 1991 in Charleston, Kanawha County, West Virginia.

QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

COPY

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Quewanncoii C. Stephens
Executive Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

May 28, 1991

James Crawford
167 Branch Rd.
Belle, WV 25015

Daniel L. Strickler, Esq.
1600 Laidley Tower
PO Box 553
Charleston, WV 25322

RECEIVED
MAY 29 1991
ATTORNEY GENERAL
CIVIL RIGHTS DIV.

Mike Kelly, Esq.
Suite 612
People's Bldg.
Charleston, WV 25301

Re: Crawford v. Valley Camp Coal Co.
EH-125-85 & EA-126-85

Dear Parties:

Enclosed, please find the final decision of Hearing Examiner, John Rogers, 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 hearing examiner'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 examiner, 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 hearing examiner shall not operate as a stay of the decision of the hearing examiner 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 hearing examiner, or an order remanding the matter for further proceedings before a hearing examiner, 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 hearing examiner, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the examiner on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the hearing examiner'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 hearing examiner's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirm-

ing the examiner'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, please feel free to contact me at the above address.

Sincerely yours,

Quewanncdii C. Stephens
Executive Director

QCS/GSG/mst

Enclosure

cc: Glenda S. Gooden, Legal Unit Manager
Mary C. Buchmelter, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAMES R. CRAWFORD
Complainant,

v. Docket Nos. EH-125-85
EA-126-85

VALLEY CAMP COAL COMPANY,
Respondent.

FINDINGS of FACT

This matter came on for hearing on 30 January 1991 at the offices of the West Virginia Human Rights Commission in Charleston, Kanawha County, West Virginia, Hearing Examiner pro tempore John A. Rogers, presiding. Present were the complainant, James R. Crawford; Deputy Attorney General Mike Kelly on behalf of the West Virginia Human Rights Commission; and Frank Simmons and Daniel L. Stickler, on behalf of the respondent, Valley Camp Coal Company.

The undersigned Hearing Examiner hereby certifies that he has read the transcript in this matter, taking into account the testimony of all witnesses and the evidence tendered; has examined the exhibits introduced; has reviewed his notes contemporaneously taken; and has considered the proposed findings of fact and conclusions of law submitted by the parties hereto. After mature and careful consideration I find as follows.

1. Complainant James R. Crawford is a white male, born 10 November 1919.

2. Complainant was employed by the respondent Valley Camp Coal Company, parent corporation of Shrewsbury Coal Company, on 13 August 1975. (Tr. p. 227). In 1983 Valley Camp Coal was divided into two companies, Shrewsbury Coal and Donaldson Mining. (Tr. p. 230). Complainant was employed during most of the time at issue by the Shrewsbury Coal Co. For the purposes of this proceeding both Valley Camp and Shrewsbury Coal are considered to be complainant's "employer" as defined by W.Va. Code 5-11-3(d).

3. Complainant is a member of that class of persons protected against age discrimination.

4. Respondent is, and was at all times relevant to this matter, a signatory to the collective bargaining agreement executed with the United Mine Workers of America. Complainant was at all times relevant to this matter, a member of United Mine Workers of America. Complainant's employment was governed by a series of collective bargaining agreements, namely the National Bituminous Coal Wage Agreements of 1981, 1984 and 1988. (Tr. p. 231, R. Ex. 3, 4, and 5).

5. Complainant was initially hired by respondent as a crane operator but also operated bulldozers and endloaders as part of his general job classification. (Tr. pp 130-132). The various jobs to which complainant was assigned were subsumed under one seniority unit for purposes of job bidding and eligibility. (Tr. pp. 244-245).

6. At the time complainant was hired he suffered from an arthritic spine but was hired despite his disability. (Tr. pp. 134-137; p. 195).

7. In late 1975, complainant suffered a back injury at work and was off work for an extended period of time. Following this injury respondent discharged complainant without just cause and subsequently lost an arbitration decision precipitated by complainant's grievance. (Arbitration 17-76-323, HRC Ex. 2).

8. Following complainant's reinstatement pursuant to the above-referenced decision, respondent's agents became critical of complainant's work. (Tr. p. 147; also, pp. 149-150, 153-154, 277-279 and 281-283). Nonetheless, respondent gave complainant only two official warnings, both in September, 1975, only a month after complainant was first hired and well before his back injury. (HRC Ex 1.)

9. During the period 1976 through 1983 complainant operated various equipment , including a crane, various bulldozers (designated Models D-4, D-7 and D-8), two types of Caterpillar endloaders (Models 950 and 966) and a Trojan endloader.

10. Sometime during 1979 complainant bid on a job requiring operation of a Model 988 endloader, a machine substantially larger than the endloaders he normally operated. (Tr. p. 157, also pp. 378-379 and R. Ex 1, p. 4). Although complainant did not pass an initial test to qualify for operating the machine, he was was directed to operate the machine at various times subsequent to his failing the test. (R. Exhibit 1, pp. 6 and 9).

11. Between 28 January and 8 August 1983 complainant was off work due to an injury unrelated to the injury he suffered in 1975. During that period, sometime in July, 1983 a reduction in force occurred because of economic conditions. This reduction was carried out pursuant to the provisions of the collective bargaining agreement then in effect. (Tr. pp. 231-234; also, HRC Exhibits 3 and 4).

12. When complainant became physically able to return to work in August, 1983 he was one of four persons eligible for recall. Of those four persons, complainant was the most senior in service and the oldest by a substantial margin. (Tr. 161; HRC Ex. 3 and 4).

13. Pursuant to the collective bargaining agreement then in effect, eligibility for recall to work also required that the person recalled be able to perform the "work of the job at the time the job is awarded." (Article XVII, Section (b), subdivision (b), R. Exhibit 3, p. 64).

14. Upon returning to work in August, 1983, complainant was given a test to determine his fitness to operate a Model 988 endloader. Although he failed the test, complainant won an arbitration award allowing another test because the arbitrator was not satisfied that respondent's actions were "free from favoritism, discrimination, and arbitrariness for convenience after the general lay-off when Crawford (was) absent because of illness and injury." (R. Ex 1, ppg. 20-22). Pursuant to this ruling, complainant was again tested on 14 May 1984. (Tr. p. 10).

15. The results of the 14 May 1984 "field test" were sharply disputed, with testimony from respondent's witnesses that complainant was unable to operate the 988 endloader safely and complainant's witnesses testifying that the complainant was

competent. A pre-shift check of the particular machine involved in the test showed that it was "Dangerous to operate---Transmission leaky + does not shift right---steering bad----rough and jerky. Wheel has too much play." (HRC Exhibit 8). No objective criteria for passage of such a "field test" were established, leaving the results subject to the judgments of those present. A conclusive finding as to complainant's fitness to operate the endloader is not possible to make.

16. Complainant executed a BCOA Standardized Panel Form upon being laid off on 19 August 1983. (R. Ex. 8). That form indicated complainant wished to be recalled to any endloader, crane operator or bulldozer operator job at any of respondent's work sites, including surface mine operations. Subsequent to 26 September 1983, when jobs became available at respondent's surface mines, complainant requested by telephone that his form be amended to eliminate him from consideration for surface mine jobs. (Tr. pp. 381-382.) When complainant attempted to re-amend the panel form, respondent's agent Fred Landers refused his request, telling complainant that the At that the BCOA contract only allowed amendment once every twelve months. The contract allows amendments "once a year." (R. Ex. 3, Article XVII, Sec. (d), p. 67). I find the contract language to be vague and potentially misleading but the respondent's interpretation reasonable.

17. Complainant would have been eligible for recall to jobs posted on 18 May 1984 had it not been for the amendment to his panel form. Employees who were younger and less senior in service were hired pursuant to this posting. (Tr. pp. 258-259; also HRC Ex. 6). Complainant filed and lost a grievance relating to the amendment. (R. Ex. 2).

18. Complainant amended his panel form in 1985 and was recalled to work 20 February 1989. He worked until he injured his back 24 May 1989. (Tr. pp. 219- 221, 385.).

CONCLUSIONS OF LAW

1. Complainant is a protected "person" within the meaning of the West Virginia Human Rights Act. W.Va. Code 5-11-3(a) Respondent is an "employer" within the meaning of the West Virginia Human Rights Act. W.Va. Code 5-11-3(d).

2. The West Virginia Human Rights Act forbids discrimination on account of age. W. Va. Code 5-11-3(h).

3. The burden of establishing a prima facie case of discrimination rests with the complainant. To establish a prima facie case, the complainant must show that " (1) the plaintiff is a member of a protected class. (2) that the employer made an adverse decision concerning the plaintiff. (and) (3) But for the plaintiff's protected status, the adverse decision would not have been made." Syllabus Point 3, Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (1986), quoted in Syllabus Point 1, Shell v. Metropolitan Life, 396 S.E.2d 174 (1990).

4. Respondent made several adverse decisions regarding complainant's employment but complainant failed to establish that "but for" his protected status the adverse decisions would not have been made.

DISCUSSION

This case illustrates in bas relief the chronic labor-management difficulties so endemic to West Virginia's coal industry. Clearly, the weight of the evidence shows that complainant and respondent were combatants in a game no one can ever win. I find that the hostility, distrust and ill will rampant in so many labor-management relations in the coal industry were all present in the dealings at issue here.

Nonetheless, while Valley Camp Coal did not conduct itself as an enlightened employer, neither can it be condemned as guilty of discrimination. Because it is unclear to me, as it was unclear to the arbitrator in the 1984 arbitration referenced herein, whether complainant was truly qualified to operate the endloader in question, I am unable to find that respondent used the various ill-planned and poorly managed opportunities for testing as a pretext for age discrimination. Similarly, while it may be possible that Valley Camp deliberately altered complainant's panel form so as to prevent his recall, the evidence did not prove this action. Indeed, I have found that complainant himself voluntarily caused the panel form to be amended.

Respondent doubtless could have treated complainant with more respect and with greater consideration during the period at issue. But respondent also had a duty to other employees to ensure that their work place was safe. Under the evidence as adduced herein, respondent was well within its rights to judge, based on three tests administered over several years' time, that complainant was unsafe in the operation of the endloader here. Doubtless, complainant felt unfairly hurried and put under undue pressure but any doubt as to skill needed to operate so considerable a machine must be resolved in respondent's favor. Taken by itself, judging complainant unsafe in operation of this machine is not sufficient to show a pretext for discrimination. Similarly, the other instances of disagreement between complainant and respondent do not demonstrate a pretext for discrimination. Further, respondent demonstrated at least some good faith by recalling complainant to a job for which he was clearly qualified several years after the incidents complained of here.

Because I find that complainant failed to establish a prima facie case, the other issues raised herein are deemed moot and therefore not discussed.

ORDER

For the reasons stated above, this complaint is dismissed.

John A. Rogers
Hearing Examiner, Pro Tem