BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

PAMELA EVANS FRANCO

Complainant,

v. DOCKET NO. ES-146-77

MONTGOMERY GENERAL HOSPITAL

Respondent.

FINAL DECISION AND ORDER

I
PROCEEDINGS

This case came on for hearing on June 23 and June 24, 1982, at the Montgomery City Hall, Montgomery, West Virginia before Hearing Examiner Emily A. Spieler, and Hearing Commissioner George Rutherford (June 23, 1982) and Hearing Commissioner Russell Van Cleve (June 24, 1982). The Complainant appeared in person and was represented by Assistant Attorney General Gail Ferguson, who also represented the West Virginia Human Rights Commission. The Respondent appeared by its counel, Fred F. Holroyd.

On November 1, 1976, the Complainant filed a verified complaint under the name of Pamela Evans with the West Virginia Human Rights Commission alleging that the Respondent, Montgomery General Hospital, had discriminated against her on the basis of her sex by terminating her from employment in violation of W. Va. Code §5-11-9(a). The Human Rights Commission issued a letter of determination finding probable cause to believe that the Human Rights Act had been violated on July 14, 1977.*

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* The initial probable cause finding indicated a violation of the Act based upon race. The complaint and the evidence do not support this and we regard it as a clerical error which has not affected the rights of the parties.

On February 10, 1982, the Human Rights Commission by Howard D. Kenney, Executive Director, served written notice of public hearing upon the parties pursuant to W. Va. Code §5-11-10. The Respondent filed an answer denying any and all illegal practices on February 23, 1982. Sometime during the pendency of this case, the Complainant changed her name to Pamela Evans Franco and the complaint was subsequently amended to reflect this change by order of Hearing Examiner Theodore Dues.

On May 26, 1982, pursuant to §7.10 of Administrative Regulations of the Human Rights Commission, a pre-hearing order was entered by Hearing Examiner Emily A. Spieler. A pre-hearing conference was held on June 14, 1982, pursuant to §7.09 of the Administrative Regulations, in which the Complainant and the Human Rights Commission appeared by Assistant Attorney General Gail Ferguson, and the Respondent appeared by its attorney Fred F. Holroyd. The matters determined at the pre-hearing conference were summarized by the Hearing Examiner in a pre-hearing order which was read into the record at the hearing. (Tr. I, 4-15). The Record was kept open at the close of the hearing in order to allow the parties the opportunity to file certain necessary information, regarding rates of pay increases and personnel changes in the relevant departments of Montgomery General Hospital. Said Information was filed by the Respondent on July 12, 1982, and hearing no objection regarding this information from the attorney for the Complainant and the Human Rights Commission, the record was closed immediately therafter.

After full consideration of the entire testimony, evidence, motions, briefs, and arguments of cousel, and post-hearing submission of evi-

dence, the Hearing Examiner recommends that the Commission make the following Findings of Fact and Conclusions of Law.

II
ISSUES

The ultimate issues to be determined in this case are as follwos:

1. Was the termination of the Complainant from her employment at Montgomery General Hospital discriminatory on the basis of sex?

   In evaluating this issue, we must determine whether termination based upon unwed and/or pregnant status of a Complainant constitutes illegal sex discrimination under the West Virginia Human Rights Act.

2. If the Complainant was discharged illegally on the basis of her sex, what is the appropriate remedy?

III
SUMMARY OF THE EVIDENCE

Both the Complainant and the Respondent had full opportunity to call all witnesses and present all evidence, insofar as it was relevant, relative to this complaint.

The Human Rights Commission and the Complainant called as their witnesses, in addition to offering the testimony of the Complainant herself, the following: Becky Cottrell Toney, co-worker with the Complainant in the pharmacy department of Montgomery General Hospital; Deborah Sue Scalise, co-worker hired subsequent to Complainant in the pharmacy department; Arthur P. Boyd, Personnel Director and EEO Officer in 1976; James A. Gillespie, Chief Pharmacist and Director of Purchasing in 1976; Kenneth R. Fultz, Administrator since 1966; and

Linda Gray, co-worker of the Complainant in the stores department. The Respondent called as its witnesses the following: Ralph G. Sullivan, Assistant Administrator and Comptroller in 1976; John Gray, Materials Manager; George John, Sr., Pharmist (under Mr. Gillespie) in 1976; and Francina Rosenthal, Chief Medical Technologist.

There is little dispute regarding certain relevant factual issues, including; prior treatment of single pregnant employees; general organization of the hospital; employees' names and job functions, and dates of employment in the relevant hospital departments; and tenure and duties of the Complainant. In addition, there is now no dispute that the Complainant performed her job satisfactorily, and that she was not discharged because of any inadequacy in her job performance.*

The Complainant testified, in relevant part, that she was hired on May 7, 1976, for a full-time permanent, position. She indicated on her pre-employment physical form that she was not pregnant and that her marital status was single. She was terminated by Respondent on September 10, 1976, and her child was born on November 18, 1976, approximately two weeks over full term. At the time she was hired, she was pregnant but was not aware of it.**

She was given a job working mornings in the pharmacy and afternoons in the central stores department. In the pharmacy she acted as a pharmacy clerk, typed the UMWA register (that is, performed the

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*The Respondent asserted, in its answer and pre-hearing statement, that Complainant was terminated for cause, but later abandoned this position.

**All witnesses agreed that her pregnancy did not become physically apparent until approximately August.

billing functions on UMWA insurance), and filled in at the pharmacy window taking prescriptions from customers, deciphering them, and typing labels. Her direct supervisor was George John, Sr. At the time of hire, her co-workers were Cindy Moore (also pharmacy clerk who worked at the window and did fill in at the UMWA billing); Becky Cottrell (now Becky Cottrell Toney); George John, Jr., who worked part time as a technician in the pharmacy while going to school; Nancy Bennett, a pharmacy student intern, who worked for the summer of 1976. In addition, Deborah Scalise was hired to work in the pharmacy in August, 1976 as a receptionist/clerk and her duties were the same as the Complainant's except that Scalise did not generally type the UMWA register. Ms. Evans assisted in training Scalise. (Tr. I-41, 42, 65).

The Complainant testified that her duties in the stores department were to act as receptionist and to do filing, typing and answering of the telephone. In the stores department her direct supervisor was John Gray. James Gillespie acted as supervisor over both Mr. John and Mr. Gray. All of these facts are basically undisputed, and were corroborated by a number of witnesses.

After Ms. Evans discovered she was pregnant, she told a number of co-workers as well as members of her family.

Ms. Evans then testified regarding a series of conversations involving supervisory personnel regarding her job. All of these conversations are denied, in whole or in part, by the supervisors in question:

In july, Ms. Evans testified she was called into Arthur Boyd's office, at which time he asked her if she was pregnant, and she replied in the affirmative. She said she would continue to work, and he said that would be fine. (Tr. I-31, 56).

Mr. Boyd does not recall any such conversation, but does not deny that it took place. (Tr. I-174). John Gray confirmed that the Complainant was called to personnel at some time, although he cannot recall precisely when. (Tr. II-146).

In July, the Complainant testified that she overheard a conversation between Mr. Gillespie and Mr. Boyd wherein Mr. Boyd said, "We might as well get rid of her before it is too late." (Tr. I-32, 56-58). Mr. Boyd does not recall such a conversation, but denies he would have wanted to get rid of her because of her pregnancy. (Tr. I-178, 185). Mr. Gillespie denies having had any conversation with Mr. Boyd regarding the Complainant. (Tr. I-218).

Immediately thereafter, according to the Complainant, John Gray was called out of the office. When he returned, he reported to her that Mr. Boyd, Mr. Gillespie and Mr. John and he were arguing about whether to retain her or get rid of her because she had lied on her application, presumably about her pregnancy. (Tr. I-33, 59, 73, 74). John Gray confirmed having a conversation with Complainant, in which she voiced her fears regarding termination due to pregnancy and he said, "I said that I didn't think that was, you know, what would happen, and it wasn't something that we did and that I would intervene if that were the case and that I did, you know, approach the people about that and obviously they told me that wasn't the case." (Tr. II-146-147).

According to the Complainant, Arthur Boyd called her back into his office in July and offered her a part-time position in stores, which she refused. He then told her that she might be terminated for lying on her application. He also said that he might hire soneone full time

for the pharmacy. (Tr. I-33). She said she would see a lawyer, and she did so. (Tr. I-33, 61, 79). Again, Mr. Boyd cannot recall this conversation. (Tr. I-174). However, a full-time position was thereafter created as discussed, infra at 13.

A co-worker in the pharmacy, Becky Cottrell, told the Complainant that she should be sure to do her work carefully because management was looking for a reason to get rid of her. (Tr. I-39, 63-64). This conversation, admitted over Respondent's objection was fully confirmed by Becky Cottrell Toney. Ms. Toney testified that she had a conversation with George John, Sr. in which he asked her to keep an eye on the Complainant because Mr. Gillespie needed an excuse to get rid of the Complainant. In the same conversation, they discussed the fact that the Complainant was pregnant. Although she was asked to watch and help out other new employees, she testified that this was the only time she was explicitly told that an excuse was sought to get rid of a co-worker. She attributed this to Complainant's pregnancy.[4] (Tr. I-99, 100, 119, 123-124). Mr. John denies that this conversation took place. (Tr. II-191, 210). Mr. Gillespie testified that it was customary for him to instruct supervisors to watch new employees, but that he did not ask George John to look for a reason to get rid of Pamela Evans. (Tr. I-225, 235).

The Complainant testified that she was called into Mr. Boyd's office on September 9, 1976, at which time he told her that she was being put part-time in stores because the pharmacy was now overstaffed (due to the hire of an additional employee) and because Mr. John had found fault with her work. (Tr. I-42, 66). Mr. John was on vacation at the time. (Tr. I-41, II-209). Again, Mr. Boyd does not recall this

conversation. (Tr. I-174). Mr. John denies ever indicating that he was not satisfied with the Complainant's work. (Tr. II-195).

On September 10, 1976, according to the Complainant, Arthur Boyd again called her into his office. This time he said that "people had been bugging them: and he terminated her. (Tr. I-44, 67). He has no recollection of such a conversation. (Tr. I-174). However, John Gray confirmed that administrators complained because "they were getting a lot of harassment from her mother and attorney and what-have-you and that they really wished that would stop." (Tr. II-148).

Kenneth Fultz, Administrator, confirmed that he received a call from Ms. Evans' mother with regard to possible animus against the Complainant due to her pregnancy. See, infra, p. 11-12.

The Complainant testified that she had never had any conversation with any supervisor regarding her marital status, but she had discussed her pregnancy as indicated above.

With regard to the question of damages resulting from her termination, the Complainant testified that she sought work after her termination and before the birth of her baby at Coal Valley Medical Center and at several grocery stores; that she was disabled for approximately two weeks at the time of the birth of the child on November 18, 1976; that she at all times had a babysitter available to watch the child; that she checked with the West Virginia Institute of Technology for a job probably twice in 1976; in 1977, she sought employment at the local Kroger's and Pennyfare stores; that in 1978 or 1979 she again sought work at Kroger's; that in October, 1979, she went to work at Kroger's and earned $454 there; that in January 1980 she left Kroger's because

of a strike and went to work at Pennyfare where she worked from January through June, 1980, earning $1, 454; that she voluntarily quit her job at Pennyfare because her husband was in an automobile wreck; that later in 1980 she checked with Dr. Morgan's office for employment, but did not fill out an application there nor did she seek employment elsewhere in 1981; and that she inquired for employment at the local Kroger's in 1982 but that she has not sought employment elsewhere. She further testified that she currently spends her time taking care of her home and her baby. She testified that as a result of her loss of employment in 1976 she lost her car and after sale of the car she still owed a balance of $768 on her loan. She wants and is available for employment at Montgomery General Hospital. (Tr. II-19-36, 236-238). No other evidence regarding questions of damages or mitigation was introduced into the record.

Testimony revealed that the supervisory and administrative staff of Respondent knew about Ms. Evans' pregnancy while she was employed. As noted above, Kenneth Fultz, Administrator, admitted receiving a phone call from the Complainant's mother regarding Ms. Evans' concerns that she might be terminated because of her pregnancy. (Tr. II-253). He asked Ralph Sullivan, Assistant Administrator, to investigate the complaint. Although Mr. Sullivan denied knowing about the pregnancy, he nevertheless also testified, in contradiction to this, that he was told of the complaint and checked with Mr. Gillespie, who assured him that the complaint was groundless. (Tr. II-74-75, 83). Arthur Boyd cannot recall knowing of Ms. Evans' pregnancy, but does not deny that his conversations with her took place. John Gray testified that he learned

about the pregnancy from one of Ms. Evans' co-workers in June. (Tr. II-143). George John, Sr. denies knowing she was pregnant, in contradiction to Becky Cottrell's testimony cited, supra. (Tr. II-188).

All supervisory witnesses agreed that Respondent had no policy of terminating pregnant employees, regardless of marital status. At least five other single, female employees became pregnant while employed and were given maternity leaves. However, no witness could recall another instance of a single employee who was pregnant when hired, or any other instance of a single employee who became pregnant in the pharmacy or stores department. (Tr. I-182, 184, 238, 246; II-49, 52-53, 119).

According to Ralph Sullivan, in the spring of 1976, both the pharmacy and stores departments requested additional help. A decision was made to create one position, divided between the two departments. (Tr. II-43-44). Pamela Evans was hired to fill this position. This position was eliminated, the supervisors agreed, due to decrease in patient census, and the Complainant was laid off. (Tr. I-221; II-46, 60). No specific evidence, either documentary or testimonial, was offered regarding this decrease in census. According to Mr. Sullivan, there is no other example of a new position which was created and then eliminated, resulting in the involuntary termination of an employee. (Tr. II-118). The supervisory staff also agreed that the patient census annually dipped in the summer and increased in the fall. (Tr. II-44-45, 101). Mr. Boyd and Mr. Sullivan also testified that the patient census was undergoing a gradual decline resulting in layoffs during this period. (Tr. I-169-170; II-103).

However, a new pharmacy clerk, Deborah Scalise, was hired in August, 1976. Testimony regarding this is confusing and contradictory. The requisition form for the position showed that the vacancy was created by the departure of Nancy Bennett and transfer of the Complainant to stores. State's Ex. 7. James Gillespie and Ralph Sullivan both testified that the vacancy was created by Bennett's departure; Sullivan further stated that Bennett herself replaced a full-time employee. (Tr. I-233; II-76). The documentary evidence showing turnover in the department does not show any departures of full-time personnel from pharmacy around the time Bennett was hired. See, document submitted by Respondent post-hearing and admitted as Hearing Examiner Ex. 2, revised. George John, Sr. testified that Nancy Bennett was a pharmacy student intern who acted as an assistant pharmacist and was a temporary employee; Deborah Scalise was not hired to replace her, but was hired because the pharmacy needed additional help. (Tr. II-203-204).

Becky Cottrell testified that James Gillespie asked her about Deborah Scalise's marital status and whether she was pregnant or had children, prior to the time Ms. Scalise was hired. (Tr. I-97-98). Mr. Gillespie denies that he made these particular inquiries, although he did ask employees about applicants generally. (Tr. I-220).

Ralph Sullivan testified that there was some discussion as to whether to put Pamela Evans into a full-time job in pharmacy or in stores. (Tr. II-78). However, when asked whether she was considered for the vacancy filled by Deborah Scalise, he said, "We can't move her around all over the hospital." (Tr. II-93). John Gray, stores supervisor, recalled no discussion of having her work exclusively in stores. (Tr. II-159).

Deborah Scalise testified that she was married when hired in August, 1976, and that she had no prior experience in performing pharmacy work. She confirmed that the Complainant assisted in her training and did substantially the same work. (Tr. I-136137).

Post-hearing documentary evidence submitted by the Respondent indicates that two employees, Michael Calhoun and Douglas Mason, were hired in the stores department after Ms. Evans was hired and were still working at the time she was terminated. Hearing Examiner, Ex. 2, revised. According to John Gray, both of these employees worked at unloading trucks, putting supplies away and delivering them to the floors. (Tr. II-166).

Generally, according to Mr. Boyd, the decision to lay off employees was made in a meeting of the Administrator, the Personnel Director, and the Comptroller. The decision as to which specific employee would be laid off followed the general decision to cut costs. (Tr. I-189).

Mr. Boyd, Mr. Fultz, and Mr. Sullivan all testified that employees serve an initial six-month probationary period, during which they do not accrue any seniority rights or recall rights. (Tr. I-199, 203, 204, 260; II-72, 110). The Personnel Policies Manual explicitly provides that lay offs will be done by seniority, and makes no exception for probationary employees. Resp. Ex. 1, p. 13, 14.

A memorandum indicating the need to cut staff by four or five employees was issued September 1, 1976. The Complainant was listed as one of two employees to be laid off. State's Ex. 7. Of the five employees listed, four quit voluntarily, according to Ralph Sullivan. (Tr. II-107).

Generally, the witnesses agreed, part-time employees are laid off before full-time employees, probationary employees are laid off before non-probationary employees, and non-probationary employees are laid off in order of seniority. (Tr. I-225, 257). According to Ralph Sullivan, Ms. Evans was selected for lay off over Deborah Scalise on the advice of James Gillespie and George John, Sr., because Ms. Scalise's skills were superior to Ms. Evans' (Tr. II-47). Mr. Gillespie could not recall any meeting at which it was decided that Ms. Scalise's skills were superior to those of Ms. Evans. (Tr. I-224). In fact, in his testimony, Mr. Gillespie attributed to Ms. Scalise the skills of the Complainant. (Tr. I-231). When examined in regard to this, he said that he did not know who was doing what in the pharmacy, but was sure that skills were discussed and that it was determined that Ms. Scalise was more qualified. (Tr. I-232). George John, Sr. testified that he did not participate in the decision to terminate the Complainant. (Tr. II-189).

In August, 1976, George John, Jr.* was working as a part-time technician in the pharmacy while majoring in biology in school. His hours were increased during the summer months. (Tr. II-205). He was not laid off as part of any economic reduction in force. Mr. Gillespie testified that George John, Jr. was not laid off in the summer or fall of 1976 because he was a special case and that Mr. Gillespie liked to see young people continue their education. Mr. Gillespie did not

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*George John, Jr. was George John, Sr.'s son. His employment in the pharmacy was admittedly against hospital policy against employment of relatives in the same department.

provide any specific explanation as to why the Complainant was laid off in preference to Mr. George John, Jr., other than personal preference. (Tr. I-228, 238).

No evidence was offered to explain the decision not to lay off employees in the stores department who were junior in tenure to the Complainant.

No supervisor could specifically recall any meetings preceding the September 1 memorandum, although Mr. Gillespie and Mr. Sullivan agreed that such a meeting must have taken place, probably about a week before the memorandum was prepared. (Tr. I-223, 244; II-89). Mr. Sullivan could not recall whether this meeting took place before or after Deborah Scalise was hired. (Tr. II-90).

Due to the inconsistencies in the testimony offered, we are called upon to evaluate the record and the credibility of witnesses carefully. We found Becky Cottrell Toeny to be entirely credible. As a current non-supervisory employee, she is disinterested in the outcome of this matter. She provided evidence corroborative of the Complainant's account. John Gray, a witness for the Respondent, also corroborated Ms. Evans' story in important details. On the other hand, we found Mr. Gillispie's testimony unconvincing on a number of key points. In particular, he failed to give a credible explanation as to why the Complainant was laid off in preference to Scalise. Ralph Sullivan also failed to explain this key point satisfactorily. Furthermore, his testimony was inconsistent and contradictory. The inexplicable inconsistencies in supervisors' explanations for the hire of Ms. Scalise and for the selection of Complainant for lay off can only lend greater credibility to Ms. Evans' claim that the Respondent was motivated to terminate her because of her pregnancy.

IV
LEGAL DISCUSSION

A. Liability

Federal law under Title VII is by no means controlling in cases under the West Virginia Human Rights Act. See, e.g., West Virginia Human Rights Commission v. United Transportation Union, Local 6551, 280 S.E.2d 653 (W.Va. 1981). Nevertheless, this Commission has consistently followed the lead of the federal courts in the precedure for the evaluation of evidence presented in employment discrimination cases wherein there is asserted disparate treatment of a member of a protected class. In particular, since direct evidence of discrimination is often unavailable to a Complainant, the Commission has followed the federal court in allowing a Complainant to prove employment discrimination cases inferentially. McConnell Douglas Corporation v. Green, 411 U.S. 792, 93 Ct. 1817 (1973); Texas Department of Community Affairs v. Burdine, ___ U.S. ____, 101 S.Ct. 1089 (1981).

Under the McDonnell Douglas formulation, the Complainant establishes a prima facie case if she or he proves: (a) that the Complainant belongs to a protected class; (b) that the Complainant applied for and was qualified for a job for which the employer was seeking applicants; (c) that despite his or her qualifications the Complainant was rejected for the job; and (d) that after the Complainant's rejection the job remained open and the employer continued to seek applications from persons of Complainant's qualifications. However, the requirements of the McDonnell Douglas prima facie case are not inflexible and must be properly tailored to the factual situation.

If the Complainant establishes a prima facie case under McDonnell Douglas by showing all four elements listed above, the burden shifts to the employer to rebutt the presumption of discrimination by articulating a legitimate non-discriminatory reason for its actions. The employer need not prove the legitimate non-discriminatory reason but must only articulate it. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether or not it discriminated illegally against the Complainant. Texas Department of Community Affairs v. Burdine, supra, at 101 S.Ct. 1094; Furnco Construction v. Waters, 438 U.S. 567, 98 S.Ct. 2943 (1978).

If the employer articulates a legitimate non-discriminatory reason for its actions, the Complainant may still prevail by persuading the trier of facts that the discriminatory reason more likely than not motivated the employer, or indirectly by showing that the employer's proffered explanation is a pretext and unworthy of credence. The ultimate burden of proof always rests on the Complainant. McDonnell Douglas Corporation v. Green, supra, 411 U.S. 804, 93 S.Ct. 1825 (1973); Texas Department of Community Affairs v. Burdine, supra, 101 S.Ct. at 1094-1095.

As noted above, the Supreme Court has held specifically that the McDonnell Douglas formulation will not neatly apply to every case of alleged employment discrimination but must be adapted to the facts at issue. McDonnell Douglas v. Green, supra, 411 U.S. 802, 93 S.Ct. 1817, n. 13. The case at hand requires careful analysis in order to arrive at an appropriate tailoring of the McDonnell Douglas formulation.

There is a category of cases that have been litigated in the federal arena which have been termed "sex plus" cases because they involve

not discrimination against all women as a class, but discrimination against some women. This discrimination can take one of two forms. In the first, the employer treats a subgroup of women with a particular characteristic different from the way men with the equivalent characteristic are treated. For example, women with children are denied employment when males with children are not. See, Phillips v. Martin-Marietta, 400 U.S. 542 (1871). In this situation, where men and women can have the equivalent characteristic, we must look to the treatment of equivalent males and females in determining whether an employer has discriminated illegally on the basis of sex. However, the effects of the anti-discrimination laws is not to be diluted because such discrimination adversely effects only a portion of the protected class. Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971).

In the second set of cases, women are discriminated against because of a characteristic unique to women: for example, pregnancy. Some of these cases involve a combination of pregnancy and unwed status. See, e.g., Beck v. Quiktrip Corporation, ___ F. Supp. ___ , 27 F.E.P. Cases 776 (D.C. Kan. 1981); Doe v. Osteopathic Hospital of Wichita, Inc., 333 F. Supp. 1357 (D. Kan. 1971); Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir. 1977). In such situations the primary inquiry is not into a comparison of the treatment of equivalent males and females, as there are no equivalent male employees. This Commission has previously ruled that discrimination based upon pregnancy is illegal under the West Virginia Human Rights Act. Varney v. Frank's Shoe Store, Docket No. ES-222-77 and ES-298-77, 3/10/82.

We find that in situations such as this the Complainant will be held to have established a prima facie case if she shows (1) that she is a

member of a protected group, that is, pregnant women: (2) that she is qualified to obtain or remain in the position: (3) that she is not hired or that she is removed from her position regardless of her qualifications or length of service; and (4) that the Respondent thereafter sought or retained others with equivalent qualifications who were not pregnant. See, Beck v. Quiktrip Corporation, supra. Based upon this analysis, Pamela Evans has established a prima facie case: she was pregnant at the time of hire and during her entire tenure of employment with Montgomery General Hospital; she was qualified to remain in her position and there was no criticism raised with regard to her job performance; she was removed from her position without regard to her qualifications; and the Respondent retained a less senior, less experienced employee who was not pregnant in violation of its own policy detailed in the personnel polich manual.

At this point it is incumbent upon the Respondent to articulate a legitimate non-discriminatory explanation for the decision to terminate the Complainant. This the Respondent here did by saying that due to low patient census the hospital was forced to lay off certain employees; that the hospital decided to eliminate the position that the Complainant occupied, that is, the full-time position divided between the stores and pharmacy departments; that the Complainant was a probationary employee and not entitled to seniority rights, and that she was therefore laid off without recall rights in September, 1976.

At this point the Complainant must show by a preponderance of the evidence that the discriminatory reason more likely than not motivated the employer or that the employer's explantion is unworhty of credence. Based upon the entire record before us, we find that the

Complainant has met this burden of proof. We must examine the entirety of the evidence for reasonableness in order to determine whether the employer's explanations are pretextual.

A full evaluation of the evidence indicates that the employer's explanation for the termination of the Complainant is simply not credible. First, there is evidence from a disinterested and highly credible witness, Becky Cottrell Toney, that the supervisors were looking for a reason to get rid of the Complainant. There is no indication in the record that there was any valid reason to want to get rid of the Complainant, as her work was fully satisfactory in everyone's view.

In addition, the employer's own explanation of the termination of the Complainant is fraught with contradictions and problems. First, the Respondent claims that, prior to the memorandum issued September 1, 1976, indicating that the Complainant would be laid off, there were meetings to discuss the need for economic cutbacks. Nevertheless, Deborah Scalise was hired into a full-time position in the pharmacy on August 10, 1976. Mr. Gillespie testified that Deborah Scalise was hired to replace Nancy Bennett, who herself had replaced a full-time employee; however, the record reveals that there was no full-time employee who left in the spring of 1976 and whom Nancy Bennett could have replaced. Furthermore, the chief pharmacist testified that a pharmacy intern like Nancy Bennett is considered a temporary employee, and cannot be replaced by someone without training who is hired to be a clerk. In view of this, we must conclude that Deborah Scalise, who had no experience in pharmacy work, was hired for a new, full-time position in the pharmacy department during the same month that the Respondent's supervisory and administrtive staff allegedly were discussing the need for cutbacks in that department.

Furthermore, there is no explanation for the failure to offer the newly created full-time position in the pharmacy to the Complainant. The requisition form used to notify the personnel department of the vacancy in pharmacy, later filled by Scalise, indicated that the need for personnel was the result of Bennett's departure and the Complainant's transfer to the stores department. But the Complainant, by all testimony, was never even offered a full-time position in stores.

Furthermore, we find it highly suspicious that the September 1, 1976 memo, which required only that four or possibly five employees be eliminated, resulted in the involuntary lay off of only one employee: the Complainant. Four other employees all quit voluntarily; the record does not show whether these four were replaced.

Even assuming that the Respondent's claim that an economic reduction in force was necessary in September, 1976, there is also no adequate explanation in the record as to why the Complainant was terminated and Deborah Scalise was maintained on the payroll. The decision to lay off employees had to have been made at some time prior to the issuance of the September 1, 1976 memorandum. Ralph Sullivan testified that it would be approximately a week between the time of the meeting and the issuance of such a memorandum. This means that in the third week of August, only two weeks after Deborah Scalise was hired, the Respondent decided to lay off Pamela Evans despite the fact that she had been employed for a considerably longer period of time than Scalise, had experience in doing all of the aspects of the job that Scalise was being trained to do, and in fact, assisted in Scalise's training. Furthermore, the Personnel Policies Manual clearly indicates that seniority is to be the key factor in lay offs and makes no exception for

probationary employees. We are not persuaded by Respondent's position that, because Pamela Evans worked half-time in pharmacy and half-time in stores, she was less skilled than Scalise; she had three and one-half months of half-time experience in two departments while Scalise had only two to three weeks' experience in one department.

James Gillespie himself testified that he had a history of acting on his personal feelings in personnel decisions. This is illustrated by his decision to keep George John, Jr. in the pharmacy as a part-time employee and to lay off a full-time employee in direct violation of the Respondent's stated policy of laying off part-time employees first.

It is true that the Respondent does not have a policy, stated or unstated, of terminating pregnant, unwed employees. However, no other single employee became pregnant in the pharmacy or stores department, and no other single female was ever hired when pregnant. The fact that Complainant's termination may not have been consistent with prior practice is not dispositive, if the Complainant can show that she herself was subject to discriminatory treatment. See, Doe v. Osteopathic Hospital of Wichita, inc., 333 F. Supp. 1357 (D. Kan. 1971).

Lastly, the Respondent's stated position with regard to the reason the Complainant was terminated has not been consistent through these proceedings. In both its answer, filed February 23, 1982, and its pre-hearing statement, filed June 14, 1982, both part of the record in this matter, the Respondent indicated that Complainant had been terminated for cause. In fact, no proof was offered at hearing to support this claim, and it was explicitly abandoned by Respondent.

In view of the fact that the Respondent maintained on its payroll in the pharmacy a male part-time employee and laid off only one employee in September, 1976; that Respondent introduced no corrobative documentary evidence into the record showing a reduction in patient census (and indicated consistently in testimony that the patient census annually dips in the summer and is expected to rise again in the fall); and in view of the fact that the Respondent chose to retain a less experienced, married, non-pregnant employee, we find the employer's explanation for the Complainant's termination not credible and merely pretextual.

B. Remedy

Once a Complainant has proven discriminatory practices, this Commission is empowered to award such relief as will effectuate the purposes of the Human Rights Act, including reinstatement, back pay, and damages for the individual and such other relief as will eliminate the discriminatory practices. W. Va. Code §5-11-10. The statute appears to make the award of back pay discretionary, stating that the order shall be "with or without back pay."

The federal statute, in contrast, explicitly requires that a Complainant, during any period of unemployment resulting from discriminatory practices, make a reasonable diligent effort to mitigate damages. 42 U.S.C. §2000e-5(g); Sprogis v. United Airlines, Inc., 517 F.2d 387, 392 (7th. Cir. 1975). The burden of proof with regard to questions of mitigation rests upon the employer. See, e.g., Taylor v. Philips Industries, Inc., 593 F.2d 783 (7th Cir. 1979); DiSalvo v. Chamber of Commerce, 568 F.2d 539 (8th Cir. 1978); Sprogis v. United Airlines, Inc., 517 F.2d 387 (7th Cir. 1975); EEOC v. Pacific Press, 211 F.E.P. Cases 848 (D.C. Cal. 1979).

In this case, the employer's counsel elicited from the Complainant a quite short list of her efforts to obtain employment after her termination from Montgomery General Hospital. Furthermore, she admitted that she voluntarily quit her last employment in June, 1980. She did not register with any employment agencies or seek secretarial work. The record does not indicate whether she registered for unemployment benefits after her termination. There is at least one year during which she cannot recall seeking employment.

An award of back pay is discretionary. W. Va. Code §5-11-10, ¶6; Brito v. Zia Co., 478 F.2d 1200 (10th Cir. 1973). In situations like this, some federal courts have disallowed back pay, while others have deducted from the back pay award such amount as in their judgment could have been earned with reasonable diligence. See, e.g., Sangster v. United Airlines, 24 F.E.P. Cases 845 (9th Cir. 1980) (denial of back pay); Durden v. R.H. Bouligny, Inc., 22 F.E.P. Cases 1455 (D.C. Fla. 1979) (deduction of minimum wage as estimate of what could have been earned with reasonable diligence). However, if the employer fails to show what could have been earned with reasonable diligence, then no deductions will be made from a back pay award. EEOC v. Sage Realty Corp., 24 F.E.P. Cases 1521 (D.C. N.Y. 1981).

The record in this matter does not show what amount was earnable with reasonable diligence, nor does it show that any employment was available in the Upper Kanawha Valley during the time in question. The Respondent did not, at any time during the pendency of this matter, make any offer to reemploy the Complainant, conditional or otherwise.

On the other hand, the long delay in bringing this matter to hearing is not the fault of the Respondent. Nor can we find that the Complainant was diligent in her search for alternative employment during all of the intervening years.

Based upon the foregoing, our Order provides for reinstatement to the first pharmacy technician* job available in the pharmacy department at Montgomery General Hospital, but disallows back pay for the time following when the Complainant voluntarily quit her employment at Pennyfare and for all years in which she did not offer any specifics regarding her search for employment. The Respondent will be ordered to place Complainant on the payroll pending a vacancy. Our Order further allows for damages for the emotional upset caused the Complainant by Respondent's discriminatory practices, and consequential damages for the loss of her car.

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*The position of pharmacy clerk is now called pharmacy technician, but the job qualifications are unchanged.

V
FINDINGS OF FACT

1. Respondent Montgomery General Hospital provides in- and out-patient hospital services in Montgomery, West Virginia. In 1976, the Administrator of the hospital was Kenneth Fultz and Ralph Sullivan was Comptroller and Assistant Administrator. James Gillespie, Chief Pharmacist and Director of purchasing, and Arthur Boyd, Personnel Director, reported to the Administrator. George John, Sr., Supervisor of the pharmacy, and John Gray, materials manager, both reported to Mr. Gillespie.

2. Complainant Pamela Evans, a female, applied to Respondent for a full-time secretarial job on May 3, 1976. She indicated on the application that her marital status was single. On May 7, 1976, she was hired subject to passing the pre-employment physical examination. As part of the pre-employment physical, in response to questions on the physical record form, she indicated that she was not pregnant.*

3. Pamela Evans began work May 7, 1976, as a full-time permanent employee, serving a six-month probationary period. She was terminated by Respondent on September 10, 1976.

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*Despite a considerable amount of testimony, there was no evidence successfully adduced to support the Complainant's apparent suspicion that a laboratory test from the pre-employment physical or thereafter was used to determine that the Complainant was pregnant. We do not think that such proof is necessary, however, in view of the fact that the Complainant's supervisors knew that she was pregnant before the decision to terminate her was made.

4. The Complainant was pregnant at the time she was hired but did not realize she was pregnant until sometime thereafter. Her baby was born on November 18, 1976. She told co-workers in both the pharmacy and stores departments about her pregnancy about two months after she was hired.

5. The Complainant worked mornings in the pharmacy department and afternoons in the stores department. In pharmacy, she was responsible for typing the UMWA billing register and worked at the window, taking and deciphering prescriptions and typing labels. In stores, she acted as receptionist, did filing, typing, and answered the telephone. Her supervisors were George John, Sr. in pharmacy and John Gray in stores.

6. Arthur Boyd, George John, John Gray, James Gillespie, Ralph Sullivan, and Kenneth Fultz all learned that Complainant was pregnant before the decision was made to terminate her.

7. The Complainant performed her work satisfactorily at all times. Her pregnancy in no way affected her job performance.

8. During the summer of 1976, the following people were employed in the pharmacy in addition to the Complainant: Cindy Moore, pharmacy clerk; Becky Cottrell, pharmacy clerk; George John, Jr., part-time pharmacy technician whose hours were increased from 20 to 40 hours per week for the summer months; Nancy Bennett, a pharmacy student hired May 14, 1976 to act as a temporary summer pharmacy intern; George

John Sr., pharmacist. In addition, Deborah Scalise was hired August 10, 1976 to work as a pharmacy clerk and perform substantially the same work as Complainant.

9. In the stores department, the Complainant worked directly with Rufus Simpson, clerk; Shirley Burton, clerk; and Linda Gray Atkins, messenger.

10. Two employees were hired into the stores department after the Complainant was hired and were still employed at the time of her termination: Michael Calhoun (hired June 1, 1976) and Douglas Mason (hired June 30, 1976). Both of these employees were clerks who unloaded trucks, put supplies away, and delivered them to floors in the hospital. Neither of these employees performed the same work in the stores department as the Complainant.

11. In June, 1976, George John, Sr. told Becky Cottrell to watch the Complainant because James Gillespie was looking for a reason to get rid of her.

12. A requisition form was filled out on August 2, 1982 indicating a vacancy for a full-time clerk in the pharmacy created by the departure of Nancy Bennett, and the transfer of the Complainant to work exclusively in the stores department.

13. Nancy Bennett was a pharmacy intern. A pharmacy intern is a pharmacy student who serves as a pharmacist-in-training, and is employed as a temporary employee by Montgomery General Hospital. Nancy Bennett did not replace a full-time employee when she was hired.

14. Pamela Evans was never offered a full-time position, and never transferred to work exclusively in the stores department.

15. The position announced by the requisition form, supra, ¶12, was a new full-time position in the pharmacy department.

16. This full-time position was not offered to the Complainant.

17. Deborah Scalise was hired to fill the aforesaid vacancy in the pharmacy on August 10, 1976. She had no previous experience working in a pharmacy. She was married and not pregnant at the time of hire.

18. James Gillespie asked Becky Cottrell Toney about Deborah Scalise before she was hired, including inquiring about her marital status and whether she was pregnant or had children.

19. Deborah Scalise's job in the pharmacy was to work at the window, take and decipher prescriptions, type labels, and to assist in typing the UMWA register. The Complainant helped to train her. She did substantially the same work as the Complainant.

20. Respondent claims that decrease in patient census led to a need to cut staff in the fall of 1976, and that Complainant's position was eliminated.

21. A memorandum issued by Respondent on September 1, 1976 indicated that staff would be cut back by four or five employees. Four employees quit voluntarily. The Complainant was the fifth employee, and the only one laid off involuntarily.

22. This memorandum was allegedly preceded, approximately one week earlier, by a meeting attended by Ralph Sullivan, James Gillespie, John Gray, and George John, at which time the decision to terminate the Complainant was made.

23. At that time, Deborah Scalise had worked in the pharmacy approximately two weeks, or about 80 hours. Pamela Evans had worked half-time in pharmacy for three and one-half months, or more than 300 hours.

24. In August, 1976, the Complainant was more qualified than Scalise to do the work of a clerk in the pharmacy.

25. George John, Jr., a part-time male employee in the pharmacy, was not terminated as part of the alleged economic reduction in force in September, 1976, despite Respondent's stated policy of terminating part-time employees before laying off full-time employees.

26. Probationary employees, Deborah Scalise in pharmacy, and Michael Calhoun and Douglas Mason in stores, all junior in tenure to the Complainant, were not affected by this reduction in force.

27. The Respondent's Personnel Policies Manual provides under "Seniority":

> "Seniority shall be the sole factor for determining demotions, transfers or layoffs, caused by job elimination or force reduction when the senior employee is qualified to do the available work or can be trained to do it in a reasonable and practical period of time."
>
> Resp. Ex. 1, p. 13.

It similarly provides under "layoffs":

> "Seniority will be the determining factor in a layoff when the remaining employees who are eligible for reassignment are qualified to do the available work or can be trained to do it in a reasonable period of time."

28. No exception to the use of seniority in layoffs for probationary employees is stated in the Personnel Policies Manual.

29. The Complainant was qualified to do the job of pharmacy clerk retained by Deborah Scalise, and could have been trained to perform the job of stores clerk performed by Michael Calhoun and Douglas Mason.

30. Six other single, female employees had children out-of-wedlock. Of these, five became pregnant when working for Respondent. None were terminated, and all were accorded full maternity benefits.

31. No single employee had ever been pregnant at the time of hire. No single, female employee in the stores or pharmacy departments had ever become pregnant.

32. Sullivan, Assistant Administrator, testified that the hospital had never employed a single female who was pregnant at time of hire.

33. Mr. Gillespie had never had under his direct/indirect supervision a single female parent, nor had he supervised a single female who had a child when hired or who after employment had become pregnant and delivered.

34. The Complainant was terminated because she was pregnant and unwed. The Respondent did not advance any legitimate

reason to want to get rid of the Complainant, or for the termination itself. The Respondent's proffered explanation for this termination is a pretext.

35. Complainant was never recalled to a position at Montgomery General Hospital. Respondent's Personnel Policies Manual gives recall rights to "regular" employees. Resp. Ex. 1, p. 14. The record reveals no probationary employee who has been recalled by the Respondent. The term "regular" employee is frequently held to exclude probationary employees. The Complainant was a probationary employee at the time of her termination, and was not entitled to recall.

36. The Complainant made some efforts to obtain alternative employment from 1976 through mid-1980. In June, 1980 she voluntarily quit her last employment, and has not made reasonably diligent efforts to find alternative employment since that time.

37. The Complainant is currently qualified to act as a pharmacy clerk and to be trained as a pharmacy technician through normal on-the-job training. All pharmacy technicians employed by Respondent begin by working as clerks and are trained on the job to be pharmacy technicians.

VI
CONCLUSIONS OF LAW

1. At all times referred to herein, the Respondent, Montgomery General Hospital, is and has been an employer within the meaning of Section 3(e), Article 11, Chapter 5 of the Code of West Virginia.

2. At all times referred to herein, the Complainant, Pamela Evans Franco, is and has been a citizen and resident of the State of West Virginia, and is a person within the meaning of Section 3(a), Article 11, Chapter 5 of the Code of West Virginia.

3. On November 1, 1976, the Complainant filed a verified complaint properly alleging that Respondent had engaged in one or more unlawful discriminatory practices within the meaning of Section 9, Article 11, Chapter 5 of the Code of West Virginia.

4. Said complaint was timely filed within ninety days of an alleged act of discrimination. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to Sections 8, 9, and 10, Article 11, Chapter 5 of the West Virginia Code.

5. The West Virginia Human Rights Act is violated when the basis of discriminatory treatment arises from the pregnant condition of females. Varney v. Frank's Shoe Store, West Virginia Human Rights Commission, Docket No. ES-222-77 and ES-298-77, 3/10/82.

6. Complainant made an initial prima facie showing that the Respondent discriminated against her on the basis of sex by terminating her because she was pregnant and unwed on September 10, 1976.

7. The Respondent articulated a legitimate non-discriminatory reason for terminating the Complainant.

8. The Complainant showed by a preponderance of the evidence that the reason articulated by the Respondent for terminating her was pretext and that she was, in fact, terminated due to illegal discriminatory reasons in violation of Seciton 9, Article 11, Chapter 5 of the Code of West Virginia.

9. No pattern or practice of discrimination by Respondent with regard to pregnant, unwed employees has been alleged or proved.

ORDER

Therefore, pursuant to the above Findings of Fact and Conclusions of Law, it is hereby ORDERED as follows:

1. The Respondent is hereby permanently ordered to CEASE and DESIST immediately from engaging in employment practices which discriminate against Complainant and all other persons on account of their sex or pregnant and/or marital status.

2. The Respondent shall pay to the Complainant back pay and interest, less interim earnings, for the years 1976 through June, 1980, based upon a forty hour work week, or a total of $26, 534 in back pay and $6,072 in interest, ... upon the following calculations:

Year	Gross Back Pay	Interim Earnings	Net Back Pay	Interest at 6%
1976	13 weeks, at 2.78/ hour $ 1,446	-0-	$ 1,446	$ 520
1977	52 weeks, at 3.17/ hour $ 6,594	-0-	$ 6,594	$1,987
1978	13 weeks, at 3.17/hour & 39 weeks at 3.58/hour $ 7,233	-0-	$ 7,233	$1,736
1979	25 weeks, at 3.58/hour & 27 weeks at 4.61/hour $ 8,559	$ 454	$ 8,105	$1,459
1980	25 weeks, at 4.61/ hour $ 4,610	$ 1,454	$ 3,156	$ 379
	TOTALS $ 28,442	$1,908	$26,534	$6,072

3. The Respondent shall pay to the Complainant $10,000 to compensate her for emotional distress and embarassment caused by Respondent's discriminatory actions against her;

4. The Respondent shall pay to the Complainant an additional $768 to compensate her for the monetary loss she suffered as a consequence of Respondent's discriminatory actions through loss of her automobile.

5. Respondent shall comply with provisions 2 & 3 of Section VII within 35 days of receipt of this Final Order.

6. Complainant shall be placed upon Respondent's payroll as a pharmacy technician within two weeks of issuance of this Order.

7. Complainant shall be given the first available job as pharmacy technician/clerk in the Respondent's pharmacy department, and shall be given appropriate on-the-job training to perform the duties of a pharmacy technician. The Respondent shall notify Marshall Moss of the West Virginia Human Rights Commission, within a reasonable time to respond, of any job offer to the Complainant. If Complainant refused a bona fide offer of a job all futher payroll benefits shall cease as of the date of such refusal.

8. Complainant's seniority, fringe benefits, and rate of pay shall be determined as if she had been employed by Respondent continuously since May 7, 1976.

May 25, 1983
DATE

Enter:
Jeffrey O. McGeary
Chairperson