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STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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2 August 1990

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Amherst Industries, Inc.
2 Port Amherst Drive
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Re: Hackney v. Amherst Industries, Inc.
Docket No. EA-200-86

Dear Parties and Counsel:

Herewith please find the Order of the West Virginia Human Rights Commission in the above-styled and numbered case. Please note that this is NOT a Final Order and that further submissions by the parties are requested.

Sincerely,

Quewanncoii C. Stephens
Executive Director

Enclosures

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

cc: Secretary of State

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

BOBBY G. HACKNEY,

Complainant,

v. DOCKET NO. EA-200-86

AMHERST INDUSTRIES, INC.,

Respondent.

ORDER

This matter matured for public hearing on the 3 March 1987. The hearing was held at 405 Capitol Street, Daniel Boone Building, Charleston, West Virginia. The hearing examiner was Theodore R. Dues. The parties waived the presence of a hearing Commissioner. The complainant appeared in person and by his counsel, Mary C. Buchmelter. The respondent appeared by its representative, Ron Morgan, and its counsel, Carl M. Duttine.

On 5 April 1988 the hearing examiner submitted his recommended findings of fact and conclusions of law. On 16 September 1988, the matter was remanded to the hearing examiner in order to clarify whether the evidence demonstrated that a prima facie case had been established and to identify any legitimate, nondiscriminatory reasons offered by the respondent which rebut the prima facie case. The hearing examiner resubmitted his findings of facts and conclusions of law on 13 December 1988. On 7 February and 13 June 1990, the Commission reviewed all recommendations and exceptions filed herein, as well as all briefs, proposals and communications of the parties.

ISSUE TO BE DECIDED

Whether the respondent violated W. Va. Code § 5-11-9 (a)(1) by unlawfully discriminating against the complainant with respect to the compensation, hire, tenure, terms, conditions or privileges of employment because of his age. The respondent argues that it did not hire the complainant because, among other things, the complainant did not formally apply for the position and that he was not qualified for the available position.

FINDINGS OF FACT

1. Complainant, Bobby G. Hackney, was, at all times relevant to this action, a resident and citizen of the State of West Virginia.

2. In August 1985, the complainant was fifty-one (51) years old.

3. Complainant was employed from August 1974 until August 1982 by the respondent, Amherst Industries, Inc. (hereinafter referred to as Amherst), as a welder at the Port Amherst location.

4. The Port Amherst facility is a union shop represented by United Steel Workers of America, AFL-CIO-CLC, Local Union No. 14261 (hereinafter referred to as the "union").

5. During his employment with the respondent, the complainant obtained his welding certification. In 1976, complainant was certified for horizontal, vertical and overhead welding. In 1978, the complainant was certified for shielded metal arc welding.

6. Complainant had performed multiple job duties, including repairing railroad cars, during his eight-year tenure at the Port Amherst site. The ability to weld is essential to car repair.

7. Bobby Hackney, Gary Beller, and Ronald Davis (Beller and Davis being coworkers of complainant) were laid off by respondent at the Port Amherst site on 12 August 1982.

8. In a seniority list prepared on 29 October 1982 pursuant to an agreement between the union and the respondent, Bobby Hackney was classified as a welder with a designated a pay rate of Nine Dollars and Forty-Five Cents ($9.45) and a hiring date of 5 August 1974. Gary Beller was classified as a car repairman at the rate of Nine Dollars and Forty-Five Cents ($9.45) with a hiring date of 9 September 1974. Ronald Davis was classified as a car repairman helper with a pay rate of Nine Dollars and Forty-five Cents ($9.45) and a hiring date of 15 July 1976.

9. In August 1985, Gary Beller was thirty-one (31) years old and Ronald Davis was thirty (30) years old.

10. Pursuant to the April 1, 1979 contract between Amherst Industries and the United Steel Workers, seniority rights of an employee expired when that employee had been laid off for three years.

11. Immediately following his lay off, the complainant worked as a truck driver for the sanitary department for the City of Belle. He also received unemployment benefits until his eligibility for the same was exhausted.

12. The complainant was hired in December 1984 by the respondent at the Plymouth site as a welder. The position at the Plymouth site was non-union, paid Six Dollars and Fifty Cents ($6.50) and provided no benefits.

13. In the spring of 1985, the complainant met with Bud Morris, who was responsible for hiring and firing employees at Port Amherst, to request a recall to his former job at Port Amherst. Complainant did not fill out a formal application.

14. Pursuant to the applicable bargaining agreement the seniority and recall rights of Bobby Hackney, Gary Beller and Ronald Davis expired on 12 August 1985.

15. Bud Morris knew that Bobby Hackney was interested in a job in August 1985.

16. Beller and Davis asked Morris about possible employment at different times during the layoff period.

17. Respondent rehired Gary Beller and Ronald Davis on 26 August 1985.

18. Beller and Davis were not required to fill out formal applications as a prerequisite to their rehire.

19. Morris testified that Davis and Beller were hired instead of Hackney because car repairmen were needed in August 1985.

20. Complainant demonstrated that the duties of car repairman and welder were substantially the same; both required the ability to make vertical welds.

21. Morris knew that the complainant had performed car repairs during his employment at Port Amherst between 1974 and 1982.

22. When he was rehired in August 1985, Gary Beller testified that he was rehired as "welder."

23. Ronald Davis wrote on the application which he filled out after he was rehired in August 1985 that the "position applied for" was "welder."

24. Bobby Hackney and Roger Wines, who have both been classified as welders at the Port Amherst, have performed car repair work.

25. In some instances, a welder can fix cracks on rail cars that a car repairman cannot.

26. The only certification required for the position of car repairman is that of "welder."

27. Officials of Amherst Industries expressed no criticism of the quality of complainant's work performance.

ULTIMATE FINDINGS OF FACT

28. Complainant was a member of the protected age group.

29. Complainant applied for and was qualified for the available position.

30. Complainant was not hired by respondent.

31. Persons, similarly qualified to the complainant and not in the protected class, were hired by respondent.

32. Respondent's reliance on the distinction between the classifications of welder and car repairman as set forth in the

expired seniority list and it's opinion that complainant had not applied for the job were pretexts for impermissible discrimination.

33. Respondent intentionally discriminated against complainant because of his age in violation of W. Va. Code § 5-11-9(a)(1).

34. The complainant reasonably mitigated his damages.

35. As a result of respondent's discriminatory action against complainant, he suffered a loss of wages and benefits, as well as humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

DISCUSSION

A. COMPLAINANT ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION.

The complainant has the burden of proving a prima facie case of employment discrimination by a preponderance of the evidence in an action to redress a violation of the West Virginia Human Rights Act (hereinafter Act), W.Va. Code § 5-11-9(a). Shepherdstown Volunteer Fire Dept. v. State ex rel. State Human Rights Commission, 309 S.E.2d 342, 352 (W. Va. 1983). In order to establish a prima facie case of employment discrimination in West Virginia, the complainant must show that (1) he belongs to the protected group, (2) he applied and was qualified for the position

or opening, (3) he was rejected, and (4) the respondent continued to accept applications after rejecting the complainant. Id. Once a prima facie case of discrimination has been established by the complainant, the burden then shifts to the employer who must offer some legitimate and nondiscriminatory reason for the rejection. Once the respondent has met his burden, the complainant may prevail only if he proves by a preponderance of the evidence that the reasons offered by the employer are merely pretextual. Id.

The West Virginia standards established in Shepherdstown were derived from federal standards originally created by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 68 (1973). The McDonnell Douglas test is not intended to be applied rigidly and mechanically to all cases. Furnco Construction Corporation v. Waters, 438 U.S. 567, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978). In addition, the task of satisfying the prima facie test is not intended to be onerous. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 93 S. Ct. 1817, 67 L. Ed. 2d 207 (1981).

If the Shepherdstown standards are applied to the present case, the evidence is sufficient to establish a prima facie case

of discrimination for the complainant.[1] Hackney was in the protected group, he was rejected (not hired), and he was looked over when the respondent hired similarly qualified person who were not members of the protected class.

The second element of the Shepherdstown test, that Hackney applied and was qualified for the position, was satisfied as well. This case is different from most hiring cases in that the prospective employees had been previously laid off by the employer. At the time of the alleged discrimination, Hackney, Beller and Davis had been laid off for over three years and had lost any formal recall rights under their union contract. During the period between the lay off on 12 August 1982 and the subsequent hire of Beller and Davis on 26 August 1985 many of respondent's employees, including Beller, Davis, and Hackney had intermittently asked the respondent about possible job openings.

Hackney specifically inquired with Bud Morris, the hiring supervisor at Amherst, about possible job openings in June 1985. Although Hackney did not fill out a formal application, Morris, by his own admission, knew of Hackney's desire for a job. Amherst did not require Beller and Davis to fill out an application until their

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[1]Since the West Virginia Supreme Court of Appeals has applied the more specific Shepherdstown test to cases of alleged discrimination in hiring, see O.J. White Transfer v. Human Rights Comm'n., 383 S.E.2d 323 (W. Va. 1989); City of Ripley v. Human Rights Comm'n, 369 S.E.2d 226 (W. Va. 1988), the general test set forth in Conaway v. Eastern Associated Coal Corporation, 358 S.E.2d 423, 429 (W. Va. 1986) is not applicable.

first day of work. The two employees had been contacted the night before concerning employment in the new positions. Therefore, it is clear that the practice of Amherst at the time was to actively contact prospective employees and call them into work. It appears that a formal application was an afterthought and not an essential element of the initial hire. Therefore, given the hiring practice of Amherst at the time, Hackney did apply for the position.

Finally, evidence supports the contention that Hackney was qualified for the job that was available. From the evidence offered at the hearing, there are no relevant differences between the qualifications possessed by Hackney and those of Beller and Davis for the purposes of establishing a prima facie case. Therefore, the Commission finds that the complainant applied and was qualified for the position. Therefore, the complainant has established a prima facie case under the Shepherdstown test.[2]

[2]Proof of qualification has been required in the present case to satisfy the complainant's initial burden. The complainant has provided enough evidence of qualification to meet his burden. Detailed treatment of the complainant's qualifications will be given in the discussion of pretext because the question of the complainant's qualifications is essential to the respondent's primary defense.

B. AMHERST OFFERED LEGITIMATE, NONDISCRIMINATORY REASONS FOR NOT HIRING COMPLAINANT.

Once the complainant has established a prima facie case of discrimination the employer bears only the burden of offering some legitimate and nondiscriminatory reason for the rejection. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 260, 101 S. Ct. 1089, 1097, 67 L. Ed. 2d 207, 219 (1981); State ex rel. State Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d 77, 86 (1985); and Shepherdstown, 309 S.E.2d at 352.

In the present case, the respondent offers several reasons for its failure to hire the complainant. The respondent contends that Hackney wasn't hired because his classification as a welder did not match the type of worker that it sought at the time. In addition, Amherst argues that Hackney did not formerly apply for the job. Amherst also presented statistics which demonstrated that a high number of those it employed are members of the protected class. Finally, Amherst argues that it had no obligation to hire Hackney because his union rights had expired.

Although some of the reasons advanced by the respondent are not adequate to rebut the complainant's prima facie case, the respondent has met its burden. Rejection on the basis of qualification is both legitimate and nondiscriminatory. Amherst also met its burden by arguing that it rejected Hackney because he did not apply for the job.

The statistics offered by the respondent, however, cannot immunize an employer from charges of individual disparate treatment. In federal cases, courts have rejected the use of statistics by employers for these purposes. See Cooper v. Federal Reserve Bank, ___ U.S. ___, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984); Connecticut v. Teal, 457 U.S. 440, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (1982); Furnco, supra; and Thornbraugh v. Columbus Greenville Railroad Co., 760 F.2d 633 (5th Cir. 1985). Therefore, evidence that Amherst employed others within the protected group cannot prove that the respondent did not discriminate against Hackney.

Similarly, questions of union contract rights are irrelevant to the dispute because the complainant has alleged discrimination on the basis of a new hire. Hackney's union affiliation and any rights connected with his membership had expired in August 1985, before Amherst hired Beller and Davis. Therefore, Beller and Davis were treated as new employees. Hackney has not sought relief based on any claim of recall rights associated with the union contract.

C. RESPONDENT'S DEFENSE IS PRETEXTUAL.

When the respondent succeeds in rebutting the presumption of discrimination, the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent are merely a pretext for unlawful discrimination. Shepherdstown, 309 S.E.2d at 352. If it is determined that the

employer's proffered explanation is a pretext and unworthy of credence, then the complainant should prevail. See Burdine, supra; Logan-Mingo Area Mental Health Agency, supra.

In the present case, both of the reasons advanced by the respondent for its actions were insufficient themselves to motivate the employment decision. The respondent's argument that Hackney did not apply for the job is transparent for several reasons. As mentioned before, Hackney acted no differently than other prospective employees in seeking employment at the Port Amherst location. In addition, Bud Morris testified at the hearing that he knew that the complainant wanted a job at the Port Amherst location. Morris explained that he would have called Hackney if a "structural welder" were required at Port Amherst. This testimony directly rebuts the employer's assertions that the complainant had not applied for a job at the work site.

The difference in classification between Beller, Davis and Hackney advanced by Amherst as a reason for not hiring Hackney also appears to be a pretext for a discriminatory action. The evidence presented at the hearing fails to demonstrate any relevant difference between the jobs of welder and car repairman.

Many employees at the Port Amherst site perform multiple tasks regardless of their classification as provided by the union seniority list. Car repairmen work on cars and the tipple. Welders work on barges, mine equipment fabrication, and car repair.

Roger Wines, an employee at Port Amherst who is classified as a welder testified that he performed car repairs every day.

The only indication that a welder could not do car repair was given by Bud Morris, who said that a car repairman "would have to be familiar with some of the valve work, the hazards involved, I think, in working on those cars." Hackney however, worked on cars on many occasions during his previous period of employment at Amherst. Morris knew that Hackney had performed car repair before.

Wines testified that the two classifications were different in that a welder could fix cracks on cars that a car repairman could not. Finally, Bud Morris admitted that the only certification required for the position of car repairman is that of welder.

Morris argued that he specifically needed to hire only car repairmen in August 1985 when he called Davis and Beller. This, however, was not clear from the evidence concerning the hire. First of all, Davis wrote on his job application that he was applying for the position of welder. In addition, Beller testified that he was hired as a welder. Finally, both Beller and Davis described their occupation as welder at the beginning of their testimony at the hearing.

The classifications provided by the union seniority list appear to provide important distinctions in many recall and

rehiring decisions. In the present case, however, the distinction between welder and car repairman is artificial. The distinction merely provided a convenient means by which Amherst could discriminate against the complainant.

The evidence compiled from the hearing demonstrates that Amherst's proffered reasons were merely pretexts for alternate motivations for their decision not to hire Hackney. Having successfully challenged Amherst's justifications, Hackney has met his ultimate burden of proof.

CONCLUSIONS OF LAW

1. The respondent is an employer within the meaning of W. Va. Code § 5-11-3(d).

2. The complainant is a citizen of the State of West Virginia and a person within the meaning of W. Va. Code § 5-11-3(a).

3. The West Virginia Human Rights Act is violated when an employer refuses to hire a person on the basis of that person's age.

4. The complainant made a prima facie showing that respondent unlawfully discriminated against him because of his age.

5. Upon the establishment of a prima facie case by the complainant, the burden shifted to the employer to articulate a legitimate nondiscriminatory reason for rejecting Mr. Hackney.

6. The respondent met its burden by articulating legitimate, nondiscriminatory reasons for complainant's rejection.

7. The complainant demonstrated that the reasons advanced by the respondent for its decisions were pretextual.

8. The complainant having proven that he was discriminated against in violation of W. Va. Code § 5-11-9(a), he is entitled to reinstatement, back pay, benefits and prejudgment interest on back pay.

9. The complainant is entitled to an award of incidental damages for humiliation, emotional and mental distress and loss of personal dignity suffered as a result of respondent's acts in the amount of $2,500.00.

ORDER

In view of the foregoing, the West Virginia Human Rights Commission ADJUDGES, ORDERS and DECREES as follows:

1. The complaint of Bobby G. Hackney against Amherst Industries, Inc., Docket No. EA-200-86, is sustained.

2. The respondent shall reinstate complainant to a position and at a rate of pay comparable to where he would have been but for his discriminatory rejection.

3. The complainant is entitled to back pay, benefits, and prejudgment interest on back pay. The amount of the award shall be determined by the Commission upon submission of the information described infra.

4. The complainant is entitled to an award of incidental damages for humiliation, emotional and mental distress and loss of personal dignity suffered as a result of respondent's acts in the amount of $2,500.

Due to the inadequacy of the record as placed before the Commission, complainant and respondent shall submit (or resubmit) all evidence and documents, with accompanying arguments if they so choose, relating to the amount of back pay, benefits and interest due complainant. Complainant shall have fifteen (15) days from the date of receipt of this Order to comply with this request by serving said documents on the Executive Director of the Commission. Respondent shall have fifteen (15) days to file a response, if it so chooses.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 2nd day of August, 1990 in Charleston, Kanawha County, West Virginia.

QUEWANNCOII C. STEPHENS
Executive Director/Secretary