

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

**ELMER GRAHAM HARDWAY,
Complainant,**

v.

CASE NO.: ES-66-03

**GO-MART, INC.,
Respondents.**

**ADMINISTRATIVE LAW JUDGE'S
FINAL DECISION**

A public hearing in the above captioned-matter was convened on May 14, 2004, at the office of the West Virginia Human Rights Commission, Charleston, West Virginia, in Kanawha County, West Virginia. The complainant, Elmer Graham Hardway, appeared in person and his case was presented by Paul Sheridan, Deputy Attorney General, Civil Rights Division. The Respondent, Go-Mart, Inc. appeared through its attorney, Erin Elizabeth Magee, of Jackson and Kelly PLLC and its corporate representative, Jesse Stevens.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

I.

STATEMENT OF THE CASE

Elmer Hardway applied for a position as a cashier with the Go-Mart, Inc., Store #24. (herein after Go-Mart, Inc.) At the time he applied, he walked with a cane. Jesse Stevens interviewed him and asked him questions about his injuries and whether he was receiving workers compensation. Mr. Hardway was not hired for the cashier's job.

II.

PARTIES CONTENTIONS

Elmer Hardway contends that the Westmoreland location of Go-Mart, Inc., Store #24 did not hire him because of his disability and the fact that he presented himself walking with a cane.

Go-Mart, Inc. contends that they have no documentation of Mr. Hardway ever applying for a job as a cashier with Go-Mart, Inc. and even if they had Mr. Hardway's application, he would not have been denied employment because he walks with a cane. Also, Go-Mart, Inc. alleges that Mr. Hardway did not file his complaint with the West Virginia Human Rights Commission in a timely manner. And, finally Go Mart alleges that Hardway is not entitled to recover under the West Virginia Human Rights Act because of his Social Security Disability award.

III.

FINDINGS OF FACT

1. The Complainant, Elmer Graham Hardway, is a 29-year-old male who lives with his wife and children in Charleston, Kanawha County, West Virginia. (Hr. Tr. at 12).

2. The Respondent, Go-Mart, Inc., operates about 100 convenience stores and gas stations in West Virginia, Ohio and Virginia. The company employs about 1,100 individuals. (Hr.

Tr. at 159, 266).

3. Jesse Stevens is one of Go-Mart, Inc.'s area managers. He oversees the hiring, firing, and the everyday operations of the stores he is responsible for including the Westmoreland Go-Mart, Inc. Store #29. (Hr. Tr. at 191).

4. Hardway's previous work experience includes having worked as a food service employee; cashier, and bank teller. (Hr. Tr. at 14-15). He graduated from college in 1998. Prior to the summer of 2001, Hardway worked as a case manager for the Coordinating Council for Independent Living and as a case teacher/counselor for Pressley Ridge Schools. (Hr. Tr. at 13).

5. Throughout most of his youth Hardway works as a general laborer for his stepfather who owns Earl Hardway Construction. The general labor work includes framing, putting up sheet rock, putting on roofing, and carrying tiles. It was heavy work. (Hr. Tr. at 159, 266).

6. In August 2000, Hardway injures his back while moving boxes at home. (Hr. Tr. at 15, 17).

7. Between August 2000 and April 2001, Hardway continues to work for Earl Hardway Construction. (Hr. Tr. at 19).

8. On or About April 2000, Hardway is diagnosed as having a herniated disk. (Hr. Tr. at 18, 129).

9. Once Hardway learns that he had a herniated disk, he stops trying to perform construction work. Hardway looks for employment elsewhere. (Hr. Tr. at 19, 20, 21).

10. He applies for employment at Reed's Jewelers, Leroy's Jewelers, Taylor Books, Books a Million, and Go-Mart, Inc.. (Hr. Tr. at 21).

11. Robert Shinn, an employee at the Westmoreland Go-Mart, Inc., tells Hardway that

the store is hiring clerks and gives Hardway an application. (Hr. Tr. At 152, 257).

12. Shinn is familiar with the job duties of a clerk. (Hr. Tr. at 257).

13. Hardway completes, submits, and returns a standard application form for a clerk's position at the Westmoreland Go-Mart, Inc. location on August 23, 2001. (Hr. Tr. at 23, 150 Commission Exhibit No. 1). I find Hardway credible.

14. Later that day, Hardway receives a telephone call from a woman who asks him to come in the next day for an interview. (Hr. Tr. at 25). I find Hardway credible.

15. On August 24, 2001, Jesse Stevens, the area manager, interviews Hardway. (Hr. Tr. at 27, 135-138).

16. At the public hearing, Hardway recognizes Stevens as the person who interviews him. (Hr. Tr. at 270-271). I find Hardway credible.

17. Stevens admits that in his fifteen years as area manager, he has never received training on appropriate or inappropriate interviewing and hiring practices. (Hr. Tr. at 186, 226-228, 262). I find Stevens credible.

18. During the interview, Stevens asks Hardway why he walked with a cane. Hardway responds that he has a weakness in his leg. (Hr. Tr. at 27). I find Hardway credible.

19. Throughout the interview, Stevens asks Hardway if he filed a Worker's Compensation claim and requests detailed information about his injury. Stevens asks Hardway who is his doctor and whether Hardway is in physical therapy for his injury. (Hr. Tr. at 27-29). Stevens tells the Complainant that there are no jobs for him because of his cane and the weakness in his leg. (Hr. Tr. at 30). Stevens tells Hardway that he will only hire him when he gets out of physical therapy

and is “a hundred percent physically.” (Hr. Tr. at 31). At the hearing, Stevens denies making any of these statements to the Complainant and indicates that he does not recognize Hardway. (Hr. Tr. at 213).

20. Hardway very credibly states that Stevens never asked him about his experience as a cashier. (Hr. Tr. at 29).

21. The duties of a clerk/cashier include but are not limited to running a cash register, operating the lottery terminal, monitoring the fuel pumps, assisting customers, stocking merchandise on the shelves, cleaning shelves in the store and in the cooler, cleaning the store and lot area, assisting with the delivery and receipt of merchandise, balancing the register at shift’s end and completing incident reports and other duties as testified to. (Hr. Tr. 198-212).

22. There is no evidence in the record supporting a finding that Stevens informed Hardway of the duties of a clerk/cashier.

23. Stevens very credibly states that he interviews 600-800 potential candidates annually and could not remember all the individuals he interviews. He does not recall having interviewed Hardway. (Hr. Tr. at 190-91, 213, 217-218). I find Stevens credible.

24. Stevens admits he might have interviewed Hardway. (Hr. Tr. at 219). I find Stevens credible.

25. Stevens admits that he never questions applicants about their ability to do the job. (Hr. Tr. at 237-238). I find Stevens not credible.

26. Go-Mart, Inc.’s standard practice is to have candidates for jobs take a pre-employment test, unless their job interview is extremely unfavorable. (Hr. Tr. at 153-154; Commission ‘s Exhibit No.7). The test is administered and graded at the store. (Hr. Tr. at 160).

Stevens tests two out of every five candidates he interviews. (Hr. Tr. at 259). One out of every two applicants tested is hired. (Hr. Tr. at 260). Stevens never tested Hardway. I find Stevens credible.

27. When Stevens does not hire an applicant, he sends the application to Scott Gallaher. (Hr. Tr. at 258). Applications are kept on file at the store. (Hr. Tr. at 160-261) and there are occasions when applications are lost. (Hr. Tr. at 262). I find Stevens credible.

28. Hardway makes it clear to Stevens that he can perform the duties of the job (Hr. Tr. at 27-28, 57).

29. Hardway tells Stevens that on his worst days he might need a stool to lean against at the cash register, but that otherwise he would be able to perform the duties of the job. (Hr. Tr. at 30).

30. Scott Gallaher, Director of Personnel and Risk Manager, has been with Go-Mart, Inc. for more than twenty years. He has been the Risk Manager for more than four years. (Hr. Tr. at 146-147, 187). During that time, Gallaher never discards applications sent to him by an area manager. (Hr. Tr. at 160).

31. Gallaher receives the applications and tests of all applicants, successful as well as unsuccessful. (Hr. Tr. at 158).

32. Gallaher is unable to produce Hardway's application or test. (Hr. Tr. at 155, 160).

33. Hardway is fully qualified for the clerk position and is able and competent to perform the essential functions of the job with a reasonable accommodation of being able to occasionally lean on a stool when he is at the cash register. (Hr. Tr. at 30-33).

34. Go-Mart, Inc. never offers Hardway a job.

35. Following Hardway's interview, Go-Mart, Inc. hires other persons as clerks.

36. In the past Stevens has hired persons who needed to be accommodated because of various medical conditions. (Hr. Tr. at 216, 219, 220-224). The evidence establishes that Go-Mart, Inc. has hired other clerks, who have standing, sitting and lifting restrictions without imposing undue hardship on its business.

37. Joe Quinn, an employee of Go-Mart, Inc. for five years, had a foot injury that required him to use a cane. Stevens hired Joe Quinn and promoted him twice, ultimately to the position of store manager during the five years he worked for Go-Mart, Inc. Stevens felt that Quinn was a good worker. (Hr. Tr. at 215-16, 230-31). I find Stevens testimony credible.

38. Another employee who had a lifting restriction was not required to lift heavy objects such as 30-can beer packs and other heavy objects. (Hr. Tr. at 223).

39. When employees suffer injuries, Stevens accommodates them by providing stacked milk crates for employees to sit on because the stores “don’t have stools.” (Hr. Tr. 220). I find Stevens testimony credible.

40. Stevens accommodates various medical conditions in his stores. He has allowed employees a sit/stand option when necessary. (Hr. Tr. 216, 219-220). Stevens works with employees with back injuries because they are able to do the job. (Hr. Tr. 220-21). Stevens has accommodated lifting restrictions on a temporary basis. (Hr. Tr. 222-24).

41. Although Stevens has made accommodations for employees, this does not make Hardway’s testimony regarding his experience with Stevens any less credible.

42. Go-Mart, Inc. does not provide a job description nor the functional limitations of the position of clerk/cashier to Hardway. (Hr. Tr. at 161).

43. As a result of his experience with Go-Mart, Inc., Hardway feels worthless and

devastated. He feels like he was robbed of his dignity and humanity. He feels sub human. After his interview with Jesse Stevens, Hardway leaves the Go-Mart, Inc., Store #24 in tears. (Hr. Tr. at 47).

44. Hardway suffers significant humiliation and loss of dignity as a result of Go-Mart, Inc.'s action. (Hr. Tr. 32 and 47).

45. In October 2001, Hardway files a complaint with the West Virginia Human Rights Commission alleging that Go-Mart, Inc. declined to consider him the position of clerk/cashier at the Westmoreland Go-Mart, Inc. Store #24 because of a perceived disability. I find Hardway's testimony in this regard credible. (Hr. Tr. at 47).

46. Hardway completes all the paperwork the Commission sent him in a timely fashion. He returned his paperwork within the month that he received them. (Hr. Tr. at 49).

47. Hardway contacts the Commission several times to follow up on his claim. He makes numerous inquiries and was informed that he would hear from the Commission in 2 to 3 months. (Hr. Tr. at 49).

48. When he does not hear from the Commission, he contacts the Commission and is told that the Commission is still processing his case. (Hr. Tr. at 50).

49. Subsequently, he is told that his case had been misfiled and that he needs to sign paperwork immediately. Hardway comes in the office and signs the necessary paperwork. (Hr. Tr. at 51).

50. The Commission's staff notarizes Hardway's Complaint for Saturday, August 24, 2001. The Commission's offices are closed on Saturdays. (Hr. Tr. at 64).

51. The necessary paperwork turns out to be three copies of the Complaint. The copies are time-stamped. (Respondent's Exhibit 1, 2, 3).

52. The date on one copy was changed from August 30, 2002 to August 24, 2002. (Respondent's Exhibit 2).

53. Hardway files his complaint in a timely manner and should not be denied relief because of the sloppy and dilatory fashion in which the Commission investigative staff handled the Complaint. (Hr. Tr. at 255, 164, 166).

54. Hardway applies for Social Security Disability Benefits September 2001. He is awarded benefits on June 26, 2002. The Social Security Administration, held under its rules that Hardway is disabled as of May 30, 2001, nearly three months before Hardway applied for a clerk/cashier's job at Go-Mart, Inc.. (Hr. Tr. at 26, 33-36, and Commission's Exhibit Nos. 2 and 3, pages.4-5).

55. The clerk/cashier position that Hardway applied for paid \$6.20 per hour. Clerk/cashiers were given a \$.20 per hour raise upon the successful completion of six weeks of work. Clerk/cashiers then generally receive a \$.20 per hour raise each year.

56. The value of the employee benefits was \$97.12 per month prior to the birth of his children and \$135.40 per month after June 2002.

IV.

DISCUSSION

West Virginia Code § 5-11-9(1) of the West Virginia Human Rights Act ("the Act"), makes it unlawful "for any employer to discriminate against an individual with respect to . . . **hire**, tenure, conditions or privileges of employment if the person is able and competent to perform the services required . . ." The Act prohibits discrimination in employment on the basis of race, religion, color, national origin, ancestry, age, sex, blindness or **disability**. Vest v. Board of Education of Nicholas

County, 193 W. Va. 222, 455 S. E. 2d 781 (1995). The term “discriminate” or “discrimination” as defined in W. Va. Code § 5-11-3(h) means to “exclude from, or fail or refuse to extend to, a person equal opportunities because of **disability** . . .”

To recover against an employer on the basis of a violation of the West Virginia Human Rights Act, a person alleging to be a victim of unlawful discrimination, or the Commission acting on the individual’s behalf, must ultimately show by a preponderance of the evidence that:

- (1) the employer excluded the individual from, or failed or refused to extend to an equal opportunity; and
- (2) one or more impermissible reasons were a motivating substantial factor causing the employer to exclude the Complainant from, or fail or refuse to extend an equal opportunity, Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed. 2d 268 (1989); and
- (3) the equal opportunity denied the Complainant is related to any one of the following employment factors: compensation, **hire**, promotion, tenure, terms and conditions or privileges of employment.

There are two theories that one can proceed under the West Virginia Human Rights Act requirement that employees with disabilities be treated “equally.” First, an employer is prohibited from treating an employee adversely because of the employee’s disability. The focus of this theory is on motive. The question is whether the employee is treated differently in an adverse way because of his or her disability. Second, where it is necessary to create equal opportunity, persons with disabilities must be provided with reasonable accommodations. Failure to do so constitutes discrimination under a failure to accommodate theory. Motive is not required. The two theories were described by Justice Cleckley in Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 479 S. E. 2d 561

(1996).

Both the West Virginia Human Rights (Human Rights Act) and the federal Americans with Disabilities Act of 1990 (ADA) prohibit employment discrimination against a qualified individual with a disability. W. Va. Code § 5-11-9 (1992); 42 U. S. C. §§ 12102-12213 (1990). This prohibition extends, of course, to the denial of employment opportunities based on vocationally irrelevant disabilities and, thus, embraces the traditional employment discrimination theories of disparate treatment and disparate impact. See generally Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S. E. 2d 152 (1995). The disparate treatment model provides that an employer may not deny job opportunities to qualified individuals because of their disabilities. Thus the law protects persons with impairments from being denied employment by virtue of an employer's hostility to those who are disabled or its stereotypical assumptions about their capabilities. See, e.g., Davidson v. Shoney's Big Boy Restaurant, 181 W. Va. 65, 380 S. E. 2d 232 (1989). In such cases, an employer animus determines its liability. . . .

In addition to legislating against those traditionally recognized forms of discrimination, the ADA also expressly provides that unlawful discrimination can occur when an employer fails to consider an applicant's or employee's disability where its adverse effect on the individual's job performance can be avoided. ADA § 102 (b)(5); 42 U. S. C. § 12112 (b)(5). That is, employers have an affirmative obligation to provide reasonable accommodation for disabled individuals. Although our Human Rights Act does not have an explicit analogue to Section 102(b)(5), the West Virginia Human Rights Commission (Commission) and this Court have inferred that our Human Rights Act imposes this duty of reasonable accommodation. See 77 W. Va. C.S.R. 1, § 4.4 (1994); Morris Mem. Convalescent Nursing Home, Inc. v. West Va. Human Rights Comm'n, 189 W. Va. 314, 431 S. E. 2d 353 (1993); Coffman v. West Va. Bd. of Regents, 182 W. Va. 73, 386 S. E. 2d 1 (1988).

Skaggs, 479 S. E. 2d at 573-574 (footnotes omitted).

The denial of an employment opportunity by Go-Mart, Inc. because of Hardway's physical disability is contrary to the intent and plain language of the West Virginia Human Rights Act.

Hardway establishes a prima facie case of disability. The West Virginia Supreme Court of Appeals sets out a prima facie test for failure to hire. A complainant must show the following.

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

Childress v. West Virginia Human Rights Commission, Syl.pt. 2, 190 W. VA. 58, 436 S. E. 2d 293 (1993); O. J. White Transfer & Storage Co. v. West Virginia Human Rights Commission, Syl. pt. 1, 181 W. Va. 519, 383, S. E. 2D 323 (1989).

Applying these standards, Hardway establishes that he is a member of a protected status in that he is a qualified person with a disability. Two of the three tests provided for in the West Virginia Human Rights Commission's *Legislative Rules Regarding Discrimination Against Individuals with Disabilities*, 6 W. Va. C.S.R. § 77-1-1 et seq. (1994) establishes Hardway's "protected status" as a person with a disability. Rule 77-1-2.1. defines "disability" as:

- 2.1.1. A mental or physical impairment which substantially limits one or more of a person's major life activities; or
- 2.1.2. A record of such impairment; or
- 2.1.3. perception of such an impairment.

First, the evidence in the record taken as a whole support a finding that Hardway has an impairment that substantially limits one or more of his major life activities. See Rule 2.1.1. Hardway's medical records, testimony at the public hearing and Social Security Disability award support this finding. Second, Stevens perceives Hardway as disabled. See Rule 2.1.3.

Rule 2.8 defines the term "Is regarded as Having an Impairment."

- 2.8.1. Has a physical or mental impairment that does not substantially limit major life activities but is treated by another as having such a limitation;
- 2.8.2. Has a physical or mental impairment that substantially limits major

life activities only as a result of the attitudes of others toward such impairment; or

- 2.8.3. Has none of the impairments defined above but is treated by another as having such an impairment.

Go-Mart, Inc.'s attitude towards Hardway is that he(Hardway) has an impairment that substantially limits a major life activity. See Rule 2.8.2.

Rule 4.2 defines "Qualified Individual with a Disability" as "an individual who is able and competent, with [or without] reasonable accommodation, to perform the essential functions of the job." The Rule further provides that "[i]f an employer has prepared a written description before advertising or interviewing applicants for the job, this description may be considered evidence of the essential functions of the job." In the instant case, there was no formal written job description in Go-Mart, Inc.'s policy materials that lists any functions which the complainant could not perform. The Go-Mart, Inc. materials do contain a general description of job duties (Commission's Exhibit 10). Those duties speak to the use of the cash register, customer service, inventory control, restocking merchandise and cash handling.

Rule 4.3. defines the terms "Able and Competent" as "with or without reasonable accommodation, an individual is currently capable of performing the work and can do the work without posing a direct threat (as defined in Section 4.8) of injury to the health and safety of either other employees or the public." There is no evidence in the record that Hardway's performance of the job would create any risk of injury to other employees or to the public.

Go-Mart, Inc. takes adverse employment action against Hardway by not considering Hardway for a job he is qualified to perform. Go-Mart, Inc. alleges that it does not recall interviewing Hardway and that if it had, Go-Mart, Inc. would not have discriminated against

Hardway because of his disability. The evidence in the record, taken as a whole does not support Go-Mart, Inc.'s contention. I find Go-Mart, Inc.'s reason for not hiring Hardway pretextual.

Hardway contends that Go-Mart, Inc. refused to hire him because of his limp and use of a cane. The preponderance of the evidence supports Hardway's contention. Clearly, Go-Mart, Inc. rejected Hardway because of the "employer's hostility to those who are disabled or its stereotypical assumptions about their capabilities." Skaggs, 479 S. E. 2d at 573-574.

I consider Hardway's request for the use of a stool to be a request for an accommodation. It is clear that such a request is not a hardship on Go-Mart, Inc. because Stevens testifies that he regularly accommodates other employees.

A traditional discrimination case may be proved on a disparate treatment theory or disparate impact theory. See Barefoot v. Sundale Nursing Home, Syl. pt. 6, 193 W. Va. 475, 457 S. E. 2d 152 (1995); West Virginia University v. Decker, 191 W. Va. 567, 447 S. E. 2d 259 (1994); Guyan Valley Hospital, Inc. v. West Virginia Human Rights Commission, 181 W. Va. 251, 382 S. E. 2d 88 (1989). A disparate treatment theory requires proof (at least inferential proof) of discriminatory intent. Discriminatory intent may be established by showing that the decision maker acted out of stereotypical thinking, such as gender stereotypes, and need not involve some type of malice or hatred. Disparate impact has no "intent" requirement but, rather a showing that a facially neutral employment has a disproportionate adverse impact on a protected class. The instant case is a disparate treatment case.

A discrimination case may be proven under a disparate treatment theory which requires that Hardway prove a discriminatory intent on the part of Go-Mart, Inc.. Hardway may prove discriminatory intent by a three step inferential proof formula first articulated in McDonnell

Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U. S. 248, 252-53, 101 S. Ct. 1089, 1093, 67 L.ED.2d 207, 214-215 (1981); and, adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). Under this formula, Hardway must first establish a prima facie case of discrimination; Go-Mart, Inc. has the opportunity to articulate a legitimate nondiscriminatory reason for its action; and finally Hardway must show that the reason proffered by Go-Mart, Inc. is not the true reason for the decision, but rather pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502---, 113 S.Ct. 2747, 125 L.Ed.2d 416 (1993); Texas Dep't of Community Affairs v. Burdine, 450 U. S. 253, 101 S. Ct. 1093, 67 L.ED.2d 215 (1981); and McDonnell Douglas Corporation v. Green, 411 U.S. at 802, 93 S.Ct. at 1824, 36 L.Ed.2d at 677-78 (1973).

The term "pretext" means an ostensible reason or motive assigned as a color or cover for the real reason; false appearance, or pretense. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (W. Va. 1986). Pretext may be shown through direct or circumstantial evidence of falsity or discrimination; and, where pretext is shown, discrimination may be inferred. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995). Although, discrimination need not be found as a matter of law. St. Mary's Honor Center v. Hicks, 509 U.S. 502---, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

There is also the "mixed motive" analysis under which Hardway may proceed to show

pretext, as established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); and recognized by the West Virginia Supreme Court in West Virginia Institute of Technology, supra. “Mixed motive” applies where Go-Mart, Inc. articulates a legitimate nondiscriminatory reason for its decision which is not pretextual, but where a discriminatory motive plays a part in the adverse decision. Under the mixed motive analysis, Hardway needs only to show that his protected class played some part in the decision, and Go-Mart, Inc. can avoid liability only by proving that it would have made the same decision even if Hardway’s protected class had not been considered. Barefoot, 457 S.E.2d at 162, N. 16; 457 S.E.2d at 164, N. 18.

The Commission may prove a disparate treatment claim by direct evidence of discriminatory intent. Proof of this type shifts the burden to Go-Mart, Inc. to prove a preponderance of the evidence that it would have rejected Hardway even if it had considered the illicit reason. TransWorld Airlines v. Thurston, 469 U. S. 111, 36 Fair Empl. Prac. Cas. 977 (1985). This analysis is similar to that used in mixed motive cases.

Go-Mart, Inc. argues that Hardway cannot assert his claim for disability discrimination because the Social Security Administration awarded Hardway benefits on June 26, 2002. The Social Security Administration, held under its rules that Hardway is disabled as of May 30, 2001, nearly three months before Hardway applied for a clerk/cashier’s job at Go-Mart, Inc.. Go-Mart, Inc. argues that Hardway is barred from asserting his disability claim under the West Virginia Human Rights Act because of his Social Security Disability application and award. These arguments lack merit. The West Virginia Human Rights Act and the Social Security Act have parallel objectives which are easily reconciled.

Although, there appears to be a contradiction between Hardway's contention that he is disabled and unable to work in his social security claim and his claim under the West Virginia Human Rights Act that he is a qualified person with a disability and he is ready and willing to work with an accommodation, what appears to be a contradiction can be explained.

The United States Supreme Court addressed this apparent contradiction in Cleveland v. Policy Management Systems Corp., 526 U. S. 795, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999). The Court held that the benefits of the Americans With Disabilities Act (the federal equivalent of the West Virginia Human Rights Act) were not inherently mutually exclusive of the benefits of the Social Security Act. Receipt of social security benefits does not automatically estop someone from claiming protection under the Americans With Disabilities Act. Neither does it erect a presumption against a successful ADA claim under those circumstances.

This holding is consistent with the following federal cases: See, e.g., Anzalone v. Allstate Ins. Co., A. D. Cas. 223 (E. D. La. 1995); Smith v. Dovenmuehle Mortgage, Inc. 859 F. Supp.1138, 4 A. D. Cas. 132 (N.D. Ill. 1994); Kupferschmidt v. Runyon, 827 F. Supp. 570, 3 A. D. Cas. 52 (E.D. Wis.1993); Overton v. Reilly, 977 F. 2d 1190, 2 A.D. Cas. 254 (7th Cir. 1992); Mohamed v. Marriott International, Inc., 944 F. Supp. 277, 6 A. D. Cas. 562 (S. D. N. Y. 1996).

A decision by the Social Security Administration "to award benefits is not synonymous with a determination that a plaintiff is not a 'qualified individual' under the ADA." Dovenmuehle Mortgage, 4 A. D. Cas. at 55 citing Overton v. Reilly, 977 F. 2d 1190, (7th Cir. 1992) Mohamed, 6 A.D. Cas. At 566-568 and Kupferschmidt 3 A. D. Cas. at 55.

The Social Security Act defines "disability" as an "inability to engage in any substantial gainful activity by any medically determinable physical or mental impairment which can be expected

to result in death or which has lasted or can be expected to last for a continuous period of less than 12 months.” 42 U.S.C. § 423 (d)(1)(A). Under the statute, a person is entitled to disability benefits only if his impairments are

of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of gainful work which exists in the national economy . . . “[Work] which exists in the national economy” means work which exists in significant numbers, either in the region where the individual lives or in several regions of the country.

42 U. S. C. § 423(d)(2)(A).

The definition of disability under the Social Security Act addresses physical limitations but not the issue of accommodation, the key feature of the West Virginia Human Rights Act. The definition under the Social Security Act assumes that physical limitations will always restrict those who work at those jobs. The Social Security statute anticipates that some recipients of Social Security benefits will be able to work, since the Social Security Act permits individuals to receive benefits while engaged in a period of paid “trial work.” 42 U. S. C. § 422(c).

The West Virginia Human Rights Act requires that the employer make a reasonable accommodation and it requires that an employer consider modifying its existing job descriptions to create a job suitable for a particular disabled employee. See 6 W. Va. C. S. R. § 77-4-5.; 42 U. S. C. § 12111 (9).

The Social Security Administration encourages persons like Hardway to return to work if he can. The West Virginia Human Rights Act’s commitment to Hardway is that he will not be excluded from employment which he can do by reason of an employer’s discrimination. These statutory purposes are completely consistent.

The issue before the Commission is whether Hardway is capable of performing the essential functions with or without accommodation. 6 W. Va. C. S. T. §§ 77-1-4.2 and 77-1-4.3. The preponderance of the evidence in this record clearly establishes that Hardway was and is so capable. There is no evidence that Hardway's performance of any of the duties of a cashier will pose any direct threat to the health and safety of other employees or the public. 6 W. Va. C. S. T. §77-1-4.3.

Go-Mart, Inc.'s actions toward Hardway are pretextual and I find that Hardway has proven by a preponderance of the evidence that he was not hired because he walks with a limp and uses a cane. Hardway is a member of a protected class. He is disabled. Although there were vacancies for a clerk/cashier at the Westmoreland Go-Mart, Inc. at the time Hardway applies for a job as a clerk/cashier and Hardway is more than qualified for the job, Go-Mart, Inc. did not consider his application for employment. I find that Go-Mart, Inc. continues to hire clerk/cashiers after it refused to hire Hardway.

V. CONCLUSIONS OF LAW

1. The Complainant, Elmer Graham Hardway, is an individual aggrieved by an unlawful discriminatory practice, and is a proper Complainant under the West Virginia Human Rights Act. W. Va. Code §5-11-10.

2. At all times relevant hereto, Hardway is a person within the meaning of W. Va. Code § 5-11-3(a).

3. Hardway is a person with a disability within the meaning of the West Virginia Human Rights Act, W. Va. Code § 5-11-3(m) (1998), and the *West Virginia Human Rights Commission's Legislative Rules Regarding Discrimination Against Individuals With Disabilities*, 6 W. Va. C. S. R. § 77-1-2.1. (1994).

4. Stevens, Go-Mart, Inc.'s Area Manager, perceives Hardway as a person with a

disability, making him a person with a disability within the meaning of the West Virginia Human Rights Act, W. Va. Code § 5-11-3(m) (1998), and the West Virginia Human Rights Commission's the *West Virginia Human Rights Commission's Legislative Rules Regarding Discrimination Against Individuals With Disabilities*, 6 W. Va. C. S. R. § 77-1-2.1. and 2.1.3. (1994).

5. Hardway is a qualified individual with a disability within the meaning of the West Virginia Human Rights Act, W. Va. Code § 5-11-3(m) (1998), and the West Virginia Human Rights Commission's the *West Virginia Human Rights Commission's Legislative Rules Regarding Discrimination Against Individuals With Disabilities*, 6 W. Va. C. S. R. § 77-1-2.1. (1994).

6. The Respondent, Go-Mart, Inc. is a person and an employer as defined by the West Virginia Human Rights Act, W. Va. Code § 5-11-3(a), and is therefore subject to the provisions of the West Virginia Human Rights Act. Go-Mart, Inc. is also a person within the meaning of W. Va. Code § 5-11-3(d).

7. The Complaint in this matter was timely filed in accordance with W. Va. Code § 5-11-10. Hardway did everything within his power to timely file this matter with the West Virginia Human Rights Commission.

8. Hardway applies for a job with Go-Mart, Inc. for which he was qualified.

9. When Stevens, Go-Mart, Inc.'s area manager, asked the complainant questions about his impairment, he clearly violates the *West Virginia Human Rights Commission's Legislative Rules Regarding Discrimination Against Individuals With Disabilities*, 6 W. Va. C. S. R. § 77-1-5.1. (1994).

10. Hardway meets his prima facie burden and proved that Go-Mart, Inc. engages in unlawful discrimination, in violation of the West Virginia Human Rights Act, W. Va. Code § 5-11-9(1).

11. The nondiscriminatory defense to Hardway's charge of discrimination articulated by Go-Mart, Inc. is pretextual.

12. The Commission proves by a preponderance of the evidence that Go-Mart, Inc. unlawfully refused to hire Hardway because of his disability.

13. Neither Hardway's application for, nor receipt of, Social Security Disability Benefits create an estoppel or bar to his asserting disability discrimination claims under the West Virginia Human Rights Act.

14. Hardway suffers lost employment, lost wages and lost benefits as a result of Go-Mart, Inc.'s discriminatory refusal to hire.

15. Hardway suffers incidental damages as a result of Go-Mart, Inc.'s refusal to hire him.

VI.

RELIEF

As a result of Go-Mart, Inc.'s illegal and discriminatory hiring and employment screening practices against Hardway, the following is hereby ORDERED.

1. Upon receipt of this Final Decision, Go-Mart, Inc. is ORDERED to cease and desist continuing the illegal discriminatory practices evidenced in its actions; including its policies and procedures regarding screening, interviewing and hiring prospective employees and its failure to modify its policies with regard to accommodation of persons with disabilities;

2. Upon receipt of this Final Decision, Go-Mart, Inc. is ORDERED to require its managerial employees in West Virginia to undergo training related to disability discrimination and harassment, and the requirements of the West Virginia Human Rights Act.

4. Upon receipt of this Final Decision, Go-Mart, Inc. is ORDERED to appoint Hardway to the next available full-time, permanent/clerk/cashier position at the Westmoreland Go-Mart, Inc.,

store #29, or a store in close proximity to Hardway's residence, and ORDERED to pay Hardway front pay until he is hired.

5. Upon receipt of this Final Decision, Go-Mart, Inc. is ORDERED to pay Hardway back pay plus prejudgment interest thereon at the rate of ten percent (10%) per annum.

6. Upon receipt of this Final Decision, Go-Mart, Inc. shall pay Hardway incidental damages in the amount of \$3,277.45 for the humiliation, embarrassment and emotional distress suffered by Hardway as a result of Go-Mart, Inc.'s discriminatory actions.

7. Within 31 days of receipt of this Final Decision, Go-Mart, Inc. is ORDERED to reimburse the Commission its deposition and hearing transcript costs in the amount of \$1,126.98 associated with prosecuting this claim, all as more fully set forth in the Commission's Memorandum of Law.

In the event of failure of Go-Mart, Inc. to perform any of the obligations hereinbefore set forth, Hardway is directed to immediately advise George Bearfield, Compliance Director, West Virginia Human Rights Commission, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Phone: (304) 558-2616.

Entered this 15th day of March 2006.

West Virginia Human Rights Commission

BY:



Phyllis H. Carter

Chief Administrative Law Judge

1321 Plaza East-Room 108A

Charleston, West Virginia 25301-1400

Ph. 304.558-2616 Fax 304. 558-0085