STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Executive Director

29 May 1992

Gregory A. Haney
7 1/2 Sixth Street
Elkins, WV 26241

Georgie's Pizza & Sub, Inc.
dba Subzone
Elkins, WV 26241

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Civil Rights Division
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Daniel B. Loftus, Esquire
Snyder & Poole
308 West Patrick Street
Frederick, MD 21701

Re: Haney v. Georgie's Pizza and Sub, Inc., dba Subzone
Docket No. EH-221-90

Dear Parties and Counsel:

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

Sincerely,

QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

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

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

GREGORY A. HANEY,

Complainant,

v. DOCKET NO. EH-221-90

GEORGIE'S PIZZA AND
SUB, INC., dba SUBZONE,

Respondent.

FINAL ORDER

On February 19, 1992, April 8, 1992 and May 14, 1992, the West Virginia Human Rights Commission reviewed the Hearing Examiner's Final Decision in the above-styled action issued by Hearing Examiner Richard M. Riffe. After due consideration of the aforementioned, after a thorough review of the transcript of record, arguments and briefs of counsel, the petition for appeal, and response to petition and cross appeal filed in response to the Hearing Examiner's Final Decision, and after due consideration of the written submission of the hearing examiner with regard to the method of calculation of prejudgment interest on damages employed by him in said Final Decision, the Commission decided to, and does hereby, adopt said Hearing Examiner's Final Decision as its own, except for such modifications and amendments as are set forth immediately hereinbelow:

On page 8, Finding of Fact No. 16 is modified as follows:

> "The parties' stipulation as to lost back pay net mitigation is hereby adopted as modified to reflect a monthly accrual date and calculation of prejudgment interest."

On pages 18 through 20, "Subsection E. Complainant's Damages" is hereby modified as follows:

> Adopt without modification the first two paragraphs on page 18 which summarize the relief granted.
>
> The last two paragraphs, on pages 20 and 21, of the Hearing Examiner's Final Decision pertaining to the issuance of a cease and desist order and notification to the Commission by the respondent with regard to compliance, as well as the award of costs to the Commission's attorney in the amount of $213.96, are adopted without modification or amendment.

Add the following language to the paragraph regarding the cap on incidental damages beginning at mid-page on page 20:

> "Accordingly, the complainant is further awarded incidental damages in the amount of $2,950, which amount contains no award of interest. This ceiling on incidental damages has been increased in accordance with the holding of the West Virginia Supreme Court of Appeals in the case of Bishop Coal Co. v. Salyers, 380 S.E.2d 238 (W. Va. 1989), and with the Consumer Price Index."

Modify the remaining paragraphs as follows:

> "The complainant is awarded back pay net mitigation based on the parties' stipulation as modified to reflect the accrual date and calculation of prejudgment interest. The complainant's back pay award is $7,029.58." (See attached damage calculation).
>
> "Back pay damages should accrue in the same manner in which they would have been received."
>
> "The complainant is further awarded prejudgment interest on his back pay award in the amount of $1,575.91, which amount has been computed utilizing compounding of interest on a monthly basis, beginning August 27, 1989 and continuing up to and including May 1, 1992."

"Complainant's total damage award is $11,555.35, as reflected in the damage calculation which is attached to and hereby incorporated into this Final Order."

It is, therefore, the order of the Commission that the Hearing Examiner's Final Decision be attached hereto and made a part of this Final Order, except as modified and amended by this Final Order.

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

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 29th day of May, 1992 in Charleston, Kanawha County, West Virginia.

QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

HANEY DAMAGES

	Lost Pay	-	Miti-gation	=	Total Backpay	+	Monthly[1] Interest	=	Total Balance
1989 (9)	632.66		0		632.66		0		632.66
(10)	632.66		0		632.66		5.25		1,270.57
(11)	632.66		0		632.66		10.54		1,913.77
(12)	632.66		0		632.66		15.88		2,562.31
1990 (1)	632.66		257.76		374.90		21.26		2,958.47
(2)	632.66		257.76		374.90		24.55		3,357.92
(3)	632.66		257.76		374.90		27.87		3,760.69
(4)	632.66		257.76		374.90		31.21		4,166.80
(5)	632.66		257.76		374.90		34.58		4,576.28
(6)	632.66		257.76		374.90		37.98		4,989.16
(7)	632.66		257.76		374.90		41.41		5,405.47
(8)	632.66		257.76		374.90		44.86		5,825.23
(9)	632.66		257.76		374.90		48.34		6,248.47
(10)	632.66		257.76		374.90		51.86		6,675.23
(11)	632.66		257.76		374.90		55.40		7,105.53
(12)	632.66		257.76		374.90		58.97		7,539.40
1991 (1)	0		0		0		62.57		7,601.97
(2)	0		0		0		63.09		7,665.06
(3)	0		0		0		63.62		7,728.68
(4)	0		0		0		64.14		7,792.82
(5)	0		0		0		64.68		7,857.50
(6)	0		0		0		65.21		7,922.71
(7)	0		0		0		65.75		7,988.46
(8)	0		0		0		66.30		8,054.76
(9)	0		0		0		66.85		8,121.61
(10)	0		0		0		67.40		8,189.01
(11)	0		0		0		67.96		8,256.97
(12)	0		0		0		68.53		8,325.50
1992 (1)	0		0		0		69.10		8,394.60
(2)	0		0		0		69.67		8,464.27
(3)	0		0		0		70.25		8,534.52
(4)	0		0		0		70.83		8,605.35
					$7,029.44[2]		$1,575.91		

Backpay net mitigation with monthly interest	$8,605.35
Incidental Damages	$2,950.00
Total Damages	$11,555.35

[1] The annual interest rate of 10% divided into 12 months results in a monthly interest rate of .83%.

[2] The sum of the total backpay was previously stipulated at $7,029.58. The numbers used here were rounded which resulted in a $ .14 difference.

NOTICE OF RIGHT TO APPEAL

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

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

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

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

GREGORY A. HANEY
Complainant,

v. DOCKET NO: EH-221-90

GEORGIE'S PIZZA AND SUB, INC.
DBA SUBZONE
Respondent.

HEARING EXAMINER'S FINAL DECISION

This matter came on for hearing on 22 August 1991 in the Randolph County Courthouse Annex in Elkins, West Virginia. The complainant appeared in person; the Commission appeared by its counsel Paul Sheridan; the respondent appeared by George Belloni its personal representative and by Dan Loftis, its attorney. All proposed findings of fact and conclusions of law submitted by the parties have been considered and reviewed in relation to the record in this case. All argument of the parties has likewise been considered. To the extent that the proposed findings, conclusions and arguments are consistent with this Order, they have been adopted; to the extent that they are inconsistent with this Order they have been rejected. Each proposed finding and conclusion that does not appear in this Order has been rejected as unnecessary to the outcome of this case, irrelevant, cumulative or not supported by the evidence. To the extent that the testimony of any witness is not in accord with the findings of fact as stated herein, such testimony was not credited. To the extent that any finding of fact should have been labeled a conclusion of law or vice versa, they should be so read. The findings of fact are based upon the testimony and documentary evidence produced, upon the credibility of witnesses and

upon the plausibility of the proffered evidence in view of the other evidence of record, taking into account each witness' motive and state of mind, strength of memory and demeanor while on the witness stand and considering whether a witness' testimony was internally consistent and the bias, prejudice or interest, if any, of each witness.

FINDINGS OF FACT

1. Complainant, Gregory Haney, is a white male who was 37 years old on the date of hearing.

2. The complainant suffered a work related injury on or about 31 July 1978 while in the employ of Coastal Lumber Company in which the little finger, the ring finger and most of the middle finger of his dominant right hand were completely severed along with about 1/3 to 1/2 of the remainder of the palm and knuckles of that hand. I read a complete medical description of the hand injury into the record and submitted a tracing of the complainant's hand as an exhibit. In lay terms, if you hold your right hand in front of you with the palm facing upward and draw a straight line from the point where the heel of your hand connects with the left side of your wrist straight through the middle of the palm to the notch between your index and your middle finger, all of the hand to the left of that line is missing.

3. The injury causes complainant some limitations in his day to day activity and he and his wife enumerated a few of his restrictions.

He has difficulty passing a football, handling a basketball, using hand tools, painting and writing. His hand tends to go numb on him and he has to rest it occasionally. For instance, he is now a dishwasher and he has to release the hand held nozzle every five minutes or so to rest his hand. Both he and other witnesses reported that he had difficulty tossing pizza because his bad hand would poke a hole through the dough.

3. During August of 1989 the complainant interviewed with Julie Miller, the manager of the Elkins store, and George Belloni, the owner of the several pizza shops which did business under the various names of Pizza Man, Subzone, or Georgia's Pizza and Subshop.

4. During the interview, the complainant was told that he was being hired to make pizzas and subs, to clean up around the shop and to wash dishes as needed. He testified, and I do find, that he was not asked if he had a driver's license. During the term of his employment, his supervisor never asked him to drive. Nothing in complainant's personnel file or any testimony of any witnesses suggests that complainant was hired to perform pizza delivery duties.

5. On the second day that he was employed by the respondent, the complainant was instructed by manager Leo Lanaham to shave and get a haircut. He worked a split shift that day and he shaved and got his hair cut in between his shifts. He got it cut to the length he was wearing when he appeared for the hearing herein. I would describe it as being a long military regulation haircut. It is of a length that

would be acceptable in the United States Air Force or the United States Navy but not in the United States Marine Corps. It was not on or over his collar. He testified that he has always worn his hair this length.

6. The complainant was able to perform the tasks that were assigned to him except for tossing pizza. He was, however, a bit slower than his co-workers due to the limitations imposed by his hand and his newness at and unfamiliarity with his job.

7. The complainant testified that he worked for only three days, however, I find that he worked for five days as reflected on time cards provided by the respondent. On his fifth day of employment, 27 August 1989, the manager, Julie Miller, came to the complainant and told him that he was being laid-off. The complainant testified, and I do find, that she did not specify a reason for his termination other than that there was a general lack of work.

8. The complainant testified specifically that the respondent's manager did not comment upon the speed or quality of his work when she fired him. Neither did she comment upon his personal hygiene habits or his lack of an operator's license.

9. The respondent hired P. J. Mallow to replace the complainant during the week day that it fired him.

10. Both parties called numerous witnesses to demonstrate alternatively that complainant was either a good worker or a bad worker. I conclude, therefore, that the complainant was, at least at times, an uneven performer. Interestingly, both parties presented testimony from witnesses who worked with Haney at one job, McBee's Restaurant, to demonstrate that he was a good performer or a bad performer based upon the very same work as observed by two different witnesses. Although one of the witnesses, Shirley McBee, did seem to have a personal "agenda" so to speak, it nevertheless tends to illustrate the lack of illumination provided by this category of testimony. (I say that Ms. McBee had an agenda because she was somewhat ranting as she related her personal believe that people should not get something for nothing and her general belief that discrimination claims are frivolous.) In any event, I don't consider the widely divergent testimony concerning Mr. Haney's performance to be particularly relevant to the outcome of this case. I do find, upon a preponderance of the evidence, that his performance during his five days at Georgie's Pizza was at least adequate albeit somewhat slower than others. I find, further, that he didn't get to work long enough for us to say whether he would have been able to increase his speed with more experience. During the term of his employment no one ever complained, orally, in writing or in any other manner, regarding the quality of his work.

11. The respondent offered several reasons as justification for the termination of complainant. These included: (1) "He wouldn't get a shave or a haircut," (2) "His wife was always at the work place

when he was on duty," (3) "He never had a car, and all employees must have a vehicle to deliver if need be," (4) "He had dirty work habits," (5) His "lack of responsibility," (6) His "poor work habits," and (7) The fact that "he wanted to do everything his way." Not a single witness called by the respondent had worked at the Subzone or knew the complainant when he worked there. No written record was made at the time of complainant's discharge despite the fact, testified to by Mr. Belloni and one of his managers in another store, that it was company policy to do so.

12. The respondent testified that the grooming standards and driver's license requirement were uniform throughout all of the stores that he owned.

13. As pointed out by the Commission in its proposed findings of fact and conclusions of law, the respondent's proffered reason was clearly demonstrated to be a sham. First, there is the direct evidence from three witnesses, two of whom were neither related to nor social acquaintances of the complainant, that George Belloni had instructed Julie Miller to fire Greg Haney because he was too slow due to his handicap. One of the unrelated and unacquainted witnesses testified that Belloni instructed Miller to make up a reason for firing him.

14. The employer's proffered reasons were further demonstrated to be pretextual by virtue of the fact that complainant proved that other employees who worked for the respondent were not required to have

driver's licenses while others had hair longer than that of the complainant and some sported beards or goatees. One current employee who came to testify, Mitchell Sprouse, had hair down over his collar when he appeared at the hearing. The respondent claims that it has an unwritten policy that all employees have access to a vehicle and be able to drive. The evidence on this point, even among respondent's own witnesses, was conflicting. George Belloni testified that despite the fact that the company's written policies were updated as late as 1990, there remains nothing in writing about this policy. At the time complainant was employed at the Subzone, those employees who were expected to drive were being paid $4.25 per hour, which was more than the $3.35 paid to other employees because of the added expense of having and operating a vehicle. It is clear that Greg Haney was paid only $3.35 per hour.

15. George Belloni denied that he had instructed Miller to fire Haney because of his handicap; however, in light of the substantial contrary evidence I do not credit his testimony on this point. Mr. Belloni appeared to be sincere, sophisticated, urbane, even progressive with respect to his employment practices vis-a-vis other handicapped employees. He was polished and at ease during all of his testimony except perhaps during his surrebuttal. His testimony was, however, a bit too malleable, fluid, flexible and responsive to the apparent changing needs of his case: I would probably have believed his testimony anyway were it not in direct contradiction to that of two disinterested witnesses, Chuck Alth and Darrell Talkington. During surrebuttal Mr. Belloni testified that Mr. Talkington had a

poor reputation for truthfulness and veracity in the community, but he did not even respond to Mr. Alth's testimony that Julie Miller told him (Alth) that she fired Haney because Belloni said to get rid of him due to his inability to prepare pizzas fast enough.

16. The complainant was paid at a rate of $3.35 per hour by the respondent. Although it was his understanding that he would be working full time, he worked five consecutive days (Tuesday through Sunday), for a total of a mere 22.25 hours. Based upon a review of several employees' pay records and the testimony of record, I find that complainant was a part-time employee who would have worked about 20 hours per week if he had not been discharged. I admit that this is a somewhat speculative figure.

DISCUSSION AND CONCLUSIONS

A. Discrimination Based Upon Handicap Is Illegal.

West Virginia Code §5-11-9 provides, in pertinent part: "It shall be an unlawful discriminatory practice ... for any employer to discriminate against an individual with respect to ... terms [or] conditions of employment if the individual is able and competent to perform the services required even if such individual is ... handicapped ... ". Code §5-11-3(t) says that the term "handicap" refers to a person who:

> (1) "Has a mental or physical impairment which substantially limits one or more of such person's major life activities; the term 'major life activities' includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working;
>
> "(2) Has a record of such impairment; or

"(3) Is regarded as having such an impairment."

The 1989 amendments to the Human Rights Act, which expanded the definition of handicap, became effective on 1 July 1989. On 26 February 1990 the Human Rights Commission filed its Rules Regarding Discrimination Against the Handicapped; these emergency rules were subsequently approved by the Legislative Rule Making Committee, thereby becoming legislative rules. These rules amplify the 1989 amendments to the Act, which substantially altered the landscape of handicap discrimination law in West Virginia, and moot much prior interpretive caselaw. (It seems plain that the amendments render moot the decisions in Ranger Fuel v. Marcum and H.R.C., 376 S.E.2d 154 (W.V. 1988), and Chico Dairy Company v. W.V.H.R.C. 382 S.E.2d 75 (1989). To what extent they erode the decision in Coffman v. Board of Regents, 386 S.E.2d 1 (W.V. 1988), is less clear. What is clear is that this is a fluid and dynamic area of the law and that State law will almost certainly change again soon to accommodate the broader scope of the new federal Americans with Disabilities Act.)

Because the new regulations are the current last word on the interpretation of State handicap law, because they are succinct yet comprehensive, those portions which are germane to employment practices are attached hereto as Exhibit 1.

In this case the respondent employer did not argue that having full manual dexterity was a bona fide occupational

qualification. Rather, it simply claimed that it didn't fire Mr. Haney because of his handicap. A defense based upon a B.F.O.Q. is an affirmative defense which must be pleaded and proved. (See Exhibit 1, Rule 4.15; and, Conaway v. Eastern Associated Coal, 358 S.E.2d 423, at 430 (W.V.1986).) The respondent did contest whether Haney met the statutory definition of handicap, as a threshold issue. Then, regardless of whether he's handicapped, says Georgie's, we fired him because of legitimate nondiscriminatory reasons (personal hygiene, and the lack of a driver's license).

B. Greg Haney Is a Handicapped Person.

The respondent herein contested whether Greg Haney met the statutory definition of "handicapped". I conclude, however, that he meets the first two of the above three statutory definitions.

As regards the first definition, it cannot even be fairly argued that Mr. Haney's ability to perform some manual tasks is not substantially limited. Referring to Exhibit 1, "physical impairment" means "any ... anatomical loss affecting ... the ... musculoskelatal [system]." Mr. Haney lost 2 3/4 fingers and half of his hand. "Substantially limits" means "interferes with or affects over a substantial period of time". Mr. Haney's loss is permanent. " Major life activities ... means functions such as ... performing manual tasks ... [or] working". Imagine him tying a fishing fly, playing a musical instrument, using a

typewriter or throwing a knuckle ball. Moreover, he testified to several limitations he has, including having to rest his hand for several minutes after squeezing a spray nozzle at his dishwashing job. I view that as a substantial limitation of his ability to work. Finally, and perhaps most importantly, as I detail in Section D, infra, I have concluded that the respondent fired Haney because he was too slow because of his hand injury. This, I believe, is substantial evidence of a substantial limitation of the major life activity of working.

As regards the second definition of handicap, the complainant testified that he thinks he received a 25% permanent partial disability award from the Workers' Compensation Fund. (Transcript, page 25.) Although the complainant said, "I think it was 25 per cent", West Virginia Code §23-4-6 provides in part: "The loss of middle, ring and little finger shall be considered a twenty per cent disability. *** The loss of hand shall be considered a fifty per cent disability. Thus, although the complainant was somewhat equivocal about his exact percentage of disability, it is plain that the statutory award would be between twenty and fifty percent since the complainant lost less than his whole hand but more than the middle, ring and little fingers thereof. That he has a record of such impairment is, therefore, beyond peradventure.

The Commission urges that Haney meets the third definition of handicap; that he "is regarded as having such an

impairment." Given the ordinary measuring of the phrase, I would agree; however, the Commission has defined the phrase narrowly in its regulations and Haney does not qualify thereunder. (See, Rule 2.8.)

C. The Tests for Handicap Discrimination.

In Heston v. Marion County, 381 S.E.2d 253 (W.V. 1989) our Supreme Court of Appeals recently wrote that: "The evidentiary standards for unlawful discrimination under Title VII and the West Virginia Human Rights Act are identical." The State Supreme Court of Appeals then went on to follow its "but-for" evidentiary standard as set out in Conaway v. Eastern Associated Coal, 358 S.E.2d 430 (W.V. 1986), at syllabus point 3. Our Court continues to cling to the Conaway "but-for" test despite the U.S. Supreme Court's plain and unambigous rejection of it as too strict in a Title VII context: "To construe the words 'because of' as colloquial shorthand for 'but-for causation,'...is to misunderstand them." Price, Waterhouse v. Hopkins, 104 L.Ed.268 (1989). ("Because of" is used identically in Title VII and in the Human Rights Act at 5-11-3(h).)

Given the inconsistency between the statement in Heston that the evidentiary standards under Title VII are identical to those under the H.R.A., and the fact that our Court nevertheless applies the "but-for" test from Conaway despite the U.S. Supreme Court's counsel to the contrary, one has to conclude that the Court either is not serious about the former statement or is not serious about the "but-for" test. I think they should abandon the latter in favor

of the old McDonnell Douglas v. Green 411 U.S. 792 (1973) line of cases and the various tests that have developed for different fact patterns therein. I think, however, that if forced to choose they would retain the Conaway test because they have continued to cite it recently and often. (Cf. Romney v. H.R.C. and Gates, W.V.S.C.A. No. 19625 (March 28, 1991).) That they intend for it to apply in a handicap discharge case seems likely, too. O'Dell v. Jenmar Corp., W.V.S.C.A. No. 19426 (Dec. 13, 1990).

The chief problem with the Conaway test is that it substitutes the plaintiff's ultimate burden of proof with her burden at the prima facie case stage. The Conaway test is a great test for reviewing courts assessing findings of discrimination vel non, but it is confusing and difficult to apply at the trial level. It is plain that the Court had the good intentions of simplifying analysis; (see footnote 5, for example) however, what it has done is create confusion. For instance, in the O'Dell case, supra, a handicap conditions of employment case, the Court quotes in the syllabus both its previous handicap failure to hire test from Ranger Fuel, infra, and the Conaway test. So what am I supposed to do?

Although the West Virginia Supreme Court of Appeals' decision in Ranger Fuel Corp. v. H.R.C., 376 S.E.2d 154 (W.V.1988) pre-dates statutory changes which broadened the definition of "handicapped", and despite the fact that it is out-of-step with the more recent Americans with Disabilities Act, _____U.S.C.§_____, et seq., it nevertheless provides the model for analyzing claims of handicap

discrimination in employment. Syllabus point two provides, in relevant part:

> "A handicapped person claiming employment discrimination under W.Va. Code 5-11-9 [1981], must prove as a prima facie case that such a person (1) meets the definition of 'handicapped,' (2) possesses the skills to do the desired job with reasonable accommodations and (3) applied for and was rejected for the desired job. The burden then shifts to the employer to rebut the claimant's prima facie case by presenting a legitimate, nondiscriminatory reason for such person's rejection."

The second test that might be applied here is the now familiar Conaway test:

> "In order to make a prima facie case of employment discrimination ... the plaintiff must offer proof of the following:
> "(1) That the plaintiff is a member of a protected class.
> "(2) That the employer made an adverse decision concerning the plaintiff.
> "(3) But for the plaintiff's protected status, the adverse decision would not have been made."
>
> "In order to meet the third prong, the plaintiff must show ' ... some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion.' The evidence could come in the form '... of unequal or disparate treatment between members of a protected class and others.' " Heston, supra, quoting Conaway, supra.

Finally, one can avoid (or perhaps add to) all this confusion in claims where there is direct evidence of discriminatory intent. In T.W.A. v. Thurston, 469 U.S. 111 (1985), the U.S. Supreme Court held that

> "[T]he McDonnell Douglas test [and, by inference, the Conaway test] are inapplicable where the plaintiff presents direct evidence of discrimination. See Teamsters v. United States 431 U. S. 324, 358 n.44, 14 FEP Cases 1514, 1528

(1977). The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the 'plaintiff has his day in court despite the unavailability of direct evidence.' Loeb v. Textron, Inc., 600 F.2d 1003, 1014, 20 FEP Cases 29, 37 (CA1 1979)." (Citations in original.)

Out of an abundance of caution (and being possessed of an abundance of paper) I shall show separately my analysis under both the McDonnell Douglas hybrid test and the Conaway test, and then address the "direct evidence" analysis.

D. The Tests for Handicap Discrimination Applied.

Greg Haney prevails under the Ranger Fuel test. As stated in §B, supra, I have concluded that Greg Haney "meets the definition of handicapped". I conclude next that he "possessed the skills to do the desired job with reasonable accommodation", the second element of the Ranger Fuel test. This conclusion is based upon Findings of Fact numbers 6, 7, 8 and 10. It would have been easy enough - and surely reasonable - to allow Mr. Haney some time to learn his job and to improve his speed; he worked only five days. It would have been easy enough - and surely reasonable - to have given him some individual training to attempt to improve his speed. It would have been easy enough - and surely reasonable - to have told Mr. Haney that he needed to improve his speed; he was never even told. Third, the complainant was hired for but fired from the desired job. This makes out the complainant's prima facia case.

The burden then shifted to the employer to rebut the complainant's prima facie case by presenting a legitimate, non-discriminatory reason for the complainant's termination. This the respondent did by stating affirmatively that it fired Gregg Haney due to the fact that he did not have a driver's license and due to his poor personal grooming habits. The complainant then has the opportunity to show that the employer's articulated reason is but a sham or a pretext. This the complainant did as set out in Finding of Fact Numbers 13 and 14.

Under the Conaway test the complainant likewise prevails. As previously noted, the complainant is a member of a protected class; to wit, handicapped. It is obvious that the employer made an adverse decision concerning the complainant; it fired him. Under the "but for" test of Conaway the complainant proved that he would not have been the subject of the adverse employment decision were it not for his protected class status, thereby giving rise to an inference that the employment decision was based upon an illegal discriminatory criteron. This evidence comes in the form of unequal or disparate treatment of the complainant as compared with non-members of the protected class. Under the Conaway test, my conclusions relating to the employer's articulation of a legitimate reason for its action and the complainant's showing that such articulated reason was a

pretext are identical to those set out in the next preceeding paragraph under the Ranger Fuel test.

Finally, this is a direct evidence case. As noted in Findings of Fact Numbers 13 and 15, there is the "smoking gun" evidence that Mr. Belloni instructed his manager to fire the complainant because of his handicap. In the case at bar, there was redundant and credible direct evidence that Julie Miller and/or George Belloni concluded that Greg Haney was not suitable for his job because of his hand, and that he was discharged based upon this conclusion. Darryl Talkington testified that he overheard George Belloni tell Julie Miller to discharge the complainant; that he was too slow because of his hand. (Tr. 435-437, 439). Charles Alth testified that Julie Miller told him that she had been instructed by George Belloni to get rid of Greg Haney because he was too slow. (Tr. 502, 503, 505). Debra Chandler, the complainant's sister testified that shortly after the complainant was terminated, Julie Miller "apologized" to her "for having to fire my brother, because she said he was too slow and he couldn't work with his hand like that." Accordingly, I do conclude that under any test that one would apply here, complainant prevails.

E. Complainant's Damages.

The Commission having shown unlawful discrimination, I shall award such relief as will effectuate the purposes of the Human Rights Act and "make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v Moody, 422 U.S. 405, 418, 45 L.Ed. 2d 280, 95 S. Ct. 2362 (1975). The injured party is to be placed, as near as possible, in the situation which he would have occupied had he not been discriminated against.

Here Gregory Haney, under the "make-whole" rule, is entitled to back pay, with prejudgment interest, and incidental damages. Frank's Shoe Store v. West Virginia Human Rights Commission. 365 S.E.2d 251 (1986). In addition, the respondent will be ordered to cease and desist from discriminatory conduct, and the Attorney General will be awarded his costs in connection with this case.

Frankly, I am nearly persuaded by Commission counsel's exhaustive argument (at pages 44 and 45 of his memo) that I should just accept the parties' stipulations as to complainant's back pay; that would certainly be the easiest approach. On the whole, though, I think it would be unfair. I think everyone in this case knows that the non-driving employees of these stores are mostly all part-time, minimum wage employees. I admit that my "20 hours per week" figure is somewhat speculative, but I truly do think it's about as close as one could get to an accurate figure. Another

variable that we can't even take into account is that Haney might well have left the respondent's employ in short order. It is a high turnover business and Haney's employment history until recently suggests that he's a fairly high turnover type employee. Twenty hours per week is my fairest estimate.

Thus, I calculate Haney's back pay as follows:

28 August 1989 through 31 December 1989:

20 hours times $3.35 hour times 18 Weeks = $1,206.00

1 January 1990 through 31 December 1990:

20 hours times $3.35 hour times 52 weeks = $3,484.00

= $4,690.00

From $4,690.00 I deduct mitigation of - $2,300.78

(mitigation is from HRX EX2) = 2,389.22

To $2,389.22 I add $2,500 in incidental damages for a total before interest award of $4,889.22.

Interest, per Code §56-6-31 is simple interest with no compounding permitted and is calculated as follows:

10% of $4,889.22 is $488.92.

18 weeks is 34.6% of a year

1989 prejudgment interest:

$488.92 x 34.6% = $169.17

1990 prejudgment interest: $488.91

10 months is 83.33% of a year

1991 prejudgment interest (through 31 October 1991):

$488.92 x 83.33% = $407.42

$407.42 plus $488.92 plus $169.17 = $1,065.51

The total award then is $4,889.22

+1,065.51

5,954.73 if paid on 31 Oct. 1991

Although Haney's testimony was scant concerning the incidental damages he suffered, I conclude that he was profoundly distressed by the loss of his job. In my estimation compensation for his humiliation alone would grossly exceed our $2,500.00 cap. This was a strong complainant's case and I suspect that a jury would have compensated Haney handsomely.

Next, the Commission asks for, and now hereby receives, a cease and desist order requiring the respondent to cease and desist from its discriminatory conduct. The respondent is directed to post notices in its establishments that the respondent is an equal opportunity employer and that unlawful

discriminatory practices regarding hiring, firing or any term of employment may be reported to the West Virginia Human Rights Commission. Further, the respondent is hereby directed to obtain and to provide to the Human Rights Commission on the first day of each quarter in the year 1992 a sworn statement from one of its officers that this order has been and will continue to be implemented.

Finally, respondent is ordered to separately pay the Commission's attorney's reasonable expenses, but not attorney fees, in the amount of $213.96.

It is so ORDERED.

ENTER: 29 October 1991

RICHARD M. RIFFE
HEARING EXAMINER

TITLE 77
LEGISLATIVE RULES
WEST VIRGINIA HUMAN RIGHTS COMMISSION
SERIES 1

RULES REGARDING DISCRIMINATION
AGAINST THE HANDICAPPED

§ 77-1-1 General.

1.1. Scope. -- The following legislative regulations of the WV Human Rights Act set forth rules for complying with the handicap provisions of the WV Human Rights Act, WV Code § 5-11-1 et seq. and are intended to interpret and implement the provisions of the WV Human Rights Act, particularly the 1989 amendments relating to handicap discrimination, and to assist all persons in understanding their rights, obligations and duties under the law.

1.2. Authority. -- These regulations are issued under authority of W. Va. Code §§ 5-11-8(h) and 29A-3-1 et seq.

1.3. Filing Date. -- These regulations are promulgated on the _____ day of _____, 1990, and filed on the 26th day of February, 1990, in the Secretary of State's Office.

1.4. Effective Date. -- These regulations become effective on the _____ day of _____, 1990.

1.5. Repeal of Former Rule. -- This legislative rule repeals and replaces WV 77 CSR 1 "Rules Regarding Discrimination Against the Handicapped" filed 20 July 1982 and effective 1 August 1982.

§ 77-1-22 Definitions.

2.1. "Handicapped Person" means a person who:

2.1.1. Has a mental or physical impairment which substantially limits one or more of a person's major life activities; or

2.1.2. Has a record of such impairment; or

2.1.3. Is regarded as having such an impairment.

2.1.4. This term does not include persons whose current use of or addiction to alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

2.2. "Physical Impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological;

musculoskeletal; special sense organs; respiratory; speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine.

2.3. "Mental Impairment" means any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

2.4. "Physical or Mental Impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, and emotional illness.

2.5. "Substantially Limits" means interferes with or affects over a substantial period of time. Minor temporary ailments or injuries shall not be considered physical or mental impairments which substantially limit a person's major life activities. Examples of minor temporary ailments are colds or flu, or sprains or minor injuries.

2.6. "Major Life Activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, transportation and adapting to housing.

2.7. "Has a Record of Such Impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

2.8. "Is Regarded as Having an Impairment" means any of the following:

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.

§ 77 -1-3 Verification of Handicap

3.1. If, at the time of public hearing, there is a question or dispute as to whether the complainant is a handicapped person, or as to the nature of the impairment, the burden of proof shall be upon the complainant to present by reasonable medical opinions or records:

3.1.1. The nature of the handicapping condition;

3.1.2. Any limitations caused by said handicap; and

3.1.3. Any restrictions upon the handicapped individual's work activity. If the complainant prevails, the costs of obtaining and presenting such medical evidence may be assessed against the respondent.

3.2. It is intended that medical evidence will be required only in cases where there is an actual dispute as to the nature or medical implications of the handicapping condition.

§ 77-1-4 Employment Discrimination Prohibited.

4.1. No employer shall, on the basis of handicap, subject any qualified handicapped person to discrimination in employment as it relates to:

4.1.1. Recruitment, advertising, and processing applications;

4.1.2. Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

4.1.3. Rates of pay or any other form of compensation or changes in compensation;

4.1.4. Job assignments, job classifications, organizational structures, position description, lines of progression, and seniority lists;

4.1.5. Leaves of absence, sick leave, or any other leave;

4.1.6. Fringe benefits, such as medical, hospital, accident, disability, life insurance, retirement benefits, unemployment benefits, and profit sharing and bonus plan, whether or not administered by the recipient;

4.1.7. Selection and/or financial support for training, including apprenticeship, professional meetings, conferences, and other related activities and leaves of absence to pursue training;

4.1.8. Employer-sponsored activities including social or recreational programs; and

4.1.9. Any other terms, conditions, or privileges of employment.

4.2. "Qualified Handicapped Person" means an individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job in question.

4.3. "Able and Competent" means that, with or without reasonable accommodation, an individual is currently capable of performing the work and can do the work without posing a serious threat of injury to the health and safety of either the individual, other employees, or the public.

4.4. "Reasonable Accommodation" means reasonable modifications or adjustments to be determined on a case-by-case basis which are designed as attempts to enable a handicapped employee to be hired or to remain in the position for which he was hired.

4.5. An employer shall make reasonable accommodation to the known physical or mental impairments of qualified handicapped applicants or employees where necessary to enable a qualified handicapped person to perform the essential functions of the job. Reasonable accommodations include, but are not limited to:

4.5.1. Making facilities used by handicapped employees, including common areas used by all employees such as hallways, restrooms, cafeterias and lounges, readily accessible to and usable by handicapped workers;

4.5.2. Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters; and similar actions;

4.5.3. Alteration of the amount or methods of training; and

4.5.4. The preparation of fellow workers for the handicapped employee, to obtain their understanding of the handicapping limitations and their cooperation in accepting other reasonable accommodations for the handicapped employee.

4.6. An employer shall not be required to make such accommodation if s/he can establish that the accommodation would be unreasonable because it imposes undue hardship on the conduct of his or her business. In determining whether or not an accommodation would constitute an unreasonable burden upon the employer, the Commission shall consider:

4.6.1. The overall size and profitability of the employer's operation; and/or

4.6.2. The nature of the employer's operation including composition and structure of the employer's workforce; and/or

4.6.3. The nature and cost of the accommodations needed (taking into account alternate sources of funding, such as Division of Vocational Rehabilitation);

4.6.4. The possibility that the same accommodations may be able to be used by other prospective employees.

4.6.5. The requirements of the West Virginia Law on Handicapped Persons and Public Buildings and Facilities, W. Va. Code § 18-10F-1 et seq. Any changes or alterations required due to the failure of the employer (or his lessee, lessor or predecessor in title) to conform to the requirements of said statute will be considered per se reasonable.

4.7. Each handicapped individual's ability to perform a particular job must be assessed on an individual basis. An employer may refuse to hire or may discharge a qualified handicapped person if, even after reasonable accommodation, the handicapped person is unable to perform the duties of the job without creating a substantial hazard to his/her health and safety or that of others. However, any such decision shall be based upon the individual handicapped person's actual abilities, and not upon general assumptions or stereotypes about persons with particular mental or physical handicaps.

4.8. In deciding whether an individual poses a serious threat to his/her health and safety, the employee must show a reasonable probability of a materially enhanced risk of substantial harm to the handicapped employee or handicapped applicant based on a consideration of the job requirements in light of that individual's handicap, and the work and medical history of the handicapped individual. The employer has the burden of demonstrating that his employment decision was based upon competent medical advice specific to the employment at issue.

4.9. An employer shall not discriminate against an applicant or employee because of a handicap or impairment which is not presently job related but which may worsen and become job related in the future. Provided, that this section shall not be construed so as to impose an undue hardship on the employer. In determining whether the requirements of this section impose an undue hardship on the employer, the Commission shall consider:

4.9.1. The length, cost, and nature of training required for the job;

4.9.2. The length of time that is likely to elapse before the condition becomes job related;

4.9.3. The normal turnover for the position;

4.9.4. The factors listed in Rule 4.6.

4.10. W.Va. Code § 5-11-9 provides an exception to the prohibition of discrimination in employment when such discrimination is based on a bona fide occupational qualification (B.F.O.Q.). The Commission construes the B.F.O.Q. very narrowly and requires that, in order to establish a B.F.O.Q. which excludes all persons with a particular handicap, an employer must prove that all or virtually all persons with that articular handicap would be unable to perform the essential functions of the job involved.

4.11. The following are examples of actions which do not warrant application of the B.F.O.Q. exception and which constitute unlawful discrimination with respect to handicap:

4.11.1. Refusal to select a handicapped individual because of the preferences (or assumptions about the preferences) of co-workers, customers or clients;

4.11.2. Refusal to select a handicapped individual for a position because of uninsurability or increased cost of insurance (whether actual or anticipated).

4.12. The following is an example of a B.F.O.Q. based upon handicap which may be permitted:

4.12.1. Physical standards for employment which are directly related to safe performance of the job and are based upon complete factual information concerning working conditions and hazards, and essential physical requirements of each job.

4.13. When an individual becomes handicapped in the course of employment, the employer shall, if possible through reasonable accommodation, continue the individual in the same position, or may reassign the employee to a new position for which s/he is qualified or for which, with training, s/he may become qualified. The requirements of this paragraph shall be interpreted in such a way as to be consistent with W. Va. Code § 23-5A-1, which prohibits employers from discriminating against employees because they have applied for or received Workmen's Compensation benefits.

4.14. An employer shall offer handicapped employees the same opportunity as nonhandicapped employees to obtain health and life insurance benefits, and no handicapped person shall, on the basis of handicap, be denied health and life insurance benefits provided in connection with employment, unless otherwise authorized by law.

4.15. If an applicant is refused employment, or an employee is discriminated against in any term, condition, or privilege of employment, because of a handicap, the burden shall be upon the employer to establish that the refusal or

discrimination was based upon a bona fide occupational qualification, (as defined in Rule 4.10.) or that, even with reasonable accommodation, the employee would be unable safely and adequately to perform the essential functions of that job, or that employment of a handicapped individual would impose an undue hardship upon the employer under the circumstances described in Paragraph 4.6.).

§ 77-1-5 Pre-Employment Practices

5.1. An employer, labor organization, or employment agency shall not make pre-employment inquiry of an applicant as to whether the applicant has a physical or mental impairment or as to the nature or severity of such impairment, except that an employer, labor organization or employment agency may ask an applicant whether s/he has any physical or mental impairment that might interfere with his/her ability to perform the job applied for.

5.2. Pre-employment examinations relating to minimum physical standards for employment are lawful if:

5.2.1. The minimum physical standards are necessary for performance of the job for which the person has applied;

5.2.2. All applicants for the job are subjected to such an exam, regardless of whether they have been identified as handicapped.

5.3. An employer shall not use any test or other selection criteria that discriminates against handicapped persons unless:

5.3.1. The employer can demonstrate that the test or other criteria is job-related for the job in question; and

5.3.2. The employer can demonstrate that there is not an alternate test or set of criteria that has less discriminatory impact.

5.4. An employer shall select and administer tests concerning employment so as to best ensure that the test results accurately reflect the applicant's job skills, aptitude, or whatever factor the test purports to measure, rather than measuring the applicant's impaired sensory, manual or speech skills, unless those skills are the ones the test purports to measure. The employer shall make reasonable accommodations for handicapped applicants in testing, upon request, by providing such adaption equipment as may be necessary and modifying testing procedures as appropriate. The employer shall supply such adaptive equipment for taking the test as the applicant shall request.

§77-2-10. Appeal to the Commission.

10.1. Within thirty (30) days of receipt of the hearing examiner's final decision, any party aggrieved shall file with the executive director of the Commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the examiner, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the Commission from the hearing examiner shall not operate as a stay of the decision of the hearing examiner unless a stay is specifically requested by the appellant in a separate application for the same and approved by the Commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the Commission shall render a final order affirming the decision of the hearing examiner, or an order remanding the matter for further proceedings before a hearing examiner, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the Commission, neither the parties nor their counsel may appear before the Commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a hearing examiner, the Commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the examiner on remand.

10.8. In considering a notice of appeal, the Commission shall limit its review to whether the hearing examiner's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the Commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the Commission;

10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a hearing examiner's final decision is not filed within thirty (30) days of receipt of the same, the Commission shall issue a final order affirming the examiner's final decision; provided, that the Commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the Commission. The final order of the Commission shall be served in accordance with Rule 9.5.

CERTIFICATE OF SERVICE

I, Richard M. Riffe, Hearing Examiner for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing ORDER by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 29 October 1991 to the following:

Gregory A. Haney
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Richard M. Riffe
Hearing Examiner