STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
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Executive Director

30 May 1990

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Re: Charles Lanham v. Yellow Freight, Inc. & Robert Johnson
Docket No. EA-164-87

Dear Parties and Counsel:

Herewith, please find the Final Order of the WV Human Rights Commission in the above-styled and numbered case. Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective July 1, 1989, 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 a review of this Final Order.

Sincerely,

Quewanncoii C. Stephens
Executive Director

Enclosures

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

cc: Secretary of State

NOTICE OF RIGHT TO APPEAL

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

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

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

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CHARLES LANHAM,

Complainant,

v.

DOCKET NO. EA-164-87

YELLOW FREIGHT, INC.,
and ROBERT JOHNSON,

Respondents.

FINAL ORDER

The public hearing in this matter was held on December 8 and 9, 1987 at 405 Capitol Street, Charleston, West Virginia, and December 23, 1987 at the Kanawha County Public Library, Charleston, West Virginia, before Theodore R. Dues, Jr., Hearing Examiner. The presence of a Hearing Commissioner was waived by the parties.

The complainant appeared in person and by his counsel, Dan L. Hardway. The corporate respondent appeared by its representative, Robert Johnson, who also appeared on his own behalf. Counsel for respondents were Anna Norton Dailey and David Mendelbaum.

On August 15, 1988, the hearing examiner submitted his recommended findings of fact and conclusions of law, and on September 20, 1988, submitted a supplementation to his recommended decision. On March 14, 1990, the Commission reviewed said recommendations, the respondents' exceptions and all proposed findings, conclusions, and supporting arguments

submitted by the parties, and upon an independent review of the entire record herein, the Commission does hereby enter its findings of fact and conclusions of law as set forth hereinbelow. To the extent that the findings and conclusions advanced by the hearing examiner have been rejected, they have been found by the Commission to be clearly wrong and to not be supported by substantial evidence of the whole record.

ISSUE TO BE DECIDED

Whether one or both respondents violated W. Va. Code § 5-11-9(a)(1) by unlawfully discriminating against the complainant with respect to the tenure, terms, conditions, or privileges of employment because of his age.

FINDINGS OF FACT

1. At the date of incident in this matter, the complainant, Charles Lanham, was over the age of forty, and thus a member of a protected class.

2. The complainant was hired by the respondent, Yellow Freight, in August of 1984 as a casual employee, i.e., temporary truck driver and dock worker. The respondent discontinued contacting Mr. Lanham for work in 1986 when the terminal manager personally instructed the dispatcher to no longer call him [Lanham] to work.

3. Under the terms of the collective bargaining agreement in effect from March 1, 1982 through March 31, 1985, a casual employee who worked 55 days in a 12-month period for a particular company was entitled to a permanent position with that company.

4. Under the terms of the collective bargaining agreement applicable to this case, in effect from April 1, 1985 through March 31, 1988, a company that worked a casual employee or any combination of casual employees as supplemental to the work force for a total of 30 work days out of 90 calendar days was required to hire a permanent employee; however, it was within the employer's discretion as to whom would be hired as a permanent employee.

5. During his tenure as a casual employee with respondent, Yellow Freight, complainant performed his duties in a satisfactory manner. Mr. Lanham was never the subject of any customer complaints, and he never refused to perform any assignment requested of him. Though he admits to periodically complaining about overtime, Mr. Lanham's complaints did not exceed those of any other driver, permanent or casual. In fact, Mr. Lanham never complained to the union steward regarding overtime as did other employees.

6. The dispatcher at the terminal where the complainant worked indicated some errors with the complainant's completion

of trip summaries. However, these problems were not discussed with Mr. Lanham as being a deficiency with his work product, and complainant had no more problems with his paperwork than did any other employee, permanent or casual.

7. Believing that the respondent, Yellow Freight, owed the union a permanent employee, complainant's union filed a grievance on his behalf on March 1, 1986.

8. Subsequent to this filing, the union made repeated efforts to obtain the original time records for the complainant; copies of the complainant's time cards presented to the union by the company were illegible.

9. As a result of this grievance, a settlement was reached in which respondent, Yellow Freight, agreed to call complainant for work before calling any other casual; the terminal manager had no input into this agreement.

10. In early 1986, the terminal manager requested the complainant to come to his office at which time he asked complainant how much longer he intended to work. Shortly after a question by the complainant as to the purpose of the inquiry, the terminal manager asked the complainant how old he was. The complainant reasonably perceived this conversation to be an inquiry as to when he planned to retire.

11. Respondent, Yellow Freight, abided by the agreement reached in settlement of the March 1986 grievance for a period of several months; respondent subsequently began to call to work on a frequent basis Herb Wendling, the younger employee targeted by complainant's charge of age discrimination.

12. Herb Wendling was under the age of forty at the date of incident in this matter.

13. The complainant filed a second union grievance in August 1986. As a result of this grievance, the union requested time cards for both the complainant and Herb Wendling. Those time cards contained inaccurate accounts of both days worked and capacity worked at a given time. For example, the time cards were inaccurate as to the time they actually reported to work and whether they were reporting as a supplemental or replacement employee; days during which a casual would be called out as a replacement did not count toward the 30 days in 90 that entitled the union to a permanent employee.

14. The complainant had pay stubs for time that respondent, Yellow Freight, had no record of complainant working; accordingly, the company did not forward this time to the union in response to the materials requested pursuant to the union grievance (regarding the union's entitlement to a probationary employee).

15. From the evidence of the record, it appeared that had the complainant been properly credited for time worked, the company would have owed the union a probationary employee in early 1986 (before Herb Wendling began working for respondent, Yellow Freight, as a casual).

16. The younger employee, Herb Wendling, did not begin working as a casual for respondent, Yellow Freight, until late March or early April 1986.

17. During the period of time Herb Wendling worked as a casual for respondent, Yellow Freight, at least one customer registered a complaint against him and he engaged in at least one argument on the job with a permanent employee.

18. The union steward at the terminal at which complainant worked advised the terminal manager against hiring Herb Wendling as a probationary employee.

19. Although the bargaining agreement did not require the trucking industry to provide the probationary position to a particular employee, it has been and continues to be a practice in the industry, as well as with respondent, Yellow Freight, to award the position to the employee with the most time in at the earliest date.

20. Prior to hiring the younger employee, Herb Wendling, respondent, Yellow Freight, had not hired a permanent employee since 1978. Accordingly, this employee was the only permanent employee hired under the terms of the then-current collective bargaining agreement.

21. From June 1985 to December 1986, respondent, Yellow Freight, utilized ten casual employees.

22. During his tenure, the complainant had no rights superior to any other casual employee under the collective bargaining agreement then in effect.

23. From December 19, 1986 to November 20, 1987, it was stipulated that Herb Wendling earned $26,393.28.

24. Herb Wendling earned the following wages from respondent for the period of times set forth:

YEAR	EARNINGS
1986	$16,054.31
1987	$26,393.28

25. As of October 1986, Herb Wendling earned benefits worth $510.00 per month under the collective bargaining agreement then in effect.

26. The complainant, Charles Lanham, earned $5,247.15 from other employment during the last half of 1986.

27. In 1987, complainant earned $15,890.69.

28. Had the complainant been placed on the seniority list in March 1986, he would have earned 21 months of benefits under the union contracting having a value of $10,710.00.

29. The complainant reasonably mitigated his damages.

30. The complainant has been discriminated against on the basis of age.

DISCUSSION OF THE EVIDENCE AND APPLICABLE LAW

The Commission reviewed this matter under the limitations set forth in W. Va. Code § 5-11-8(d)(3), thus recognizing its obligation to sustain the hearing examiner's findings of fact if they are supported by substantial evidence on the whole record or are unchallenged by the parties. West Virginia Human Rights Comm'n v. United Transportation Union, 280 S.E.2d 653 (1981). Similarly, we give great deference to any recommended findings resting on an assessment of credibility since "the credibility of the witnesses was for the hearing examiner to determine." Westmoreland Coal v. Human Rights Comm'n, 382 S.E.2d 562, 567, n.6 (1989).

The evidence in this case is clear on several points. First, there is no question that the complainant falls within the age group of those persons targeted for protection by the West Virginia Human Rights Act, i.e., age forty or over. Secondly, the complainant worked for the respondent Yellow Freight as a casual employee from approximately August 1984 until September 1986. During his tenure as a casual employee, the complainant performed his duties in a satisfactory manner. The complainant, however, ceased to be called by the respondent for further work assignments as a result of a unilateral decision by the terminal manager. The record reflects that this decision was not based upon any credible job-related reason. Thirdly, at the time complainant ceased to be called, the respondent began to work more heavily the targeted employee of this action, Herb Wendling, who was under the age of forty on the date of incident.

In order to make a prima facie case of employment discrimination based upon age, the complainant must prove that: (1) he is a member of a protected class; (2) that the employer made an adverse decision concerning him; and (3) but for his protected status, the adverse decision would not have been made. Conaway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (1986). The complainant is thus required to show some evidence which would sufficiently link the employer's decision and the complainant'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. Id., at 429. The complainant in the present case has clearly established the criteria set forth in Conaway.

Having established a prima facie case of employment discrimination, the burden then shifts to the employer to rebut the complainant's case by presenting a legitimate, non-discriminatory reason for its adverse employment decision. Respondent articulated several reasons for failing to hire complainant as a probationary employee. Respondent suggested that it wanted to hire a permanent employee that associated well with as many of the other full-time current employees as possible. The choice to hire the targeted employee is unjustified in light of that representation, for the targeted employee was not the choice of the majority of the full-time employees comprising respondent's work force at the time. This was corroborated by management's statement that the unsettled work environment, after the complainant's severance from the work relationship with respondent, was probably due to the fact that the complainant was no longer working at the terminal. Additionally, respondent contended that complainant was not the better employee due to the fact that he was not as proficient as he should be with the paperwork required to document trips and deliveries made during the course of the work day. Respondent further contended complainant attempted to avoid overtime work. However, the evidence revealed that

the complainant was never approached about underperformance, nor was he ever disciplined for failure to do any duties requested of him or counseled regarding deficiencies in his paperwork. Furthermore, complainant did not voice any more complaints about overtime than did any other casual or permanent employee. Time records showed that complainant in fact worked a significant amount of overtime.

Where an employer presents a non-discriminatory reason for the action giving rise to an employment discrimination claim which is sufficient to overcome the inference of discriminatory intent, the complainant's prima facie case is rebutted; however, the complainant may proceed if it is shown that the reason presented by the employer is merely a pretext for a discriminatory motive. Mingo County Equal Opportunity Council v. State Human Rights Comm'n, 376 S.E.2d 134 (W. Va. 1988); West Virginia Institute of Technology v. West Virginia Human Rights Comm'n, 383 S.E.2d 490 (W. Va. 1989). For the aforementioned reasons, the articulated non-discriminatory reasons set forth by respondent to justify the employment action taken against the complainant, Charles Lanham, are pretextual.

CONCLUSIONS OF LAW

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

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

3. Complainant has established a prima facie case that respondent discriminated against him on the basis of age.

4. Complainant has shown that the reasons articulated by respondent for failure to hire him are pretextual.

5. Respondent discriminated against complainant on the basis of age in violation of W. Va. Code § 5-11-9(a).

6. Complainant suffered economic loss as a result of the actions of respondent and incurred attorney's fees in the prosecution of this action.

PROPOSED ORDER

The Commission having found that respondents, Yellow Freight and Robert Johnson, have engaged in an unlawful discriminatory practice as defined in the West Virginia Human

Rights Act, it is hereby ORDERED that:

1. Respondents cease and desist from discriminating against individuals on the basis of age with respect to compensation, hire, tenure, terms, conditions or privileges of employment;

2. Complainant be reinstated to his former position with full benefits and seniority based upon a hiring date of March 27, 1986;

3. Complainant be awarded back pay per the joint stipulation of the parties in the amount of $8,466.60;

4. Complainant be entitled to receive full wages and benefits from the date of this Final Order until he is in fact placed into a position with respondent, Yellow Freight, Inc.;

5. Complainant receive interest at the statutory rate of 10% per annum until the aforementioned monetary provisions have been met;

6. Complainant be awarded reasonable attorney's fees in the amount of $8,475.00;

7. Complainant be awarded the sum of $324.10 for costs reasonably expended and necessary to the litigation of this

matter; said costs include reimbursement for service of process in the amount of $140.00, court reporter fees in the amount of $166.30, and copying costs in the amount of $17.80.

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 have ten (10) days to request that the Human Rights Commission reconsider this final order or 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 31st day of May, 1990, in Charleston, Kanawha County, West Virginia.

QUEWANNCOII C. STEPHENS
Executive Director/Secretary