BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

Arthur Moss

COMPLAINANT,

v. Docket No. ER-16-75

City of St. Albans/Police Dept./
Police Civil Service Commission

RESPONDENT.

FINAL DECISION AND ORDER

I. Proceedings

This case came on for hearing on 19 March, 1981, State Capitol Complex in Charleston, West Virginia before the hearing panel of Douglas Miller and Russell Van Cleve. The Complainant appeared in person. The West Virginia Human Rights Commission appeared by its counsel Eunice L. Green. The Respondent appeared by its counsel, Gary A. King.

On or about 26 July, 1974 the Complainant, Arthur Moss, filed a complaint, duly verified, with the West Virginia Human Rights Commission of the State of West Virginia, alleging that the Respondent, City of St. Albans/Police Department had discriminated against him on the basis of his race in violation of West Virginia Cose §5-11-9 in that said Respondent had refused to rehire him in his position as policeman for the City of St. Albans, while rehiring a white policeman.

An amended verified complaint was filed on or about 1 April, 1980, naming the Police Civil Service Commission as a respondent.

On 29 January, 1981 the West Virginia Human Rights Commission, by Howard D. Kenney, its Executive Director, served written notice of hearing upon the parties pursuant to West Virginia Code §5-11-10. The said notice appointed a hearing panel composed of a hearing examiner, Douglas Miller, and a hearing commissioner, Russell Van Cleve, and set the date of hearing as 19 March, 1981.

II. Findings of Facts

For approximately four and one half (4½) years prior to February 1973, Arthur Moss, a black male was employed by the city of St. Albans, West Virginia as a patrolman with the St. Albans Police Department. During the four and one half (4½) years of his employment, Mr. Moss was involved in a number of job related incidents which are pertinent to our consideration in this case. Those incidents were:

1. Mr. Moss was given two (2) three-day suspensions. One for calling in a false alarm to the St. Albans Fire Department and the other for being absent without leave for one day;

2. he was involved in an accidental shooting in which he and the police chief were injured and;

3. he was involved in an automobile accident in which a police car was damaged. While no disciplinary action was taken against him pertaining to the shooting accident, Mr. Moss' driving priviledges were suspended for a short time after the automobile accident. These matters appear to be undisputed upon the face of the record.

However, at the time of the hearing of this case, there were matters introduced about which there is a great deal of dispute. First, there is the matter of some warrants issued for Mr. Moss' arrest for

checks that he had written, in varying amounts, to one Basil Estep of Estep Sunoco without having sufficent funds on deposit to cover the said checks. Mr. Moss argues that he and Mr. Estep had an understanding that the checks were to be held until Mr. Moss was financially able to pick them up. But in 1975, someone other than Mr. Estep obtained a warrant for Mr. Moss' arrest. This was done in spite of the fact that other members of the St. Albans Police Department had been known to have checks outstanding for which warrants were not frequently issued and when issued they were not served. In addition to the evidence concerning the checks, there was some evidence that at some point in time a peace warrant had been obtained against Mr. Moss by his wife and that a formal complaint had been filed against him by a former girlfriend. No action was taken by the Police Department regarding these incidents.

On February 21, 1973, Mr. Moss resigned his position with the St. Albans Police Department, but on July 18, of that same year applied for reinstatement.

It appears that sometime prior to Mr. Moss' application for reinstatement, Mr. Homer Clark, who had worked with Mr. Moss in the St. Albans Police Department and who, like Mr. Moss, had resigned his position, had also applied for reinstatement. Mr. Clark is a white male.

Mr. Clark, after having applied for reinstatement, was called in for a meeting with the Chief of Police, Thomas L. Midkiff, and the Police Civil Service Commission. He was subsequently given a physical examination and reinstated. This was done dispite the fact that Mr. Clark, by his own admission, had had complaints filed against him, an accident in a police car, and personal problems concerning his domestic affairs.

Thomas L. Midkiff, a verteran of some thirty two (32) years with the St. Albans Police Department, who indicated that Mr. Moss was the only black employed by the department to his knowledge, was Chief of Police at the time that Clark and Moss applied for reinstatement.

There is conflicting testimony as to what transpired between Midkiff and Moss with Midkiff saying that he told Moss that there were no vacancies and Moss saying that Midkiff promised to reinstate him. However, Midkiff admits that he hired Homer Clark and that several other persons were hired while Moss' application for reinstatement was pending.

Even though Clark, who had worked with Moss; and Barnard L. Dodd, a twenty three (23) year veteran and a chief of the department, testified that Moss was a good police officer, the City of St. Albans and the Police Civil Service Commission refused to grant Moss' request for reinstatement. Mr. Williams A. Heslep explained the reasons for the refusal.

Mr. Heslep, who served on the St. Albans Police Civil Service Commission from 1964 until 1976 and who was the Secretary during the pendency of the Moss request, testified that the Commission met, without notification to Mr. Moss, and made a decision concerning the reinstatement request.

In addition, according to Mr. Heslep, during its deliberation the Commission studied Moss' file and conferred with the Chief of Police and the Mayor. Finally, Mr. Heslep indicated that in the absence of guidelines concerning reinstatement, the Commission assumed that the matter was discretionary. Therefore, even though there were only two police officers who had resigned and applied for reinstatement in the twelve

(12) years that Mr. Helsep had served on the Commission, Clark and Moss, the Commission felt that it could, through the exercise of its discretion, reinstate Clark and refuse to reinstate Moss. Consequently, in deciding not to reinstate Moss, the Commission considered the shooting accident even though other officers had been involved in shooting accidents, including Chief Walker. The Commission also considered the false fire alarm incident and some matters not found in his police file such as an alleged chase while Moss was off duty and some rumors they had heard about Moss which were not related to police work. The Commission had no knowledge of the warrants concerning Moss.

Mr. Barnard L. Dodd testified that in making a selection for reinstatement some proirity is given over those making application for the first time. Mr. Heslep agrees. He stated that if Moss had been certified he would have been the next hired.

As Mr. Dodd put it in answer to the question:

Q. "Who had the legal responsibility for making the employment?"

A. "The Mayor, I would say, but that's not to say that the Chief really doesn't have any say so because the Mayor will go along with what he says normally, I would say." (Page 89-transcript)

III. Conclusions of Law

There are no valid issues raised concerning the jurisdiction of the West Virginia Human Rights Commission over the matter herein considered. Therefore, all of the proceedural requirements of the West Virginia Human Rights Act and Title VII of the Civil Rights Act of 1964 are

deemed to have been met and the case will be disposed of on the bases of the substantive issue.

The sole issue presented upon the record of this case is whether the Respondents were in violation of the prohibition of racial discrimination in employment within the meaning of the West Virginia Human Rights Act and Title VII of the Civil Rights Act of 1964 when they refused to certify a black male for reinstatement because of materials found in his personnel file and rumors but granted certification to a white male who had been involved in similar activities.

The Complainant does not contend that he was excluded from employment by some policy or device which was facially neutral but had a disparate impact on minorities. He also does not argue that he was victimized by the present effects of some past practice. Therefore, we must conclude that the complaint herein is grounded in the theory of discrimination in employment which is commonly called disparate treatment.

The law applicable to employment discrimination cases based on disparate treatment has been well settled since the United States Supreme Court's announcement of McDonald Douglas Corporation v. Green 411 U.S. 792 F.E. P965 (1973). In that case, the court stated that the Complainant has the initial burden of proving the existance of a prima facie case by showing:

1. that he belongs to a racial minority;
2. that he applied and was qualified for a job for which the employer was seeking applicants;
3. that despite his qualifications, he was rejected and;

4. that after his rejection the position remained open and the employer continued to seek applicants from persons of the Complainant's qualifications.

The court continues by stating that once the prima facie case is established, the burden of proof shifts to the employer who must articulate some legitimate non-discriminatory reason for the Complainant's rejection.

In addition, the courts have stated that in those cases where the employer has articulated a non-discriminatory reason for the Complainant's rejection, the Complainant is allowed to show that the employer's reasons are merely pretextual. In other words, the Complainant is allowed to show, by competent evidence, that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.

Finally, evidence which may be relevant to any showing of pretextuality includes facts, such as to the treatment of the Complainant and the employer's general policy concerning the employment of minorities.

In this case, the fact that the Complainant has established a prima facie case is beyond all doubt. None of the witnesses testifying for either of the parties ever denied that there were vacancies on the St. Albans Police Department at the time Moss applied for reinstatement. In fact, Chief Midkiff stated that during the pendency of Moss' application, not only was Mr. Clark reinstated, but several other people were hired. Further, there was no testimony indicating that Moss did not apply for the job or was not qualified.

Therefore, the only question remaining is whether the City of St. Albans has put forth sufficiently valid non-discriminatory non-pretextual reasons for the Complainant's rejection,

The Respondent's evidence indicates that the Police Civil Service Commission refused to certify the Complainant on the bases of materials in his personnel file concerning false alarm called in to the St. Alban Fire Department; the accidental shooting and the accidental damaging of police car. The evidence also shows that the Commission in consultation with the Mayor and Chief of Police rejected Moss on the bases of information that was not related to police work. There are two interesting points concerning the Commission's deliberations aside from the fact that the Mayor and the Chief of Police participated therein. The first is that Moss was not called before the Commission and the second is that the Commission gave no consideration to the arrest warrants issued against Moss. One must assume that the reason for the Commission's failure to consider the arrest warrants is because they were not in the file when it was reviewed in 1973 because the warrants were not issued until 1975. They were then placed in Moss's file which had been, for all purposes, closed since February of 1973.

One can only guess as to why Moss was never called before the Commission. This is especially true in light of the fact that Clark, who admitted that he had damaged a police car and had had complaints filed against him, was called before the Commission, took his physical examination and was reinstated. While it is true that Clark had not been involved in a shooting accident or called in a false fire alarm and Moss had done both, the treatment of the two men was so grossly different as to suggest a discriminatory intent.

In International Brotherhood of Teamsters v. U.S. 431 U.S. 324; 14 F.E.P. cases 1514 the Supreme Court of the United States observed that direct proof of discriminatory intent is required in order to make a

prima facie showing in individual disparate treatment cases. The court also found that statistics are an important source of proof of racial discrimination in employment since absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a work force more or less representative of the racial composition of the population in the community from which employees are hired. (See also Hazelwood School District v. U.S. 433 U.S. 299; 15 F.E.P. Cases 1.)

A racially discriminatory intent is amply shown in this case. All parties admit that Moss was employed for four and a half (4½) years and the other black lasted less than two (2) weeks. It cannot be seriously argued that the number of blacks employed by the Police Department, none is reflective of the City's black population.

The Respondents, the City of St. Albans and the St. Albans Police Department, argue that the certification of Moss was solely within the discretion of the Civil Service Commission and that since the Commission refused to certify Moss, the City and the Department were without the power to reinstate him. The arguement, though inventive, is without bases in fact and in law.

Police Chief Dodd testified that in the reinstatement process, the Mayor would "go along with what the Chief said normally" and Mr. Heslep admitted that in considering Moss' application the Commission consulted both the Mayor and Police Chief.

Finally, the Respondents argue that Chapter 8, Article 14, Section 12 confers upon Police Civil Service Commissions the sole discretion to determine whom they will reinstate. Such a proposition, if allowed to hold sway, would fly in the face of two hundred years of constitutional

law. No legislative body is allowed to delegate unbridled power to an administrative agency.

The statute in question, in pertinent part, provides:

> No Application for ariginal appointment shall be received if the individual applying is less than eighteen (18) years of age or more than thirty-five (35) years of age at the date of his application: Provided, that in the event any applicant formerly served upon the paid police department of the city of which he makes application, for a period or more than his probationary period, and resigned from the department at a time when there were no charges of misconduct or other misfeasance pending against such applicant, within a period of two years next preceding the date of his application, and at the time if his application resides within the corporate limits of the city in which the paid police department to which he seeks appointment by reinstatement is located, then such individual shall be eligible for appointment by reinstatement in the descretion of the policemen's civil service commission, even though such applicant shall be over the age of thirty-five years, and such applicant, providing his former term of service so justifies, may be appointed by reinstatement to the paid police department without a competitive examination but such applicant shall undergo a medical examination; and if such individual shall be so appointed by reinstatement to the paid police department, he shall be the lowest in rank in the department next above the probationer of the department. (Emphases Stated)

Even the most cursory examination of the above quoted section of the statue reveals that the legislative intent was to allow the civil service commissions to exercise discretion in matters concerning the age and written examination only. The meaning is plain and unambiguous.

We, therefore conclude that the claimant has established a prima facie case of racial discrimination in employment and the Respondents have failed to articulate a valid non-discriminatory reason for rejecting his reinstatement application.

IV. Order

Pursuant to the above Finding of Facts and Conclusions of Law, it is herby ORDERED as follows:

1. The Respondents, City of St. Albans/Police Department Civil Service Commission, its officers, employees and agents are hereby ORDERED to cease and desist from engaging in any employment practices which discriminate against persons on account of their race.

2. The Respondent is hereby ORDERED to reinstate the Complainant Arthur Moss as a policeman.

3. The Respondent is hereby ORDERED to pay to the Complainant backpay in the amount of $1,657.70.

Respectfully submitted,

October 26, 1982
Date

Jeffrey O. McGeary
Chairperson