STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
1321 Plaza East
Room 104/106
Charleston, WV 25301-1400

GASTON CAPERTON
GOVERNOR

TELEPHONE (304) 348-2616
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Quewanncoii C. Stephens
Executive Director

February 28, 1992

William Owens
P.O. Box 185
Gilbert, WV 25621

Buffalo Mining Co./
Pittston Co.
Lyburn, WV 25632

Re: Owens v. Buffalo Mining Co., et al.
Docket No. EA-32-88

Dear Parties:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in your case. Since the Final Decision of the Hearing Examiner was not appealed, this Final Order is being issued without the Commission's review. You have a right to appeal this Final Order to the Supreme Court of West Virginia. We have attached information about the appeal process to this Final Order. If you do not appeal, you should realize that your case has reached a final conclusion and will be dismissed.

Sincerely,

Quewanncoii C. Stephens
Executive Director

Enclosures
CERTIFIED MAIL/RETURN
RECEIPT REQUESTED
cc: The Honorable Ken Hechler
Secretary of State

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February 28, 1992

Mary C. Buchmelter, Esquire
Deputy Attorney General
812 Quarrier Street, 5th Floor
Charleston, WV 25301

Charles M. Surber, Esquire
Jackson & Kelly
P.O. Box 553
Charleston, WV 25322

Re: Owens v. Buffalo Mining Co., et al.
Docket No. EA-32-88

Dear Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above styled and numbered case. Since the Final Decision of the Hearing Examiner was not appealed, this Final Order is being issued without review, in accordance with § 77-2-10.9. of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission.

Pursuant to W. Va. Code § 5-11-11, as amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Issues not previously raised to the Commission on appeal are deemed to be waived.

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: The Honorable Ken Hechler
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

WILLIAM OWENS,

Complainant,

v. DOCKET NO. EA-32-88

BUFFALO MINING CO., a PITTSTON COMPANY, ELKAY MINING COMPANY, THOMAS DEVELOPMENT, LTD., and PITTSTON COAL GROUP, INC.,

Respondents.

FINAL ORDER

On October 17, 1990, this matter came on for public hearing before Gail Ferguson, Hearing Examiner. On June 10, 1991, after consideration of the testimony and other evidence, as well as the proposed findings and other written submissions of the parties, the Hearing Examiner issued her Final Decision. This decision found in favor of the respondent and ordered that the case be dismissed with prejudice.

No appeal having been filed pursuant to W. Va. Code § 5-11-8(d)(3) and § 77-2-10 of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission, the Final Decision of the Hearing Examiner has been reviewed only as to whether it is in excess of the statutory authority and jurisdiction of the Commission, in accordance with § 77-2-10.9. of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission. Other defects in said final

decision, if there be any, have been waived. Finding no excess of statutory authority or jurisdiction, the Final Decision of the Hearing Examiner attached hereto is hereby issued as the Final Order of the West Virginia Human Rights Commission.

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 28th day of February, 1992 in Charleston, Kanawha County, West Virginia.

QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
1321 Plaza East
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Quewanncoii C. Stephens
Executive Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

June 10, 1991

William Owens
PO Box 185
Gilbert, WV 25621

Buffalo Mining Co/
Pittston Co.
Lyburn, WV 25632

Mary C. Buchmelter
Deputy Attorney General
812 Quarrier St.
Charleston, WV 25301

Charles M. Surber, Esq.
Jackson & Kelly
PO Box 619
Morgantown, WV 26507

Re: Owens v. Buffalo Mining Co., A Pittston Co., Elkay Mining Co., Thomas Development, Ltd., and Pittston Coal Group, Inc. EA-32-88

Dear Parties:

Enclosed, please find the final decision of the undersigned hearing examiner in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§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."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,

Gail Ferguson
Hearing Examiner

GF/mst

Enclosure

cc: Quewanncoii C. Stephens, Executive Director
Glenda S. Gooden, Legal Unit Manager

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

WILLIAM OWENS,

Complainant,

v. DOCKET NUMBER(S): EA-32-88

BUFFALO MINING CO, A PITTSTON COMPANY, ELKAY MINING COMPANY, THOMAS DEVELOPMENT, LTD., AND PITTSTON COAL GROUP, INC.

Respondent.

HEARING EXAMINER'S FINAL DECISION

A public hearing, in the above-captioned matter, was convened on October 17, 1990, in Logan County, West Virginia, before Gail Ferguson, Hearing Examiner.

The complainant, William Owens, appeared in person and by counsel, Mary C. Buchmelter, Sr. Asst. Attorney General. The respondents, Buffalo Mining Co., a Pittston Company, Elkay Mining Company, Thomas Development, Ltd., and Pittston Coal Group, Inc., appeared by counsel, Charles M. Surber, Jr. Esq.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the hearing

examiner and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

PRELIMINARY MATTER

Respondents Buffalo Mining et al. assert that the complaint in this action is time barred; that a notarized formal complaint was not filed with the West Virginia Human Rights Commission by the complainant, William Owens, until July 28, 1987; that the alleged act of discrimination occurred on April 10, 1987; and that, on that date, the effective deadline for filing of complaints with the Human Rights Commission was within ninety days after the alleged discriminatory act; therefore, respondent urges that July 9, 1987 marked the filing deadline for complaining of the adverse action as alleged in this complaint.

The narrow question presented is whether the amendment of the filing deadline by the West Virginia Legislature enacted prior to April 1, 1987, with an effective date of July 1, 1987, extended this cause of action which had accrued but not yet expired as of July 1, 1987.

During the 1987 Legislative Session, the Legislature amended the filing deadline for complaints to the Human Rights Commission. The

filing deadline for actions to come before the commission had been ninety days from the date of the last adverse action. It was amended to provide one hundred and eighty days from the date of the last adverse action. While the amendment was signed into law prior to April 10, 1987, it was given an effective date of July 1, 1987. The amendment to the time limitations is silent as to the effect upon claims accrued but not yet barred as of July 1, 1987..

The effect of this particular amendment upon such claims has not been specifically considered by the West Virginia Supreme Court. However, the West Virginia Court has considered precisely this issue when it arose in the context of the state worker's compensation statute in the case of Lester v. State Worker's Compensation Commissioner, 242 S.E.2d 443 (WV 1978). The claimant's cause of action in Lester accrued March 13, 1970. Under the statute then in effect, the action was barred three years from that date. However, between the time the action accrued and the date upon which it would be barred under the original limitation, the deadline for filing with the commission was amended. Like the relevant amendment to the West Virginia Human Rights Act, the amendment to the state worker's compensation law was silent as to the effect upon accrued but not yet barred claims. The question of whether Lester's action with the Worker's Compensation Commission was barred turned upon whether the amended limitation applied to his accrued cause of action.

The court in Lester held that the extended limitation applied to accrued but not yet barred claims:

> It has long been recognized in this jurisdiction that where a new statute deals with procedure only, prima facie, it applies to all actions -- those which have accrued or are pending, and future actions. (Citations omitted).

> A substantial majority of those jurisdictions which have considered the precise question presented here hold that statutes enlarging a limitation period are merely procedural and remedial in nature and are applicable to all claims not barred under the original limitation period at the effective date of the statute enlarging the limitation period.. (Citations omitted). We believe the majority view is sound and we adopt it.
>
> Lester v. Worker's Compensation Commissioner, at 446.
>
> ...We are of the opinion that the amendments are applicable to claims which had accrued and had not yet expired under the previously existing period of limitation.
>
> Lester v. Worker's Compensation Commissioner, at 447.

It has been held that the filing deadlines for complaints before the West Virginia Human Rights Commission are not jurisdictional but are procedural in nature. Independent Fire Company No. 1 v. West Virginia Human Rights Commission and Daniel Lutz, 376 S.E.2d 612 (WV 1988); Naylor v. West Virginia Human Rights Commission, 378 S.E.2d 843 (WV 1989). The law and circumstances addressed in Lester are remarkably similar to those in this case. The rationale applied in Lester is directly applicable to the facts of this case.

This issue has also arisen with regard to the parallel federal anti-discrimination statute. The 1972 amendments to Title VII, inter alia, expanded the filing period with the EEOC from ninety days to one hundred eighty days. The statute was explicit with regard to the effect of the various amended provisions on "pending" claims and upon charges filed after the date of the amendment, but was silent as to the effect of the amended filing deadlines upon accrued but not-yet-filed claims. In Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229, 97 S. Ct. 441, 50 L. Ed. 2d 427 (1976), the court held that the one hundred eighty day filing deadline

applied to claims which accrued but had not yet expired when the amendment became effective.

Accordingly, it is the determination of the undersigned examiner that the above inquiry compels an affirmative response and complainant's charge is not time barred, given the remedial purpose of the West Virginia Human Rights Act.

It should be noted that the complainant argues alternatively should the trier of fact determine that the 90 day filing period applied to his cause of action, rather than the more expansive 180 day filing period, that, nevertheless, his complaint should not be time barred based on circumstances beyond his control, which raises not only the issue of equitable tolling but of constitutionality. The record, however, contains no testimonial or documentary evidence supporting this contention, and the merits of that argument are not considered by the undersigned.

FINDINGS OF FACT

1. The complainant, William Owens, was born on December 4, 1939.

2. Elkay Mining Company and Buffalo Mining Company are part of the West Virginia operation of the Pittston Coal Group, respondents herein.

3. The complainant was a salaried employee of the respondents Buffalo Mining Company or Elkay Mining Company from June 7, 1971 until his layoff from respondent's Buffalo Mining Division on April 10, 1987.

4. Complainant was employed on July 7, 1971, as Plant Foreman of respondent's Elkay Mining Company's Wade Tipple. On October 2, 1972, he was transferred to respondent's Buffalo Mining Company's Loredo Tipple, where he also held the position of plant foreman. On January 28, 1980, complainant returned to respondent's Elkay's Rum Creek Preparation Plant, again as plant foreman, and remained in that position until September 4, 1981, at which time he was transferred to respondent's Buffalo's Mark Tipple.

5. On January 18, 1982, complainant was again transferred to respondent's Elkay's Rum Creek Preparation Plant, this time as superintendent. In January of 1983, respondent's Elkay division greatly reduced its operations at the respondent's Rum Creek facility, and several employees, including salaried employees were laid-off.

6. In the fall of 1982, a layoff took place at that facility which included salaried employees; however, complainant who was over the age of 40, was not laid-off. In January 1983, there was a further layoff which again affected salaried employees; however, once again, complainant was not. In fact, only three salaried people were retained after that layoff, and complainant was one of the three.

7. In May of 1983, complainant was transferred to the position of evening shift plant foreman at respondent's Buffalo Loredo Tipple. In February of 1986, complainant was transferred to the respondent's Elk Lick Dock facility of Buffalo. The respondent's Elk Lick Dock facility was a small raw coal loading facility located on Buffalo Creek in Logan County, West Virginia. Three hourly employees

worked there, along with one full-time (dock foreman) and one part-time (coal sampler) salaried employee.

8. In December of 1985, A. W. Adams, Manager of Human Resources for respondent's Buffalo and Elkay divisions, was asked by Mike Odom, Division Vice President, to meet with and to counsel complainant concerning problems management believed he had in communicating with hourly employees.

9. Management's concern was prompted by the request of Willard Wright, Preparation Plant Foreman of respondent's Buffalo division, who had previously counseled complainant about the way he talked to hourly employees.

10. In November of 1986, while complainant was a foreman of the respondent's Elk Lick Dock facility, Wright completed a performance appraisal relating to complainant. In addition to numerical scores being given in various performance categories, written narratives or comments were added. These included comments by Wright that "his [Owens'] worse fault is getting along with his people" and the "relations with his people are not good." In the latter regard, complainant was rated two on a one to four scale, with one being the lowest and four being the highest available scores.

11. Complainant was given the opportunity to add his own comments to his evaluation; however, his response to "Employee's Comments" was "None." Complainant accepted the appraisal that was given, and, although he did not agree, he had the opportunity to lodge his disagreements but did not do so.

12. On April 1, 1987, the respondent's Elk Lick Dock facility ceased operations. Respondent's Buffalo division had lost a coal

contract for coal supplied by the respondent's Elk Lick Dock facility, therefore, the facility was closed. The three hourly employees were realigned in accordance with the collective bargaining agreement, thus causing the layoff of three junior hourly employees. The salaried position of dock foreman was eliminated, and has never been filled since that layoff.

13. As a result of the dock closure, complainant was laid-off on or about April 10, 1987.

14. The criteria utilized by respondent in determining which salaried employees would be retained were: ability to perform a particular job; degree of proficiency in the job; managerial ability; technical ability; and, as a "tie-breaker," length of service in the company. These criteria were considered by respondent's management in its decision as to whom should be laid off and retained; and the qualifications and performance of salaried personnel at both respondent's Buffalo and Elkay divisions were reviewed in making this determination.

15. The complainant was laid off because his job had been eliminated. He was not put into a different position at respondent's Buffalo division due to the fact that the individuals employed at that facility were as qualified, or more so, than complainant. At the time of complainant's layoff, the individuals retained by respondent at its Buffalo's Loredo Tipple were all older, chronologically, than complainant. They were: Willard Wright, Superintendent, age 57; James Bragg, Plant Shift Foreman, age 56; Dan Carper, Maintenance Foreman, age 51; Darrell Fox, General Plan Foreman, age 49; and Conard Midkiff, Plant Shift Foreman, age 50.

16. Although complainant was an employee of respondent's Buffalo division, consideration was also given as to the propriety of moving him to the respondent's Elkay division, thereby displacing another salaried employee. However, based upon the recommendations of Alvin Shelton, Superintendent of the respondent's Rum Creek Preparation Plant, and his evaluations of the personnel holding various positions, James Campbell, Vice President of the respondent's West Virginia Operations, decided to lay off the complainant rather than to transfer him from the Buffalo division, and, as a consequence, displace salaried employees at respondent's Elkay division.

17. At the time of complainant's layoff, the following salaried individuals were employed at respondent's Elkay Rum Creek Preparation Plant, they were: Alvin Shelton, Preparation Manager, age 44; Ralph Blevins, Heavy Equipment Foreman, age 32; Bill Cline, Tipple Foreman, age 49; Paul Ellis, Tipple Foreman, age 52; Darrell Moran, Maintenance Superintendent, age 44; Dana Queen, Plant Shift Foreman, age 37; and Mickey Senator, Shift Maintenance Foreman, age 39.

18. The average age of salaried employees at respondent's Buffalo Mining Company in 1986, prior to the layoffs, was 40.87 years. The average age of salaried employees after the layoffs rose to 41.97 years. Indeed, the average age of all employees laid off from 1986 through 1988 was 32.14 years, and the average age of salaried employees at the end of 1988 rose from 40.87 to 44.92 years.

19. The average age of salaried employees at respondent's Elkay division, prior to the layoffs, was 42.295 years. The average age of salaried employees who were laid off was 41.4 years, and the average

age of all terminated employees (including those who retired, quit, were laid-off, etc.) was 41.842 years. Thus, the average age of salaried employees rose to 42.42 years. Although there were no layoffs at Elkay in 1987 and 1988, several employees terminated their employment for various reasons as previously described. The average age, considering all terminations, of Elkay salaried employees was 43.394 years at the end of 1988. It should be noted however, that four employees, with an average age of 63.75, retired during this period, and one employee, age 63, died during this period, which lowers the age of the workforce.

20. Complainant's salary at the time of his layoff was $4,490.00 per month. In October of 1987, a mine clerk job became open and, since complainant was the last employee to have been laid off, he was offered the position. Although the salary was $1,300.00 per month, the benefits were the same benefits as complainant's position as plant foreman. Complainant rejected this job offer.

21. The complainant claims that he should have displaced the three younger employees respondent retained at Elkay, namely, Dana Queen, age 37, plant shift foreman; Ralph Blevins, age 32, Heavy Equipment Foreman; or Mickey Senator, age 39, Maintenance Foreman, because he was qualified and more experienced than these younger employees. Complainant does not claim entitlement on the basis of qualification and experience to the jobs held by Alvin Shelton, age 44; Bill Cline, age 49; Paul Ellis, age 52; or Darrell Moran, age 44.

22. According to respondent's Vice President Campbell, the decision to layoff the complainant was made upon the recommendation

of Willard Wright, Plant Superintendent at Buffalo's Loredo Tipple and Alvin Shelton, Elkay's Preparation Manger.

23. According to Campbell, he did not displace Blevins because it was related to him that Blevins was more qualified in maintenance than complainant. He did not displace Dana Queen because he was more qualified than complainant and he did not displace Senator because Senator was more qualified in maintenance.

24. There existed between the complainant and Willard Wright a personality conflict. The complainant, in the past, had been superintendent of the Buffalo Plant over Willard Wright. It is apparent that there was hostility and animus between the two, and that their past relationship may have had some bearing on management decisions.

DISCUSSION

Judicial precedent in this jurisdiction has generally adopted the order and allocation of proof test established in McDonnell Douglas v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) in analyzing discrimination claims.

The complainant carries the initial burden of establishing a prima facie case of intentional discrimination. After this showing, the burden shifts to the respondent to articulate a legitimate nondiscriminatory reason for the employer's rejection. After the respondent has articulated a justification, the burden shifts back to the complainant to prove, by a preponderance of the evidence, that

this reason was merely a pretext for the alleged discrimination. Shepherdstown V.F.D. v. WV Human Rights Commission, 309 S.E.2d 342 (1983); State ex rel. State of WV Human Rights Commission v. Logan-Area Mental Health Agency, Inc., 329 S.E.2d 77 (1985).

In Conaway v. Eastern Associated Coal Co., 358 S.E.2d 423 (WV 1986), which was an age discrimination case, the West Virginia Supreme Court of Appeals established the principle that the illegal criterion need not be the sole motivating factor for a respondent's adverse action, but rather the determining factor in the sense that, but for the respondent's motive to discriminate, the adverse action would not have occurred.

In Conaway, the court proposed a general test for determining a prima facie case of illegal employment discrimination in situations where McDonnell Douglas is unadaptable. In order to make a prima facie case, a complainant must prove the following:

1. that the complainant is a member of a protected class;

2. that the employer made an adverse decision concerning the complainant; and

3. but for the complainant's protected status, the adverse decision would not have been made.

Applying the Conaway standard to the facts at bar, the complainant has not established a prima facie case of age discrimination. Although it is undisputed that the complainant has satisfied two elements of the proposed test: class membership by virtue of his age, 47; and adverse action by virtue of respondent's decision to lay him off in April of 1987.

What the complainant must next show is some evidence that would sufficiently link the employer's decision and his status as a member

of the protected class so as to give rise to an inference of discrimination. As pointed out by the court, in Conaway, a complainant may establish the necessary nexus by evidence of disparate treatment between members of the protected class and others; through elimination of the apparent legitimate reasons for the adverse decision; by statistics; or by party admissions. This the complainant has failed to do.

Complainant has not presented any direct evidence or admissions by the respondents that show that either was motivated by age discriminatory animus as the basis for complainant's layoff. Further, the complainant has not established evidence of any disparity in treatment between himself and others not in the protected class by respondent; or any evidence which demonstrates that older salaried employees were laid off in statistically significant numbers. To be sure, an analysis of the statistical evidence of record reveals the contrary. The salaried personnel layoffs occurring throughout Buffalo Mining Company (not limited to the Loredo Tipple) for the years 1986, 1987 and 1988 show that the average age of salaried employees at Buffalo in 1986, prior to the layoffs, was 40.87 years. The average age of salaried employees who were laid-off was 29.67, and the average age of salaried employees after the layoffs rose to 41.97 years. Indeed, the average age of all employees laid off from 1986 through 1988 was 32.14 years, and the average age of salaried employees at the end of 1988 rose from 40.87 to 44.92 years. The salaried personnel layoffs occurring throughout Elkay Mining Company (not limited to the Rum Creek Preparation Plant) for the years 1986, 1987, and 1988 show that the

average age of salaried employees at Elkay, prior to the layoffs, was 42.295 years. The average age of salaried employees who were laid off was 41.4 years, and the average age of all terminated employees (included those who retired, quit, were laid-off, etc.) was 41.842 years. Thus, the average age of salaried employees rose to 42.42 years. Although there were no layoffs at Elkay in 1987 and 1988, several employees terminated their employment for various reasons as previously described. The average age, considering all terminations, of Elkay salaried employees was 42.394 years at the end of 1988. It should be noted, however, that four employees, with an average age of 63.75, retired during this period, and one employee, age 63, died during this period, which lowered the age of the workforce.

The evidence also reveals that the complainant's job as a dock foreman was eliminated when Buffalo lost its contract for coal loaded at that facility and that after complainant's layoff, that position was never filled. Simply put, complainant was laid off as were three other hourly employees because the dock facility was closed. It could be concluded on these facts alone that complainant's claim fails as a matter of law; as the court noted in Leichman v. Pickwick International, 814 F.2d 1263 (8th Cir. 1987):

> In a reduction-in-force case, there is no adverse inference to be drawn from an employee's discharge if his position and duties are completely eliminated; it is readily explained by the employer's economic hardship and the decrease in business.

Of some significance is the fact that the complainant himself, while within the protected age group, had survived previous layoffs.

A close scrutiny of the evidence of record further shows that complainant's allegations to be without merit for other reasons. A review of the ages of the other salaried personnel at Buffalo's Loredo Tipple reveals that complainant was the youngest salaried employee there. If there had been an intent to discriminate on the basis of age, then Willard Wright, who was 57 years old, or James Bragg, who was 56 years old, would have been laid-off and complainant would have been retained. This was not the case.

However, complainant does not only claim that he should have been retained at Buffalo Mining Company, but rather, that he should have been transferred to Elkay Mining Company, and then only to one of three jobs held by individuals not within the protected age group. Complainant's claim in this regard assumes that: the respondents had an obligation to transfer complainant; the fact the some younger employees were retained proves age discrimination; and the respondents were required to give preference to older employees. Each assumption is erroneous as a matter of law.

First, an employer who reduces his workforce because of economic reasons has no obligation, without more, to transfer an employee to another position within the company. See Ridenour v. Lawson Co., 791 F.2d 52, 57 (6th Cir. 1986). See also Baines v. Southwest General Motors Corp, 656 F.2d 120 (5th Cir. 1981) cert. denied, 455 U.S. 943 (1982). Thus, once complainant's job at Buffalo's Elk Lick Dock had been eliminated, there was no duty to transfer him to Elkay's Rum Creek Preparation Plant.

Second, although complainant claims that he should have displaced one of the three "non-protected" salaried employees at

Elkay, the mere fact that three younger employees were retained does not prove intentional discrimination on the basis of age. Joumas v. Maryland Casualty Co., 698 F. Supp. 675 (E.D. Mich. 1988); Branson v. Price River Coal Co., 627 F. Supp. 1324 (D. Utah 1986), aff'd, 853 F.2d 768 (10th Cir. 1988). This is especially true considering the ages of all employees who were retained -- all of the salaried employees at Buffalo's Loredo Tipple were older than complainant, and all but the three of the salaried employees at Elkay's Rum Creek Preparation Plant were within the protected age group.

Third, the jobs at Elkay's Rum Creek Preparation Plant to which complainant claims entitlement were higher level jobs than his job at the Elk Lick Dock. Thus, complainant not only claims that he should not have been laid-off, but, of necessity, that he should have been promoted. Essentially, then, complainant claims that he should have been given preferential treatment because of his age without justification as to why.

Finally and compellingly, complainant has taken the position that his layoff was as a result of a personality conflict between Willard Wright and himself. Indeed, complainant has previously testified that the biggest reason for his layoff was that Wright had a vendetta against him, ostensibly, because the complainant had previously been named superintendent of the Buffalo Plant over Wright. Clearly, complainant's own testimony eviscerates a claim that "but for" his age he would not have been laid-off.

Complainant has not sustained his claim that respondent discriminated against him on the basis of his age, inferentially, and certainly not by a preponderance of the evidence.

CONCLUSIONS OF LAW

1. The complainant, William Owens, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, WV Code §5-11-10.

2. Each respondent, Buffalo Mining Company, a Pittston Company, Elkay Mining Company, Thomas Development, Ltd., and Pittston Coal Group, Inc., is an employer as defined by WV Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act.

3. The complaint in this matter was properly and timely filed in accordance with WV Code §5-11-10.

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to WV Code §5-11-9 et seq.

5. Complainant has not established a prima facie case of age discrimination.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** that this case be dismissed with prejudice and be closed.

Entered this 10 day of June, 1991.

WV HUMAN RIGHTS COMMISSION

BY _____
GAIL FERGUSON
HEARING EXAMINER