STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE: 304-348-2616

ARCH A. MOORE, JR.
Governor

November 13, 1985

Mary C. Holbert, Esquire
Assistant Attorney General
Room W-435, State Capitol
Charleston, WV 25305

Fred F. Holroyd, Esquire
209 W. Washington Street
Charleston, WV 25302

RE: Grace Skeen V. Jackson General Hospital
Docket Nos.: REP-54-79, EANC-55-79 & REP-56-79

Dear Ms. Holbert and Mr. Holroyd:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Grace Skeen V. Jackson General Hospital/Docket Nos.: REP-54-79, EANC-55-79 and REP-56-79.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,

Howard D. Kenney
Executive Director

HDK/kpv

Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

GRACE SKEEN,

COMPLAINANT,

V.

DOCKET NOS. REP-54-79
EANC-55-79
REP-56-79

JACKSON GENERAL HOSPITAL,

RESPONDENT.

FINAL ORDER

Except as hereinafter set forth, the Commission does hereby adopt the Hearing Examiner's Proposed Findings, Decision, Conclusions and Order, and by the adoption as aforesaid, the Commission does incorporate the Findings, Decision and Conclusions in this order as if they were their own.

The Commission does find, however, that on page 18 of the Hearing Examiner's Proposed Findings, Decision, Conclusions and Order that the amount of lost wages was $23,997.88 and not $20,000.00 as set forth in the aforesaid document. The Commission further finds that the Complainant is entitled to incidental damages for mental anguish, embarrassment and suffering and establishes that amount to be $5,000.00.

In as much as the Attorney General provided representation through its assistant, Mary Cole Holbert, no attorneys fee will be awarded which is consistent with WV Code 5-11-7 and the Allen decision.

It is, therefore, ORDERED:

1. That Complaint number EANC-55-79 be dismissed because the Complainant was not discriminated against on grounds of religion or ancestry.

2. The Complainant was terminated from employment by the Respondent as a reprisal for initiating proceedings before the Human Rights Commission.

3. That the Respondent shall pay to the Complainant the sum of $23,997.88 as backpay.

4. That the Complainant is awarded the sum of $5,000.00 as incidental damages for mental anguish, embarrassment and suffering.

5. That no award of an attorneys fee is made to the Attorney General for services rendered on behalf of the Commission and the Complainant in this case.

6. That the said sums awarded to the Complainant are payable upon the entry of this order.

7. That the Respondent shall cease and desist from acts of retaliation and reprisal against employees who initiate, testify or assist in proceedings before the Human Rights Commission and that they acknowledge, in writing, compliance with this order and shall thereafter report to the Commission every six months and provide, therein, such information as the Commission may request to determine compliance with the Decision and Order.

Entered this 8th day of November, 1985.

WV HUMAN RIGHTS COMMISSION

Nathaniel Jackson

NATHANIEL JACKSON, CHAIR
OR BETTY HAMILTON, VICE CHAIR

approved
aug. 26, 1985
SRH

WEST VIRGINIA SUPREME COURT OF APPEALS
FOR THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

GRACE SKEEN,

Complainant,

v.

CASE NO: REP-54-79
EANC-55-79
REP-56-79

JACKSON GENERAL HOSPITAL,

Respondent.

HEARING EXAMINER'S PROPOSED FINDINGS, DECISION, CONCLUSIONS AND ORDER

INTRODUCTION

A public hearing was held in this matter on May 29, 1985, at the Jackson County Courthouse in Ripley, West Virginia. Complainant, Grace Skeen, was present and was represented by Mary Carol Holbert, Assistant Attorney General. Respondent was represented by Fred F. Holroyd, attorney at law. Respondent's corporate representative was William Chapman, chief executive officer of Jackson General Hospital. The presence of a hearing commissioner was waived by both parties.

Witnesses testifying on behalf of complainant were: Shirley Ann Shumaker, Eugena Curry and Brenda J. Cunningham.

Complainant also testified on her own behalf. Respondent's witnesses were Terry Ray, Geraldine Dorsey and William Chapman. The hearing was completed in one day.

PROPOSED FINDINGS OF FACT

1. Complainant filed 3 separate complaints on July 24, 1978. One complaint, EANC-55-79,alleged discrimination because of her ancestry. The other two alleged a retaliatory discharge by respondent after complainant had informed her supervisor that she had been to the Human Rights Commission concerning the discrimination complaint. Specifically, complainant's discrimination complaint alleged that she is a female of Mexican-American ancestry; that she had been harassed and questioned about her ancestry at work; that she received unequal pay, and that she was required to provide a written physician's excuse for being absent from work, which she alleged was not required of other employees. No evidence was presented in this hearing regarding the allegations of unequal pay. Evidence was presented on the other allegations in the discrimination complaint. In addition, complainant also offered evidence relating to harassment because of her religion, Catholic. This evidence was offered without objection even though the formal discrimination complaint did not allege discriminatory treatment because of religion.

2. Complainant is a female of Mexican-American ancestry and a member of the Catholic religion. She commenced employment with respondent in 1975 as a laboratory secretary and phlebotomist. She was discharged on July 15, 1978.

3. The person responsible for interviewing her and recommending her hiring was Terry Ray, then chief medical technician of the hospital laboratory. At the time of her hiring, Ray explained to complainant that she would be required to work a half day on Saturdays and would have an afternoon off during the week. Complainant does not dispute that she was so advised.

4. Terry Ray himself is of minority ancestry in that one of his grandparents was a Cherokee Indian. Complainant does not directly accuse Ray of discriminating against her because of her ancestry or religion although she did relate a conversation in which Ray, she says, expressed racial prejudice toward blacks and Mexican Americans. However, she indicates that she got along well with Ray.

5. Terry Ray is no longer employed by respondent as of the date of the hearing. He is now chief medical technologist at Hilton Head Hospital, Hilton Head, South Carolina.

6. Complainant's specific accusations of harassment due to religion and ancestry are directed at two other individuals: Geraldine Dorsey, assistant chief technician of the laboratory

and a Doctor Newman, a private physician under contract with the hospital to perform services as a pathologist.

7. Complainant's evidence about Geraldine Dorsey is to the effect that Dorsey, a Baptist, continually harassed her about her Catholic faith, on occasions reducing her to tears and causing a generally tense atmosphere between the two. Respondent's evidence was that discussions did occur about religion but that the discussions were not unfriendly and complainant's religion was not ridiculed nor was she harassed because of it. Ray testified that he too discussed religion with complainant in a friendly way and that he and complainant concluded that their religions were very similar (Ray is an Episcopalian). Dorsey testified that she has a sister-in-law who is Mexican-American and Catholic and that she has no arguments or problems with the sister-in-law about religion. Complainant's evidence about Dr. Newman is to the effect that he frequently directed ethnic slurs toward her, alluding to her Mexican ancestry in sexual terms and using terms such as "spic" and "jumping bean". Unfortunately, Dr. Newman died prior to the hearing and no deposition had been taken of his testimony.

8. Complainant also testified that Dorsey prevailed upon or influenced Ray to fire her, presumably because of complainant's Catholic faith. She admitted, however, that this was only speculation on her part. It is undisputed in this record that

Dorsey had resigned from the hospital for personal reasons unrelated to any purported dispute with complainant. In effect, Dorsey retired in order to spend time with grandchildren. By coincidence, her resignation was effective July 14, 1978, one day before complainant's termination. Dorsey has not been employed anywhere since then.

9. The allegations that complainant was singled out regarding the requirement of a physician's excuse for absence from work is based upon an incident that occurred approximately one week before complainant was discharged. Complainant testified that she had begun to see a doctor for treatment for nervousness and tension arising from the situation at work. She says that the doctor (who did not appear as a witness) advised her to take some time off from work, although he did not require her to stay in bed or even to stay home. This apparently was shortly before the July 4th holiday in July, 1978. On the Saturday prior to the 4th of July, complainant telephoned the hospital to advise that she was taking a day of sick leave. She then flew to Texas that day to attend a wedding. By coincidence, the laboratory was shorthanded that day and as a consequence, a call was made from the hospital to complainant's home to ask about an office matter. A member of complainant's household answered that she was out of town. When complainant returned to work on or about July 6th, she was confronted by Dorsey

with the apparent inconsistency between her reported use of a sick leave day and her out-of-town trip. This circumstance led to Ray suggesting that it might be best if complainant provided a doctor's statement to corroborate her use of such leave. Ray testified that this was not the first time a doctor's statement had been required of employees, that such a requirement was not unusual. In any event, complainant furnished the excuse and Ray accepted it. The following day, July 7th, after complainant had returned to work, she went to the Human Rights Commission in Charleston and filled out a form questionnaire (Complainant's Exhibit No 4) in which she alleged the harassment due to ancestry and other discriminatory treatment. (This form is entitled "Employment Complaint Background Information" and is used by the Commission to elicit information such as the grounds of alleged discrimination, witnesses and relief desired.) However, she apparently did not formally file her notarized complaint that day. She testified that the next day -- Saturday, July 8, 1978 -- she informed Ray that she had been to the Commission. Ray denies that she informed him that she had been to the Human Rights Commission; he says instead that she told him she would or could "go to the N.L.R.B." (In response to a question from the Hearing Examiner, Ray correctly identified that agency as the National Labor Relations Board)

10. A week later, on Saturday, July 15, 1978, Ray advised

complainant that she was being fired because it was obvious that they could no longer "get along". Ray testified that since the previous week's discussion about complainant's trip to Texas and the need for a doctor's statement, a tense relationship had existed between the two; that complainant in the ensuing week had carried out all assigned tasks but with a resentful attitude, that she would "huddle" with other employees in a corner to discuss problems rather than coming to him. He also testified that he talked to complainant about the need to improve their relationship since they would have to work together, but the situation showed no signs of ever improving. Ray characterized her attitude as "I'll do it, but leave me alone". Ray further testified that when he decided to terminate complainant, he first discussed the matter with the then hospital administrator, "and because of the friction and things, we decided -- I decided -- that it would be best to terminate her..."

11. Ray testified that complainant was an "excellent" employee, "very capable", one who learned quickly, did a lot of work and did it quickly. During her employment with the hospital, Ray did three personal evaluations of complainant. These evaluations were on printed forms on which a number of job factors were listed. On all 3 evaluations, Ray summarized complainant as an effective employee who met the hospital standards. In an evaluation done October 1, 1977, he noted that she "does

job well", and that she exceeded standards in regard to "Planning & Organizing", "Accepts Responsibility" and "Appearance of Work Area". He also noted that she required improvement in "Observation of Work Hours" and "Employee Contacts ". The latter was apparently related to a handwritten notation that complainant should "Get along better with other employees".

A year earlier, October, 1, 1976, Ray gave complainant an overall favorable evaluation, noting that the employee "must learn not to be drawn into crusades" and that she should "confine [her] opinions to those things which concern her own job assignments". In October of 1975, her first evaluation after being hired, Ray found that she met or exceeded standards in all job factors. He noted several items that could be improved; specifically, that she should "be more selective of subjects discussed & be more careful of choice of persons to talk to", and that she should "Discuss problems with Supervisor or Administration". His only other comment of an adverse nature was that complainant inadvertently had caused some problems by discussing confidential material with other persons.

12. Since the termination of her employment by respondent in 1978, complainant has had several jobs, from which she has earned $50,083.40 through June 30, 1985. Wage information submitted by respondent for the position held by complainant at the time of her termination indicates that she would have

$70,000.00 VAB

earned approximately $70,00.00 if she had remained in that position up to June 30, 1985.

Complainant has made a demand for back pay and also for incidental damages. She does not request reinstatement to her former position.

PROPOSED CONCLUSIONS, DECISION AND ORDER

I.

THE DISCRIMINATION COMPLAINT

Regarding the discrimination complaint, I find that for the reasons stated hereafter, complainant has not proven her allegations by a preponderance of the evidence.

Having heard the evidence, I find that the discussions that might have occurred about religion were not in the nature of harassment. Even assuming that complainant did become upset as a result of such discussions, it is almost a cliche' that discussions of religion and politics provoke strong reactions, to the point that many people refuse to discuss the subjects at all. The evidence indicates that rather than avoiding or discouraging the discussions, complainant participated in them.

The testimony about Dr. Newman's alleged sexual and ethnic slurs cannot be a basis for a finding of discrimination by respondent, for two reasons. First, Dr. Newman was not an employee of this hospital. He was a private physician --

a pathologist -- serving the hospital in the capacity of an independent contractor for the purpose of analyzing tissue. He had no authority to hire and fire and no supervisory authority over any hospital employee. Complainant has not shown how the hospital can or should be responsible for conduct by Dr. Newman that was outside the scope of his specific field of medical expertise.

Second, as noted in the proposed findings, Dr. Newman died prior to this hearing and thus was not available to refute the allegations made about him. Under these circumstances, even if Dr. Newman had been an employee of respondent, I would have been extremely reluctant to draw an ultimate conclusion in favor of complainant based on this hearsay evidence.

Further, after considering the undisputed evidence and weighing the conflicting evidence, I can find no other basis on which to conclude that complainant was harassed and discriminated against because of her religion or ancestry. The requirement that she produce medical verification for her absence on one particular Saturday in July of 1978 was not due to her religion or ancestry. Complainant admitted that she advised the hospital she was taking "a sick leave day". Later that day, the hospital called her home and was advised that she had gone out of town. Under these circumstances, it is understandable that some question might exist as to whether

she really had been ill. Complainant had not previously informed the hospital that her private physician had advised her to "get away from the office for a while". Therefore, complainant is at least partially to blame for any confusion or suspicion that might have arisen over this incident. This confusion or suspicion -- not her ancestry -- is what led to the requirement of a medical verification for her absence. In any event, respondent's evidence indicated that such medical verifications were occasionally required of other employees.

Finally, regarding the discrimination charges in general, respondent's memorandum raises a valid point: Except for the "medical excuse" incident involving complainant's trip to Texas, all of the evidence presented by complainant related to events which occurred more than 90 days prior to the filing of the discrimination complaint. Complainant called 3 witnesses in addition to herself. The first, Shirley Ann Shumaker, left the employment of the hospital over a year before complainant was discharged; all of her testimony related to events that took place while she was employed. The second witness, Eugena Curry, left the employment of the hospital on the day complainant was hired in 1975. Her testimony primarily dealt with conditions as they had existed when she left. The third witness, Brenda Cunningham, left the hospital six months before complainant was terminated and did not return to the hospital until about

four months after complainant had left. Thus, she too had no direct knowledge of anything that might have happened within the 90 days prior to the filing of the discrimination complaint. Excluding the testimony of these three witnesses and looking solely at complainant's own testimony, she has failed to carry the burden of showing that any of the alleged harassment or slurs took place within the 90-day limitation period. The only event clearly within the limitation period was the "medical excuse" requirement, and I have already concluded that said incident was not motivated by discriminatory reasons.

II.

THE REPRISAL COMPLAINT

We turn now to the reprisal charge. Complainant contends that she was fired because she went to the Human Rights Commission to complain about respondent's alleged discriminatory treatment of her.

In order to prevail on a reprisal claim, complainant must first show that respondent knew she had engaged in the protected conduct. There is a conflict in the testimony on this issue. Complainant's testimony is unequivocal that she informed Terry Ray on July 8, 1978, that she had been to the Human Rights Commission on the previous day. Ray denies that complainant mentioned the Human Rights Commission; he says

instead that she said she could go, or would go, "to the N.L.R.B."

I resolve this conflict in favor of complainant. Based upon her total testimony and all of the evidence, including respondent's admission that she was a competent employee, I believe that complainant was sufficiently intelligent to know the name of the agency she had visited only the previous day and to correctly identify it in a conversation that next day. It should be noted that complainant had visited the Commission on a previous occasion with another employee on an unrelated matter. Ray's testimony amounts to a concession that the two did discuss the subject of complainant going to some government agency. The assertion that complainant said "N.L.R.B." rather than "Human Rights Commission" is not credible, particularly in light of Ray's subsequent admission that the hospital had no dealings with the N.L.R.B. when he worked there.

I therefore conclude that complainant did inform her superior of her visit to the Human Rights Commission.

West Virginia Code §5-11-9 (as in effect now and in 1978) makes it unlawful for an employer to: "Engage in any form of reprisal or otherwise discriminate against any person because he has opposed any practices or acts forbidden under this article <u>or because he has filed a complaint, testified or assisted in any proceeding under this article</u> ."

As noted above, complainant did not actually file a complaint until July 24, 1978. On her visit to the Commission on July 7, 1978 -- the visit about which she informed Ray on July 8th -- she filled out the form questionnaire. This questionnaire is an internal Commission procedure utilized as a first step in the complaint process. In that form, complainant alleged discrimination on grounds of religion and ancestry. I conclude that complainant's visit to the Commission on July 7, 1978, and her completion of the form questionnaire, would be viewed by the courts as either the filing of a complaint or assisting in a proceeding under the Human Rights article; and, therefore, as protected conduct. In any event, respondent's two post-hearing memoranda do not dispute that complainant's July 7th visit was protected conduct under the Human Rights Law; respondent simply contends that it was not the cause of her firing, even though the firing took place just one week after respondent had been informed of the conduct.

Respondent correctly argues that employees do not gain immunity from legitimate disciplinary actions merely because they have complained to the Human Rights Commission. Respondent's supplemental memorandum on the reprisal issue specifically cites authority holding that such protected conduct does not permit employees to miss work, fail to perform assigned duties, leave work early or engage in disruptive conduct. Respondent

further argues that the only burden an employer must bear after an employee has been terminated following a visit to the Human Rights Commission is to show that the termination would have taken place irrespective of the visit. Both parties in their supplemental memoranda argue that a "but for" test applies to complainant. If she shows that she would not have been terminated "but for" the protected conduct, she has satisfied the test for showing reprisal.

I find the following portion of complainant's supplemental memorandum particularly relevant:

> " In Kathy Varney v. Frank's Shoe Store, Docket No. ESS222-77/ESS298-77, the Human Rights Commission held that the complainant must show that first she participated in a protected activity; second, that the employer was aware of complainant's participation; third, that the complainant received adverse treatment from the employer, contemporaneous with or subsequent to the participation; and, finally, that there is evidence of a causal connection between the participation and the issue, namely, that a retaliating motive played a part in the adverse treatement.
>
> In establishing the causal connection, it is virtually impossible to produce direct evidence of discrimination. Therefore, in the ordinary case, all proof will be circumstantial. There are several types of circumstantial evidence commonly encountered which can support an inference that retaliatory motive played some part in the adverse treatment of the employee. This evidence includes closeness in time between the employer's knowledge for the protected opposition of participation in the adverse activity. Rutherford v. American Bank of Commerce, 565

> F.2d 1162, 16 FEP 26 (10th Cir. 1977); Minor v. Califano, 452 F. Supp. 36, 17 FEP 756 (D.D.C. 1978). The inference of retaliatory motive is strengthened in direct proportion to how close in time the adverse action follows the employer's notice of participation."

It may be noted that in Kathy Varney v. Frank's Shoe Store, cited by complainant, the complainant filed her complaint on December 21, 1976 and was terminated on December 31, 1976. In the present case, as noted in the findings, the termination was one week after complainant's visit to the Commission. The inference of retaliatory motive must be given substantial weight in these circumstances. Although I do not elevate the inference to a presumption, I do conclude that the close proximity of the events requires that some other plausible explanation must exist for the termination.

In this case, I find it difficult to believe that the reasons stated by respondent, absent any retaliatory motive, would have caused her termination. Terry Ray, her supervisor, testified that complainant was an "excellent employee", "very capable"; that she did a lot of work and did it quickly. The three annual personnel evaluations of complainant were generally favorable. In each evaluation, Ray had a few suggestions for improvement but none of these suggestions detracted from what were overall good evaluations. Ray's testimony indicates that he did not hesitate to discuss weaknesses or problem areas

with her during the evaluations. Both parties seem to agree that they got along well up to the fateful final week. Nevertheless, Ray told her she was fired because they "couldn't get along".

I do not find it plausible that a supervisor who was getting along well with an employee, communicating with her and giving her consistently good evaluations would feel compelled to fire her because of a single misunderstanding involving a sick leave day and a doctor's excuse. Yet that is the theory presented by respondent.

Ray testified that even during the final week of her employment, complainant carried out all her assignments. He said, though, that she had a "resentful" attitude, and would "huddle" with other employees. No evidence was presented that the other employees were disciplined or warned for participating in these "huddles". Just as it is understandable that Ray would ask complainant for a doctor's excuse when it appeared on the surface that complainant had not been sick, it is perhaps understandable that complainant would resent that her integrity was questioned. The entire incident was an unfortunate misunderstanding on the part of all concerned, and I have already indicated that complainant is at least partly, if not primarily to blame. Nevertheless, I repeat that it does not seem plausible that this incident, standing alone, caused the termination of an

otherwise capable employee who had been with the hospital for three years.

Therefore, in the absence of any other reasonable explanation, I conclude that the termination of complainant was due to reprisal for her earlier visit to the Commission.

Since complainant does not seek reinstatement -- although she is entitled to it -- the primary relief to be granted in this case is back pay. The findings of fact indicate that this is approximately $20,000.00. The back pay reaches this sum in large part because of the 7-year lapse of time between the filing of the complaint and the hearing. Neither party is responsible for the delay; however, in these circumstances the lapse of time penalizes the respondent rather severely. The respondent is a non-profit community hospital, and the act of reprisal was by a relatively low-level management employee. For these reasons, and because the back pay award sufficiently compensates complainant, I do not find an award of incidental damages appropriate in this case.

Complainant has also requested an award of attorney fees. She was represented by the Attorney General's office. The Hearing Examiner believes that an award of attorney fees to a public agency such as the Attorney General's office is a policy matter for the Commission. Therefore, no recommendation is made as to attorney fees.

The Hearing Examiner's Proposed Conclusions and Order are as follows:

1. Complainant was not discriminated against on grounds of religion or ancestry. Her complaint No. EANC-55-79 should be dismissed.

2. Complainant was terminated from employment by respondent as a reprisal for initiating proceedings before the Human Rights Commission.

3. Respondent shall cease and desist from acts of retaliation and reprisal against employees who initiate, testify or assist in proceedings before the Human Rights Commission.

4. Respondent shall pay to complainant the sum of $20,000.00 as back pay representing the difference between what complainant has earned through other employment since July 15, 1978, and what she would have earned had she not been terminated.

5. Complainant's request for incidental damages is denied.

6. Respondent shall report to the Commission periodically at Commission's request as to compliance with this decision and order.

Dated this 23rd day of August, 1985.

Victor A Barone

Victor A. Barone
Hearing Examiner