STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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

GASTON CAPERTON
GOVERNOR

TELELPHONE 304-348-2616

Quewanncoii C. Stephens
Executive Director

2 July 1990

Thomas T. Lawson, Esquire
Counsel for Respondent
P. O. Box 720
Roanoke, VA 24004

Joseph M. Price, Esquire
Counsel for Respondent
P. O. Box 1791
Charleston, WV 25326

Appalachian Power Company
301 Virginia Street, East
Charleston, WV 25301

William A. Smith
5819 MacCorkle Avenue
St. Albans, WV 25177

Re: Smith v. Appalachian Power Company
Docket No. EA-33-73

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

WILLIAM A. SMITH,

Complainant,

v. DOCKET NO. EA-33-73

APPALACHIAN POWER COMPANY,

Respondent.

FINAL ORDER

The complaint in this case was filed on 24 January 1973. A public hearing was held in March 1978. Before the hearing examiner were two race discrimination claims which arose from Appalachian Power Company's failure to hire complainant in 1972. Complainant alleged that he had applied for a maintenance position with respondent, and also for a utility position. Both jobs were at respondent's John Amos plant. Following extensive briefing by the parties, the hearing examiner found that complainant's claim involving the maintenance position was barred because it had not been filed within the requisite statute of limitations. Thereafter, the hearing examiner concluded, ruling on the merits of the second claim, that complainant had failed to prove that he was unlawfully discriminated against with respect to the utility position.

In 1985, when reviewing the hearing examiner's recommended decisions, the Commission, as then constituted, reversed the hearing examiner's conclusion that the claim regarding the

maintenance position was time barred. It issued an order which found that respondent had discriminated against complainant regarding the maintenance position and awarded complainant damages, including back pay. For unexplained reasons, the Commission did not address the hearing examiner's finding of no discrimination regarding the utility position. On 14 July 1987, the Circuit Court of Kanawha County, ruling on respondent's petition for appeal, reversed the Commission's decision of May 1985 and reinstated the hearing examiner's finding that complainant's allegations regarding the maintenance position were, by law, time barred. The court then remanded this matter to the Commission for consideration of the utility claim. The court stated that, "Since the Commission made no decision on the only issue that it has jurisdiction to consider, there is no valid decision of the Commission for this court to review [regarding the utility position]. This action must be remanded to the Human Rights Commission for a decision on the complaint which it had jurisdiction to consider, the position of utility man."

In February 1990 the Commission, as now constituted, found itself in the unenviable position of having to rule on a matter that is now seventeen years old. After mature consideration of the lengthy and disturbing history of this case, the mandate of the Circuit Court of Kanawha County that we render a decision regarding the utility position, the examiner's recommendation that we enter a finding of no discrimination, 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 set forth hereinbelow.

ISSUE TO BE DECIDED

Whether the failure to hire William A. Smith for a utility position in February through May 1972 was the result of race discrimination as proscribed by then-W. Va. Code § 5-11-9 (now W. Va. Code § 5-11-9(a)(1)).

FINDINGS OF FACT

Given that twelve years have passed since the hearing on this matter, the Commission makes no independent findings of fact, but relies solely on the findings of fact made by the hearing examiner as they appear in the examiner's recommended decisions received by the Commission in February 1979. The below findings of fact are culled from the hearing examiner's recommendations word for word and in their entirety, except for such sections as would be redundant or which are not applicable to the utility position, and have been arranged in an order designed to facilitate continuity.

Facts As Found By The Examiner

1. On 21 December 1971 complainant, William A. Smith, filed an application for the position of maintenance mechanic at

Appalachian Power Company, John Amos Plant, Saint Albans, West Virginia.

2. On 22 February 1972 the complainant was interviewed by Marvin F. Morrison, then Personnel Supervisor of the John Amos Power Plant, which is owned and operated by the respondent. At that time Mr. Morrison introduced Mr. Smith to Mr. Hart, the yard superintendent in charge of utility personnel.

3. During the interview of 22 February 1972, Marvin F. Morrison unambiguously stated to the complainant that he was not qualified for the job of maintenance mechanic. Further, Mr. Morrison then suggested to the complainant that he submit another application for the position of utility man for which he appeared to be qualified.

4. On 24 February 1972 Mr. Smith completed and returned the second application listing thereon "maintenance mechanic" in the space for "position desired." Mr. Smith erred in this respect, intending instead to write "utility man" in the place for "position desired." Thereafter, he informed Mr. Morrison of this mistake.

5. After completing his second application, Mr. Smith telephoned the John Amos Power Plant several times for the purpose of inquiring about his application. On each such occasion, Mr. Smith was informed that there was no opening available to him, but

if an opening became available that he would be contacted. Mr. Smith last telephoned the plant in December 1972.

6. The complainant did telephone and speak to representatives of the respondent on several occasions after his second application was filed. During these telephone conversations, he informed the representatives of the aforementioned error. He last contacted the respondent by telephone in the month of December 1972. At no time was Mr. Smith informed that he would not be hired as a utility man.

7. On 24 January 1973 Mr. Smith signed a complaint with the West Virginia Human Rights Commission which named John Amos Power Plant as respondent and charged age discrimination. The complaint was docketed by the Human Rights Commission on 26 January 1973.

8. On 14 December 1974, the complaint was amended to charge John Amos Power Plant with age and race discrimination. The complaint remained the same in all other respects.

9. Between the times when complainant first applied for a job with the respondent and when he filed a complaint with the West Virginia Human Rights Commission charging John Amos Power Plant and Marvin Morrison with age discrimination, others were hired in the position of utility man.

10. The respondent considered the complainant to be qualified for the utility man position at all times pertinent thereto.

11. The reason offered by the respondent as to why it did not hire Mr. Smith as a utility man remains essentially unexplained. Mr. Morrison does not recall any phone conversation with Mr. Smith following the interview, but states that he deduced from the second application that Mr. Smith was not interested in the utility man job because he had not so designated. Mr. Hart remembers no meeting or interview with Mr. Smith. He states that he did not then like to hire persons who wanted to transfer out of his department to another.

12. Several persons were hired by the respondent in utility man positions who, like the complainant, had designated maintenance for the position desired.

13. At all times pertinent to this case, the respondent was engaged in an affirmative program to hire Negro employees.

14. The respondent demonstrates by its Exhibit 9, that based upon the 1970 Census the percentage of minority employees (excluding female) at the John Amos Power Plant exceeds the percentage of minority persons available in the area labor force for the appropriate area.

15. Mr. Smith earned $9,902.49 in 1971; $8,574.50 in 1972; $5,042.00 in 1973; $6,284.00 in 1974; $8,143.00 in 1975; $5,770.96 in 1976; and $9,961.83 in 1977. For the years 1972 and 1973 he supplemented the foregoing by approximately $1,000 in earnings from Mr. Clifford Dean.

DISCUSSION

With due respect to the hearing examiner's findings of fact and his conclusions based thereon, and with knowledge that this case, one of the oldest on the Commission's docket, should long ago have been fully and finally resolved, and not wishing to prolong this matter any further, the Commission still remains convinced that the hearing examiner's findings of fact lead ineluctably to the conclusion that complainant was discriminated against on the basis of race by respondent. We find the hearing examiner's recommendation that a finding of no discrimination be entered to be faulty for the following reasons:

A. The Examiner Found That Respondent Failed To Explain Its Reason For Rejecting Mr. Smith.

Once the hearing examiner found that complainant had established a prima facie case of discrimination, the burden switched to respondent to articulate a legitimate non-discriminatory reason for Mr. Smith's rejection. Though respondent's burden was only one of production, it was still required to ". . .clearly set forth through the introduction of

admissible evidence the reason for the plaintiff's rejection." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). The explanation provided "must be clear and reasonably specific," Id. at 258, and "must be legally sufficient to justify a judgment for the defendant." Id. at 254.

Here, after hearing all of the evidence, the hearing examiner was compelled to conclude that the reason respondent did not hire Mr. Smith in a utility position was "essentially unexplained." (Finding 14). In other words, he could not identify any "clear and reasonably specific" reason for Mr. Smith's rejection.

Despite his finding that Mr. Smith's rejection went unexplained at hearing, the examiner, in his discussion of the facts, opines that Mr. Smith was a victim of an amorphous "bureaucratic snafu." This conclusion is contradicted, however, by the examiner's specific findings that complainant phoned the plant several times regarding his application (Findings 5 and 6), spoke specifically to Mr. Morrison about the mistake on his application (Finding 4), and was repeatedly told that there were no open positions (Finding 5), while respondent was, in fact, hiring for the utility position (Finding 9).

B. A Possible Reason Articulated By The Respondent For Mr. Smith's Rejection Was Clearly Shown To Be Pretextual.

From all appearances, the respondent attempted to prove that a reason it did not hire complainant was because his second application stated that he was interested in a mechanic's position and the supervisor of the utility positions "did not then like to hire persons who wanted to transfer out of his department to another." (Finding 11). The examiner found, however, that "several persons were hired by the respondent in utility man positions who, like the complainant, had designated maintenance for the position desired."[1] (Finding 12). This finding also contradicts Morrison's testimony that he deduced from the second application that Mr. Smith had no interest in the utility position. Clearly, when looking at applications other than complainant's, respondent did not base its utility hiring decisions on what the applicant had said was his "position desired." The Commission can only assume that the examiner found this defense so flimsy that he decided to ignore it and instead chose to characterize the reason for Mr. Smith's rejection as "essentially unexplained."

---

[1]The evidence reveals that Rex Hill, white, filed an application for a "maintenance job" on 2 February 1972, a few weeks after Mr. Smith had filed his first application and several weeks before he filed his second application. On 30 May 1972 Mr. Hill was hired as a utility man. On 3 February 1972, James Mooney, white, filed his application listing "maintenance" as one of the positions in which he was interested. On 22 May 1972 Mr. Mooney was hired as a utility man. Johnny Brite, also white, filed his application on 10 January 1973 for a maintenance position, and on 11 June 1973 was hired as a utility man. These three individuals were less qualified than Mr. Smith.

Where a proffered reason for a hiring decision is proven to be untrue, as here, the complainant has met his burden of showing pretext and it is proper for the examiner to conclude that the decision was based on illegal discriminatory criteria, especially when the decision is otherwise "essentially unexplained." Furnco Construction Corporation v. Waters, 438 U.S. 567 (1978); Conaway v. Eastern Associated Coal Corporation, 358 S.E.2d 423, 430 (1986); Institute of Technology v. Human Rights Commission, 383 S.E.2d 490, 496 (1989). Here, without question, the examiner gave no weight to his own findings of fact showing pretext. In this regard, we believe that he erred as a matter of law.

C. The Examiner Improperly Gave Conclusive Weight To Respondent's Statistics.

Given his findings that respondent either failed to articulate a legitimate non-discriminatory reason for Mr. Smith's rejection and/or that the reason it proffered was untrue, the Commission can discern only one possible explanation for the examiner's recommendation that we enter an order dismissing the complaint. As is obvious from his discussion, the examiner was extremely impressed with and gave conclusive weight to respondent's statistics showing that it hired black applicants at a higher rate than their appearance in the workforce. As stated by the examiner:

> ". . . respondent shows that it did actively recruit black employees and did have a higher percentage of minority employees at the John Amos Plant than the percentage of minorities in the area population. This trend is likewise true of the semi-skilled and unskilled job

> categories here involved. . . . [R]espondent has both the statistics and the evidence of fair hiring policies and practices on its side. And although patterns and practices in general do not insulate one from committing an individual act of discrimination they do constitute persuasive evidence. To find for the complainant would be to conclude that the respondent engaged in fair hiring practices, but varied from their practice only to discriminate against Mr. Smith." (Emphasis added).

By giving conclusive weight to respondent's statistics, and disregarding his own findings tending to show discrimination, we believe that the examiner erred as a matter of law. As the U.S. Supreme Court stated in Connecticut v. Teal, 457 U.S. 440 (1982), civil rights laws were "never intended to give an employer a license to discriminate against some employees merely because he favorably treats other members of the employee's group." 457 U.S. at 455. While an employer's overall selection process may not evidence discrimination, an examination of a component of that process may, nonetheless, result in a different finding.

Particularly instructive is the Court's decision in Furno Construction Corporation v. Waters, 438 U.s. 567 (1978). In Furnco, the employer had an affirmative action goal of a 16% black workforce among its bricklayers. On the job in question, it had exceeded that goal and had reached a workforce that was 20% black. Moreover, only 5.7% of the bricklayers in the relevant labor market were minority group members, as were only 13% of the bricklayers in the organized labor union.

Despite Furnco's recent record of fair hiring, said the Court, "a racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." 438 U.S. at 579. "It is clear beyond cavil," wrote Justice Rehnquist for the majority, "that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." 438 U.S. at 579. (Emphasis in original). Proof of a racially balanced workforce "neither was nor could have been sufficient to conclusively demonstrate that Furnco's actions were not discriminatorily motivated. . . .," 438 U.S. at 580, though a factfinder may "consider the racial mix of the workforce when trying to make the determination as to motivation." Ibid. (Emphasis in original).

As reiterated by Professor Larson in his much quoted treatise Employment Discrimination: "Since the employer's motive for a particular decision is the issue, a statistical showing by the employer of a balanced workforce or of a history of affirmative action will not, by itself, ordinarily suffice as an effective rebuttal" [to a prima facie case]. Vol. 2, § 50.82(b). Citing Furnco, Professor Larson concluded that proof of a racially balanced workforce "can never be conclusive as to what motivated the particular decision which disadvantaged the plaintiff." Id.

Putting respondent's statistics in their proper light, the Commission believes that the non-statistical facts as found by the

hearing examiner make out a case of race discrimination, and that complainant has proved the same by a preponderance of the evidence. The statistics offered by respondent, while tending to show that respondent may have a record of fair employment, do not counter the weight of the evidence that Mr. Smith, for whatever reason, was, in this instance, unlawfully discriminated against because of his race.[2]

Finally, we note that it appears that the examiner gave such weight to respondent's statistics that he placed a heightened burden on complainant, a burden requiring that complainant show why he was singled out for unlawful treatment. At no time, however, must a complainant "prove discrimination with scientific certainty," Bazemore v. Friday, 478 U.S. 385, 400 (19886), or produce direct evidence of discriminatory intent or motive, Conaway, supra. It is sufficient that a complainant produce enough evidence so that the Commission "may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists. . . ." Bazemore, at 400-01. This, we believe, Mr. Smith has done.

---

[2]Why would a previously fair employer suddenly engage in discrimination? Without suggesting that any of these reasons are applicable to this case, several come to mind: the employer has implemented an impermissible quota on the number of minority employees it will hire, which it has attained, or perhaps a particular supervisor is biased and makes hiring decisions that ignore the employer's fair hiring policy. Because of these and other possibilities, which an applicant will seldom if ever be aware of, a respondent in a disparate treatment case must state why this applicant (the complainant) was rejected and cannot rely solely on statistics that have no direct relation to this particular decision.

CONCLUSIONS OF LAW

Based on the findings of fact recommended by the examiner and adopted hereinabove, we make the following conclusions of law:

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

2. 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).

3. The West Virginia Human Rights Act is violated when an employer rejects an applicant for a position for which that employer is hiring because of the applicant's race.

4. The complainant made a prima facie case showing that respondent unlawfully discriminated against him because of his race when it rejected him for the position of utility man.

5. The respondent articulated a legitimate nondiscriminatory reason for rejecting complainant's application, i.e., that he had applied for the position of maintenance person instead of utility person, or, in the alternative, it allowed complainant's rejection to go "essentially unexplained."

6. The complainant showed by a preponderance of the evidence that the reason articulated by respondent to explain its actions was a pretext and not true, and that respondent was more likely motivated by an unlawful discriminatory reason.

7. The complainant having proven that he was discriminated against in violation of the West Virginia Human Rights Act, he is entitled to back pay and benefits, with prejudgment interest thereon at the rate of 6% per annum, compounded annually.[3]

8. The complainant is entitled to an award of incidental damages for humiliation, emotional and mental distress, and loss of personal dignity suffered as a result of respondent's acts in the amount of $500.00.

ORDER

In view of the foregoing, the West Virginia Human Rights Commission ADJUDGES, ORDERS, and DECREES as follows:

1. The amended complaint of William A. Smith, Docket No. EA-33-73 is sustained.

---

[3]We award complainant limited prejudgment interest from 1 January 1977 up until the date of hearing, 17 March 1978. We exercise our discretion to limit the onset and cutoff dates for interest out of fairness to respondent, since it should not be penalized for the tragic delay in bringing this matter to a finality. The rate of 6% per annum was the rate in effect during the time for which back pay is awarded.

2. The respondent shall pay complainant back pay in the amount of $19,000, plus prejudgment interest thereon in the amount of $1,442.10.[4]

3. The respondent shall pay to complainant the sum of $500.00 for incidental damages for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity.

4. The respondent shall report to the Commission within thirty (30) days after the entry of this order concerning the steps taken to comply with this order.

By this final order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of the 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

---

[4]In its previous order the Commission awarded complainant back pay in the amount of $20,699.53 based on a start date of 15 January 1972. Since the evidence reveals that Mr. Smith more than likely would not have started at a utility position until May 1972, we deduct an appropriate amount from the back pay award.

Entered for and at the direction of the West Virginia Human Rights Commission this 2nd day of July, 1990 in Charleston, Kanawha County, West Virginia.

QUEWANNCOII C. STEPHENS