STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Gaston Caperton
Governor

Herman H. Jones
Executive Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

November 15, 1996

William E. Swisher
571 Grant St.
Middleport, OH 45760

American Alloys, Inc.
PO Box 218
New Haven, WV 25265

J. David Fenwick, Esq.
PO Box 2107
Charleston, WV 25328

Sandra Henson
Assistant Attorney General
812 Quarrier St.
Charleston, WV 25301

Re: Swisher v. American Alloys, Inc.
EAH-146-95

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge 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 administrative law judge'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 judge, 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 administrative law judge shall not operate as a stay of the decision of the administrative law judge 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 administrative law judge, or an order remanding the matter for further proceedings before a administrative law judge, 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 administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge'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 administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge'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,

Robert B. Wilson
Administrative Law Judge

RW/mst

Enclosure

cc: Herman H. Jones, Executive Director

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

WILLIAM E. SWISHER,

Complainant,

v. DOCKET NUMBER: EAH-146-95

AMERICAN ALLOYS, INC.,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on August 1, 1996, in Kanawha County, at the Human Rights Commission, 1321 Plaza East, Charleston, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, William E. Swisher, appeared in person and by counsel for the Human Rights Commission, Sandra K. Henson, Assistant Attorney General and legal intern, Kassy Kelley. The respondent, American Alloys, Inc., appeared by its representative, Thomas G. Riscili, Chief Operating Officer, and by co-counsels, Richard Owen and J. David Fenwick, with the firm of Goodwin & Goodwin.

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 administrative law judge 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.

A.

FINDINGS OF FACT

1. Complainant, William E. Swisher is a sixty-three year old man who resides in Middleport, Ohio. Complainant filed an age discrimination complaint against the respondent under the West Virginia Human Rights Act alleging that the respondent terminated him based upon unlawful consideration of his age. Joint Stipulation of Fact, Joint Exhibit No. 1.

2. Respondent, American Alloys, Inc. is a person and an employer as those terms are defined by W. Va. Code §§ 5-11-3(a) and 5-11-3(d), respectively. Joint Stipulation of Fact, Joint Exhibit No. 1.

3. Complainant worked for respondent from January 1, 1988 through June 30, 1994. At the time of his discharge, complainant was earning $1,976.00 per month. Joint Stipulation of Fact, Joint Exhibit No. 1.

4. After complainant was terminated, he elected to continue his insurance coverage at the group rates received by the respondent via COBRA. The complainant's out of pocket costs in this regard were $379.09 per month from September 1994 through February 22, 1996. Joint Stipulations of Fact, Joint Exhibit No. 1.

5. Prior to working for respondent, complainant had worked at the same plant for Vanadium Corporation and Foote Mineral Company since 1956. Tr. pages 18 and 19.

6. Complainant worked as a Railroad Clerk in the yard and in the shipping department for Vanadium; and worked as a Shipping Clerk, Assistant Foreman, and Relief Foreman in shipping, and as a Foreman in the yard, production and in the com plant for Foote. Tr. pages 19 and 20.

7. Upon the purchase of Foote by the respondent, complainant was hired by respondent as Assistant Foreman prior to the respondent's hiring of its full employee complement. Over a two or three month period, complainant helped respondent establish various departments prior to the start up of plant operations. Specifically, complainant assisted in establishing the shipping department. As part of that task, complainant ordered all materials necessary to enable the shipping department to function. In purchasing, complainant initiated telephone calls to different companies to determine prices, chose the vendor and ordered materials as needed. Complainant also played an

integral role in organizing the respondent's yard. He led crews that cleaned the furnaces in preparation for plant start up and trained the guards to manage the respondent's weigh stations at the plant. Tr. pages 22, 23, 24, 25 and 50.

8. Once operations began, the respondent assigned complainant to the storeroom as Assistant Foreman. At that time, the storeroom was not stocked and complainant ordered the materials necessary to keep the plant running properly. While performing those purchasing duties, complainant contacted the different companies to determine prices, and he completed requisitions for the quantities of materials needed. Complainant purchased materials until the respondent hired Roger Manley to do the purchasing he had been performing. Tr. pages 26 and 27.

9. The complainant was next demoted to a union position of Clerk for two to three years, after which time he was placed in the Storekeeper's position. Tr. page 28.

10. The Storekeeper's position was a management position involving various paperwork functions with purchasing and accounting, and inventory functions involved with receipt and disbursement of materials from the storeroom. He originally performed his duties as well as the duties of a union employee in the storeroom until Brian Yonker was hired as a union employee to assist the complainant in the storeroom. Tr. pages 29, 30, 31, 32 and 33.

11. Complainant was on a medical leave for six weeks from a hernia operation for an injury he sustained in the plant. When he was released to return to work on June 20, 1994, he returned to work. Complainant was called into Mr. Riscili's office on June 30, 1996, and

informed that he would be let go with two months severance pay. Mr. Riscili and Mike Wolfe told him he could sign up for unemployment and it would take him up to retirement age for Social Security. They told him to get out and go home. Complainant just sat there and felt stunned. His stomach turned. He could not face his wife and co-workers after being terminated. Tr. pages 34, 35, 36 and 45.

12. Complainant testified credibly that he was sixty-one (61) years old when he was terminated and had planned to continue working until he retired at age six5y-five (65). Complainant and his wife have been without medical coverage since February 22, 1996. Tr. pages 36 and 43.

13. Larry McKee was hired as a management consultant from late August or early September 1993 by the respondent to turn around a business that had been having severe financial difficulties. Larry McKee was made acting president of the respondent December 1, 1993 and began his employment contract as President and Chief Executive Officer of the respondent effective January 1, 1994. Larry McKee Evid. Deposition pages 4 and 8.

14. Early on Mr. McKee terminated one of two Customer Service, Accounts Receivable positions; shut down the Pittsburgh management office, eliminating the Comptroller at the plant in favor of the Pittsburgh Comptroller, and eliminating two temporary Accounts Payable positions at Pittsburgh which were not filled when that office was moved to the plant. He also had eliminated a clerical Cost Computer Input position. Larry McKee Evid. Deposition pages 41 and 42.

15. In the late winter or early spring of 1994, Larry McKee contacted his brother George McKee about performing consulting work to

evaluate the purchasing functions at the plant. Larry McKee felt there were significant problems in procurement; both in the amount of dollars being expended in this area, and in the shortages that were being experienced when physical inventory of on-hand parts were conducted. George McKee performed his review by coming in for a couple of days on four or five separate occasions sometime between the late winter and late May 1994, giving his recommendations in verbal form to Larry McKee, Tom Riscili and Mike Wolfe at meetings in the morning, at lunch and briefly after work. Larry McKee Evid. Deposition page 13; George McKee Evid. Deposition pages 5, 9 and 21.

16. In mid May 1994, while complainant was on medical leave, Larry McKee approached Cindy Hesson and asked her if she knew complainant's age. Ms. Hesson informed Larry McKee that she was not aware of complainant's age. Later that same day Mr. Riscili entered her office, and also asked if she knew complainant's age. Ms. Hesson went to the Human Resources Director to ask complainant's age, whereupon the Human Resources Director informed Ms. Hesson that either Larry McKee or Mr. Riscili had also asked her complainant's age and taken his personnel folder. Tr. pages 127, 128, 129 and 130.

17. Sometime in late April or early May 1994, Larry McKee asked Lisa Ohlinger if she knew complainant's age. Tr. page 169.

18. During the week preceding the 1994 Memorial Day weekend, Larry McKee ran into Ms. Hesson and Ms. Ohlinger while they were on their way to lunch and invited them to join him for lunch at Sahler's restaurant. During the lunch, Mr. McKee commented that he planned to terminate complainant's employment when complainant returned from medical leave and that complainant would be able to collect early

social security retirement benefits after receiving eight weeks of severance pay and six months of unemployment compensation benefits. Tr. pages 133 and 167.

19. Both Mr. Riscili and Larry McKee are unable to specify when the decision to terminate the complainant was made, stating only that it was late April or May, 1994. Larry McKee Evid. Deposition page 18; Tr. page 231.

20. Testimony that Larry McKee or Mr. Riscili did not consider complainant's age prior to the decision to terminate the complainant's employment are not credible, as the preponderance of the evidence suggests that both were aware that complainant was approaching retirement age and considered the impact of his termination in terms of years of service and eligibility for various entitlements. The best evidence available as to when the termination decision had been made is the lunch meeting on May 26, 1994, when the decision was announced to others by Larry McKee; after the earlier inquiries concerning complainant's age.

21. George McKee offered his opinion at the time of his visits that there were two people in the purchasing department, and that there was really only sufficient work to gainfully employ one person; and in conjunction with the supply room [storeroom], that responsibility could also be added to a single Buyer's position. There was only sufficient work to gainfully employ one person, where the respondent was presently employing three people. George McKee also opined at the time that the remaining staff would have to know the ins and outs of the storeroom, as well as be capable of purchasing. George McKee Evid. Deposition pages 7 and 14.

22. Based upon George McKee's recommendations, management decided to eliminate the Storekeeper's position. Management considered George McKee's recommendation to eliminate one of the Buyer positions, but decided to retain two equal Buyer positions involving the demotion of Ms. Hesson from her Senior Buyer position and reassignment to the storeroom. Ms. Hesson who had been supervising Ms. Ohlinger and complainant, was demoted in salary and moved to the storeroom and was not informed what her duties would be at the storeroom. Ms. Hesson upon being informed of the change, went home and never returned. Larry McKee explained that it was envisioned that Ms. Hesson would have been utilized to coordinate and expedite raw materials receipt from the storeroom where it was convenient to the yard where raw materials were stored in bulk and could be ordered for delivery when scrap was short. Tr. pages 120, 121, 122 and 223; Larry McKee Evid. Deposition pages 18, 19 and 20.

23. After complainant's position was terminated, and Ms. Hesson resigned, the respondent operated from that point forward with the one remaining Buyer position with Ms. Ohlinger, who skimmed the top off the paperwork formerly done by complainant working about two hours per day at the storeroom. Subsequently, some of the purchasing paperwork was assigned to the accounting department and the storeroom union employees were supervised by the Maintenance Coordinator, without the need for additional personnel. Tr. pages 185-189, 224-225; Larry McKee Evid. Deposition pages 25-26.

24. Complainant knew the storeroom better than anyone at the plant and performed his job duties well. Tr. pages 126, 127 and 203.

25. Complainant was capable of performing the remaining functions as Buyer, based upon his varied experience both closing up after Foote Mineral closed the plant and his duties associated with the start up of operations under respondent's ownership of the plant.

26. Complainant was never asked if he could perform Buyer duties by Mr. Riscili or Larry McKee prior to his position being eliminated. Tr. pages 235 and 236; Tr. page 36.

27. Mr. Riscili and Larry McKee were not aware of complainant's past duties as they did not arrive with the respondent until mid 1993. Tr. page 220; Larry McKee Evid. Deposition page 4.

28. Ms. Ohlinger was hired by the respondent on May 19, 1993, as a Buyer in purchasing for storeroom items. Ms. Ohlinger had previously performed this function of purchasing for storeroom items from 1981 to 1985 for Foote Mineral as well. She performed these duties until June 30, 1994, at which time she also assumed the duties of assisting in procurement of the raw materials as Ms. Hesson had previously performed. Tr. pages 176-178.

29. Cards were kept in the storeroom with requisitioners, vendors, past history including where parts had been ordered from, what date and what price, which complainant in the past had pulled and taken to Ms. Ohlinger. Ms. Ohlinger would then make the actual order of the items from the vendors arranging for when and how the delivery would be made, under what terms; and would then generate a purchase order for the items. During Ms. Ohlinger's tenure with respondent, there were great financial problems making it difficult for Ms. Ohlinger to arrange for credit for needed supplies, with various vendors. Ms. Ohlinger had to rely upon both her personnel

relationships with established vendors and to look for alternative vendors when past creditor vendors would not sell to respondent. Ms. Ohlinger testified that many of the vendors that respondent utilized were the same vendors that she had purchased from while working for Foote Mineral previously. Ms. Ohlinger described in detail her extraordinary efforts to obtain an order that had been on credit hold, requiring her to utilize her personal vehicle to transport hazardous materials one week-end, which drums had to be procured or the furnace would have shut down. The respondent's plant did not experience any operational or production problems as a result of the termination of the complainant's Storekeeper's position or the elimination of the Senior Buyer position and Ms. Ohlinger's assumption of most of those duties. Tr. pages 178-189, 192-196.

B.

DISCUSSION

The West Virginia Human Rights Act, W. Va. Code § 5-11-9(1), makes it unlawful "for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment...." West Virginia Code § 5-11-3(h) states that "discriminate" means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of ... age...."

The West Virginia Supreme Court, in its per curium decision in KVRTA v. W. Va. Human Rights Com'n, 383 S.E.2d 857 (W. Va. 1989) cited with approval the case of Thornbrough v. Columbus & Greenville, R.R.

Co., 760 F.2d 633, 644 (5th Cir. 1985) for the proposition that in reduction in force cases, what creates the presumption of discrimination is not the discharge itself, but rather the discharge coupled with the retention of younger employees. The prima facia test for discrimination in the reduction in force age discrimination case consists of four basic elements:

> 1. the claimant was a member of a protected class (at least forty years of age);
>
> 2. that a negative action was taken (that [he] was fired);
>
> 3. that [he] was qualified;
>
> 4. that others not in the protected class were treated more favorably. KVRTA v. W. Va. Human Rights Com'n, 383 S.E.2d at 860, (1989).

In KVRTA supra, the Court held that the complainant must be qualified to assume another position at the time of the reduction in force as the West Virginia Human Rights Act does not guarantee a job regardless of qualifications.

There are three different analyses which may be applied to evaluate the evidence in a disparate treatment discrimination case. The first, and most common, uses circumstantial evidence to prove discriminatory motive. Since those who discriminate usually hide their biases and stereotypes, making direct evidence unavailable, a complainant may show discriminatory intent by the three step inferential proof formula first articulated in McDonnell Douglas Corporation v Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). See Barefoot v. Sundale Nursing

Home, 193 W.Va. 475, 457 S.E.2d 152 at 169, n. 19 (1995). This method requires that the complainant establish a prima facia case of discrimination. The burden of production then shifts to the respondent to articulate a legitimate, nondiscriminatory reason for its action. Finally, the complainant may show that the reason proffered by the respondent was not the true reason for the employment decision, but rather pretext for discrimination. The term pretext has been held to mean "an ostensible reason or motive assigned as color or cover for the real reason or motive; false appearance; pretense." West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490, 496 (1989). A proffered reason is pretext if it is not the true reason for the decision. Conaway v. Eastern Associated Coal Corporation, 174 W.Va. 164, 358 S.E.2d 423, 430 (1986). Where pretext is shown, discrimination may be inferred, Barefoot, 457 S.E.2d at 164, n. 19, though discrimination need not be found as a matter of law. St. Mary's Honor Society v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

Second, there is the "mixed-motive" analysis. Where an articulated legitimate nondiscriminatory motive is shown by the respondent to be nonpretextual, but is in fact a true motivating factor in an adverse action, a complainant may still prevail under the "mixed-motive" analysis as established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), and recognized by the West Virginia Supreme Court in West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490, 496-497, n.11 (1989). If the trier of fact is convinced that the complainant's age

played some role in the decision, the respondent can escape liability only by proving that it would have made the same decision even if it had not considered the complainant's age. Barefoot, 457 S.E.2d at 162, n.16; 457 S.E.2d at 164, n.18.

Finally, if it is available, a complainant may prove a disparate treatment claim by direct evidence of discriminatory intent. Proof of this type shifts the burden to the respondent to prove by a preponderance of the evidence that it would have rejected the complainant even if it had not considered the illicit reason. Lee v. Russell County Board of Education, 684 F.2d 769, 29 F.E.P. Cases 1508 (11th Cir. 1982); Trans World Airlines, Inc. v. Thurston, 469 U.S. 11, 36 F.E.P. Cases 977 (1985). This type of analysis is similar to that used in "mixed-motive" cases.

The KVRTA case sets forth the prima facia case for age discrimination in a reduction in force situation. At the time of the complainant's discharge he was a member of the protected class at age sixty-one. The complainant suffered a negative employment action in that he was discharged from employment. Although respondent urges that the complainant was not qualified to perform the work of the Buyers who were retained, the evidence would indicate that he was capable of performing those duties; both because he was able to perform some purchasing as required, while helping the respondent start up operations; and because he was responsible for maintaining the card files on the parts, which were utilized by the Buyer in obtaining the parts from the various vendors. Since the complainant was capable of contacting vendors and preparing requisitions, he was certainly just as capable of issuing purchase orders. There is no

doubt about the abilities of complainant in regards to his Storekeeper's duties. Finally, it is not disputed that Ms. Ohlinger, a younger individual was retained; and indeed that Ms. Hesson, also a younger individual was demoted but retained as well under the initial management plan. Thus, the complainant has made a prima facia case of age discrimination under the KVRTA standard.

The respondent has advanced a legitimate nondiscriminatory reason for its discharge of the complainant in that both Larry McKee and Tom Riscili who were responsible for his termination stated that his position as Storekeeper was eliminated. Larry McKee Evid. Deposition page 19 and Tr. page 223. Nevertheless, complainant has submitted evidence tending to demonstrate that both Larry McKee and Tom Riscili unlawfully considered complainant's age in the decision to terminate him. Each specifically inquired of others regarding complainant's age during the period of time during which the decision to terminate complainant was being made. Subsequent testimony indicates that each was specifically aware of the fact that complainant was approaching early retirement age for Social Security. Furthermore, Larry McKee specifically mentioned that he had considered the effects of complainant's termination and that two months severance pay and six months unemployment should take him up to early retirement age; when he had lunch with Ms. Hesson and Ms. Ohlinger on May 26, 1994, and first indicated that a decision had been made to terminate complainant upon his return from medical leave. In light of these facts, it is not believable that Larry McKee and Tom Riscili did not consider complainant's age or his being on sick leave for that matter, until after they had made a decision to terminate his position. Thus, the

"mixed-motive" analysis of Price Waterhouse is appropriate to apply in this case, and the respondent can escape liability only if it demonstrates by a preponderance of the evidence that it would have made the same decision to terminate the complainant's employment even without consideration of his age. (Specifically in the instant case his approaching eligibility for early retirement under Social Security).

Complainant suggests that the respondent set out to terminate complainant's employ, ostensibly because of his age, and did so by simply moving Ms. Hesson into the former Storekeeper's position. Complainant relies upon the fact that Ms. Hesson's former responsibilities for purchasing raw materials had been put under Controller and newly promoted Director of Purchasing, Kevin O'Brien, while she was moved into the storeroom. Tr. page 120 and 171, Complainant's Exhibit No. 5. Nevertheless, Larry McKee explained that the contracts for purchase of raw materials were issued for a course of time over the year. While Mr. Wolfe and Mr. Riscili handled negotiations and pricing, the delivery dates over the course of the year had to be coordinated carefully with the yard where the raw materials were stored in bulk. Ms. Hesson was envisioned as coordinating and expediting the deliveries. Larry McKee Evid. Deposition pages 22 and 21. Nothing suggests that Ms. Hesson was simply taking over complainant's duties in the storeroom. In fact complainant had been the subject of union grievances for performing hourly work associated with receiving in of materials. Tr. page 234 and Larry McKee Evid. Deposition pages 27 and 28. In theory, complainant's duties were primarily supposed to be supervisory in

nature and Larry McKee felt that Ms. Hesson had previously had some past supervisory experience in the storeroom, therefore Ms. Hesson would be the likely candidate for being moved to the storeroom. Regardless of what Ms. Hesson's duties would have been, it is evident that the big picture envisioned the elimination of the Senior Buyer, Buyer and Storekeeper's positions and their functions being consolidated in one Buyer position with the rest of the duties redistributed elsewhere through the organization. This proved to be exactly what transpired following Ms. Hesson's quitting upon finding out about her demotion. The respondent has operated since that time with hourly employees handling receiving in the storeroom, with some supervision being provided by the maintenance coordinator, who already had physical responsibility for eighty percent of the stores inventory consisting of huge furnace parts which were not kept in the storeroom in any event. Larry McKee felt that supervision of the storeroom was not really necessary given the self directed workforce concept in place at the plant. Larry McKee Evid. Deposition pages 24-26. The overwhelming evidence of record clearly establishes that the Storekeeper's position was eliminated on June 30, 1994, and those functions reassigned throughout the respondent's remaining workforce. Regardless of who had held the Storekeeper's position, or their individual characteristics of age, sex, handicap, race, national origin or religion, the position of Storekeeper would nevertheless have been eliminated. Thus, the preponderance of the evidence establishes that complainant would have been terminated when the Storekeeper's position was abolished, regardless of considerations of

complainant's age and proximity to reaching early retirement for Social Security.

Eliminating a position due to reorganization compelled by financial difficulties and terminating the least qualified employee is lawful. Schutz v. Western Pub. Co., 609 F.Supp. 888 (D.C. Ill. 1985); Heerdink v. Amoco Oil Co., 919 F.2d 1256 (7th Cir. 1990); Morser v. AT&T Information Systems, 703 F.Supp. 1072 (S.D.N.Y. 1989). As the West Virginia Supreme Court noted in Conaway v. Eastern Associated Coal Corp., 356 at page 430, once the employer shows a nondiscriminatory reason for its action, the reason need not be a particularly good one, or one that the fact finder would have acted upon, as long as it is any other reason than that the complainant is a member of a protected class. If the fact finder believes the proffered reason was the true reason for the decision, then the employer, while he may be guilty of poor business practices, is not guilty of discrimination. All three individuals involved in the decisions which resulted in elimination of the Senior Buyer and Storekeeper's positions were supervisory at will employees of the respondent. The lions share of the work associated with the three positions involved after consolidation of those positions, whether into the two or a single Buyer position, involved purchasing items for the storeroom. In making the decision to retain the two Buyers over complainant, it was clear that both Buyers had extensive experience in making purchasing arrangements with vendors and obtaining credit from those vendors under difficult financial conditions. Complainant clearly did not have the same demonstrated ability to maintain the types of relationships on an ongoing basis with the different vendors,

such as to assure continued receipt of items, because he did not perform those duties on an ongoing basis during the tenure of Mr. Riscili and Mr. McKee. Speculation that complainant had the necessary skills to perform those duties based upon past work experience does not negate the legitimate concerns of management that respondent retain Buyers with demonstrated ability to meet the daily struggle of obtaining supplies from vendors and dealing with the vendors concerns about those financial difficulties respondent was operating under at the time. Tr. pages 138 and 139.

One troubling aspect of the situation, is that the compalinant had in the past been demoted to a union storeroom Clerk position under earlier management. There remains a nagging question as to why complainant could not simply have been demoted to a union Clerk position in the storeroom given the subsequent staffing for hourly positions in the storeroom. Given this scenerio it appears that concerns over paying costs associated with complainant's being off on sick leave due to his work injury may have mitigated against his being retained in the storeroom as an hourly union employee. Nevertheless, other courts have recognized that an employer is not required to allow an employee whose job has been eliminated to displace other less senior employees. Wolfe v. Time, Inc., 702 F.Supp. 1045 (S.D.N.Y. 1989). For the foregoing reasons, the undersigned concludes that respondent terminated complainant when his Storekeeper position was eliminated as part of efforts to turn around a difficult financial situation and would have terminated complainant for this reason alone without regard to complainant's age. Thus the respondent is not liable for age discrimination in this matter.

C.

CONCLUSIONS OF LAW

1. The complainant, William E. Swisher, 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. The respondent, American Alloys, 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 established a prima facie case of discrimination.

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the respondent has established, by a preponderance of the evidence, to be a legitimate nondiscriminatory reason for the termination of the complainant, while the complainant has established, by a preponderance of the evidence, that unlawful age discrimination played some role in the termination decision, under the mixed-motive analysis of Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed. 2d 268 (1989).

7. The respondent has proven by a preponderance of the evidence that complainant's position would have been eliminated and another employee would have been retained for the one remaining buyer position even if age had not been considered.

D.

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.

It is so **ORDERED**.

Entered this 15th day of November, 1996.

WV HUMAN RIGHTS COMMISSION

BY: _____
ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I, Robert B. Wilson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing FINAL DECISION by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 15th day of November, 1996, to the following:

WILLIAM E SWISHER
571 GRANT ST
MIDDLEPORT OH 45760

AMERICAN ALLOYS INC
PO BOX 218
NEW HAVEN WV 25265

J DAVID FENWICK ESQ
GOODWIN & GOODWIN
PO BOX 2107
CHARLESTON WV 25328

SANDRA HENSON
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
L & S BLDG 5TH FLOOR
812 QUARRIER ST
CHARLESTON WV 25301

R. B. Wilson

ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE