



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**WV HUMAN RIGHTS COMMISSION**

**1321 Plaza East**

**Room 104/106**

**Charleston, WV 25301-1400**

**TELEPHONE 304-348-2616**

**GASTON CAPERTON**  
GOVERNOR

**Quewanncoii C. Stephens**  
Executive Director

April 24, 1990

Arnold E. Townsend  
5135 Soulton Dr.  
Cross Lanes, WV 25313

Eye Physicians & Surgeons  
424 Division St.  
S. Charleston, WV 25309

Karen Hamrick, Esq.  
237 Capitol St.  
Charleston, WV 25301

Mike Kelly  
Deputy Attorney General  
812 Quarrier St.  
L & S Bldg. - 5th Floor  
Charleston, WV 25301

Re: Townsend v. Eye Physicians and Surgeons  
EA-238-87

Dear Parties:

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 with the WV Supreme Court of Appeals within 30 days of receipt of this final order.

sincerely,

A large, stylized handwritten signature in black ink, appearing to read "Quewanncoii C. Stephens".

Quewanncoii C. Stephens  
Executive Director

Enclosures  
CERTIFIED MAIL-RETURN RECEIPT REQUESTED

## 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 non-resident of this state, the non-resident 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 Section 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ARNOLD E. TOWNSEND,

Complainant,

v.

DOCKET NO. EA-238-87

EYE PHYSICIANS AND SURGEONS,

Respondent.

FINAL ORDER

On 7 February 1990 the West Virginia Human Rights Commission reviewed the recommended findings of fact and conclusions of law filed in the above-styled matter by hearing examiner Theodore R. Dues, Jr. After consideration of the aforementioned, and all exceptions filed in response thereto, the Commission decided to, and does hereby, adopt said recommended findings of fact and conclusions of law as its own, with no modifications.

Accordingly, it is hereby ADJUDGED, ORDERED and DECREED that the complaint filed in this matter by Arnold E. Townsend against Eye Physicians and Surgeons be, and the same is hereby, dismissed with prejudice. The examiner's recommended findings of fact and conclusions of law are to be attached hereto and made a part of this Final Order.\*

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\*We note with regret that the recommended findings of fact and conclusions of law contain approximately a dozen or more typographical errors. None of these errors, however, can in any way be construed to affect the outcome of this matter.

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 the State of West Virginia, the parties are hereby notified that they have ten (10) days to request that the West Virginia 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

Entered for and at the direction of the West Virginia Human Rights Commission this 30<sup>th</sup> day of March, 1990, in Charleston, Kanawha County, West Virginia.

  
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QUEWANNCOLL C. STEPHENS  
EXECUTIVE DIRECTOR/SECRETARY

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ARNOLD E. TOWNSEND,  
Complainant,

v.

EYE PHYSICIANS AND SURGEONS,  
Respondent.

Docket No. EA-238-87

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W.V. HUMAN RIGHTS COMM.

EXAMINER'S RECOMMENDED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

This matter matured for public hearing on the 25th day of April, 1988, and June 28th, 1988. On each occasion, the hearing was held at the John V. Ray Room, Kanawha County Library, Charleston, West Virginia. The Hearing Examiner was Theodore R. Dues, Jr. The parties waived the presence of a Hearing Commissioner. The Complainant appeared in person and was represented by Antionette Eates, Esquire. The Respondent appeared by its representative, John Moore and was represented by Karen Hamrick, Esquire.

After a review of the record, any exhibits admitted in evidence, any stipulations entered into by the parties, any matters for which the Examiner took judicial notice during the proceedings, assessing the credibility of the witnesses and weighing the evidence in consideration of the same, the Examiner makes the following findings of fact and conclusions of law. To the extent that these findings and conclusions are generally consistent to any proposed findings of fact and conclusions of law submitted by the parties, the same are adopted by the

Examiner, and conversely, to the extent the same are inconsistent to the findings and conclusions, the same are rejected.

#### ISSUES

1. Did the Respondent unlawfully discriminate against the Complainant as a result of his age in its determination to discharge him?
2. If so, to what relief is the Complainant entitled?

#### FINDINGS OF FACT

1. The Complainant was born on October 8, 1946.
2. The Respondent is a medical association doing business in South Charleston, West Virginia.
3. The Complainant was hired on or about December 9, 1986, by the Respondent to perform driving duties which specifically required him to: pick up Respondent's patients and deliver them to the Respondent's place of business for treatment; return the patients to their destination upon the completion of their treatments; and from time to time to provide limited maintenance to the vehicle (a van) used for this purpose.
4. During his tenure, the Complainant received two bonuses. He also received a gift certificate for his birthday.
5. The gift certificate was provided due to the occasion and was not based upon any factors pertaining to the Complainant's performance.
6. During the Complainant's tenure he was the only full time driver hired by the Respondent. During most of this time,

the back-up driver was the Respondent's janitor.

7. On or about October 9, 1986, the Complainant had an automobile accident, while in the course of his employment and during a time at which he was driving the Respondent's van.

8. The accident was caused by another driver backing her vehicle out in front of the Complainant's path.

9. The Complainant was determined not to be at fault for this accident.

10. On several occasions, during his tenure, the Complainant's immediate supervisor had trouble locating him, at times when the Complainant was to have been on duty.

11. As a result of this conduct, the Complainant's immediate supervisor initiated a log-out procedure designed to assure accountability for him, and the Respondent's vehicle which he was assigned during the work day.

12. The Complainant was instructed on how to complete the log, at the time in which it was implemented. However on approximately thirteen (13) separate occasions, over a period of approximately two (2) months, the Complainant did not complete the log correctly.

13. On each of these occasions, the Complainant was approached by his immediate supervisor and confronted with his failure to properly make entries in the log.

14. During his tenure, on approximately forty-three (43) occasions, over a period of six (6) months, the Complainant failed to clock in or out in a proper fashion, although he had been instructed on the proper procedure for punching his time

card.

15. On or about September 11, 1986, the Complainant signed out to have left the job at 4:00 p.m., when in fact he had left the job at 2:00 p.m., on that date. On September 24, 1986, management confronted the Complainant with this fact.

16. Although the Complainant had been prescribed glasses, by the Respondent, he refused to wear the same, during his work day, notwithstanding the multiple requests by the Respondent for him to wear them.

17. During the Complainant's tenure, the Respondent received four (4) separate reports from persons, on the Complainant's perceived unsafe driving practices; speeding and otherwise reckless driving.

18. As a result of these incidents, the Complainant's immediate supervisor admonished him not to drive beyond the posted speed limits.

19. The Respondent did not provide the Complainant a radar detector to be used during the work day in its vehicle.

20. On or about October 9, 1986, the Complainant was involved in a "fender bender", during his employment. The Complainant assured his supervisor that he was not injured and was capable of completing the work day.

21. On or about October 10, 1986, the Complainant's immediate supervisor and the Respondent's manager met and discussed the continual problems that were being realized with the Complainant's performance. It was decided at that time that the Complainant would be discharged.



22. The Complainant was sent a letter dated October 10, 1986 which provided for his termination from Respondent's employment.

23. The Complainant reported to work on October 14, 1986, and was advised, by his immediate supervisor, that he had been sent a letter on the 10th which provided for his termination.

24. During his tenure, the Complainant's immediate supervisor did not make statements regarding his age which were discriminatory in motive.

25. The age of the employee hired to replace the Complainant was the early twenties.

#### DISCUSSION

The Complainant made a prima facie case of age discrimination by introducing evidence to the effect that he is a member of the protected age group; that he was hired to perform the position of driver for the Respondent; that he was qualified to perform the position of driver; that he was discharged by the Respondent and replaced by an individual who was not in the protected age group. Conoway v. Eastern Associated Coal Corp., 358 S.E. 2d 423 (1986). Sheppardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E. 2d 342 (1983). State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E. 2d 77 (1985).

The Respondent, in its case-in-chief, introduced evidence

which indicated that the Complainant was everything but an ideal employee. Specifically, the Respondent introduced evidence to establish that the Complainant failed to make a reasonable effort to comply with the time accountability needs of the Respondent; to the effect that the Respondent had to implement a log-out procedure to keep track of the Complainant's whereabouts, during the work day. Additionally, the Complainant failed to substantially comply with the proper procedure of punching his time card, notwithstanding the fact that he had been instructed on the proper procedure for the same. Additionally, the Complainant was requested not to take the Respondent's vehicle home, but, on occasion, he took the van home anyway. Further, the Respondent received several complaints about the poor driving practices of the Complainant.

Giving consideration to the credibility of the witnesses and assessing the weight to be provided by the evidence received, the Examiner is of the opinion that the reasons articulated by the Respondent were not only legitimate nondiscriminatory reasons, but were credible, as well. Further, the Complainant failed to establish that the Respondent's articulated reasons were in fact pretext for unlawful discriminatory actions against him based upon his age. Texas Department Of Community Affairs v. Burdine, 101 S.Ct. 1094; Sheppardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E. 2d 342 (1983); State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, 329 S.E. 2d 77 (1985).

### CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the parties and the subject matter herein.

2. The Complainant initially established a prima facie case of age discrimination by establishing he was a member of the protected age group; that he was hired to perform the duties of driver for the Respondent; that he was qualified to perform the duties of driver; and that he was terminated and replaced by an individual who did not fall within the protected age group.

3. The Respondent articulated legitimate nondiscriminatory reasons for its actions by establishing that the Complainant's work performance was unsatisfactory in several areas.

4. The Complainant failed to establish that the reasons articulated by the Respondent were in fact pretext for unlawful discriminatory acts against him based upon his age.

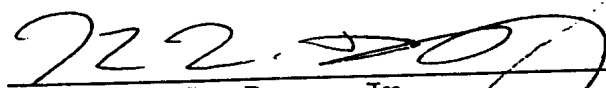
5. Accordingly, the Complainant has failed to establish by a preponderance of the evidence that he was discriminated against, by the Respondent, in its employment decision to terminate him.

PROPOSED ORDER

Acccrdingly, the Examiner does hereby reccmend to the Commission that judgement be entered for the Respondent and that the Complainant take naught under his complainat.

DATED: October 27, 1988

ENTER:

  
Theodore R. Dues, Jr.  
Hearing Examiner