

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

PATRICIA THAW

Complainant,

v.

DOCKET NO. ES-9-78

CHARLESTON AREA MEDICAL CENTER,

Respondent.

FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

I
PROCEEDINGS

This case came on for hearing on May 11 and May 12, 1982, in Conference Room C, State Capitol Complex, Charleston, West Virginia, before Hearing Examiner Emily A. Spieler, and Hearing Commissioner Iris Bressler. The Complainant appeared in person and was represented by attorneys Franklin D. Cleckley and Tod J. Kaufman. The Human Rights Commission was represented by Assistant Attorney General Eunice Green. Charleston Area Medical Center was represented by John Brown and Robert Morris, and by its counsel, Fred F. Holroyd.

On July 6, 1977, the Complainant filed a verified complaint alleging that the Respondent, Charleston Area Medical Center, had discriminated against her on the basis of sex by failing to promote her and by requiring her letter of resignation on June 28, 1977. The Human Rights Commission issued a letter of determination finding probable cause to believe that the Human Rights Act had been violated on June 13, 1978.

On February 22, 1982, the Human Rights Commission, by Howard D. Kenney, Executive Director, served written notice of public hearing upon the parties pursuant to W. Va. Code §5-11-10.

The Respondent filed its Answer on March 1, 1982, generally denying that CAMC engaged in any illegal discriminatory practices based upon sex against the Complainant. On March 22, 1982, and April 14, 1982, pursuant to §7.10 of the Administrative Regulations of the Human Rights Commission, prehearing orders were entered by the Hearing Examiner Emily A. Spieler. A prehearing conference was held May 6, 1982, at which the Complainant appeared by attorney Tod J. Kaufman, the Human Rights Commission was represented by Assistant Attorney General Eunice Green, and the Respondent appeared by its counsel, Fred F. Holroyd. The matters determined at the prehearing conference were summarized briefly by the Hearing Examiner at the commencement of the public hearing. (Tr. 3-4).

The Respondent urges in Motions to Dismiss, that the matter of the failure to promote the Complainant was not properly before this Hearing Panel. First, Respondent moved to dismiss the promotion allegations at the prehearing conference and at commencement of the hearing on the grounds that the letter of determination finding probable cause did not in fact support a probable cause determination. Second, at the close of the Complainant's case, Respondent again moved to dismiss, urging that the complaint, not having been filed within 90 days of the alleged failure to promote, was untimely and could not, on a jurisdictional basis, encompass the promotional questions. As indicated in the body of this Recommended Decision, the Hearing Examiner is of the opinion that the failure to promote was properly before the Hearing Panel and that the Complainant was entitled to a full hearing and consideration on the merits of her claims of discrimination.

After full consideration of the testimony, the evidence, the arguments of counsel, the Hearing Examiner suggested decision and exceptions thereto, the Commission make the Findings of Fact and Conclusions of Law and Order set forth herein.

II ISSUES

The issues presented for resolution in this matter are:

1. Did the Respondent's decision not to promote the Complainant to the position of Director of Community Affairs constitute illegal discrimination based on sex?
2. Did the Complainant's resignation constitute a discriminatory discharge based on sex?
3. Did the discriminatory activities of the Respondent constitute a continuing pattern of discrimination?
4. Should the complaint regarding the failure to promote be dismissed due to the language contained in the letter of determination issued by the Human Rights Commission, or due to the fact that the charge was filed more than 90 days after the Complainant was passed over for the promotion in question?

III SUMMARY AND EVALUATION OF THE EVIDENCE

The Complainant and Respondent had full opportunity at public hearing to call witnesses and present evidence relative to this complaint. The Complainant offered the testimony of Patricia Thaw, the

Complainant; Robert L. Morris, Vice-President for Personnel Services at Charleston Area Medical Center, and John Brown, Director of Community Affairs at Charleston Area Medical Center. The Respondent called Jean Campbell, employment interviewer for the Respondent; J. Darrell Richmond, Administrator of the Memorial Division and Vice-President of CAMC; Frank R. Parsons, Administrator of the General Division and Vice-President of CAMC; James Crews, President of Charleston Area Medical Center since November 3, 1981, and previously Executive Vice-President of CAMC. The Respondent also called as its own witnesses John Brown and Robert L. Morris, who were previously called as witnesses for the Complainant.¹

Due to significant inconsistencies in the evidence and testimony offered by the witnesses, issues of credibility are central to the decision in this matter. This is particularly true as neither party could offer substantial, corroborative proof of certain aspects of their cases.

¹The Respondent sought to call witnesses not listed on its prehearing submission during the second day of hearing, despite the Prehearing Order indicating that parties would be held to lists of witnesses presented prior to hearing, except where good cause for new witnesses could be shown. The testimony of all witnesses was nevertheless heard. However, the scope of the testimony of witnesses not previously identified was limited to unanticipated rebuttal testimony. The Respondent did further attempt to call Eunice Green, Assistant Attorney General for the Human Rights Commission, to the witness stand in order to discover and present the contents of the investigatory file of the Human Rights Commission. Strenuous objection was raised to this manner of proceeding, and the Hearing Examiner excluded this testimony. No formal Freedom of Information Act request had been made for the contents of the file by the Respondent. Furthermore, the activities of the Human Rights Commission prior to the issuance of a letter of determination and notice for public hearing were held to be irrelevant at the public hearing stage.

The testimony of Patricia Thaw, the Complainant, may be summarized briefly as follows. She was hired on February 5, 1973, by Charleston Area Medical Center to be the executive secretary for Robert Morris, Vice President of Personnel Services. Soon thereafter she was promoted to be coordinator of Employee Communication and Community Relations, a position she held for four and one-half years until she submitted her resignation at the request of her supervisor at the end of June, 1977. Until February, 1977, she reported to Robert Morris. Her job duties consisted of coordinating the publication of the internal newspaper, The Shield, including writing, editing, layout, and photography; acting as a media liaison for CAMC; preparing annual reports, brochures, handbooks and slide presentations; and doing other tasks assigned to her by Morris or the President of CAMC, Don Arnwine. Her job duties at no time included holding press conferences or in other ways acting as spokesperson for CAMC. She was the only employee at CAMC during this four year period with specific public relations functions. She maintains that she performed her duties adequately at all times, and that her evaluations, performed on a regular annual basis, reflected this fact.

In January, 1977, Thaw maintains that she accidentally discovered that CAMC was preparing to hire a Director of Community Affairs who would head a new Department of Community Affairs and report directly to the President of CAMC. When she approached Morris concerning this discovery, she alleges he told her that she could not be considered for the job because she was a woman. She claims that she saw no posting of the job internally at CAMC nor any other indication that the job was

being created at any time prior to January, 1977. Prior to the time she approached Morris concerning the job, no one discussed or mentioned the position to her. She admittedly had no college degree or, apparently, any formal training in public relations or journalism.

In January, 1977, John Brown was brought in for a second interview for the Director of Community Affairs job. He was hired effective February 14, 1977. However, Thaw and all witnesses agreed that her job remained the same after February, 1977, except that she was assigned to report to Brown instead of Morris.

Thaw further testified that she was unaware of any major problems in her working relationship with Brown until he asked for her resignation on June 28, 1977, which she tendered.

Thaw called as her witness Robert Morris, her supervisor until February, 1977. His testimony contradicted Thaw's in several significant areas. First, the development of the Director of Community Affairs job, according to Morris, was approved for development and hiring in August, 1976, by the Board of Trustees. A job description was immediately thereafter developed and the job was posted to obtain applications from CAMC employees. Second, Morris alleges that he told Thaw about the job within a week of the action taken by the Board of Trustees in the summer of 1976, and that they had several discussions regarding it. According to Morris, Thaw chose not to apply for the job because she did not think she could report to President Arnwine. As a result, Thaw was never formally considered for the new position; Morris denied that he told Thaw a woman would not be considered.

Third, Morris raised several questions with regard to Thaw's job performance during the time that he was supervising her, and pointed to her evaluations as corroboration for this. In particular, he noted that she disagreed with President Arnwine with regard to how to approach public relations; that she was not consistently dependable in her work as coordinator; that she lacked respect for the working press; and that there were complaints made about her by reporters from the Charleston newspapers and by the administrators of both the Memorial and General Divisions of CAMC.

Basically, Morris' position with regard to the Director of Community Affairs job, a position shared by other management employees who testified in this matter, is that Patricia Thaw did not apply for the job, and that had she applied, she would not have been considered to be adequately qualified to perform the new job with its added responsibility of acting as spokesperson for CAMC. Thaw, on the other hand, maintains that she was qualified for the job, and that her failure to apply was the result of the deliberate process by which she was prevented from learning of the existence of the job until a decision had been made to hire John Brown. There is no dispute that John Brown, a white male, was fully qualified for the job in question. Notably, conversations with regard to Thaw's knowledge of the job and decisions as to whether or not to apply for it were all held between Thaw and Morris. At no time were there witnesses present who could corroborate one version or the other of these critical events.

In addition to Thaw and Morris, John Brown offered testimony on behalf of both parties in this matter. Brown began work with CAMC as

the Director of Community Affairs on February 14, 1977, and replaced Morris as Thaw's direct supervisor. He is unable to offer evidence with regard to Thaw's job performance prior to his arrival, the development of his job, or any events leading to his selection as Director of Community Affairs. In relevant part, he testified that he too had problems working with Thaw because she was not dependable; that Thaw did not show up at the times that she was supposed to, despite his multiple attempts to adjust her work hours for her convenience; that Thaw was continually tardy, at least 15 times in a period of about three months and that she was often one-half to one hour late in addition to being unavailable for extended periods during the day; that he discussed her problems with her and with Morris; and that Thaw was replaced with a woman. Brown made the decision to ask for Thaw's resignation after speaking with Arnwine and Morris, and he spoke with Thaw on June 27 or 28, 1977. In contrast to Thaw who testified that he indicated no problems with her work in this particular conversation, Brown testified that he told her that he wanted her resignation because of the problems with her dependability. Like the conversations that Thaw had with Morris, there were no witnesses to this conversation. Thaw was replaced by Mary Alice Hennen, a woman.

In addition to the testimony of Brown and Morris, the Respondent offered the testimony of Jean Campbell, an employment interviewer for CAMC responsible for posting jobs and keeping a record of this posting. She indicated that the job of Director of Community Affairs was in fact posted on September 27, 1976, and remained posted on bulletin boards throughout CAMC for three working days. This testimony was

corroborated by the notebook she kept in the normal course of business in which she noted down jobs which were posted (Resp. Ex. 7). Thaw, who by her own testimony checked the bulletin boards only periodically, offered no refutation of Campbell's testimony.

J. Darrell Richmond, Administrator of the Memorial Division of Charleston Area Medical Center from 1975 to 1977, offered testimony on behalf of the Respondent to corroborate the fact that Thaw had failed on several occasions to show up at scheduled events which were supposed to be covered for the employee publication. Richmond reported that he talked with Thaw and Morris about these problems. Frank Parsons, Administrator of the General Division and Vice-President of CAMC since March 1, 1976, also testified that he complained to Morris about Thaw's performance on at least two specific occasions when she did not show up or was late to cover events for the same publication.

James Crews, currently President of CAMC and previously Executive Vice-President from 1972 to 1981, indicated in his testimony that he was responsible in part for the development of the job description for the Director of Community Affairs position. The Board of Trustees meeting in August 1976, approved the creation of the Department of Community Affairs and instructed President Don Arnwine to develop a job description and to proceed with hiring. Crews and Arnwine felt that the person hired to fill the new Director of Community Affairs position ought to be a college graduate and have experience in community relations. In fact, according to Crews, not only did they not intend to exclude females from the job, but they were assisted in developing the concept of the Community Affairs Director at CAMC by a female community affairs director from Richmond, Indiana. Crews further

testified that he and Arnwine did not feel that Thaw had the qualifications for which they were looking, and therefore they did not discuss the position with her.

There is no dispute that all employees of CAMC who report to the President and Executive Vice-President are and have always been male. The President has always been male. The Board of Trustees, to which the President reports, is and has been all male. As far as this record shows, no women have served on the Board of Trustees nor have any women served in any positions above those of reporting to a Vice-President.

There are however several disputed factual areas of key importance in the evaluation of the evidence in this matter.

First, what was the quality of the Complainant's job performance in the Coordinator position?

Respondent's witnesses offered a consistent story of problems with Thaw's performance which pre-dated the decision to hire a Director of Community Affairs. Thaw insists that there were no problems with her job performance during the period of time she was employed as coordinator except for a period when difficulties at home resulted in her being placed on probation on January 1, 1976.

The annual evaluations prepared by Morris (admitted as Respondent's Exhibits 1-4 and Complainant's Exhibit 2), although indisputably subjective in nature, show certain consistencies indicating performance problems and corroborating the testimony of witnesses other than Thaw. For example, her "effectiveness in dealing with people," was rated only satisfactory or fair in all the evaluations. Her evaluation for the calendar year 1974 indicated that "Ms. Banks [now Thaw] must remember

that regardless of personal feelings or attitude on requests or suggestions that tact and diplomacy are essential in her job. [sic]" (Resp. Ex. 2). There can be no question that this is an indication that the Complainant had had certain shortcomings in this area. Complainant was placed on probation on January 1, 1976, due to personal problems. (Resp. Ex. 3). Although she was taken off probation after three months on April 1, 1976, her performance at that time was rated as only satisfactory, and the evaluation covering the probationary period still indicated a need for her to communicate her whereabouts each day to someone in personnel.²

There is considerable dispute concerning Thaw's last written evaluation which covered the period from April 1, 1976, to the end of that calendar year. Thaw testified that she obtained copies of her personnel file after resigning in June, and that her last evaluation for the period of April 1, 1976, to January 1, 1977, had been changed after she copied it in June, 1977, to include the language: "[past problems] must remain under control to remain in position; dependability must improve." Morris agreed that Thaw's last evaluation was

²Interestingly, in examining these evaluations, it is important to note that even the evaluation which resulted in placing her on probation rated her as satisfactory and outstanding in several areas and did not rate her as unsatisfactory in any area. This indicates that the ratings of satisfactory and outstanding did not necessarily indicate overall satisfaction with an employee's performance, and would certainly not indicate that the employee's performance was of such a quality that would justify advancement into a job with significant or greater responsibility.

changed, but insists that the change was made before January 1, 1977,³ However, even aside from the language that was admittedly added, the evaluation indicated that her performance needed improvement. In particular, the evaluation said "while Mrs Thaw's communications are better - still needs improvement. Mrs. Thaw's career goals and initiative, while good, are in doubt." Overall, we conclude that the evaluation taken together indicate that Thaw's job performance was not of the level that was indicated in her testimony.

Second, what were the general procedures for handling promotions at CAMC?

There is no dispute that all jobs were posted at CAMC, and employees were generally expected to apply for positions posted. There is also no dispute that CAMC had a policy of promoting from within, rather than seeking outside applicants.⁴ In keeping with this policy,

³Morris' testimony with regard to the changes made in the evaluation for the period ending January 1, 1977, is wholly incredible and raises questions regarding his credibility generally. Morris admitted that the requirement that an employee sign an evaluation was instituted in order to insure that the employee would have knowledge of what the evaluation said. Nevertheless, he indicated that the evaluation was changed after it was signed by Thaw, and that it was not shown to her. He characterized the change as "a very minor addition in her behalf." Tr. 1-56. No plausible explanation was offered by Morris or any other witness as to why the evaluation would have been changed after it had been signed by Thaw, and not discussed with her, or how this change was to her benefit.

⁴Although all witnesses indicated a general preference for hiring from within, the record as a whole, with regard to the community affairs and public relations positions at CAMC, indicates that this policy was not implemented in a manner which would truly exclude from consideration more qualified people employed at the time the job was available. In particular, Brown's discussion of hiring various people into the Department of Community Affairs under his management indicated that those responsible for hiring did not adhere strictly to the policies stated in the handbook.

administrators' testimony indicated that qualified employees who logically might be appropriate for open positions did not need to apply, as they would be approached about the opening. In fact, Thaw did not know whether her coordinator position had been posted in 1973, as she was approached about it directly by Morris.

Third, did Thaw know about the new position and decide not to apply for it?

Despite Thaw's doubts, we are persuaded that the job was posted on bulletin boards in September 1976. We are equally persuaded that Thaw did not see this posting.

Morris alleged repeatedly that Thaw chose not to be considered for the Director of Community Affairs position. She, on the other hand, contends that she did not know about the job, and that, upon learning about it, was told that a woman would not be considered for it. Therefore, the evaluation of the testimony of these two witnesses is critical to the ultimate resolution of this question.

We found Morris' testimony implausible and not credible. The Complainant's demeanor and testimony persuaded us that, had she been given the opportunity, she would have sought a job which would have represented a substantial advancement in her career. Furthermore, as noted above, Morris' decision to change Thaw's final evaluation, and his testimony concerning this change, cast serious doubts upon his credibility.

On the other hand, we also have serious doubts regarding the Complainant's testimony. If the job was posted, as we are persuaded it was, we cannot conclude that there was a deliberate attempt to keep

knowledge of it from her. Her testimony regarding her job performance and her working relationship with Brown was self-serving, generally not credible, and uncorroborated. Although we suspect that Thaw did not know about the creation of the Department of Community Affairs, we are not convinced that her conversation with Brown occurred as she reported.

Fourth, was the position of Director of Community Affairs substantially the same as the position held by Thaw?

The record indicates that the job performed by Thaw did not change after Brown was hired. The job descriptions of Coordinator of Employee Communications and Director of Community Affairs clearly show that the new position held far greater responsibility and scope. (Resp. Ex. 14 and 15). Witnesses all agreed that Thaw's job duties did not change after Brown was hired. Thaw was evidently unsure as to what functions Brown was performing. However, we cannot conclude, based upon the totality of the evidence, that their duties were the same.

Fifth, was Thaw qualified for the Director of Community Affairs position?

Thaw claims she was fully qualified for the position as a result of her performance in the coordinator job. The Respondent points to her job performance and her lack of formal academic credentials as justification for its position that she was not qualified and therefore not approached regarding it. In view of the preceding discussions regarding the Complainant's job performance and the nature of the job, we are persuaded that Respondent's position was a reasonable one.

Sixth, what were the reasons for Thaw's termination in June, 1977?

Thaw maintains that her termination was a direct outgrowth of CAMC's failure to promote her, and as such constituted illegal discrimination. She argues that she was not given progressive discipline, as required by the Employee Handbook, nor was she inadequate in her job performance.

CAMC maintains that progressive discipline was not usually accorded to professional employees. We found this argument credible, and further were persuaded that there were indeed persistent problems in Thaw's job performance.

Thaw's testimony with regard to her final months at CAMC and her resignation raises certain questions. She indicated that she had no on-going problems with her new supervisor, John Brown. Nevertheless, she admittedly both sought to transfer from the Community Affairs Department, and met with Morris to voice concerns about her job during the spring of 1977. She insists she was not supervised by Brown, yet admits that she met with him after his orientation period on a daily basis and that he reviewed her work. Furthermore, her letter of resignation of June 29, 1977, indicated an on-going problem with her working situation: "I am sorry that such stringent action was necessary, but I can no longer tolerate the working situation we now have. Your gross insecurity in your present position, which seems to make you feel extremely threatened by me, and your total inability to supervise, direct and/or communicate has made my job completely unbearable." (Resp. Ex. 5). In conclusion, we feel these actions and statements do not at all support Thaw's contention that Brown's demand for her resignation came after a problem-free working relationship.

IV
LEGAL DISCUSSION

A. Procedural Issues

The Respondent advanced two arguments to limit the scope of this hearing to the Complainant's termination.

First, CAMC argued that the letter of determination finding probable cause did not support a finding that the denial of promotion was discriminatory. However, the public hearing phase in these matters constitutes a de novo exploration of issues raised in the complaint, if probable cause has been found. The Rules and Regulations of the Human Rights Commission in fact provide that the Respondent and Hearing Examiner be served only with the initial complaint and the notice of public hearing if conciliation fails. Section 5.01-5.02, Rules and Regulations Pertaining to Practice and Procedure Before the West Virginia Human Rights Commission.

Furthermore, the letter of determination in this matter did not indicate that probable cause was not found on any issue of the complaint; therefore, the Complainant was not given notice of administrative appeal rights to which she would have been entitled if there had been a denial of probable cause. The decision to exclude at the public hearing stage part of the complaint alleging discrimination in promotion would therefore deny the Complainant due process of law.

Second, CAMC moved at the close of Complainant's case to dismiss the promotion aspects of the case as jurisdictionally barred since the failure to promote occurred more than 90 days prior to the filing of this

complaint. However, the allegation of a continuing violation of discriminatory activity by a respondent brings activities which occurred more than 90 days before the filing of the charge within the purview of a discrimination charge under the West Virginia Human Rights Act. West Virginia Human Rights Commission v. United Transportation Union, Local 655, 280 S.E.2d 653 (W.Va. 1981). Complainant in this matter alleged that her termination was the direct result of the discriminatory failure to promote her in the sense that "but for" the promotion problem, the termination would not have occurred.

More importantly, the 90-day time limit is a statute of limitations, and not jurisdictional in nature. See generally, Michie's Jurisprudence, Limitations of Actions, §64 and §66; Zipes v. TransWorld Airlines, Inc., 102 S.Ct. 1127 (1982). As such, it must be affirmatively pleaded or it may be held to have been waived. Nellas v. Loucas, 191 S.E.2d 160 (W.Va. 1972). Respondent in this matter had ample opportunity to raise this issue in its Answer or prehearing submissions, and did not do so. The Respondent failed to demonstrate any reason for its delay, arguing only that the question is jurisdictional, and that it is therefore appropriate to be raised at any time, by any party, or sua sponte by the Hearing Panel or Commission. Since this argument is without merit, Respondent's Motion to Dismiss on these grounds must be denied.

B. Liability

This Commission has consistently followed the lead of the federal courts with regard to the evaluation of evidence presented in an employment discrimination case wherein there is asserted disparate treatment of a member of a protected class. In particular, this Commission has

allowed a Complainant to prove employment discrimination cases inferentially when direct evidence of discrimination is unavailable. Cases may also be proven with direct evidence or through a combination of inferential proof and direct evidence. McDonnell Douglas Corp. v. Green, 411 U.S. 72, 93 S.Ct. 1817 (1973); Texas Department of Community Affairs v. Burdine, _____ U.S. _____ 101 S.Ct. 1089 (1981).

Under the McDonnell Douglas formulation the Complainant establishes by inference a prima facie case in hiring if he or she proves: (a) the Complainant belongs to a protected class; (b) the Complainant applied for and was qualified for the job for which the employer was seeking applicants; (c) That despite his/her overall qualifications the Complainant was rejected for the job; and (d) that after the Complainant's rejection the job remained open and the employer continued to seek applications from persons of Complainant's qualifications. However, the requirements of the McDonnell Douglas prima facie case are not inflexible and must be tailored to each factual situation. In particular, these requirements may be applied to cases where discrimination in promotion is alleged; where the Complainant alleges that he or she has been terminated discriminatorily; and in hiring situations where Complainants are considered and evaluated as a group rather than sequentially as was the case in McDonnell Douglas.

If the Complainant establishes a prima facie case under McDonnell Douglas, the burden shifts to the employer to rebut the presumption of discrimination by articulating a legitimate nondiscriminatory reason for its actions. The employer need not prove the legitimate nondiscriminatory reason but must only articulate it. It is sufficient if the Respondent's evidence raises a genuine issue of fact as to whether or not it

discriminated illegally against the Complainant. Texas Department of Community Affairs v. Burdine, *supra*, 101 S.Ct. at 1094; Furnco Construction v. Waters, 438 U.S. 567, 98 S.Ct. 2943 (1978).

If the employer articulates a legitimate nondiscriminatory reason for its actions, the Complainant may still prevail by persuading the trier of facts that the discriminatory reason more likely than not motivated the employer, or indirectly by showing that the employer's explanation is a pretext and unworthy of credence. The ultimate burden of proof always rests on the Complainant. McDonnell Douglas Corp. v. Green, *supra*, 411 U.S. 804, 93 S.Ct. 1825 (1973); Texas Department of Community Affairs v. Burdine, *supra* 101 S.Ct. at 1095.

More recently there has developed an alternative order of proof in certain employment cases where a Complainant has successfully proven with direct or equivalent evidence that the employer engaged in discriminatory practices. Where a Complainant has demonstrated by a preponderance of the evidence that the Respondent had the disposition not to treat females or other protected groups equally, a statutory violation may have been shown regardless of whether the Complainant has shown that he or she would have been promoted, hired or maintained on the payroll but for the discrimination. In particular, where a Complainant is not properly considered for a job and there is evidence showing discriminatory animus, the Respondent will be held to have violated the Human Rights laws. Patterson v. Greenwood School District 50, ___ F.2d ___ Docket No. 81-2141 (4th Cir. 12/15/82); Muntin v. California Parks Department, 50 U.S. L.W. 2626, 28 FEP Cases 905 (9th Cir. 1982); Ostroff v. Employment Exchange, 683 F.2d 302, 29 FEP Cases 683 (9th Cir. 1982). In such cases, once the Complainant has

demonstrated a statutory violation, the burden shifts to the Respondent to show by clear and convincing evidence that the Complainant was not the most qualified for the available job; the Respondent may not thereby defeat the finding of liability but may successfully limit the Complainant's monetary award. Patterson v. Greenwood School District 50, Supra; Muntin v. California Parks Department, supra; Ostroff v. Employment Exchange, supra.

(1) The Termination

As noted above, the Supreme Court has held specifically that the McDonnell Douglas formulation will not neatly apply to every case of alleged employment discrimination but must be tailored to meet the facts at issue. McDonnell Douglas Corp. v. Green, Supra, 408 U.S. 802, 93 S.Ct. 1817, note 13. With regard to a termination a Complainant must show; (a) that he or she is a member of a protected group; (b) that the Complainant performed her job adequately; (c) that despite his or her performance the Complainant was terminated; and (d) that after the termination the Complainant was replaced by a member of a group other than his or her own. Alternatively a complainant may show by presentation of direct evidence that the termination was a result of discrimination. Or in the third alternative, the Complainant may show that the termination represented the continuing and present effects of past discrimination.

Patricia Thaw has not presented proof of a prima facie case under

⁵Since Brown did not replace Thaw or perform her job functions, we cannot hold that he replaced her.

the McDonnell Douglas formulation. In particular, and most obviously, she was replaced in the job that she held at the time of her termination by another woman.⁵ Nor has she presented direct proof that the termination was the result of illegal discrimination. She offered no testimony to indicate that Brown's animus toward her was discriminatory in nature. Therefore, in order to claim successfully that she is due a finding of liability due to her termination, she must show by a preponderance of the evidence that the termination represented continuing effects of past discriminatory behavior, i.e., discriminatory failure to promote her to the position of Director of Community Affairs. West Virginia Human Rights Commission v. United Transportation Union, Local 655, 280 S.E.2d 653 (W.Va. 1981).

If she can successfully establish that the failure to promote her was the result of discrimination, and that she ought to have been promoted, then she may successfully claim that the subsequent conditions of her employment leading to her termination were discriminatory. We must, therefore, look at the promotion question in order to determine this issue of liability.

(2) The Promotion

(a) The McDonnell Douglas Formulation

Again, the McDonnell Douglas formulation must be tailored to meet the specific facts at issue. Hiring, which was involved in McDonnell Douglas, and promotion are generally analogous. As noted above, the Complainant must show, to prove a prima facie case, that she was a member of a protected group; she applied for the job; she was qualified for the job; and that the job was held open for equivalently, qualified applicants subsequent to the Complainant's rejection.

Let us look carefully at these four requirements. The Complainant has offered her own testimony to prove that she is a member of a protected class; that she was qualified for the job in question; that, had she been given the opportunity, she would have applied for the job, and that as a qualified in-house applicant she should have been promoted to be Director of Community Affairs. However, most of the Respondent's evidence was introduced during the Complainant's case in chief, as a result of the fact that the Complainant chose to call, as her own witnesses, Robert Morris and John Brown. As a result, we could examine the evidence in one of two ways. First, based upon Complainant's testimony taken in its most favorable light, we could find that she presented a prima facie case, and that the Respondent articulated legitimate nondiscriminatory reasons for its failure to promote her, in that she was not qualified and failed to apply. Second, we could examine the evidence offered in its entirety to determine whether the requirements of a prima facie case have been met.

When reviewing the evidence offered, we are persuaded that the Complainant has failed to present a prima facie case of discrimination in two respects.⁶ First, as noted in the Summary of the Evidence, we are not persuaded that the Complainant's prior job experience would make her a qualified candidate for the job of Director of Community

⁶In addition to these two problems with the Complainant's prima facie case, we must also note that it is undisputed that she did not apply for the position. Of course, the Complainant maintains that the Respondent should have approached her about the job and did not do so. Had she shown she was qualified, the issue of why she did not apply would be critical. However, we do not see the question of her application as dispositive.

Affairs, a position requiring greater responsibility and self-direction. Respondent's position that Thaw was not qualified is supported by the written evaluations of her job performance, and by her lack of formal credentials.

Questions are frequently raised with regard to the subjective nature of evaluations, when those evaluations are performed by supervisors who are not within the protected group and whose self-interest is obviously served by providing justification for a decision not to hire or not to promote. It is, on the other hand, well accepted in the area of discrimination law that professional positions, such as the one involved in this case, are not analogous to positions such as secretarial or blue collar positions where qualifications are more easily subjected to objective analysis. See generally, Larson Employment Discrimination, §50.20 etseq. It is further important to note that the aspects of Mrs. Thaw's evaluations which indicated a failure to be dependable and responsible began before the job of Director of Community Affairs was created in 1976, and therefore cannot be regarded as pretextual.

The Complainant argues that satisfactory performance in her position, when combined with promote-from-within and affirmative action policies should have entitled her to the promotion. However, the Complainant's performance as late as the end of 1975 -- only nine months prior to the posting of the Director of Community Affairs position -- was admittedly unsatisfactory and led to a probationary period. Furthermore, while satisfactory performance may raise questions concerning a termination, it does not itself entitle an employee to a promotion to a position of considerable responsibility. The fact that a complainant has

been employed as the sole employee responsible for public relations does not in and of itself entitle the employee to a promotion to a more responsible position. Grano v. Department of Development of the City of Columbus, ____ F.2d ____, 32 EPD ¶33,378 (6th Cir. 2/18/83). Furthermore, it is not in keeping with any developments in civil rights laws to assert that a Respondent has violated the West Virginia Human Rights Act or Title VII by failing to engage in affirmative action, whether or not affirmative action appears to be needed; nor can a Complainant successfully maintain a claim under the civil rights laws because of an employer's failure to comply with its own written policies unless this failure is directed at or impacts discriminatorily on a protected group.

There is an additional problem with Complainant's prima facie case. Under the McDonnell Douglas formulation, she must show that the position was held open for equivalently qualified applicants. She has failed to do so. In fact, no candidates were solicited with her qualifications. Rather CAMC sought superior experience and academic credentials.

In summary, looking at both the Complainant's initial and ultimate burdens of proof under McDonnell Douglas, and the entirety of the evidence, it appears that the Complainant has failed to demonstrate that she was denied the position of Director of Community Affairs because of her sex.

(b) The Patterson Formulation

Where a Complainant has shown through the introduction of direct

and supportive evidence that an employer has a predisposition to discriminate against certain subgroups, in this case women, the Complainant may be entitled to a finding of liability, irrespective of whether the Complainant should have received the promotion. In situations of this kind, as noted above, the finding of liability does not necessarily mean the Complainant is then entitled to either the job or the monetary relief generally available to Complainants under Title VII, if the Respondent can meet its burden by showing that despite its discriminatory actions, the Complainant would nevertheless not have received the promotion or the job.

In the case at hand, the Complainant has introduced evidence, not refuted by the Respondent, indicating complete male dominance in all positions at the level of the Director of Community Affairs and above. The Complainant also testified that she was told that she was not considered for the Director of Community Affairs position because she was a woman.

As noted in the Summary of the Evidence, we find the Respondent's claim that the Complainant chose not to be considered for the position not credible and pretextual. However, we feel that problems of credibility also run throughout the Complainant's testimony. The burden of proof ultimately rests with her. In view of the lack of corroboration to show that an issue in the decision not to promote her, in view of her prior problematic job performance and lack of qualifications, and in view of the aforesaid questions regarding her credibility, we do not feel that a finding of liability can be based upon this one self-serving statement which is vehemently disputed by the Respondent.

We reach this conclusion despite the admitted male dominance of administrative positions at CAMC. The Complainant introduced no evidence that qualified women had applied for or sought any of the positions in question. While the lack of representation of a particular group is certainly relevant and probative, we do not feel that it itself can support a finding of liability in a disparate treatment case.

(3) Promotion and Termination Together

The Complainant has not persuaded us that she would have received the promotion but for illegal discrimination. Therefore, after John Brown was hired in February, 1977, the Complainant was in the job she would have held irrespective of any allegedly discriminatory activities of the Respondent. She has introduced no evidence of discriminatory activities against her during the period of time from February through June 1977. Whatever the source of conflict between her and Brown which led to his demand for her resignation, there is no evidence to indicate that this conflict was the result of ongoing or past discriminatory activities by the Respondent. The Complainant has, therefore, failed to meet her burden of proof that the termination was the result of discriminatory activities by the Respondent.

V
FINDINGS OF FACT

1. The Respondent, Charleston Area Medical Center (CAMC), is a 950-bed nonprofit medical center located in Charleston, West Virginia. It is the largest medical center in the State of West Virginia (Tr. I-78, II-204). During the period of time at issue in this matter, Don Arnwine was the President of CAMC, and as such

reported directly to the Board of Directors of the corporation; James Crews, Executive Vice-President, reported to the President; Vice-Presidents for Personnel (Robert Morris), the General Division, (Frank Parsons), the Memorial Division, (J. Darrell Richmond), and for finance (Robert Halonen) all reported to Crews (Tr. I-12-14, 125).

2. The Board of Directors of the Charleston Area Medical Center is and has been composed of only men. The President, the Executive Vice-President, all administrators who reported directly to the President, and all Vice-Presidents are and have been men (Tr. I-64, 113-14, 125-26). Overall, approximately 75% of the workforce at CAMC is female; a number of women hold positions which require them to report to administrators at the Vice-President level (Tr. I-74-75, II-155).
3. Complainant, Patricia Banks Thaw, a woman, was hired by the Charleston Area Medical Center on February 5, 1973, as executive secretary for the Vice-President of Personnel Services, Robert Morris (Tr. I-11, 120). She served in this capacity for approximately one month, after which she was promoted to be Coordinator of Employee Communications and Community Relations (Tr. I-12, 120). In this capacity Thaw's job duties included: coordinating publication of the in-house employee newsletter, "The Shield," including writing, editing, layout, and photography; acting as liaison to the media; preparing annual reports and books, slide presentations, and other things requested by the President or

Vice-President. Her duties did not include doing budget preparations or holding press conferences or otherwise acting as spokesperson for CAMC (Tr. I-73, 143, 144, II-57, 199, 200, Resp. Ex. 15).

4. Employees of the Respondent are given annual evaluations. The evaluation is generally prepared, discussed with the employee, signed by the employee, and placed in the personnel file. The purpose of this evaluation process is to act as a training and development tool. Employees could request copies of their evaluations, and the Complainant consistently did so (Tr. I-44, 86, 134).
5. From the date of her hire until February, 1977, the Complainant was supervised by Robert Morris, Vice-President for Personnel. Morris was responsible for preparing all the written evaluations of the Complainant's job performance.

These evaluations showed problems with regard to the Complainant's job performance, and she was placed on probation for the period January 1, 1976 to April 1, 1976 (Comp. Ex. 2, Resp. Ex. 1-4). The last evaluation Morris prepared regarding the Complainant was changed after the evaluation was discussed and signed. The changes were not discussed with her. The following language was added to the evaluation after it was signed: "[past problems] must remain under control to remain in position. Dependability must improve." Based upon the totality of the evidence and the credibility of witnesses, we find that this evaluation was changed after the time that the Complainant was eventually terminated

during the summer of 1977. Nevertheless, even without the added language, this final evaluation indicated that the Complainant's job performance needed improvement (Comp. Ex. 2, I-47-51, 57, 95, 136-38).

6. Based upon the entire record, and the credibility of the witnesses, we find that Thaw performed her job in a manner that was satisfactory in many respects but exhibited from early in her employment certain consistent problems with regard to tact and dependability. In particular, she was frequently late and difficult to find during the work day, and she did not always follow through on commitments made to administrators, nor did she communicate to them that she would be unable to perform her duties when expected to do so (Resp. Ex. 1, 2, 3, 4, Comp. Ex. 2, Tr. I-85, 87-89, 91, 93, 142, II-57-62, 67, 69, 74-76, 181-192).
7. In August, 1976, the Board of Trustees approved creation of a new Department of Community Affairs, the Director of which would report directly to the President (Resp. Ex. 14, Tr. II-196-198). Following that Board meeting, Arnwine and Morris prepared a job description for the Director of Community Affairs position (Tr. I-16, 35, II-212). The qualifications for this position were determined by Arnwine, Crews, and Morris, and included the requirement of a college degree or equivalent experience (Comp. Ex. 1, Tr. I-22-24, II-221).
8. In general, whether a job is new or newly vacated, CAMC posts job descriptions on bulletin boards for three days in order to notify in-house employees of a vacancy. Employees are then

expected to notify the employment office of interest in the job. Those employees who notify the employment office are interviewed. However, the normal procedure is also to evaluate people who are already on staff even if they do not file formal applications. There is a general policy of promoting qualified employees rather than recruiting from outside (Comp. Ex. 3, Tr. I-17-18, 32, 112, II-30-54).

9. In keeping with the general policy of promoting employees from within, the job description for Director of Community Affairs was posted for three days in September, 1976 (Resp. Ex. 7, Tr. I-16, II-32-54). Patricia Thaw did not see the posting nor did anyone who saw it tell her of it (Tr. I-122, 132). There were no applicants from among the current employees of CAMC for the position (Tr. I-113).
10. Thaw did not apply for the position of Director of Community Affairs. She did not see the job posted nor was she approached by Morris or any other management personnel regarding it. Thaw was never formally considered for the job, nor was she told that she was not qualified for the job or that she would not be considered for it until she herself approached Morris (Tr. I-27, 34, 42, 121-122, 127-132, II-237).
11. Robert Morris alleges tht, in keeping with the practice of discussing jobs with potential in-house applicants, he discussed the Director of Community Affairs job with the Complainant several times during the fall of 1976, and the Complainant chose not to apply for the job. The Complainant, on the other hand, maintains

that no one ever discussed the job with her and that had she been given the opportunity, she would have applied for the job. She further maintains that she learned of the job in question by accident and that she was told by Morris that she would not be considered because she was a woman (Tr. 1-75, 121, 124, 127, 151, 154). There were no witnesses to the conversations between Morris and Thaw regarding the position of Director of Community Affairs. Based upon the totality of the evidence and the credibility of the witnesses, we find that the job in question was not discussed with the Complainant Patricia Thaw until she herself approached Morris (Tr. 1-28, 30-33, 35-36, 121-124, 127, 151, 154).

12. Respondent maintains that Thaw did not have the necessary qualifications to be Director of Community Affairs (Tr. 1-33, 11-238, 256). Patricia Thaw's qualifications for the job were limited to the experience she acquired acting as the Coordinator of Employee Communications at CAMC. The record does not show any other relevant experience or training, and it is clear that she did not hold any college degree (Tr. 1-75-76, 160). Based upon the documented evaluations of the Complainant and the testimony offered at hearing, we find that the Complainant was not qualified for the position of Director of Community Affairs. She lacked formal credentials, and did not perform her job in a manner indicating sufficient alternative experiential qualifications. In particular, we find that she was not dependable, did not arrive on time for work, did not maintain good working communications with her

immediate superiors or other administrators at the hospital, was the subject of a variety of complaints from both administrators and from the press regarding her behavior, and had disagreements with administrators over how to approach public relations questions (Comp. Ex. 2, Resp. Ex. 1, 2, 3, 4, Tr. 1-85, 87-89, 91, 93, 142, 11-57-62, 67, 69, 74-76, 181-192).

13. The decision of Respondent not to promote the Complainant was not based upon her sex.
14. Sometime at the end of November, CAMC began recruiting from outside for the position of Director of Community Affairs. No women applied for the job (Tr. 1-16). John Brown, then press secretary and media liaison for Congressman Mollohan in Washington, D.C., was contacted through Charles Ryan Associates and was hired for the position (Tr. 1-70, 217-219, 231). John Brown's qualifications for the job included the following: Bachelor of Science in Journalism, Master's in Mass Communications, television experience during his university training, and work experience as noted above for Congressman Mollohan. His qualifications were superior to those of the Complainant. (Tr. 1-70-71, 217-219).
15. After Brown was hired as Director of Community Affairs, the Complainant continued in her position as Coordinator. Her job duties did not change. She was supervised by Brown (Tr. 1-15, 73, 120, 143).
16. Brown's job duties were similar to those of the Complainant but broader in scope and responsibility. He was designated to act as

spokesperson for CAMC, attended meetings of the Board of Trustees of the medical staff, and various management and administrative meetings. He was responsible for putting out the external publications, including Health Horizons, a consumer health education magazine. He is responsible for all external communications and for preparing the budget for his department (Resp. Ex. 14, Tr. II-84, 90, 143-144, 146-148, 149-150, 171, 202-203, 238).

17. After his initial month of orientation, Brown saw Thaw daily and reviewed her work (Tr. I-144-145, 227). Following the hiring of Brown, Thaw's problems with dependability and tardiness persisted. Brown attempted to adjust Thaw's hours of work for her convenience and counseled her regarding these problems but did not formally discipline her (Tr. I-117-118, 120, 222-224, 229-232).
18. Professional employees, including the Complainant, while normally covered by the Employee Handbook, were not covered by provisions regarding work hours and overtime, nor were they generally accorded progressive discipline (Comp. Ex. 3, Tr. I-95-98).
19. On or about June 28, 1977, Brown asked for and obtained Thaw's letter of resignation. Thaw denied that there had been any problems with her working relationship with Brown and denied that she had been told of any problems in her work performance. However, her letter of resignation indicates otherwise: "I am sorry that such stringent action was necessary, but I can no longer tolerate the working situation we now have. Your gross insecurity in your present position, which seems to make you feel extremely threatened by me, and your total inability to supervise, direct and/or communicate has made my job completely unbearable."

(Resp. Ex. 5). Based upon the totality of the evidence and the credibility of witnesses we find that Thaw was unable to develop an adequate working relationship with Brown, and that the decision to request her resignation was not based upon sex. We further find that the decision to terminate her did not represent continuing efforts of a discriminatory failure to promote, in that Thaw was not qualified for the job of Director of Community Affairs.

20. Thaw was replaced in her job by Mary Alice Hennen, a woman (Tr. I-73).
21. The Complainant has not obtained full-time employment since she was terminated from her position at CAMC. She has worked as a fill-in secretary at her church and has done volunteer work. Her entire interim earnings from August 5, 1977, to the date of the hearing in this matter were approximately \$2,200 (Tr. II-53). She has applied for public relations and advertising jobs at Union Carbide, C & P Telephone, and other employers and has put in numerous applications (Tr. II-157). She has consistently told employers when applying that she was asked by CAMC to resign, and that she had a complaint pending with the West Virginia Human Rights Commission (Tr. I-174).

VI
CONCLUSIONS OF LAW

1. At all times referred to herein the Respondent, Charleston Area Medical Center, is and has been an employer within the meaning of Section 3(e), Article 11, Chapter 5 of the Code of West Virginia.

2. At all times referred to herein the Complainant, Patricia Banks Thaw, is and has been a citizen and resident of the State of West Virginia and is a person within the meaning of Section 3(a), Article 11, Chapter 5 of the Code of West Virginia.
3. On or about July 6, 1977, the Complainant Patricia Thaw, a woman, filed a verified complaint properly alleging that Respondent had engaged in one or more unlawful discriminatory practices within the meaning of Section 9, Article 11, Chapter 5 of the Code of West Virginia.
4. Said complaint was timely filed within 90 days of an alleged act of discrimination.
5. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to Sections 8, 9, and 10, Article 11, Chapter 5 fo the Code of West Virginia.
6. The Respondent's motion to dismiss, based upon the failure to file a timely complaint regarding the promotion issue is denied, for the reasons set forth in the body of this Decision.
7. The Complainant failed to show by a preponderance of the evidence that the Respondent failed to promote her or terminated her because of her sex, or that sex was a factor in the failure of the Respondent to consider her for the promotion and to discuss the Director of Community Affairs position with her.
8. The Complainant has failed to show, by a preponderance of the evidence, that the Respondent violated the West Virginia Human Rights Act by failing to promote her or by terminating her from employment.

VII
ORDER

Therefore, pursuant to the above Findings of Fact and Conclusions of Law, it is hereby ORDERED that the complaint in this matter be dismissed.

Oct 13, 1983
DATE

Enter:

Russell Van Cleve
Russell Van Cleve
Chairperson