STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
1321 Plaza East
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GASTON CAPERTON
GOVERNOR

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Quewanncoii C. Stephens
Executive Director

March 28, 1990

Stanley E. Taylor
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Re: Taylor v. Marathon Industries, Inc.
EA-02-87A

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,

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 advserse 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

STANLEY E. TAYLOR,

Complainant,

v. DOCKET NO. EA-82-87A

MARATHON INDUSTRIES, INC.,

Respondent.

FINAL ORDER

On 10 January 1990 the West Virginia Human Rights Commission reviewed the Recommended Decision of the hearing examiner, Gail Ferguson. After consideration of the aforementioned and the exceptions filed in response thereto, the Commission decided to, and does hereby, adopt said Recommended Decision as its own, encompassing the Findings of Fact and Conclusions of Law set forth therein.

By adopting said Recommended Decision, it is, therefore, the Order of the West Virginia Human Rights Commission that the complaint filed by Stanley E. Taylor against Marathon Industries, Inc. be dismissed with prejudice. The hearing examiner's Recommended Decision shall be attached hereto and made a part of this Final Order.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and to the Secretary of State of the State of West Virginia, the parties are hereby notified that they have ten days to request a

reconsideration of this Final Order and that they may seek judicial review.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 22d day of March, 1990, in Charleston, Kanawha County, West Virginia.

QUEWANNCOII C. STEPHENS
Executive Director/Secretary

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

STANLEY E. TAYLOR,

Complainant,

v.

MARATHON INDUSTRIES, INC.,

Respondent.

DOCKET NUMBER: EA-82-87A

HEARING EXAMINER'S RECOMMENDED DECISION

A public hearing, in the above-captioned matter, was convened on June 14, 1988 and July 26, 1988, Kanawha County, at the office of the West Virginia Human Rights Commission, 1036 Quarrier Street, Charleston, West Virginia. The Hearing Panel consisted of Gail Ferguson, hearing examiner, and Russell Van Cleve hearing commissioner.

The complainant, Stanley E. Taylor, appeared in person and by counsel, Antoinette Eates and Donna S. Quesenberry, assistant attorneys general. The respondent, Marathon Industries, Inc., appeared in person and by counsel, William S. Smith.

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

hearing examiner 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.

ISSUES

1. Whether the complainant, Stanley E. Taylor, was laid-off from employment and otherwise treated disparately by respondent, Marathon Industries, Inc., because of his age, in violation of the West Virginia Human Rights Act.

2. If so, to what relief is the complainant entitled?

FINDINGS OF FACT

1. The respondent, Marathon Industries, Inc., was engaged in the buying, selling, manufacturing and repairing of coal mining and related equipment.

2. The complainant, Stanley Taylor, of Danese, West Virginia, was employed by Marathon Industries, Inc. from April 24, 1967 until respondent ceased operations on October 24, 1986. Mr. Taylor, whose date of birth is July 28, 1937, was 49 years of age in August of 1986 when he filed his complaint.

3. The complainant was initially hired by respondent as a heat treater and received on-the-job training as a welder. The

complainant held the position of first class welder from 1974 until October, 1986.

4. At the public hearing, the complainant offered evidence as to numerous instances that he was subjected to layoffs by the respondent allegedly because of his age. They were: on May 4, 1983 for a period of seven weeks; from July 2, 1983 through November 1983, two to three days a week; in February of 1985, 18 days and in August of 1985, two weeks; and in 1986 for 136.75 hours as follows,

January 18	--	14.5
February 15	--	8.
February 22	--	8.
March 8	--	16.
April 19	--	16.
April 26	--	18.25
May 10	--	8.
June 14	--	16.
June 21	--	16.
July 19	--	16.

5. In addition to these frequent layoffs, the complainant testified that he was subjected to disparate treatment in 1984 when he performed job duties of a similarly situated, younger employee, and respondent refused to pay the complainant the higher rate paid to the younger employee.

6. Finally, the complainant testified that he was not given the opportunity to transfer into other positions and receive training for such position rather than be subjected to the aforementioned layoffs, as were younger, less senior employees.

7. The respondent testified that the numerous layoffs complainant was subjected to were based on a reduction in force because of economic depression and need for maximum efficiency of

its labor resource, and that it treated all of its employees fairly, pursuant to the union contract and seniority provisions contained therein, without regard for age. Further, specifically related to alleged acts occurring in 1986, that the complainant chose not to work available hours.

8. These issues will be addressed seriatim below as part of the discussion.

DISCUSSION

The complainant contends that the respondent, Marathon Industries, Inc., subjected him to repeated layoffs and afforded him no opportunities for training and transfers beginning in May of 1983 intermittently through November of 1986 because of his age. The complainant further maintains that in 1984, he performed the job duties of a younger employee for three months, and that the respondent refused to compensate him at the higher hourly rate paid to the younger employee, and that said action constituted age discrimination.

Without consideration of the merits of these claims, it is the conclusion of the hearing examiner that the Virginia Human Rights Commission is without jurisdiction to make such determinations, as to alleged unlawful acts occurring between May of 1983 and May 10 of 1986.

West Virginia Code §5-11-10, provides, in pertinent part:

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1. Following the amendment of WV Code §5-11-10 in 1987, the requisite time period was enlarged to 180 days.

> "Any individual claiming to be aggrieved by an alleged unlawful discriminatory practice shall...file with the Commission a verified complaint...any complaint filed pursuant to this article shall be filed within 90 days of the alleged act of discrimination...."[1].

On August 27, 1986, the complainant filed a complaint with the West Virginia Human Rights Commission setting forth the above alleged unlawful practices which occurred at various times encompassing the period 1983 through 1986. To be sure, the 90 days filing period had elapsed on the majority of these claims in August of 1986.

It has previously been established in West Virginia in the context of employment discrimination law, that an individual layoff is a separate actionable event complete at the time it occurs. McJunkin Corp. v. WV Human Rights Commission, et. al., slip opinion number 17932 (WV Supreme Court, April 25, 1988); Lawson v. Burlington Industries, Inc., 683 F. 2d 862 (4th Cir. 1982); Morris v. Frank's Sons, Inc., 486 F. Supp. 728. Accordingly, the complainant's failure to file a complaint within 90 days after each layoff leaves the Commission without jurisdiction to entertain any subsequent complaint concerning the same conduct. Furthermore, even though the complainant amended his complaint to allege a prior to and continuing violation, the continuing violation theory is not available to the complainant under the circumstances he presents.[2].

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[2]. This is not to say that if the causes of action were based upon allegations of systemic discrimination, a pattern and practice of discrimination or disparate impact that the concept of continuing violation and hence jurisdiction would not survive.

Similarly, complainant's other allegations of disparate treatment based on age arising during the aforementioned time frames, specifically respondent's alleged failure in 1984 to compensate complainant at the same rate of pay as that received by a younger employee performing the same job; and respondent's alleged failure to provide him with opportunity for training and transfer, are also time barred, since no complaints were filed within 90 days of these incidences, and the evidence of record does not adequately reflect that any of those incidences were of a continuing nature.

The only viable claims, then, the complainant has are acts he alleges occurred unlawfully after May 26, 1986. The issue becomes whether the complainant has, at the threshold, established a prima facie case of age discrimination. This he has not done.[3.]

The complainant maintains that on June 14 1986 he was laid-off for 16 hours; on June 21, 1986, he was laid-off for 16 hours and on July 19, 1986 he was laid-off for 16 hours because of his age.

The West Virginia Supreme Court of Appeals recently proposed a general test for determining a prima facie case of illegal employment discrimination. In order to make a prima facie case, a complainant must prove the following:

[3.] Arguendo, even if it were determined for the purpose of jurisdiction that all layoffs or reduction in complainant's hours occurring in 1986, constituted a series of related acts, some of which fell within the limitation period and thereby supported a continuing violation theory, complainant has not established a prima facie case of age discrimination.

1. The plaintiff is a member of a protected class;

2. That the employer made an adverse decision concerning the plaintiff; and

3. But for the plaintiff's protected status, the adverse decision would not have been made.

The court stated that direct proof is not necessary to prove the third element. What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the complainant's status as a member of the protected class to the adverse employment action so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion. This evidence, the court stated, could come in through proof of "a case of unequal or disparate treatment between members of the protected class and others," or through elimination of the apparent legitimate reasons for the adverse decision. Conway v. Eastern Associated Coal Corp., 358 S.E.2d 423 (1986). The court noted that the Conway test does not overrule or modify its previous tests in Shepherdstown V.F.D. v. WV Human Rights Commission, 309 S.E. 2d 342 (WV 1983) State ex rel. State Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E. 2d 77 (1985); or McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

It is undisputed that the complainant was 49 years of age in 1986 and hence, in the protected class. It is further the determination of the examiner that, even if the complainant's testimony that his hours were reduced, and that he was laid-off repeatedly in 1986, was given some credence, the evidence, as a

whole, is insufficient to establish a nexus between the complainant's age and any of these layoffs particularly when one compares respondent's treatment of the complainant with its similar treatment of both younger and older co-workers of complainant.

Assuming, arguendo, that complainant has established a prima facie case, respondent has articulated a nondiscriminatory reason, as to why the complainant worked reduced hours in 1986, inasmuch as it has demonstrated through reliable testimonial and documentary evidence that in 1986 prior to the plant's closing, all twelve union employees of respondent, seven of whom were older than the complainant, were given equal opportunity to work in an effort to keep the plant open and that complainant opted not to work available hours.

Complainant has failed to demonstrate that the reasons articulated by respondent were pretext for age discrimination.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission had jurisdiction over the parties and the subject matter herein, related specifically to alleged acts of discrimination occurring after May 26, 1986.

2. The West Virginia Human Rights Commission has no jurisdiction over the parties and the subject matter herein related specifically to alleged acts of discrimination occurring before May 26, 1986, as said alleged acts are time barred.

3. As to the alleged acts of discrimination occuring after May 26, 1986, specifically, the "lay-offs" of June 14, 1986; June 21, 1986 and July 19, 1986, respectively, the complainant has failed to establish a prima facie case of age discrimination.

PROPOSED ORDER

Accordingly, it is the recommendation of this examiner that this matter be dismissed with prejudice and be closed.

Entered this 14 day of June, 1989.

WV HUMAN RIGHTS COMMISSION

BY _____
GAIL FERGUSION
HEARING EXAMINER