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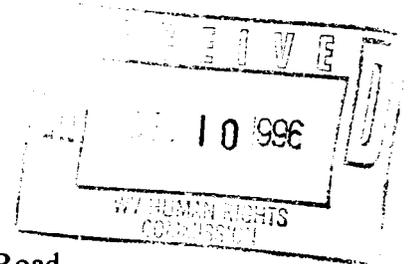
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NOTICE OF FINAL DECISION

PLEASE TAKE NOTICE that pursuant to W.Va. Code §5-11-8(d) and 6 WVCSR §77-2-10, any party aggrieved by the attached final decision shall file with the executive director of the West Virginia Human Rights Commission, **WITHIN THIRTY (30) DAYS OF RECEIPT OF THE DECISION**, a petition of appeal setting forth such facts showing that the party is aggrieved, stating all matters alleged to have been erroneously decided herein, the relief to which the party believes they are entitled and any argument in support thereof.

The filing of an appeal to the Commission from the final decision shall not operate as a stay of the decision unless specifically requested by the appellant in a separate application for the same and approved by the Commission or its executive director.

All documents shall be directed to:

Herman Jones, Executive Director
West Virginia Human Rights Commission -
1321 Plaza East, Room 104-106
Charleston, WV 25301

Dated this 9th day of December, 1996.

WV HUMAN RIGHTS COMMISSION

BY: Mike Kelly
MIKE KELLY
Administrative Law Judge
Post Office Box 246
Charleston, West Virginia 25321
(304) 344-3293

cc: Herman Jones, Executive Director
West Virginia Human Rights Commission

**BEFORE THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION**

ELIZABETH A. BECKETT,

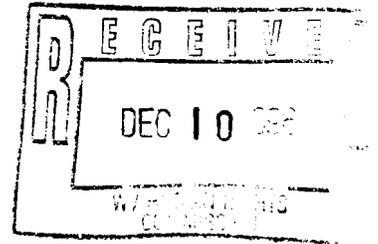
Complainant,

v.

Docket No. ES-195-93

KMART CORP.,

Respondent.



FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

This matter came on for hearing on 20 July 1995 at the office of the Raleigh County Commission, Beckley, Raleigh County, West Virginia. Complainant appeared in person and the case was presented on her behalf by the West Virginia Human Rights Commission and its counsel, Senior Assistant Attorney General Paul Sheridan and legal intern Ariana Kincade. The respondent appeared by its representative, Mike Minchin, and by its in-house counsel, Sherry L. McMillan, of Troy, Michigan¹, and by Erin Elizabeth Magee and Jackson & Kelly.

¹ Ms. McMillan appeared in this action after meeting the requirements set forth in Rule 8.0 admission pro hoc vice of the Rules for Admission to the Practice of Law.

I. ISSUE TO BE DECIDED

Whether Kmart Corporation unlawfully discriminated against Elizabeth A. Beckett in violation of W.Va. Code §5-11-9(1) by failing or refusing to consider her for promotion to the position of manager of the Sporting Goods/Automotive Accessories Department of its Beckley, West Virginia store because of her sex.

II. FINDINGS OF FACT

Based upon the credibility of the witnesses, as determined by the Administrative Law Judge, taking into account each witness' motive and state of mind, strength of memory, and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and the bias, prejudice and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence; and upon thorough examination of the transcript of the proceedings, the exhibits introduced into evidence and the written recommendations and argument of counsel, the Administrative Law Judge finds the following facts to be true²:

² To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issue as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

A. Preliminary Facts and Background

1. Complainant Elizabeth A. Beckett resides in Crab Orchard, Raleigh County, West Virginia. Since October 1984 Ms. Beckett has been employed by respondent at its retail store in Beckley Plaza, Beckley, Raleigh County. Most of complainant's work for respondent has been in the Sporting Goods/Automotive Accessories Department (hereinafter "sporting goods") of the Beckley store. Her duties have included sales work layouts, service desk, layaway and front checkout. For a period of time prior to going on maternity leave in March 1986, she was a merchandiser.

2. As of the date of hearing, Ms. Beckett was still in the employ of Kmart. She was working as a member of a team in charge of assuring that respondent's prices are competitive.

3. Kmart is a national retailer of consumer goods and is an "employer" as that term is defined by W.Va. Code §5-11-3(d). At all times relevant herein, the manager of its Beckley store was and remains Mike Minchin.

B. The Position of Manager of Sporting Goods Becomes Available

4. The sporting goods department is one of the key operations for producing profit within respondent's Beckley store. Respondent asserted, and the Commission did not dispute, that the manager of sporting goods is one of the top five or six positions within the store. While most

department managers are paid hourly and do not participate in management staff meetings, the sporting goods manager is on salary and is considered part of the management staff.

5. Beginning in approximately February 1992, respondent detected a significant theft or "waste" problem in the sporting goods department of the Beckley store. At that time, the manager of sporting goods was Roger Mitchem. Ms. Beckett worked in sporting goods as a Level 2 salesclerk. Hourly employees at Kmart are classified by Pay Grade Levels 1 through 6, with 6 being the most advanced and highest paid hourly position.

6. Respondent's continued investigation into sporting goods culminated in an August 1992 audit that revealed a department shortfall of \$42,000, that amount being the difference between the value of the merchandise received by the store and the amount accounted for in department sales and inventory.

7. In September 1992, Mr. Mitchem was arrested and charged with the unlawful sale of firearms. He confessed to stealing at least four rifles from Kmart. He resigned his position with respondent on or about 13 September 1992.

8. Upon Mr. Mitchem's resignation, Ms. Beckett approached Kathy Sizemore, the store's personnel manager, and inquired about the now vacant position. When Ms. Sizemore stated that no consideration had yet been given to a replacement, Ms. Beckett asked to be kept in mind. At that time, Ms. Beckett did not speak to Mr. Minchin about the position. While the testimony was not

completely clear, it appeared that Ms. Sizemore was not usually involved in the selection of management staff. It was undisputed that she played no role in the filling of the sporting goods manager position. There was no evidence that she ever told Mr. Minchin about complainant's interest in the position.

9. Local management positions at Kmart are not posted and employees are not uniformly given a defined or certain opportunity or avenue to "bid on", apply for or otherwise express interest in a vacant management position.

10. At the time the manager's position came open, complainant's Level 2 salesclerk duties included filling endcaps and shelves, providing customer service, operating the cash register, setting and signing advertised merchandise, completing firearm forms and scanning merchandise for reordering. She had minimal experience in management and supervision.

11. For approximately the six weeks prior to the hiring of Mr. Mitchem's replacement, Ms. Beckett was in at least de facto charge of sporting goods, though her duties did not incorporate all of the tasks normally assigned to the manager.

C. Robert Mills is Selected as Sporting Goods Manager

12. Approximately a week after Mr. Mitchem resigned, Mr. Minchin and his management team chose Robert Mills to be the new manager of sporting goods. At the time of his selection, Mr.

Mills was manager of the garden shop at the Beckley store, which is an hourly position at Pay Grade Level 5. Mr. Mills had been manager of the garden shop for roughly two years.

13. The method by which Mr. Mills was selected consisted of Mr. Minchin expressing his opinion at a management staff meeting that Mr. Mills should get the promotion. His three then assistant managers (Carol Persinger, Mark Clements and Phil Fondale) all agreed. No other person was discussed or considered. Unlike the other department manager positions in the store, Mr. Minchin's selection of the sporting goods manager had to be reviewed and approved by district and regional supervisors.

14. Mr. Minchin testified that he selected Mr. Mills because he had done a good job as garden shop manager and had supervisory and managerial experience.

15. When she learned that Mr. Mills had been selected, complainant approached Mr. Minchin and asked why she had not been awarded the job. Mr. Minchin did not give a clear answer and stated that he would discuss it with Ms. Beckett at a later time. Sometime later, they discussed it again. While the substance of the latter conversation is disputed, I find as fact that Ms. Beckett's version is true and accurate and, therefore, that:

(a) Mr. Minchin told her that she was not suspected of having participated in any way in Mr. Mitchem's thefts or the losses in the department, and she was not rejected for that reason; and

(b) Mr. Minchin told her that Mr. Mills was better qualified for the position than she was because, among other things, he hunted and fished.

I credit Ms. Beckett's testimony as being true as to this conversation because it was clear, specific and related with an assurance that I associate with telling the truth. On the other hand, Mr. Minchin's testimony as to this discussion was somewhat vague and general.

16. After Mr. Mills began work as sporting goods manager, Ms. Beckett taught him how to complete mandated firearms forms, how to log firearms in and out and how to order hunting and fishing licenses.

D. The Allegations of Discrimination

17. Respondent readily admits that it did not even consider Ms. Beckett for the position of sporting goods manager. She was not considered, it alleges, because,:

- (a) she was not qualified; and
- (b) Mr. Minchin was uncertain as to whether other employees in the department, in addition to Mr. Mitchem, had been involved in the theft/waste problem.

18. Respondent does not dispute that it has never had a female sporting goods manager at its Beckley store or at the stores in the surrounding area.

19. The Commission alleges that Ms. Beckett was not considered for the position because of respondent's gender stereotype that the manager of a sporting goods department should be male

and not female and that this stereotype unlawfully excluded Ms. Beckett from the opportunity to compete for the position on the basis of her qualifications. The Commission asserts that Ms. Beckett was as qualified, if not more qualified, than Mr. Mills.

20. In regard to gender stereotyping, I find as fact as follows:

(a) A reason that Mr. Mills was selected for the sporting goods position was the knowledge that he hunted and fished and the assumption that all or nearly all males in West Virginia hunt or fish;

(b) A reason that Ms. Beckett was not considered for the position was a lack of knowledge that she hunted and fished and an assumption that all or nearly all females in West Virginia do not hunt or fish; and

(c) While Ms. Beckett does hunt and fish, there was no evidence that she ever communicated her involvement in these activities to Mr. Minchin or other management officials.

The above findings rest on the testimony of complainant and assistant managers Persinger and Clements³, as well as my perception from personally observing these witnesses on the stand.

³ Mr. Clements testified that at the time Mr. Mills was promoted to sporting goods manager, he knew he was a hunter and a fisherman. Mr. Clements said, "He lives in West Virginia, we're all fishermen." On the other hand, he said he did not know whether Elizabeth Beckett hunts or fishes, and made no assumption about her in this regard. He testified that the fact that Mr. Mills was a hunter and fisherman was a consideration in his mind, though he later denied that it made any difference. Ms. Persinger was also aware that Mr. Mills hunted and fished because she had seen him in his fatigues. In response to a question about whether Ms. Beckett hunts and fishes, she testified, "No, she doesn't as far as I know," and then added "she goes to church a lot."

21. In regard to Ms. Beckett's qualifications for the position, I find as fact as follows:

(a) She had no previous managerial or supervisory responsibilities;

(b) Her written evaluations as a Pay Grade Level 2 salesclerk reveal a "satisfactory" level of performance for 1988, 1990 and 1991 and "above average" in 1989;

(c) She received several written acknowledgements and certificates for good performance, including one issued shortly after Mr. Mills was hired as her supervisor that recognized her "outstanding performance in making decisions on your own that resulted in exceeding the expectations of customers";

(d) During the course of her employment, she received several written warnings, none involving serious infractions of company policy; and

(e) She had good working knowledge of the sporting goods department which enabled her to serve as interim manager, albeit with diminished responsibilities, for the period between Mr. Minchin 's last day on the job and Mr. Mills' selection as manager.

22. In regard to Mr. Mills' qualifications for the position, I find as fact as follows:

(a) As the Pay Grade Level 5 manager of the garden shop, Mr. Mills had experience in buying basic, promotional and seasonal merchandise and supervising other employees;

(b) His performance as manager of the garden shop was satisfactory;

(c) He had been promoted to the Level 5 hourly position from a Level 1 hourly position;
and

(d) At the time of his promotion to sporting goods manager, he had little or no experience or knowledge as to the day-to-day operations of the department.

23. Comparing the qualifications of Ms. Beckett to those of Mr. Mills, I find as fact that Mr. Mills was better qualified for the promotion in 1992. This finding is based on the following:

(a) Sporting goods manager is a salaried position of extreme importance to the overall profitability of the store and it was reasonable for the company to promote an employee with proven managerial experience over an employee without such experience;

(b) Despite performing satisfactorily and becoming a valued employee in sporting goods, Ms. Beckett did not have experience supervising other employees, controlling inventory or purchasing or developing sales strategies, all of which were required of the sporting goods manager and all of which had been done by Mr. Mills; and

(c) There was a lack of evidence that any male employee had ever been promoted from a Level 2 hourly position (the second lowest pay grade) to a salaried position, which is what the Commission proposed here.

E. Summary of Findings

24. I find as fact that unlawful gender stereotyping played a role in the failure or refusal of respondent to consider complainant for promotion to the position of sporting goods manager. This finding is based on the following:

(a) Complainant was a valued, long time employee performing at a satisfactory level and not suspected of any involvement in the losses that plagued the department in 1992; and

(b) The testimony of decisionmakers Minchin, Persinger and Clements leads me to believe that they knew Mr. Mills was a sportsman who had knowledge of hunting and fishing products, but assumed that Ms. Beckett, because she is female, did not have the knowledge of or enthusiasm for the products that would enable her to be a successful manager.

25. I find as fact that even if unlawful gender stereotyping had not prevented Ms. Beckett from being considered for the position, she would not have been hired over Mr. Mills given his greater experience in management and the key role sporting goods played in the profitability of the store.

III. CONCLUSIONS OF LAW

1. Under the West Virginia Human Rights Act (HRA), it is unlawful for an employer to use an employee's sex as a reason to fail or refuse to extend to her an equal opportunity to be considered for a promotion. W.Va. Code §5-11-9(1).

2. This case having been heard in its entirety, with all evidence submitted and considered, it is not necessary to address whether the complainant established a *prima facie* case of sex discrimination. Once all the evidence has been heard, and the "defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether plaintiff

really did so is no longer relevant." *U.S. Postal Service v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482 (1983). The job of the factfinder, after taking all of the evidence, is to address "the ultimate question of discrimination *vel non*." 103 S.Ct. at 1481. See, *Barefoot v. Sundale Nursing Home*, ___ W.Va. ___, 457 S.E. 2d 152 (1995).

3. The burden on the Commission was to show by a preponderance of the evidence that an unlawful reason, sex, was a motivating factor in the decision of respondent to not consider Ms. Beckett for promotion to sporting goods manager. *Skaggs v. Elk Run Coal Co.*, ___ W.Va. ___, ___ S.E. 2d ___, 1996 W.Va. Lexis 107 (1996). It is not necessary to show that sex was the only factor causing the decision, but merely that complainant's sex entered into the decision making in any degree.

4. It is unlawful to predicate employment decisions such as promotions on assumptions and stereotyped impressions about the characteristics of or differences between men and women. *Los Angeles Dept. v. Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370 (1978).

5. Promotion decisions that are made in a closed and somewhat secretive environment and that are based on the exercise of personal judgment and inherently subjective criteria, while not unlawful per se, are highly suspect and must be viewed skeptically. *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).

6. I find that the Commission met its burden. The combination of the guarded method in which Kmart considers management promotions with the unlawful gender stereotype at play here, plus the fact that a longtime satisfactorily performing employee such as complainant was not considered for promotion in her own department, leads me to the conclusion that sex was a factor when respondent considered its options in selecting a new sporting goods manager and that it was because of complainant's sex that she was not afforded an opportunity to compete for the job.

7. The Commission having shown that sex was a motivating factor in an employment decision, the burden of persuasion shifted to respondent to prove by a preponderance of the evidence that it would have made the same decision even in the absence of an unlawful motive. *Skaggs, supra*.

8. I find that respondent met its burden. Manager of sporting goods is a salaried position of critical importance to the operation of the store. Respondent had a right to limit the possibilities for promotion to those persons with a full range of management experience. Mr. Mills met the non-discriminatory criteria deemed essential by respondent and Ms. Beckett did not. Even if Ms. Beckett had not been denied the opportunity to be considered for the position, I find that respondent would not have promoted her due to her lack of managerial and supervisory experience and that Mr. Mills would have been promoted into the position anyway.

9. Reading the West Virginia Human Rights Act in a manner consistent with the federal Civil Rights Act of 1991, I find that the Commission, having proven that unlawful consideration of sex was a motivating factor in an employment decision, is entitled to a cease and desist order and its

costs, but that complainant is not entitled to the denied promotion, back pay or incidental damages.
42 U.S.C. §2000e-5(g)(2)(B)(i) and (ii).

10. A Cease and Desist Order is hereby directed against respondent prohibiting it from engaging in further violations of the West Virginia Human Rights Act.

11. The Commission is awarded its costs in the amount of \$501.00.

12. Ms. Beckett's claim of unlawful sex discrimination is SUSTAINED to the extent of the relief granted above and to the extent not granted is DENIED.

WV HUMAN RIGHTS COMMISSION

ENTER this 9th day of December, 1996.

BY:



MIKE KELLY
Administrative Law Judge
Post Office Box 246
Charleston, West Virginia 25321
(304) 344-3293