



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**215 PROFESSIONAL BUILDING  
1036 QUARRIER STREET  
CHARLESTON, WEST VIRGINIA 25301**

ARCH A. MOORE, JR.  
Governor

TELEPHONE: 304-348-2616

August 18, 1987

Shirley T. Basta  
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Corning Glass Works, Inc.  
Staunton Ave.  
Parkersburg, WV 26101

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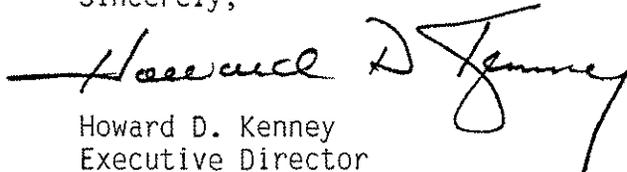
RE: Basta v. Corning Glass Works, Inc.  
ER-166-86 & EH-167-86

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 April 1, 1987, any party adversely affected by this final order may file a petition for review with the supreme court of appeals within 30 days of receipt of this final order.

Sincerely,

  
Howard D. Kenney  
Executive Director

HDK/mst  
Enclosures

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE

AMENDED AND EFFECTIVE  
AS OF APRIL 1, 1987

Enr. H. B. 2638]

8

116 this article.

§5-11-11. Appeal and enforcement of commission orders.

1 (a) From any final order of the commission, an  
2 application for review may be prosecuted by either  
3 party to the supreme court of appeals within thirty days  
4 from the receipt thereof by the filing of a petition  
5 therefor to such court against the commission and the  
6 adverse party as respondents, and the clerk of such  
7 court shall notify each of the respondents and the  
8 commission of the filing of such petition. The commis-  
9 sion shall, within ten days after receipt of such notice,  
10 file with the clerk of the court the record of the  
11 proceedings had before it, including all the evidence.  
12 The court or any judge thereof in vacation may  
13 thereupon determine whether or not a review shall be  
14 granted. And if granted to a nonresident of this state,  
15 he shall be required to execute and file with the clerk  
16 before such order or review shall become effective, a  
17 bond, with security to be approved by the clerk,  
18 conditioned to perform any judgment which may be  
19 awarded against him thereon. The commission may  
20 certify to the court and request its decision of any  
21 question of law arising upon the record, and withhold  
22 its further proceeding in the case, pending the decision  
23 of court on the certified question, or until notice that the  
24 court has declined to docket the same. If a review be  
25 granted or the certified question be docketed for  
26 hearing, the clerk shall notify the board and the parties  
27 litigant or their attorneys and the commission of the fact  
28 by mail. If a review be granted or the certified question  
29 docketed, the case shall be heard by the court in the  
30 manner provided for other cases.

31 The appeal procedure contained in this subsection  
32 shall be the exclusive means of review, notwithstanding  
33 the provisions of chapter twenty-nine-a of this code:  
34 *Provided*. That such exclusive means of review shall not  
35 apply to any case wherein an appeal or a petition for  
36 enforcement of a cease and desist order has been filed  
37 with a circuit court of this state prior to the first day  
38 of April, one thousand nine hundred eighty-seven.

39 (b) In the event that any person shall fail to obey a  
40 final order of the commission within thirty days after  
41 receipt of the same. or, if applicable, within thirty days  
42 after a final order of the supreme court of appeals, a  
43 party or the commission may seek an order from the  
44 circuit court for its enforcement. Such proceeding shall  
45 be initiated by the filing of a petition in said court, and  
46 served upon the respondent in the manner provided by  
47 law for the service of summons in civil actions; a hearing  
48 shall be held on such petition within sixty days of the  
49 date of service. The court may grant appropriate  
50 temporary relief, and shall make and enter upon the  
51 pleadings, testimony and proceedings such order as is  
52 necessary to enforce the order of the commission or  
53 supreme court of appeals.

BEFORE THE WV HUMAN RIGHTS COMMISSION

SHIRLEY T. BASTA,

Complainant,

v.

DOCKET NOS. ER-166-86  
EH-167-86

CORNING GLASS WORKS,

Respondent.

FINAL ORDER

On the 12th day of August, 1987, the Commission reviewed the recommended findings of fact and conclusions of law of Hearing Examiner Theodore R. Dues, Jr. After consideration of the aforementioned and exceptions thereto, the Commission does hereby adopt said recommended findings of fact and conclusions of law as its own, with modifications and amendments set forth below.

The Commission strikes the word "lehr" from finding of fact number 5.

The Commission supplements the Examiner's recommended decision with the following findings:

"17. On September 12, 1985, the complainant was reinjured while on the job."

"18. Complainant has been compensated by the WV Workers Compensation Fund on the basis of total temporary disability since September 12, 1985."

It is hereby ORDERED that the Hearing Examiner's findings of fact and conclusions of law be attached hereto and made a part of this final order except as amended by this final order.

By this final order, a copy of which shall be sent by certified mail to the parties, the parties are hereby notified that they have ten days to request a reconsideration of this final order and that they have the right to judicial review.

Entered this 18<sup>th</sup> day of August, 1987.

RESPECTFULLY SUBMITTED

*Betty A. Hamilton*  
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CHAIR/VICE CHAIR  
WV HUMAN RIGHTS COMMISSION *B*

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

SHIRLEY T. BASTA,  
Complainant,

v.

Docket Nos.: ER-166-86  
EH-167-86

CORNING GLASS WORKS,  
Respondent.

EXAMINER'S RECOMMENDED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

This matter matured for public hearing on the 30th day of April, 1987. The hearing was held in Charleston, West Virginia. The hearing panel consisted of John Richardson, Hearing Examiner and Iris Bressler, Hearing Commissioner.

The Complainant appeared in person and by her counsel, Assistant Attorney General Anthony Serreno. The Respondent appeared by its representative, Bernard McManus, and by its counsel, Scott Zimmerman.

This matter was referred to Theodore R. Dues, Jr., Hearing Examiner, for the purpose of making a decision to the Commission after the resignation of Examiner Richardson.

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

consistent to any proposed findings of fact and conclusions of law submitted by the parties, the same are adopted by the Examiner, and conversely, to the extent the same are inconsistent to the findings and conclusions, the same are rejected.

#### ISSUES

1. Whether the Respondent discriminated against the Complainant as a result of her race in its layoff and recall decisions.

2. If so, to what relief is the Complainant entitled.

3. Is the Complainant a qualified handicap individual within the meaning of the West Virginia Human Rights Act.

4. If so, did the Respondent discriminate against the Complainant as a result of her handicap by failing to offer reasonable accommodations.

5. If so, to what relief is the Complainant entitled.

#### FINDINGS OF FACT

1. The Complainant is a black female.

2. The Respondent is a corporation licensed to do business in the State of West Virginia.

3. The Complainant was hired by the Respondent on February 27, 1978. Subsequent to her hire, the Complainant became a member of the American Glass union local 570.

4. The Complainant was hired as a packer-regular. A packer-regular's duties are packing material, putting it on skids, and pulling the skids out. It also required writing

tickets for the packaged material.

5. The Complainant has also performed the inspector-packer, lehr, cleaner-sweeper, gauging and scoring machine duties.

6. On or about July 10, 1984, the Complainant reported to the Respondent's dispensary during her shift as a result of an injury she sustained while attempting to assist a co-worker in lifting a picnic table.

7. Subsequent to this injury, the Complainant sought the professional services of Dr. Matthew Godlewski and her primary physician, Dr. Shepherd.

8. By letter dated, July 23, 1984, Dr. Godlewski prepared a written restriction for the Complainant that prohibited her from lifting objects weighing over 30 pounds.

9. The Complainant delivered this medical restriction to Elizabeth Hupp, a nurse then employed by the Respondent.

10. Subsequent to the July 23, 1984, written restriction, Dr. Godlewski wrote the Complainant another restriction on November 21, 1984, which had the same weight prohibition.

11. During the period July 10, 1984 through September 12, 1985 the Complainant performed jobs for the Respondent that required lifting objects which weighed more than 30 pounds.

12. On or about September 13, 1985, Dee Ann Wade, the scheduler, notified the Complainant that she was laid off.

13. Subsequent to the Complainant's layoff, more particularly by letter dated October 11, 1985, Complainant's

attending physician sent a letter to Workers' Compensation which indicated that she was unable to return to work.

14. Dr. Shepherd notified the Respondent of the same by a copy of the October 11, 1985, letter. Dr. Shepherd at no time specifically provided that the Complainant could return to work for even light duty. The extent to which light duty was addressed by him was with the term "possibly".

15. Again on January 22, 1986, the Complainant's physician, Dr. Shepherd, sent a letter to Workers' Compensation advising that the Complainant was unable to return to work.

16. As of the date of the hearing, the specialist to which the Complainant was referred by Dr. Shepherd, has not released the Complainant to return to work.

#### CONCLUSIONS OF LAW

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

2. The Complainant was determined to have made a prima facie case of racial discrimination by introducing evidence which indicated that she was a member of a protected group; that she requested light duty employment for which she was qualified; that she was rejected for light duty employment and that less senior whites were employed in those light duty positions. Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E. 2nd 342 (1983). McDonnell Douglas v. Green, 411 U.S. 72, 93 S.Ct. 1817 (1973).

3. The Complainant established a prima facie case of

handicap discrimination by establishing that she is a qualified handicapped person within the meaning of the Act, that she is qualified to perform certain jobs existing within the Respondent's job classifications despite her handicap and that she was discriminated against because of her handicap. Doe v. New York University, 666 F.2d 761 (2nd Cir. 1981); Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983).

4. The Respondent articulated a nondiscriminatory reason for its conduct pertaining to the Complainant's racial discrimination allegations by establishing by a preponderance of the evidence that the Complainant was not laid off but rather was off work due to an injury she contends was sustained on or about September 12, 1985; that is the date before she was notified by the Respondent of her layoff. Subsequent to the Complainant's work related injury, the Complainant was never certified by her physician to return to work. The preponderance of the evidence indicates that this certification included any light duty jobs which may have been available. Texas Department of Community Affairs v. Burdine, 101 S.Ct. 1089 (1981).

5. The Respondent introduced by a preponderance of the evidence a legitimate nondiscriminatory explanation for the absence of an accommodation for Complainant's handicap. That being, the Complainant was absent from work from September 13, 1985 until the date of hearing in this matter, as a result of a work related injury for which her primary physician, Dr. Shepherd, had referred the Complainant to a specialist who had not exhausted medical testing of the Complainant for the purpose

of recommending to Dr. Shepherd as to when the Complainant could be released to return to work and/or the type of work the Complainant could perform, if any, upon the conclusion of the medical testing. In addition, Dr. Shepherd had not provided the Respondent with any information other than a speculation that the Complainant could possibly perform light duty work. Moreover, Dr. Shepherd even at the date of hearing, refused to represent that the Complainant was capable of returning to work in any capacity.

6. Accordingly, there was no opportunity or lawful requirement for the Respondent to have offered any accommodation to the Complainant. Buttressing this position, is the fact that the Complainant had received Workers' Compensation Benefits for the injury subject of this litigation since January, 1986 to the date of this hearing. Pruitt v. United States Postal Service, 662 F.2d. 292; Treadwell, supra; Pushkin v. Board of Regents, 658, F.2d. 1372 (10th Cir. 1981).

7. Secondly, the Respondent was incapable of discriminating against the Complainant for reason of layoff and lack of recall due to the uncontested fact that the Complainant has been a recipient of Workers' Compensation Benefits under the West Virginia Act since January, 1986, and has been determined by her primary physician to be unavailable for work due to a work related injury since October 11, 1985. A person, such as the Complainant, who receives temporary total disability benefits must be, by definition, unable to return to substantial, gainful employment requiring skills or activities comparable to those of

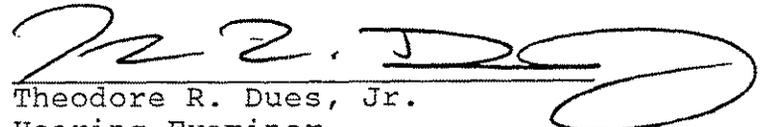
the recipient's previous gainful employment during the healing or recovering period after sustaining such injury. Allen v. Workers' Compensation Commission, 314 S.E. 2d 401 (W.Va. 1984); Mitchell v. State Workmen Compensation, 256 S.E. 2d 1 (W.Va. 1979); and such benefits are to be terminated upon the date the recipient is released to return to work. WVC § 23-4-7(a).

PROPOSED ORDER

Accordingly, it is the recommendation of this Examiner that the Commission award judgment to the Respondent.

DATED: June 18, 1987

ENTER:

  
Theodore R. Dues, Jr.  
Hearing Examiner

CERTIFICATE OF SERVICE

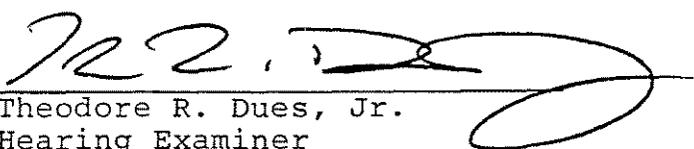
I, Theodore R. Dues, Jr., Hearing Examiner, hereby swear and say that I have served a true and exact copy of the foregoing EXAMINER'S RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW upon the following:

Anthony F. Serreno, Esq.  
Assistant Attorney General  
812 Quarrier Street  
L & S Bldg.  
Charleston, WV 25301

and

Scott F. Zimmerman, Esq.  
Redd, Smith, Shaw & McCoy  
425 6th Avenue  
Pittsburgh, PA 15219

by mailing the same by United States Mail on this 18th day of June, 1987.

  
Theodore R. Dues, Jr.  
Hearing Examiner