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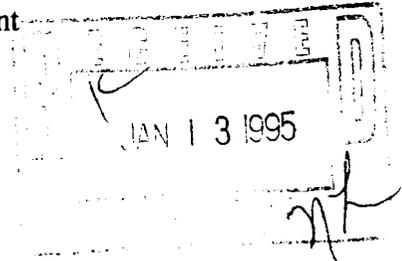
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Attention: Karen Abramowicz

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NOTICE OF FINAL DECISION

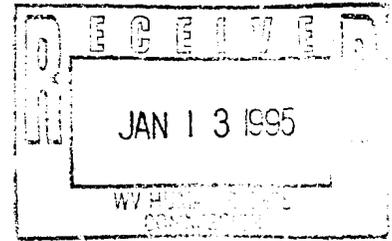
PLEASE TAKE NOTICE that pursuant to W.Va. Code §5-11-8(d) and 6 WVCSR §77-2-10, any party aggrieved by the attached final decision shall file with the executive director of the West Virginia Human Rights Commission, WITHIN THIRTY (30) DAYS OF RECEIPT OF THE DECISION, a petition of appeal setting forth 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:

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

Dated this 11th day of January, 1995.



WV HUMAN RIGHTS COMMISSION

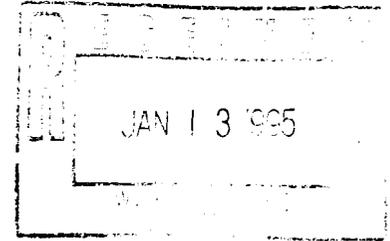
BY: Mike Kelly
MIKE KELLY
Administrative Law Judge
Post Office Box 246
Charleston, West Virginia 25321
(304) 344-3293

cc: Norman Lindell, Acting Executive Director
West Virginia Human Rights Commission

**BEFORE THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION**

ROBERT A. CERVI,

Complainant,



v.

Docket No. EH-58-92

**MAY DEPARTMENT STORES COMPANY,
d/b/a KAUFMANN'S DEPARTMENT STORE, INC.,**

Respondent.

FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. HISTORY OF THE PROCEEDINGS

This case has a tortured procedural past. Since a second appeal to the West Virginia Supreme Court of Appeals appears inevitable, a brief recounting of its history may help clarify how today's decision was reached.

Robert M. Cervi filed a complaint with the West Virginia Human Rights Commission on or about 12 August 1991. He alleged that on 6 June 1991 his former employer, Kaufmann's Department

Store, Inc.¹, had discharged him from employment "because of my actual and/or perceived handicap, AIDS-HIV Infection".

On 4 and 5 November 1992, a public hearing was held before a Human Rights Commission hearing examiner. At the conclusion of the evidence the parties elected to submit proposed findings of fact and conclusions of law to the hearing examiner, along with legal argument in support of their respective positions. As is routine, and encouraged, in HRC proceedings, the parties waived their right to closing oral arguments in reliance upon the understanding that the hearing examiner would read and consider their arguments in the post-hearing briefs. Additionally, the transcripts of the public hearing indicate that some documentary evidence was not fully developed because of the parties' belief that they would have an opportunity to address such points in later written submissions.

On 7 December 1992, more than a month prior to the date on which initial briefs were due, the hearing examiner issued a "draft opinion" in favor of Kaufmann's. Mr. Cervi objected. After an exchange of correspondence among the parties and the hearing examiner, the written briefs were submitted as scheduled. On 29 January 1993, the hearing examiner entered his final decision, again in favor of Kaufmann's.

¹ In subsequent proceedings, the name of respondent was amended to "May Department Stores Company, doing business as Kaufmann's Department Store, Inc." to reflect that Kaufmann's is a wholly owned corporate subsidiary of the May Company. Respondent will be referred to in this decision as "Kaufmann's".

Mr. Cervi appealed to the Human Rights Commission. He cited the procedural irregularity of the issuance of a "draft opinion" and alleged that the hearing examiner had made inappropriate off the record remarks regarding the credibility of witnesses. He asked for a new hearing.

Subsequent to oral argument before the Human Rights Commission (another, albeit entirely proper, procedural anomaly unique to this case), on 23 June 1993 the Commission remanded this matter for a new hearing. From a list of three hearing examiners provided by the Human Rights Commission, the parties chose this factfinder, who was duly appointed by the HRC executive director by letter dated 3 August 1993. Kaufmann's meanwhile, appealed the HRC's order to the West Virginia Supreme Court of Appeals.

It was the original intention of the factfinder, and presumably the parties, to conduct an entirely new hearing, as directed by the HRC. After much discussion and consideration of the various interests of the parties, a hearing date of 28 October 1993 was set with the understanding that all proceedings would be stayed if the Supreme Court accepted Kaufmann's petition for appeal. By order entered 21 September 1993, it was specifically noted that ". . . in the further event that complainant's health begins to deteriorate to a degree that will in the near future challenge his ability to effectively participate in his case, complainant may request that a full hearing be scheduled or that he be afforded the opportunity to present and preserve his testimony before the hearing examiner." The Supreme Court accepted the appeal and Mr. Cervi did not request a hearing in either of the forms offered.

On 16 June 1994, the West Virginia Supreme Court of Appeals issued its decision. *May Department Stores Co. v. West Virginia Human Rights Commission*, W.Va., 446 S.E.2d 692 (1994). Affirming in part, and remanding in part, the decision of the HRC, the Supreme Court ruled that ". . . we affirm the decision of the HRC to appoint a new hearing examiner but direct that he render a final decision based upon the evidence already taken and after considering the written briefs of both parties as originally agreed." 446 S.E.2d at 694. The Court went on to say that:

In the present case, we do not disturb the HRC's determination that remand is necessary; we do, however, disagree that a de novo hearing is imperative. While we would not encourage any rehearing, the new hearing examiner would have some discretion in determining whether it is necessary to rehear the testimony of witnesses whose credibility may be particularly significant to the final decision.

446 S.E.2d at 695.

By agreement of the parties, it was determined that each side would submit written argument based on the previous hearing. A date for the taking of "supplemental testimony" was set if the hearing examiner, after reviewing the transcripts, decided that the same would be helpful for purposes of determining credibility. On 24 August 1994, the hearing examiner informed counsel by letter that he had reviewed the transcripts and that "unless both parties disagree and wish to put on additional testimony, I am prepared to proceed to read your written argument, evaluate all the evidence in light thereof and make a decision." Neither side opted to put on additional testimony.

In making this decision, the factfinder considered the following documents: the four volume, two day, 620 page transcript (read three times in its entirety), plus all exhibits; all written proposals

and argument of counsel; the evidentiary deposition of Marilyn J. Haynes; and the opinion of the West Virginia Supreme Court of Appeals. The factfinder has not read or considered the former hearing examiner's "draft opinion" or his final decision, or the decision of the Human Rights Commission which resulted in these remanded proceedings.

All determinations as to credibility made in this decision were made by comparing the witness or testimony under scrutiny to the testimony of other witnesses and exhibits, and by application of "common sense", which our Court has directed be used in proceedings under the West Virginia Human Rights Act (HRA). *Woodall v. International Brotherhood of Electrical Workers*, _____ W.Va. _____, _____ S.E.2d _____, Slip Opinion (16 December 1994).

II. ISSUE TO BE DECIDED

Whether respondent violated W.Va. Code §5-11-9(1) by terminating complainant's employment because of an actual or perceived handicap.

III. SUMMARY OF THE EVIDENCE AND FINDINGS OF FACT

Despite the adversarial passion understandably attendant to these proceedings, the hearing examiner finds few facts to actually be in dispute. This summary of evidence should be considered

as findings of fact except where specifically rejected or where the summary is clearly inconsistent with findings that have been specifically credited.

A. Testimony of Robert A. Cervi

1. Mr. Cervi started his employment with Kaufmann's in 1988. He first worked at respondent's Monroeville, Pennsylvania store and transferred to the Charleston, West Virginia store in March 1989.

2. In Charleston, Mr. Cervi was the visual merchandising manager. It was his job to supervise and set up displays that would be visually attractive to customers and entice them to purchase the displayed merchandise. Mr. Cervi's position was an "executive" or management job.

3. Mr. Cervi, while under the authority of the management of the Charleston store, was supervised from the visual merchandising department in respondent's corporate headquarters in Pittsburgh.

4. During his first week at the Charleston store, Mr. Cervi and Mr. Tom Olsen, a visual merchandising executive from Pittsburgh and Mr. Cervi's supervisor, went out to the Kaufmann's warehouse in Nitro, West Virginia. They were accompanied by several "associates" or non-management Kaufmann's employees. Mr. Cervi testified credibly that while sorting out stored visual

props, Mr. Olsen permitted some of the associates to keep items that would have otherwise been discarded. He also allowed Mr. Cervi to take some items into his personal possession. Over the next two years, Mr. Cervi followed the same practice when he went to the Nitro warehouse and was in charge of sorting out unneeded visual props.

5. Mr. Cervi had an office or workroom in Kaufmann's where he would keep props. The office had a desk for his use. He did not have to keep a log of the props that were in his office. When he would bring in items from his home for use in a display, they were not marked in any way when he brought them into the store or when he took them out.

6. Mr. Cervi was rated as an "effective" employee in his performance evaluations and performance is not at issue in this matter.

7. Mr. Cervi had first tested positive for HIV in March 1990. In early 1991, he started receiving medical attention after contracting the flu and laryngitis and missing up to four days of work. He also began use of the drugs AZT and Pentamidine.

8. Prior to his March 1991 illness, Mr. Cervi had never filed a claim for medical benefits at Kaufmann's. When he received the bills for his treatment, he wasn't sure of what procedure to follow. He took the bills to Human Resources Manager Karen Abramowicz and told her that he wanted to file a claim for health insurance benefits. On at least one of the bills that he handed Ms. Abramowicz, the health provider had listed the diagnosis as "Immune System Disorder".

9. It is undisputed that it was widely known at Kaufmann's that Mr. Cervi is gay. He testified that the work environment at the store was not hostile towards gays and that none of the major players in this litigation had ever exhibited personal hostility towards him.

10. For an unspecified period of time after March 1991, Mr. Cervi continued to take his medical bills to Ms. Abramowicz. At some point, she informed him that he did not have to present them to her and that they could be filed directly with the health insurer. He asked if he could have the bills that he had already given her. He testified that she retrieved the bills from a file in her file cabinet and handed them to him. Mr. Cervi admitted that prior to his discharge, he never had a feeling that Ms. Abramowicz knew or suspected that he was HIV positive.

11. After his illness in March 1991, several Kaufmann's employees, including Mr. Abramowicz, inquired about his health. He told them that he was being treated for anemia.

12. Mr. Cervi did tell Marilyn J. Haynes, a close friend and fellow Kaufmann's employee, about his HIV status. He did not ask her to keep the information confidential. Ms. Haynes told her mother and Kim Lively, another Kaufmann's employee, who, in turn, told her mother. As of the date of hearing, Mr. Cervi had no knowledge of anyone else being told about his condition.

13. Mr. Cervi also testified that after his March 1991 illness, Ms. Shannon Cable, a department manager at Kaufmann's, said to him "Are you sure you're okay? We're all really worried

about you." He said Ms. Cable's comment caused him to "pick . . . up a feeling that maybe they thought that something else was wrong". Still, he noticed no change in the way he was treated.

14. On 23 May 1991, Mr. Cervi reported to work at 7:30 a.m. He was working on a major promotion of Guess cologne for men. After he and his assistant, Michael Spangler, had finished the Guess visual display, he said to Mr. Spangler: "I'll let you have a tester and I'll take a tester". They had been working with six to eight testers. Mr. Cervi testified that perfume testers and similar fragrance items were part of his props and that a tester has no retail value. A tester is usually marked with a label stating "This product is not for resale".

15. Mr. Cervi took some of his work materials and the testers he had selected for himself and Mr. Spangler into his office. He placed the testers on his work table, where they remained for the rest of his work day. Mr. Cervi testified that it was not unusual for testers to be in his work space. It is unclear, however, if security or personnel employees were aware that testers were commonly left in his work area.

16. At the end of their work day, Mr. Spangler and Mr. Cervi walked back toward the latter's office. They stopped at the office door. Mr. Spangler said "I'm going to go upstairs and clock out now." Mr. Cervi went into the room and picked up his briefcase and two t-shirts, which he had purchased that day and which were in a sealed Kaufmann's bag. He then picked up the two testers and went out his door and toward the employee exit area. He testified that he set his briefcase and bag down on the floor, along with the two testers. Glen Justus, head of security for respondent, then

walked past Mr. Cervi three or four times. Finally, after briefly exchanging pleasantries, Mr. Justus pointed to the testers and asked "What are those?" Mr. Cervi said "They are two Guess testers." Mr. Justus asked "What are you doing with those?" Mr. Cervi responded "I was going to give one to Michael and I was going to keep one." Mr. Justus said "I don't think you can do that." Mr. Cervi testified that he then replied "Well, you know, I've done it before in Monroeville when I worked there", to which Mr. Justus responded "Well, I don't think you can do that. Why don't you let me take those, and I'll let you know later on what happens?" Mr. Spangler then arrived and he and Mr. Cervi left the building. Mr. Cervi testified that his conversation with Mr. Justus was pleasant and did not indicate to him that his job was in jeopardy.

17. Mr. Cervi was on vacation through 3 June 1991. He returned to work on 4 June 1991. Shortly after starting work, he was summoned to Mr. Justus' office. Mr. Justus and Ms. Abramowicz were present. They confronted him regarding the testers. He alleges that Ms. Abramowicz said "What you did wasn't right", but that she also added "We're not saying you stole anything." In response to a request from Mr. Justus, Mr. Cervi "wrote out what had happened that day". When he was through with the written statement, Mr. Justus asked for his Kaufmann's ID card and told him that they were going to investigate the matter and that they would let him know their findings by 6 June. He then left the store. His status at that point was "suspended".

18. The statement given by Mr. Cervi is as follows:

I, Rob Cervi, on May 23rd did attempt to carry out 2 testers of Guess fragrance without approval.

/s/ Rob Cervi
6/4/91
252643

At hearing, he stated that, in fact, he merely wrote in his own hand what Mr. Justus dictated to him. His statement is, in part, inconsistent with his hearing testimony.

19. During his meeting with Mr. Justus and Ms. Abramowicz, Mr. Cervi informed them that Russell Daff, an employee in Kaufmann's Monroeville store, had promotional materials in his home and had, in the past, given testers to Mr. Cervi. As late as May 1991, Mr. Cervi had noticed testers, fabric and a table cloth, all of which he recognized as Kaufmann's non-retail material, in Mr. Daff's home in the Pittsburgh area. He admitted, however, that he did not believe that Russell Daff had the approval of store management to remove these items from the store.

20. On 6 June 1991, Mr. Cervi reported to work and went to the office of store manager Dennis Kasproski . They were joined by Ms. Abramowicz and Mr. Justus. Ms. Abramowicz informed him that he was fired.

21. Mr. Cervi applied for unemployment compensation benefits on the same day of his discharge. He signed the following statement which had been handwritten by the state employee helping him apply for benefits:

"I worked for Kaufmann's from 17-26-89 (sic)to 6-6-91. I was discharged [by] Karen Abramowicz because I violated company

[policy] by accepting a gift from a supplier. I wasn't aware of the time I could not accept the gift. I was told by security, Glen Justus, to return it to Guess cosmetics. I did on 5/23/91. Nothing was said about it until 6/3/91 when I was suspended. I was fired on 6/6/91".

/s/ Rob Cervi
6/6/91

Mr. Cervi admitted that he was given a chance to read the statement, that he did read it, that he did not make any corrections to it and that he signed it. This statement is inconsistent with Mr. Cervi's hearing testimony.

22. Regarding his knowledge of Kaufmann's policy on removing items from the store, Mr. Cervi testified:

- (a) As of 4 June 1991, it was not his understanding that he needed approval to remove testers from the store;
- (b) No one had ever given him authority to remove testers and he had never sought such authority;
- (c) When asked if he now knows that he violated store policy by attempting to remove the testers, Mr. Cervi replied "Now that I know, I did, yes"; and
- (d) The incident of 23 May was the only time he had tried to remove a tester from the store.

23. Mr. Cervi also admitted that after his suspension, but prior to his discharge, he had learned from his friend and fellow manager, Marilyn J. Haynes, that while he was working in

Pittsburgh in May 1991 (prior to his suspension), the Charleston store managers had informed all personnel that testers and other cosmetic promotional materials were not to be removed from the store. This was not a new policy, but was an attempt to reassert Kaufmann's established policy in regard to removing store materials for one's personal use.

24. Mr. Cervi also testified that other management employees, including Vickie Leishman, Mary Jo McCune, Shannon Cable, Kim Lively and Marilyn J. Haynes had all removed items from the store without any disciplinary action being taken against them. He admitted, however, that to the best of his knowledge, the store managers and security were not made aware of the alleged thefts until they were revealed at his unemployment benefits hearing and/or his deposition. Only the alleged thefts by Ms. Leishman and Ms. McCune are relied upon by complainant in support of his claim of discrimination.

25. Finally, Mr. Cervi testified that after his termination he learned that there had been a rumor circulating at Kaufmann's that he had AIDS. Ms. Haynes told him, after his discharge, that Ms. McCune had once asked her if he had AIDS. Ms. McCune is on a management level equal to that of Ms. Abramowicz.

B. Deposition Testimony of Marilyn J. Haynes

26. Ms. Haynes was an area sales/department manager with Kaufmann's in 1991. She recalled that prior to Mr. Cervi informing her that he had tested HIV positive, Mary Jo McCune, an upper management employee in the Charleston store, ". . . point-blank asked me if Rob had AIDS. And I very emphatically told her 'no', because at the time I didn't realize that he was HIV". This conversation would have occurred in or before March 1991.

27. Ms. Haynes testified that she understood that merchandise and other items, including testers, were not to be removed from the store. She added that while the policy was always in effect, enforcement of the policy was sometimes lax. She was clear, however, that any attempt to remove testers was a violation of store policy.

28. Ms. Haynes stated that up until the time of his discharge, there was nothing unusual about Mr. Cervi's appearance or his health which would have suggested that he was HIV Positive. As far as she knew, only herself and Kim Lively were aware of his condition.

29. Ms. Haynes admitted that, in her experience, gay and straight employees were not treated differently by Kaufmann's for disciplinary infractions, though she did hear Mr. Glen Justus, respondent's security manager, make anti-gay comments.

C. Testimony of Kathryn Morris

30. In May 1991, Kathryn Morris was a loss prevention security guard with Kaufmann's Charleston store. She retired in July 1991. Ms. Morris testified that on 23 May 1991, about 15 minutes before the store opened, she saw Mr. Cervi coming down the hallway toward his office. She was in the security office. She saw that Mr. Cervi was carrying two bottles of Guess cologne and a table cloth, and observed him take them into his office and put them on a table. A few minutes later she went into his office "to see if those were live products in those boxes and they were." By "live product", she meant that "the boxes were full . . . not empty".

31. When Mr. Justus arrived at work, she informed him of her observations.

32. Ms. Morris stated that at the time of his discharge she knew that Mr. Cervi was gay "but that didn't bother me." She did not know that he had AIDS. (Tr. 352).

33. Ms. Morris testified to a similar role she played in the discharge of Ms. M.R.² She had observed merchandise in Ms. R.'s purse. She reported her observation to Mr. Justus. Ms. R. was subsequently discharged. Ms. Morris stated that she and M.R. had been friends for 25 years, but that their friendship did not prevent her from reporting a suspected theft of company property.

² Persons involved in this matter solely because they were subjected to disciplinary measures by Kaufmann's will be referred to only by their initials.

34. The testimony of Ms. Morris is specifically found to be credible in all respects. It is also noted that Ms. Morris is the unbiased progenitor of the subsequent disciplinary action.

D. Testimony of Glen Justus

35. Glen Justus was the security manager at Kaufmann's in 1991. He alleged that Ms. Morris had called him at home to inform him of what she had observed and that he came into work early and met with her. He then personally went into Mr. Cervi's office and observed the two testers on the table. The difference in testimony between Mr. Justus and Ms. Morris in regard to whether she first informed him of her observations by phone or in person was not fully developed in hearing and is not considered significant in terms of assessing credibility.

36. Mr. Justus, looking out of the security room window and through the window in the visual display room, later observed Mr. Cervi pick up the testers and a sealed Kaufmann's bag. He testified that Mr. Cervi placed the testers between his body and the bag and walked out of his office and toward the exit. As Mr. Cervi walked past him, he could see the bottles. Mr. Justus came out of the office behind Mr. Cervi and announced that he was doing package checks. He testified that Mr. Cervi put the package down and put the bottles of cologne on a nearby desk. Mr. Justus picked up the package, verified the dates on the receipt, and then asked about the two testers. Mr. Cervi, he said, replied that "cosmetics" had let him have the testers. Mr. Justus asked "Do you have authorization to carry these out?" He testified that Mr. Cervi said that he did, and, when Justus asked

specifically who gave him authorization, he said again "cosmetics". Mr. Justus said that he would have to look into that. Mr. Justus then took the testers and Mr. Cervi left the building. Given Mr. Cervi's somewhat similar claim of a "gift" on his unemployment benefits statement, the testimony of Mr. Justus on this point is credited.

37. Mr. Justus further testified as to the following actions and observations:

(a) When he asked Mr. Cervi to leave the testers, Mr. Cervi did so without protest;

(b) He believed that Mr. Cervi was attempting to conceal the testers by placing them between his body and his package;

(c) When he asked Mr. Cervi who had authorized him to remove the testers, Mr. Cervi replied "Monroeville let you. The Monroeville store let you have them.";

(d) After Mr. Cervi left, he went to the cosmetics department and learned that no one had authorized Mr. Cervi to remove the testers; and

(e) He knew that Mr. Cervi was gay, but did not know about his HIV status.

38. Mr. Justus testified that during his tenure as security manager numerous Charleston Kaufmann's employees had been discharged for unauthorized removal or attempted removal of company property from the store, including:

(a) M.R., discharged in August 1989 for concealing testers in her purse;

(b) K.H. for concealing a pair of earrings in her purse;

(c) D.L. for removing out-of-stock merchandise from the trash and placing it in his duffel bag; and

(d) R.P., a sales manager, for eating a handful of cashews and a candy truffle without paying for them.

39. Mr. Justus testified that Kaufmann's does not take disciplinary action against an employee for suspected or attempted theft unless there is a confession or unless security personnel or someone in management personally observes an infraction of the rules.

E. Testimony of Karen Abramowicz

40. Karen Abramowicz is the Human Resources Manager at Kaufmann's Charleston store. She is responsible for the hiring process, discipline, payroll, benefits orientation, safety, and is the liaison between area sales managers and upper management.

41. Ms. Abramowicz, upon being informed of the Cervi incident by Mr. Justus, helped gather information and passed it on to her supervisors in the Pittsburgh office, Rose Gilbride and Debra McCallister. The three of them then conferred by telephone.

42. Among items gathered by Ms. Abramowicz were statements from Ms. Morris, Mr. Justus and Ms. Leishman, the cosmetics manager.

Ms. Morris' statement is as follows:

I, Kathryn Morris, on Thurs. May 23, 1991 at 9:45 a.m. I observed Rob Cervi (display mgr.) have 2 bottles of men's 4 oz. Guess Cologne, he had taken to his office. I also informed "Glen Justus" (Security Mgr.) about this incident. Glen also observed the cologne in Rob office. At 3:30 p.m. Glenn did a package check, Rob was leaving the building, and the cologne was in his possession.

/s/ Kathryn Morris 5866
Security 5-23-91
4:30 p.m.

Mr. Justus made this statement:

I, Glenn Justus on Thursday May 25, 1991, was informed by Kaufmann's store detective, Kathryn Morris, that Rob Cervi (Display Manager) had placed two boxes of men's Guess cologne in his office.

At 3:30 p.m. I was in the security office and observed Mr. Cervi place the two boxes of Guess cologne behind a Kaufmann's bag, which he was carrying, and he then proceeded to the employee's entrance. At this time I asked Mr. Cervi what the two boxes of fragrance were. Mr. Cervi stated that they were testers and "Cosmetics O.K.'d this." I asked him who gave him authorization to have them and he stated "Monroeville let's you have them." Mr. Cervi would not tell me specifically who authorized him to carry the boxes of cologne out of the building. I then asked Mr. Cervi for the boxes of cologne and he gave them to me.

I then spoke with Jim Foltz, Assistant Store Manager; Vicki Leishman, Cosmetic Manager; and Maxine Poore, Mens Fragrance Associate (see attached statements).

Glen R. Justus
Security Manager

And the statement of Ms. Leishman reads:

5/23/91

I Vickie M. Leishman have no knowledge of Guess for men testers being give to anyone for personal use.

Vickie M. Leishman
ASM - Cosmetics

The statements of Mr. Foltz and Ms. Poore were not introduced into evidence at hearing.

43. Ms. Abramowicz stated at hearing that the final decision to discharge Mr. Cervi was made by Ms. McCallister. She stated that she did not make any recommendation that he be discharged, because "At my level, with an executive, that's not something that I can make a recommendation on." At the unemployment hearing, Ms. Abramowicz had stated that the decision was made by herself, Ms. Gilbride and Ms. McCallister. This inconsistency in testimony is noted, but is not give such weight as to effect the credibility of her testimony in regard to other matters.

44. Ms. Abramowicz admitted that she knew Mr. Cervi was gay, and so did many other managers. She stated that it was possible that knowledge of his HIV infection could create a negative reaction among coworkers and customers. She testified, however, that she was unaware of his HIV status until he filed his complaint with the West Virginia Human Rights Commission, some two months after his discharge.

45. On 6 June 1991, Ms. Abramowicz handed Mr. Cervi his written notice of discharge, which states the reason for his firing:

On May 23, 1991, Rob Cervi admitted to attempting to remove 2 Guess Men's Fragrance testers from the store. After conducting a thorough investigation, we have concluded that what he did was a violation of company rule or policy as stated in Handbook on pg. 3.3 Section 5.0 point 5.1. For this reason, his employment with Kaufmann's has been terminated.

46. "Point 5.1" of the employee handbook states:

5. OUT OF STOCK MERCHANDISE AND STORE MATERIALS.
5.1 Under no circumstance may any out-of-stock merchandise or store materials be given to associates, contractors or customers, to be taken from the store premises. This includes such items as office supplies, boxes, hangers, plastic bags, display and scrap materials or any other related items.

It is Kaufmann's position that testers are "store materials".

F. Testimony of James Bierbower

47. James Bierbower is Kaufmann's manager of compensation and benefits. He works in the corporate office in Pittsburgh and reports to Ms. McCallister. He testified that there have been employees of Kaufmann's who have tested HIV Positive or who have contracted the AIDS virus, but he denied that any employees have been terminated because of such status. He testified that executives such as Mr. Cervi who contract AIDS are eligible for short-term disability benefits, which provides a full salary for three months, as well as long-term disability.

48. Mr. Bierbower testified credibly that the affect on Kaufmann's financial position of an employee being HIV Positive is "relatively minimal". The minimal impact is due to two factors: (1) Kaufmann's is fully insured for the fiscal year, regardless of cost, and that only the next year's premium would be effected, and; (2) the costs of HIV treatment have gone down to an average of \$68,000 to \$75,000 per year, which is a relatively small amount given Kaufmann's annual premium of \$10 million. He testified that care for premature babies is substantially more costly than AIDS treatment and is of much greater concern to the company.

49. Mr. Bierbower testified that while he does receive reports from medical insurers, they show only a summary of the amount billed by the health provider, the amount that was paid by the insurance company, and the amount that was billed to the employee. Kaufmann's managers do not routinely see any medical records. He further testified that when he receives a monthly report from an insurer he looks for two items: (1) any claim that was paid in excess of \$100,000.00, since that is an internal threshold for identifying claims that could have a significant impact on the following years' premium, and; (2) the total amount paid out to health providers that month compared to the amount that Kaufmann's has paid to the insurers.

50. Mr. Bierbower said that any report on Rob Cervi would not have drawn his attention because the dollar amount of the claims identified were small, and that there were thousands of claims paid over the course of a year. There are no codes on the printout that would indicate the type of illness an employee might have.

G. Testimony of Rose Gilbride

51. Rose Gilbride is the manager of store personnel in Kaufmann's corporate office. She supervises the Human Resources function at branch stores, and reports to Debra McCallister. Karen Abramowicz reports directly to Rose Gilbride. Kaufmann's has approximately 11,000 employees.

52. Ms. Gilbride testified that when an executive is involved in a disciplinary matter, she alerts Debra McCallister, her immediate superior. She said that, during her investigation of Mr. Cervi, she was not aware that he was gay, nor was she aware that he was HIV Positive, and that these items never came up in her discussions with Ms. Abramowicz or Ms. McCallister.

53. When she learned of Mr. Cervi's reference to testers being allowed to be removed from the Monroeville store, she contacted the store management personnel who, predictably, denied the charge.

H. Testimony of Debra McCallister

54. Debra S. McCallister is vice president of Human Resources Administration for Kaufmann's. Ms. McCallister testified that in 1991 Kaufmann's experienced a \$12 million shortage due to theft. For that reason, Kaufmann's tries to be as strict as possible in communicating to its

employees that under no circumstances can anything that is store property be independently removed from company premises by employees.

55. Ms. McCallister learned about the Cervi incident from Rose Gilbride, who, in turn, had learned about it from Karen Abramowicz. Ms. Gilbride and Ms. McCallister called Ms. Abramowicz and asked for more details. Ms. McCallister testified that Mr. Cervi was merely suspended, and not immediately discharged, upon his return from vacation, because he had stated that he believed the removal of testers to be a common practice, and that he referred to a Monroeville store policy that it was acceptable to remove testers. Ms. McCallister testified that if testers had been routinely removed at the Monroeville store, it would have been a consideration that senior management would have taken into account in determining the resolution of the Cervi incident. As noted, management at the Monroeville store denied the charge.

56. As part of her investigation, Ms. McCallister called David Knouse, vice president of visual merchandising, and asked him to make an inquiry of his management employees as to whether they had condoned the practice of removing testers from stores. Mr. Knouse reported back to her that under no circumstances had the visual merchandising group allowed testers to be removed from stores.

57. After her investigation, McCallister testified: "It seemed real clear to me that this was a simple case of somebody taking something that didn't belong to them and trying to remove it from

the store, company property." In response to a question as to who made the decision to discharge Mr. Cervi, Ms. McCallister answered: "I did".

58. Ms. McCallister denied that there was any discussion regarding Mr. Cervi being gay or his HIV status during the consideration of his discharge. She testified that Kaufmann's AIDS policy would have required her to contact the parent corporate office in St. Louis before discharging Mr. Cervi. She did not do that, however, because she did not know his HIV status.

I. Testimony of Vickie Leishman

59. Considerable testimony was received regarding an incident involving cosmetics manager Vickie Leishman. Ms. Leishman testified that a representative of Lancome took testers and other items that she was going to discard into Ms. Leishman's office. Ms. Leishman and other employees then placed certain items into individual bags. The representative (not Ms. Leishman) then took the parcels and carried them out of the store, where they were distributed to employees from Ms. Leishman's car. Ms. Leishman testified that she went out the store door with the Lancome representative because she had the key to her car, and that after they deposited the material into the car, she went back to work.

60. The Leishman incident elicited the following testimony:

(a) Kaufmann's senior managers were not aware of the incident until Mr. Cervi revealed it at his unemployment hearing;

(b) Ms. Leishman had informed Mr. Cervi about the availability of the cosmetics and Mr. Cervi saw Ms. Leishman leave the store with a bag that day, but he is not sure if the cosmetics were in that bag;

(c) Mr. Justus gave contradictory assessment as to whether distributing items in the parking lot after a vendor's representative removes items from the store is a violation of company policy.

(d) Ms. Abramowicz, upon learning of the incident, spoke to both Ms. Leishman and the Lancone representative. Their stories were consistent that it was the representative, not Ms. Leishman, who carried the items out of the store. Ms. Abramowicz did not believe that store policy was violated.

(e) Store policy provides that:

6. **VENDOR GIFTS/FREE GIFTS**

6.1 No vendor gifts or free gifts are to be taken from the store. If a manufacturer or vendor wants to make you a gift of his merchandise it should be sent to your home directly.

61. Ms. Leishman was not discharged or otherwise disciplined as a result of this incident.

J. Testimony of Mary Jo McCune

62. Mary Jo McCune is a divisional sales manager for Kaufmann's. She testified that she and Ms. Haynes did discuss Mr. Cervi's health prior to his discharge, but that she did not discuss his health with Ms. Abramowicz. She denied asking Ms. Haynes if Mr. Cervi had AIDS.

63. Ms. McCune admitted to removing a wreath from the store, as Mr. Cervi had charged at his deposition, but stated that she had paid Mr. Cervi or Mr. Spangler for the wreath.

64. The testimony of Ms. McCune was not credible and is rejected in regard to both her conversation with Ms. Haynes and the theft of the wreath.

65. Kaufmann's did not become aware of Ms. McCune's theft until after Mr. Cervi's discharge. Since she has not confessed to the theft, nor did security or management personnel observe the theft, Kaufmann's has not treated her action as a violation of store policy. She has not been discharged or otherwise disciplined for her actions.

K. Testimony of Michael Spangler

66. Mr. Spangler, Mr. Cervi's assistant, testified that in May 1991 he was aware that removing testers from the store was a dischargeable offense.

IV. DISCUSSION OF EVIDENCE AND APPLICABLE LAW

The law to be applied in this case is relatively straight forward. Under the West Virginia Human Rights Act, an employer may not discipline a member of a protected class more harshly than similarly situated non-members of the protected group who engage in similar or more grievous offenses. *State v. Logan-Mingo Area Mental Health Agency*, 329 S.E.2d 77 (1985). An employer who does so causes an inference to be raised that it was motivated by an unlawful discriminatory animus.

Here, complainant alleges that at least three non-members of his protected group³, Russell Daff, Mary Jo McCune and Vickie Leishman, engaged in conduct similar to or worse than his, but were not disciplined. We will analyze each comparison separately.⁴

Preliminarily, it should be noted that complainant's attempted removal of the testers from the store was a clear violation of store policy. While not "live product", testers undeniably are "store material" and have value to a fragrance promotion. A promotion, common sense tells us, is designed to reach new customers. Few, if any, non-regular users of a fragrance will purchase a cologne

³ The relevant protected group, of course, is persons with the actual or perceived handicap of being HIV Positive.

⁴ This case having been heard in its entirety, with all evidence submitted and considered, it is not necessary to determine whether a *prima facie* case was established. *U.S. Postal Service v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482 (1983).

product without benefit of a tester. While Mr. Cervi might have observed individuals such as Mr. Daff pilfer testers, his alleged belief that the removal of testers was not against policy is simply unbelievable.

A conclusion that Mr. Cervi knew his action was wrong is also supported by his statement to Mr. Justus that he had authorization from "cosmetics" to remove the testers and his statement on his application for unemployment benefits claiming that the testers had been "a gift from a supplier". These statements, both false, would not have been made if he truly believed that removing the testers was entirely appropriate.

Of course, even if Mr. Cervi is guilty of an offense that would provide a reasonable basis for discharge, the discharge would still be discriminatory if comparable acts by non-target group employees did not result in similar discipline. *Williams v. Giant Eagle Markets*, 883 F.2d 1184 (3rd Cir. 1989).

Russell Daff

Russell Daff, according to Mr. Cervi, stole testers and more from Kaufmann's store in Monroeville. He admitted, however, that he has no knowledge of Kaufmann's personnel or security managers being aware of, approving or condoning Mr. Daff's thefts.

While Kaufmann's investigation into Mr. Cervi's allegations regarding Mr. Daff and the Monroeville store (consisting of calls to managers at Monroeville and in visual display) can be criticized as less than exhaustive, its efforts are consistent with its policy to not take disciplinary action in the absence of a confession or personal observations by security. Here, no one but Mr. Cervi knew, or would go on record, about Mr. Daff's thefts or the tolerance of theft by his supervisors. As Kaufmann's argues persuasively, perhaps persons would not go on record about Mr. Daff precisely because they knew that the penalty for removing store materials or condoning theft was harsh and the decisionmakers unforgiving.

In the absence of evidence indicating the approval or condonation of key decision makers, a complainant cannot prove that he was intentionally discriminated against by comparing himself to a person who was not caught doing the same or a similar act. Nor is it evidence of discrimination if an employer fails to discharge or discipline an employee who has been accused of policy violations by only the complainant and no one else.

L. Testimony of Mary Jo McCune

The factfinder has no doubt that Mary Jo McCune stole a wreath, as charged by Mr. Cervi. He also has no doubt that neither Mr. Justus, Ms. Abramowicz nor Mr. Kasprowski (much less Ms. McCallister) were aware of the theft until Mr. Cervi's deposition. Again, the standard of proof for intentional discrimination requires evidence that the decisionmakers were aware or should have been

aware that non-members of the protected group committed similar or more grievous acts. Here, no such evidence was produced. The key players did not know of Ms. McCune's acts, nor was there more than a hint that they purposely turned away to avoid such knowledge.

In regards to Ms. McCune, complainant also argues that her high-level position demands that knowledge of her theft be imputed to Kaufmann's. Significantly, the complainant cites no authority in support of this argument and the factfinder can find none. If Mr. Justus, Ms. Abramowicz or Mr. Kasproski were guilty of theft, the factfinder would be more tempted to make law on this crucial point. Certainly, they and Ms. McCallister are Kaufmann's when they participate in the discharge of an executive for attempted theft. If one of them approves of and plays a crucial role in a discharge when, even without knowledge of the others, she or he has committed or tolerated a similar act, then a discriminatory motive may very well be at play. Here, however, Ms. McCune played no role in the decision to discharge Mr. Cervi. The factfinder is strained to see her other than as another management employee who helped herself to store materials in violation of company policy. As with Mr. Daff, the crucial difference between she and Mr. Cervi is that he was caught and she wasn't.

M. Vickie Leishman

Vickie Leishman, intentionally or not, carefully skirted store policy. While she did not direct that the gifts from the Lancone representative be sent to her home, as required in the employee handbook, neither did she attempt to remove the materials from the store by herself. Moreover, the

evidence convincingly indicated that it was the vendor representative who decided that her company's product could be distributed to Kaufmann's employees. Ms. Leishman, unlike Mr. Cervi, did not unilaterally decide that certain items were free for the taking.

V. DIRECT EVIDENCE

Direct evidence may consist of explicit and blatant discriminatory or derogatory comments or acts made to the complainant, about the complainant, about the complainant's protected group or a mixture of the above. Direct evidence in this case, for example, would include a comment such as "People with AIDS should not be allowed to work here."

Complainant asserts that he has shown direct evidence of discrimination by producing the following evidence:

- (1) Mr. Cervi tendered to Ms. Abramowicz certain medical records, at least one of which stated that Mr. Cervi had "Immune System Disorder";
- (2) Ms. McCune asked Ms. Haynes if Mr. Cervi had AIDS and she must have gained such knowledge from Ms. Abramowicz; and
- (3) Ms. Abramowicz's denial that she had no knowledge of his HIV status and, therefore, did not discuss the subject with Ms. Gilbride and Ms. McCallister is not credible.

The factfinder concludes that none of the above-listed testimony or suppositions is direct evidence of discrimination as recognized by law. While the factfinder may be free to simply disbelieve Ms. Abramowicz's denial of knowledge of Mr. Cervi's HIV status, there are no grounds in the record to do so.

VI. CONCLUSIONS OF LAW

This is a sad case in which a harsh, albeit understandable, policy comes down full force on a person who was otherwise a good employee. The question to be addressed, however, is not whether the policy was humane or even fair, but whether it was applied in an unlawful discriminatory manner. The evidence indicates that it was not.

Based on the evidence of the whole record, the complaint of Robert A. Cervi should be, and is hereby, **DISMISSED**.

Decided this 11th day of January, 1995.



MIKE KELLY
Administrative Law Judge
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