



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE 304-348-2616

ARCH A MOORE JR
Governor

December 23, 1987

Shirley A. Cutlip
Wolf Rt., Box 121
Sutton, WV 26601

High Power Energy
Drennan, WV 26667

Roger L. Sabo, Esq.
The Huntington Center
suite 2195
41 S. High St.
Columbus, OH 43215

Mary C. Buchmelter
Assistant Attorney General
812 Quarrier St.
Charleston, WV 25301

RE: Cutlip v. High Power Energy
ES-102-87

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
Howard D. Kenney
Executive Director

HDK/mst
Attachments

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

AMENDED AND EFFECTIVE
AS OF APRIL 1, 1987

Enr. H. B. 2628]

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 WEST VIRGINIA HUMAN RIGHTS COMMISSION

SHIRLEY A. CUTLIP,

Complainant,

v.

DOCKET NO. ES-102-87

HIGH POWER ENERGY,

Respondent.

FINAL ORDER

On the 10th day of December, 1987, the West Virginia Human Rights Commission reviewed the proposed order and decision of Hearing Examiner, James Gerl, in the above-captioned matter. After consideration of the aforementioned and exceptions thereto, the commission does hereby adopt said proposed order and decision, encompassing proposed findings of fact and conclusions of law as its own, with modifications and amendments set forth below.

In the subsection titled Findings of Fact, finding number 5 is modified by substituting the following language for that contained therein:

"Respondent has hired males from October 1984 on forward into positions the complainant was qualified for and could have assumed."

In the subsection titled, Discussion of Conclusions, on page 7 referencing the first full paragraph contained therein, at the end of the second sentence following the word "conciliate," the citation "Logan v. Zimmerman Brush Co., 455, U.S. 422 (1982)" is

added. The final sentence of that paragraph is stricken in its entirety.

At the end of the third full paragraph contained on that page, the language "said calculations which are contained on page 23 through 25, inclusive are herein incorporated by reference."

Finally, the commission, based upon review of the record and an exception related to an agreement of the parties, and the manifest intent of the Hearing Examiner, does modify the terms of complainant's instatement as shall be subsequently reflected herein.

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

It is further ORDERED as follows:

1. The complaint of Shirley A. Cutlip, Docket No. ES-102-87 is sustained.

2. Respondent shall cease and desist from discriminating against individuals on the basis of their sex in making employment decisions.

3. Subject to the condition that the complainant meet the requirements of respondent's physical examination, which exam shall be offered with reasonable notice to the complainant and conducted in a fair and non-prejudicial manner within one month of receipt of this order, respondent shall, thereafter, immediately make an unconditionally bona fide offer of instatement to the complainant as a truck driver at the prevailing hourly union wage for that position as set forth in the union rules.

4. Respondent shall pay the complainant a sum equal to wages she would have earned but for respondent's unlawful failure to hire her. Such wages for the relevant period to the date of hearing would have been \$35,976.33 as set forth in complainant's memorandum pages 23 through 25, inclusive. Thereafter, respondent shall pay to the complainant lost wages at the prevailing hourly wage set forth in the union rules less any interim earnings, until the complainant is instated as a truck driver or there is objective evidence presented that complainant does not meet the requirements of respondent's physical examination.

5. Respondent shall also pay complainant interest on any backpay amount at the statutory rate of ten percent.

6. Respondent shall pay to complainant the sum of \$2,000.00 as incidental damages for humiliation, embarrassment, emotional and mental distress and loss of personhood and dignity as a result of respondent's failure to hire her.

It is finally **ORDERED** that respondent provide to the commission proof of compliance with the commission's final order within 35 days of service of said final order by copies of cancelled checks, affidavits or other means calculated to provide such proof.

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 may seek judicial review.

Entered this 22nd day of December, 1987.

RESPECTFULLY SUBMITTED,

BY Beth A. Hamilton
CHAIR/VICE CHAIR
WV HUMAN RIGHTS COMMISSION

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

RECEIVED
OCT 16 1987
W.V. HUMAN RIGHTS COMM.

SHIRLEY A. CUTLIP, :
Complainant, :
v. : DOCKET NO. ES-102-87
HIGH POWER ENERGY, :
Respondent :

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing was convened for this matter on July 22, 1987, in Summersville, West Virginia. Commissioner Jack McComas served as Hearing Commissioner. The amended complaint was filed on October 4, 1986. The notice of hearing was served on January 13, 1987. Respondent answered on February 3, 1987. A Status Conference was held on April 30, 1987. Subsequent to the hearing, respondent and complainant submitted written briefs and proposed findings of fact. In addition, the Human Rights Commission filed a brief in support of certain relief requested.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views 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

issues as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

CONTENTIONS OF THE PARTIES

Complainant contends that respondent discriminated against her on the basis of his sex by failing to hire her. Respondent maintains that complainant was not hired because her skills were not sufficiently versatile.

FINDINGS OF FACT

Based upon the parties stipulations of uncontested facts as set forth in the joint pre-hearing memorandum, the Hearing Examiner has made the following findings of fact:

1. Complainant is a woman.
2. Complainant has worked as a truck driver in other coal mining operations.
3. Complainant applied for work with respondent at the Drennen Surface Mine in October, 1984.
4. Complainant was not hired by respondent.
5. Respondent has hired people from October, 1984, on forward.
6. The hourly wage of a truck driver for respondent is as follows: October, 1986 to December 31, 1986 - \$14.86 per hour; January 1, 1987 to April 1, 1987 - \$14.91 per hour; April 1, 1987 to the date of the hearing herein - \$14.96 per hour.

Based upon the preponderance of the evidence, the Hearing Examiner has made the following findings of fact:

7. Only one female is employed by respondent. She is employed two to three nights per week as the cleaning person. Respondent employs seventy-one male employees at its Drennen site.

8. Complainant had approximately $3\frac{1}{2}$ to 4 years of actual experience as a truck driver, not counting periods of unemployment or disability.

9. Complainant's performance as a truck driver was very good. Her safety record was good. She drove 35 ton, 50 ton and 120 ton trucks.

10. Respondent files all applications received. There is no time limit as to the active status of applications.

11. Complainant's application for employment with respondent lists experience with five types of construction equipment. Such equipment included three types of trucks - rock, crusher, and shuttle car.

12. Two of the male employees hired by respondent after complainant submitted her application were clearly less qualified than complainant. Pitsenbarger had only eighteen months experience as a truck driver and no other equipment experience. Lehr had no relevant prior experience. He was a carpenter; his only equipment experience involved a tractor.

13. Hall, respondent's Superintendent gives a preference to his friends and acquaintances with regard to hiring.

14. Respondent has never employed a female coal miner at its Drennen Site.

15. For the year prior to hearing, respondent's Drennen Site has worked nine hour shifts five days per week. Any time over $7\frac{1}{2}$ hours per day is overtime and is compensated at time and a half.

16. Since her application for employment with respondent,

complainant has made a diligent and good faith effort to secure employment.

17. Since April 2, 1987, complainant has been employed by Red Lobster. In her first three months of employment, complainant earned \$1,858.71.

18. Respondent's failure to hire complainant hurt her deeply. She was humiliated by the fact that respondent hired less qualified men, and she was embarrassed to tell people that she was not working.

CONCLUSIONS OF LAW

1. Shirley A. Cutlip is an individual claiming to be aggrieved by an alleged unlawful discriminatory practice and is a proper complainant for purposes of the Human Rights Act. West Virginia Code, §5-11-10.

2. High Power Energy is an employer as defined by West Virginia Code § 5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. The complaint, in this matter, was timely filed.

4. Complainant has established a prima facie case of sex discrimination.

5. Complainant has demonstrated that the reason articulated by respondent for failing to hire her is pretextual.

6. Respondent discriminated against complainant on the basis of her sex violation of West Virginia Code, § 5-11-9(a) by failing to hire her.

DISCUSSION OF CONCLUSIONS

In fair employment, disparate treatment cases, the initial burden is upon the complainant to establish a prima facie case of prima facie case of discrimination. Shepherdstown Volunteer Fire

Department v. West Virginia Human Rights Commission 309 S.E.2d 342, 352-353 (WV 1983); McDonnell-Douglas Corporation Corporation v. Green 411 U.S. 792 (1973). If the complainant makes out a prima facie case, respondent is required to offer or articulate a legitimate non-discriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunteer Fire Department, supra; McDonnell-Douglas, supra. If respondent articulates such a reason, complainant must show that such reason is pretextual. Shepherdstown Volunteer Fire Department, supra; McDonnell-Douglas, supra.

In the instant case, complainant has established a prima facie case of discrimination by proving facts, which is otherwise unexplained, raise an inference of discrimination. Furnco Construction Company v. Waters 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981). The parties have stipulated that complainant is a woman, that she applied for work at respondent in October, 1984, that complainant was not hired by respondent and that respondent hired other people since October, 1984. In addition, complainant proved that respondent has no female employees among the 71 persons employed at the Drennen Site, unless one considers the cleaning person who works only two or three nights per week.

Respondent has articulated a legitimate non-discriminatory reason for failing to hire complainant. Hall, respondent's Superintendent, testified that he preferred versatile employees and that complainant had truck driving experience but no other equipment experience.

Complainant has demonstrated that the reason articulated by

respondent for failing to hire her is pretextual. The testimony of complaint and her witnesses is more credible than the testimony of respondent's witnesses. The credibility of the testimony of respondent's witnesses in general and of Hall in particular is impaired by their evasive and uncomfortable demeanor. Hall's testimony as to the criteria he utilizes to hire new employees is further impaired by an external contradiction with the testimony of Wallace. Wallace testified that he files applications after they are received. Hall testified that Wallace places all applications on Hall's desk. Hall's contention that he does not discriminate on the basis of sex is further undermined by two factors. The first factor is the objective fact that no women, with the exception of the cleaning person, are employed at respondent's Drennen site. The second factor was Hall's glaring tendency to refer to any employees and applicants as "man." That Hall would testify that he prefers a "man" who can operate many types of machinery, even at a hearing where he is charged with sex discrimination indicates a profoundly sexist mind set with regard to hiring.

Complainant has also demonstrated that the reason articulated by respondent is pretextual by demonstrating that complainant's experience and equipment qualifications as demonstrated by her application were clearly superior to the qualifications of two male applicants who were hired. Complainant is more qualified than Pitsenbarger who had only 18 months of experience and no other equipment experience. Complainant is also more qualified than Lehr who had no relevant prior experience and no equipment experience. Clearly versatility was not the criteria used by Hall to evaluate applicants for employment.

Respondent's argument that the complaint was not timely filed

is rejected. Complainant had an active application on file with respondent since October, 1984. When she learned on July 28, 1986, that respondent was hiring she consulted the Human Rights Commission. On August 19, 1986, she filed her complaint. The amended complaint was filed on October 4, 1986. The complaint is timely.

Respondent's argument that a lack of conciliation should result in dismissal of the complaint is a frivolous argument. Even if the factual premise of the argument is correct, and there is absolutely no evidence in the record to support it, there has been no showing that complainant was herself responsible for any failure to conciliate. Clearly dismissal is not the appropriate sanction.

The testimony of Barrett, a statistician called by respondent is not credited. The sample size utilized by Barrett as low as 14, is simply insufficient to draw any valid conclusions. In addition, Barrett failed to utilize the 4/5 rule adopted by the EEOC. Most significantly Barrett used the chi square technique rather than the standard deviation technique which has been approved by the U.S. Supreme Court. See, Costenada v. Partida, 430 U.S. 482 496 n. 17; Hazelwood School District v. United States. 433 U.S. 299.

Complainant is entitled to backpay. The backpay calculation set forth in complainant's brief appears to be accurate.

Complainant testified as to her deep hurt, humiliation and embarrassment caused by respondent's discriminatory failure to hire her. Respondent's contention that complainant must show physical injury to qualify for incidental damages is rejected. Pearlman Realty Agency v. West Virginia Human Rights Commission 239 S.E.2d 145 (W.Va. 1977) Complainant should be awarded \$2,000.00 for her humiliation and embarrassment.

PROPOSED ORDER

In view of the foregoing, the Hearing Examiner recommends the following:

1. That the complaint of Shirley A. Cutlip, Docket No. ES-102-87, be sustained.

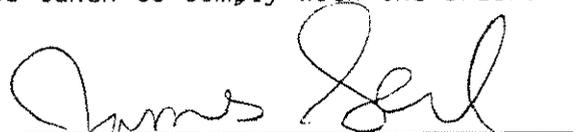
2. That respondent hire complainant as a Truck Driver at a rate of pay comparable to what she would be receiving but for the discriminatory failure to hire.

3. That respondent pay complainant a sum equal to wages she would have earned but for respondent's unlawful to hire her. Such wages for the period to the date of the hearing herein, would have been \$35,976.33. Respondent should also be ordered to pay complainant interest on that amount of back pay owed her at the statutory rate of ten percent.

4. That respondent pay to complainant the sum of \$2,000.00 for incidental damages for humiliation, embarrassment, emotional and mental distress and loss of personhood and dignity as a result of respondent's discriminatory failure to hire her.

5. That respondent be ordered to cease and desist from discriminating against individuals on the basis of their sex in making employment decisions.

6. That respondent report to the Commission within thirty days of the entry of the Commission's Order, the steps taken to comply with the Order.


James Gerl
Hearing Examiner

ENTERED: May 20, 1985

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served
the foregoing Proposed Order and Decision
by placing true and correct copies thereof in the United States
Mail, postage prepaid, addressed to the following:

Roger L. Sabo
Millisor & Nobil
41 South High Street
Columbus, OH 43215

Mary Catherine Buchmelter
Assistant Attorney General
812 Quarrier Street
Charleston, WV 25301

on this 15th day of October, 1987.



James Gerl