



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION

1321 Plaza East

Room 104/106

Charleston, WV 25301-1400

GASTON CAPERTON
GOVERNOR

TELEPHONE (304) 348-2616
FAX (304) 348-2248

Quewanncoii C. Stephens
Executive Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

November 18, 1992

Mary Davis
13720 Nancy Ave.
Chesapeake, WV 25315

Capital City Nursing Home, Inc.
dba Triad Medical Services
1301 Virginia St. E.
Charleston, WV 25301

Harold S. Albertson, Esq.
Albertson & Jones
PO Box 1989
Charleston, WV 25327

Kathleen Mansheim
Assistant Attorney General
812 Quarrier St.
Charleston, WV 25301

Re: Davis v. Capital City Nursing Home, Inc. dba
Triad Medical Services ER-153-90A

Dear Parties:

Enclosed, please find the final decision of the undersigned hearing examiner in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the hearing examiner's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition

setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the examiner, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

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

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the hearing examiner, or an order remanding the matter for further proceedings before a hearing examiner, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a hearing examiner, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the examiner on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the hearing examiner's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a hearing examiner's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the examiner's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,


Gail Ferguson
Hearing Examiner

GF/mst

Enclosure

cc: Glenda S. Gooden, Legal Unit Manager
Mary C. Buchmelter, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

MARY DAVIS,

Complainant,

v.

DOCKET NUMBER(S): ER-153-90A

CAPITAL CITY NURSING HOME,
DBA TRIAD MEDICAL SERVICES,

Respondent.

HEARING EXAMINER'S FINAL DECISION

A public hearing, in the above-captioned matter, was convened on May 7, 1992, in Kanawha County, West Virginia, before Gail Ferguson, Hearing Examiner.

The complainant, Mary Davis, appeared in person and by counsel, Kathleen Mansheim, Assistant Attorney General. The respondent, Capital City Nursing Home, dba Triad Medical Services, appeared by its corporate representative, Randall Spears, Administrator and by counsel, Harold S. Albertson, Jr., Esq.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the hearing examiner and are supported by substantial evidence, they have been

adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

PRELIMINARY MATTER

On November 17, 1989, the complainant, Mary Davis, filed a complaint with the West Virginia Human Rights Commission alleging that the respondent, Capitol City Nursing Home, doing business as Triad Medical Services, had discriminated against her on the basis of race by failing to promote her to the position of assistant director of nursing, in violation of the West Virginia Human Rights Act, WV Code §5-11-9(a). On or about June 25, 1991, the complainant filed an amended complaint. The amended complaint severed a subsequent claim for retaliatory discharge which has since been filed separately in circuit court.

The commission issued a letter of determination finding probable cause to believe that the Act had been violated. This matter was then set for public hearing in compliance with WV Code §5-11-10.

On February 10, 1992, respondent's counsel filed a motion to dismiss and a motion in limine. On February 21, 1992, respondent's counsel filed a motion to postpone the proceedings pending a decision in the circuit court matter. Counsel for the commission opposed the aforesaid motions. A status conference was held on March 25, 1992,

and the hearing examiner issued an order limiting the issues in this case and denying respondent's motions on March 30, 1992.

The case then came on for public hearing on May 7, 1992.

FINDINGS OF FACT

1. The complainant, Mary Davis, is a licensed practical nurse.

2. Complainant is an African American.

3. Complainant was employed by respondent, Capital City Nursing Home, dba Triad Medical Services, as a part-time charge nurse in or about early May, 1989.

4. After completion of her probationary period, complainant was promoted to a full-time charge nurse position.

5. Jim Harris was former director of nursing for respondent. In this capacity, Mr. Harris is an agent of respondent.

6. On August 11, 1989, complainant received an above average job performance evaluation. In six out of seven categories, complainant scored above average or outstanding. In the remarks section, Jim Harris noted that complainant had good leadership qualities.

7. Respondent's policy provides that performance evaluations will serve as a basis for promotion of employees.

8. While complainant was employed with respondent, respondent decided to hire an assistant director of nursing.

9. Jim Harris was largely responsible for selection and hiring of assistant director of nursing.

10. Respondent's personnel manual states that it shall be the "policy of the respondent to fill position vacancies from within our organization whenever possible. Whenever a position becomes available, the administrative office will usually post a notice of vacancy. Appropriate details of the vacancy will be provided in the notice of vacancy."

11. Complainant had been previously notified of a job opening on a different shift at respondent's facility. Complainant applied for and was transferred to this position.

12. Respondent had previously posted job openings for employees at respondent's facility on the bulletin board near the time clock.

13. Respondent did not internally post a vacancy notice for the position of assistant director of nursing (ADON).

14. Employees were not formally notified, at staff meetings or otherwise, that licensed practical nurse applicants were being accepted for the position of ADON.

15. Virginia White, one of complainant's witnesses, testified that on several occasions she notified Jim Harris and Carolyn Mandela that the ADON job opening should be posted internally.

16. From July 13 to July 16, 1989, respondent published a newspaper advertisement in the Charleston Newspapers requesting applications for the position of ADON. This advertisement did not specify which nursing degree (LPN and/or RN) was required for the position. Respondent published this advertisement a second time from August 5 to August 11, 1989; however, this time the advertisement required that applicants possess an RN degree.

17. Assistant director of nursing positions are generally filled by registered nurses. Complainant only saw the newspaper advertisement seeking registered nurse applicants for the ADON position.

18. Complainant did not formally apply for the ADON position because she assumed only registered nurses were eligible to apply.

19. Respondent accepted applications from individuals with registered nursing as well as licensed practical nursing degrees.

20. Respondent hired a white female, Cathy Easter, a licensed practical nurse, for the ADON position.

21. Respondent did not interview any internal or external applicants for the ADON position other than Cathy Easter.

22. Cathy Easter's job qualifications and work experience are described in her resume and job application.

23. Respondent did not rely solely upon Cathy Easter's resume and job application to assess her ability to perform the ADON position. Rather, respondent relied upon Jim Harris' personal knowledge of Cathy Easter's qualifications and prior work experience.

24. Respondent maintains that the complainant was considered for the ADON position insofar as it reviewed the complainant's personnel file to assess her qualifications for promotion to ADON. Complainant's job application, however, allowed only three lines to record her prior employers and provided no space to describe job duties and experience. Therefore, respondent was not personally and fully familiar with the complainant's prior extensive job experience.

25. Seniority was not considered in the decision to hire an ADON.

26. Complainant was eligible to apply for the ADON position.

27. Respondent did not consider complainant's favorable charge nurse job evaluation of August 11, 1989 as having any affect on complainant's promotability to the ADON position.

28. Complainant has performed or taught 19 of the 23 responsibilities described in the ADON job description. Complainant could have easily learned how to perform the four remaining responsibilities based on her education, teaching and job experiences.

29. Complainant has twelve years of nursing experience, compared with Ms. Easter's four years of experience. Complainant has three additional years of college education (one year paid by academic scholarship). She majored in accounting and business administration and finance. Furthermore, complainant received a certificate in pharmacology (for 94 hours of class work). In contrast, Cathy Easter has a vocational degree in nursing and is continuing her education to complete RN training. However, it is not known to what extent Ms. Easter has already pursued this goal. Ms. Easter's resume further indicated she had phlebotomy training.

30. Complainant has supervised LPNs, nursing assistants and orderlies. Mr. Harris did not testify concerning the type of employees Ms. Easter supervised.

31. Complainant also had extensive geriatric experience. At complainant's second job for CAMC-Memorial, she worked for two years on the medical/surgical unit and treated geriatric patients. Complainant also worked for five years on the medical/surgical ward at her third job for CAMC-General. During these five years, complainant also did private duty nursing for nursing homes and

hospitals. She testified that most of her patients were elderly. At Shawnee Hills, patient ages ranged from age 25 to age 55. For four years complainant was employed by Kanawha Valley Hospital, she worked on the medical/surgical ward treating geriatric patients.

32. Complainant was an instructor at Charleston Job Corps for three years. In this capacity, she taught nursing assistant, medical assistant, ward clerk, medical record, geriatric assistant, and home health aid students. At Job Corps, complainant taught health/occupational training, patient care, how to assist doctors with office duties and patient care, infection control, billing, nursing home and geriatric patient care. Ms. Easter had no comparable experience.

33. Jim Harris' conclusory testimony that Ms. Easter had the experience and knowledge doing everything needed for the ADON position is not supported by the evidence.

34. Complainant was more qualified for the position of ADON than Cathy Easter and was not accorded the same consideration as Ms. Easter in the selection process

35. Of the 14 of 15 LPNs employed by respondent, only the complainant and one part-time LPN are African American. Complainant is the only full-time African American.

36. Jim Harris treated African American employees and the complainant more harshly than white employees.

37. The parties stipulated that complainant is entitled to back wages if complainant established liability in the amount of \$8,645.00. Complainant is entitled to prejudgment interest on backwages in the amount of \$945.78 for a total of \$9,390.78.

38. Complainant was hurt and depressed as a result of respondent' discriminatory conduct.

39. Respondent testified that all of its employees have been entitled to health insurance benefits at no cost to the employees.

40. There is no evidence that the complainant incurred actual medical expenses because of respondent's discriminatory conduct.

DISCUSSION

The prohibitions against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act. WV Code §5-11-1 et seq. Section 5-11-9(a)(1) of the Act makes it unlawful "for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment..." (Emphasis supplied).

The term "discriminate" or "discrimination" as defined in WV Code §5-11-3(h) means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of race...."

Given this statutory framework, to recover against an employer on the basis of a violation of the Act, a person alleging to be a victim of unlawful race discrimination, or the Commission acting on her behalf, must ultimately show by a preponderance of the evidence that:

1. the employer excluded her from, or failed or refused to extend to her, an equal opportunity;
2. race was a motivating or substantial factor causing the employer to exclude the

complainant from, or fail or refuse to extend to her, and equal opportunity, Price Waterhouse v. Hopkins, 490 U.S.228, 104 L.Ed.2d 268, 109 S. Ct. 1775 (1989); and

3. the equal opportunity denied a complainant is related to any one of the following employment factors: compensation, hire, tenure, terms, conditions or privileges of employment.

There are three different analyses which may be applied in evaluating the evidence in a discrimination case. The first, and the one applicable to the case at bar, uses circumstantial evidence to prove discriminatory motive. Since discriminating employers usually hide their bias and stereotypes, making direct evidence unavailable, a complainant may show discriminatory intent by the three-step inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct.1817 (1973), and adopted by our supreme court in Shepherdstown V.F.D. v. State Human Rights Commission, ___WV___, 309 S.E.2d 342 (1983). The McDonnell Douglas method requires that the complainant or commission first establish a prima facie case of discrimination. The burden of production then shifts to respondent to articulate a legitimate, nondiscriminatory reason for its action. Finally, the complainant or commission must show that the reason proffered by respondent was not the true reason for the employment decision, but rather a pretext for discrimination. The term "pretext," as used in the McDonnell Douglas formula, has been held to mean "an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance; pretense." WV Institute of Technology v. Human Rights Commission, ___WV___, 383 S.E.2d 490, 496 (1989), citing Black's Law Dictionary, 1069 (5th ed. 1979). A proffered

reason is a pretext if it is not "the true reason for the decision." Conaway v. Eastern Associated Coal, ___WV___, 358 S.E.2d 423, 430 (1986).

Second, there is the "mixed motive" analysis. Even where an articulated legitimate, nondiscriminatory motive is shown by the respondent to be nonpretextual, but in fact a true motivating factor in an adverse action, a complainant may still prevail under the "mixed motive" analysis. This analysis was established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L.Ed. 2d 268, 109 S.Ct. 1775 (1989), and recognized by the West Virginia Supreme Court of Appeals in WV Institute of Technology v. WV Human Rights Commission, ___WV___, 383 S.E.2d 490, 496-97, n.11 (1989). If the complainant proves that her race played some role in the decision, the employer can avoid liability only by proving that it would have made the same decision even if it had not considered the complainant's race.

Finally, if it is available, a complainant or the commission may prove a case by direct evidence of discriminatory intent. Proof of this type shifts the burden to the respondent to provide by a preponderance of the evidence that it would have rejected the complainant even if it had not considered the illicit reason. Trans World Airlines v. Thurston, 469 U.S. 111, 36 F.E.P. Cases 977 (1975). This analysis is similar to that used in mixed motive cases.

Complainant has established, through circumstantial evidence, a prima facie case of race discrimination. Establishment of a prima facie case raised an inference that respondent has discriminated against complainant on the basis of her race.

In Conaway v. Eastern Associated Coal Corp., ___WV___, 358 S.E.2d 423 (1986), the West Virginia Supreme Court articulated a general prima facie test. The Conaway Court, however, noted that the test did not overrule, but was inclusive of, more specific tests concerning hiring or discharge. In Pride v. WV Human Rights Commission, ___WV___, 346 S.E.2d 356 (1986), the West Virginia Supreme Court articulated a specific failure to promote prima facie test.

The Conaway Court held that:

In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, WV Code §5-11-1 et seq. (1979), the plaintiff must offer proof of the following:

1. That the plaintiff is a member of a protected class;
2. That the employer made an adverse decision concerning the plaintiff; and
3. But for the plaintiff's protected status, the adverse decision would not have been made.

Conaway, 358 S.E.2d at 429.

In Conaway, the Court noted that although the first two parts of the test would be easily proved, the third would cause controversy. Conaway, 358 S.E.2d at 429. In describing the third part of the test, the Court stated:

What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion. This evidence could, for example, come in the

form of an admission by the employer, a case of unequal or disparate treatment between members of the protected class and others by the elimination of the apparent legitimate reasons for the decision, or statistics in a large operation which show that members of the protected class received substantially worse treatment than others.

Conaway, 358 S.E.2d at 429-30. [Emphasis supplied].

Complainant has clearly established a prima facie case of race discrimination based on respondent's failure to promote her to the ADON position.

First, complainant is a member of a protected class. She is an African American.

Second, there is no doubt that the complainant suffered an adverse employment decision by respondent. Respondent admitted through its agent, Jim Harris, the respondent's former director of nursing, that complainant was (unknown to her) considered for the ADON position but was not promoted, and thereafter respondent continued to accept applications from similarly qualified candidates.

Third, complainant has proven that "but for" the complainant's race she would have been promoted. This nexus was shown by complainant's evidence that she was denied an opportunity to formally apply for the ADON position and thereby fully and fairly convey her extensive job qualifications and experience to the respondent. If complainant had known respondent was accepting LPN applicants, she would have applied. Jim Harris admitted that, unknown to the complainant, he only reviewed her personnel file to determine whether she was qualified for the ADON position. In particular, Mr. Harris testified that he reviewed complainant's

charge nurse job application to determine her nursing licensure and job experience. He also stated that there was a space on complainant's job application to describe her job duties. In fact, there is no such space on complainant's application. Although Mr. Harris characterized his consideration of complainant for the ADON position as fair, it readily appears otherwise. In contrast to complainant, Cathy Easter, the white applicant hired for the job, was allowed to formally apply. As part of her formal application, Mr. Harris personally interviewed Ms. Easter. In fact, Mr. Harris admitted that of all applicants considered for the ADON position, Ms. Easter was the only one he interviewed. Furthermore, Jim Harris admitted that he relied on his personal knowledge of Ms. Easter's qualifications. Again, by limiting its consideration of complainant to her personnel file, respondent did not afford complainant the opportunity to convey her extensive qualifications to respondent.

Also, complainant demonstrated a nexus between respondent's decision not to promote her and complainant's race by proving that respondent did not follow its own guidelines for posting of job vacancies to seek internal applicants. Complainant convincingly and credibly testified that, during her three periods of employment with respondent, she had seen four or five job openings advertised on respondent's bulletin board. Complainant's testimony was corroborated by Diane Fitch who also testified that respondent had always required that job openings be posted, and by Virginia White's testimony that she remembered positions being posted on respondent's bulletin board. Ms. White further testified that she personally informed Jim Harris and Carolyn Mandela, several times, that they

should post the ADON position. She also testified that it was her understanding that the position had to be posted.

In contrast, Jim Harris' testimony that he was not aware of any vacancy postings while he was employed with respondent was simply not credible. It was directly refuted by complainant, Diane Fitch and Virginia White. Furthermore, respondent's witness, Randall Spears, directly contradicted the testimony of Jim Harris. Mr. Spears, testified that respondent posted dietary, laundry and transfer openings, but maintained that it did not post new openings. Mr. Spears then testified ambivalently that although respondent has never had a policy to post vacancies, it does post positions in order to treat people equally. Further, respondent's supplement to its employee handbook states that it shall be respondent's policy to promote from within whenever present employees are qualified and available and that whenever a position becomes available, the administrative office will usually post a notice of vacancy. This policy was corroborated by Carolyn Mandela's letter, dated November 27, 1989, to an investigator for the commission, in which she cites to Article I, and states that it is respondent's policy to "usually" post job openings. Complainant argues that this failure to follow guidelines or this exercise of discretion was intended to prevent complainant from formally applying for the ADON position.

Next, complainant demonstrated a nexus between respondent's decision not to promote her and complainant's race by presenting evidence that Jim Harris had racial animus toward African American employees. Complainant testified that Jim Harris would talk down to her and did not talk to her with respect. She stated that although

Jim Harris treated both black and white employees harshly, he treated black employees more severely than he did white employees. This testimony was corroborated by Diane Fitch, an African American, who stated that Jim Harris treated black employees in a racially, disparagingly and disparate manner. As an example, Ms. Fitch testified that Jim Harris would scream and yell at her whereas he would respond politely when questioned by a white employee. Complainant's evidence suggests that Jim Harris did not want to promote complainant to the ADON position because it would require that complainant and Mr. Harris work closely together.

Complainant demonstrated a nexus between respondent's decision not to promote her and complainant's race based on statistical evidence that complainant was the only full-time African American LPN employed by respondent and by demonstrating that African Americans are limited to certain jobs with respondent. Of the 12 to 14 LPNs employed by respondent, only two, Barbara Pegram and complainant, are African American. Of the two, complainant was the only full-time staff member. Furthermore, Jim Harris testified that of nine positions held by upper management only one position was held by an African American. The evidence further reveals that respondent hired African Americans only for certain types of jobs. Although the respondent employed one administrator, director of nursing, business manager, personnel director, laundry/housekeeping/maintenance staff, and social worker, African Americans were employed solely in the kitchen. Ms. Fitch, who was employed as a food service supervisor, testified that virtually the entire kitchen was comprised of black employees.

In conclusion and given the evidence as a whole, complainant has proved her prima facie case under Conaway, and is thereby entitled to an inference that respondent discriminated against her based on race.

The establishment of a prima facie case creates a "presumption that the employer unlawfully discriminated against" the complainant. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207, 101 S. Ct. 1089 (1981); Shepherdstown V.F.D. v. WV Human Rights Commission, ___WV___, 309 S.E.2d 342, 352 (1983). The circumstantial evidence of a "link" was sufficient that "the burden then shifted to the defendant...to rebut the presumption of discrimination by producing evidence that the [complainant] was rejected, or someone was preferred, for a legitimate, nondiscriminatory reason." Burdine, 450 U.S. at 254. Though the burden on respondent under this test is only one of production, not persuasion, to accomplish it a respondent "must clearly set forth through the introduction of admissible evidence the reason for the [complainant's] rejection." Burdine, 450 U.S. at 254. The explanation provided "must be clearly and reasonably specific," Burdine, 450 U.S. at 258, "must be legally sufficient to justify a judgment for the defendant," and it must be both legitimate and nondiscriminatory. Burdine, 450 U.S. at 254.

If the respondent clearly articulates a legitimate, nondiscriminatory reason for rejecting the complainant, "then the complainant [or the commission] has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for unlawful discrimination."

Shepherdstown, 309 S.E.2d at 352. The commission "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256.

Initially, respondent articulated several reasons for its actions. Respondent first argues that complainant "could have applied" but that since she did not apply, she "could not have been considered as a candidate." Respondent further asserted that newspaper advertisements advised applicants that LPNs were being considered. This argument is pretextual. First, it is completely contrary to respondent's position at trial that complainant was unbeknownst to her, fully and fairly considered for the ADON position by Jim Harris. Furthermore, the testimony of respondent's witnesses was not consistent with the evidence. At trial, Jim Harris testified that he originally advertised for RN applicants for the ADON position and only after that search proved unsuccessful did he then advertise for LPN applicants. In fact, the evidence proved otherwise. Respondent's first advertisement did not specify the required nursing licensure for the ADON position. The second advertisement, seeking RN applicants, ran three weeks later.

Complainant testified that she did not formally apply for the ADON position because she only saw the second advertisement and she thus assumed that only RN applicants need apply. Complainant would have formally applied had she known that respondent was accepting LPN applicants. Accordingly, respondent's assertion that complainant could have formally applied for the ADON position in response to the

advertisement in the Charleston Newspapers is not the true reason for its action. Respondent's true reason is that it did not want to promote complainant because of her race.

Respondent further maintained that it had no duty or past practice of promoting employees from within. Contrariwise, respondent's supplement to the employee handbook, states that, "It shall be respondent's policy to promote candidates from within." Complainant corroborated this when she testified that it was her understanding, as provided in the employee handbook and supplement, that respondent would promote candidates from within.

Respondent also argues that it had no duty to post job openings. However, complainant testified that she had seen respondent post job openings before. Complainant's two witnesses corroborated her testimony. In contrast, respondent's witnesses were not credible. Jim Harris said he had never posted a job opening. Yet, in his memo concerning the complainant dated September 5, 1989, Mr. Harris acknowledges it was respondent's usual policy to post job openings. This is also stated in Carolyn Mandela's letter to Paul Hamilton, dated November 27, 1989. Further, the testimony of Randall Spears, respondent's witness, contradicted that of Mr. Harris and was internally inconsistent. Mr. Spears testified that respondent posted dietary, laundry/housekeeping/maintenance, and transfers, but not new job openings. Then, he testified that respondent usually posted out of the kindness of its heart to assure equality of opportunity.

Again, respondent's assertion that it had no duty to post job openings is obviously not true, nor is it the real reason for failing to promote complainant.

Jim Harris stated that he ultimately hired Cathy Easter over complainant because she was more qualified than complainant. A comparison of the two applicants reveals that complainant's qualifications, overall, are superior to Ms. Easter's.

Complainant has twelve years of nursing experience, compared with Ms. Easter's four years of experience. Complainant has three additional years of college education (one year paid by academic scholarship). She majored in accounting and business administration and finance. Furthermore, complainant received a certificate in pharmacology (for 94 hours of class work). In contrast, Cathy Easter has a vocational degree in nursing and is continuing her education to complete RN training. However, it is not known to what extent Ms. Easter has already pursued this goal. Ms. Easter's resume further indicated she had phlebotomy training.

Complainant testified that she had supervised LPNs, nursing assistants and orderlies. Mr. Harris did not testify concerning the type of employees Ms. Easter supervised.

Complainant also had extensive geriatric experience. (It is worth noting that long-term care is not exclusively for geriatric patients.) At complainant's second job for CAMC-Memorial, she worked for two years on the medical/surgical unit and treated geriatric patients. Complainant also worked for five years on the medical/surgical ward at her third job for CAMC-General. During these five years, complainant also did private duty nursing for

nursing homes and hospitals. She testified that most of her patients were elderly. At Shawnee Hills, complainant testified that patients ranged from age 25 to age 55. Complainant also testified that for the four years she was employed by Kanawha Valley Hospital, she worked on the medical/surgical ward treating geriatric patients. In contrast, Ms. Easter has only four years of long-term care experience.

Finally, complainant testified that she was an instructor at Charleston Job Corps for three years. In this capacity, she taught nursing assistant, medical assistant, ward clerk, medical record, geriatric assistant, and home health and aid students. At Job Corps, complainant taught health/occupational training, patient care, infection control, billing, and nursing home and geriatric patient care. Ms. Easter had no comparable teaching experience.

Beyond this, complainant testified that she had experience with performing or teaching 19 of the 23 responsibilities listed in the ADON job description. Of the four remaining responsibilities, complainant testified that she could readily learn them. Complainant's assertion is quite reasonable given complainant's extensive educational background, teaching experience and job experience. Jim Harris' conclusory testimony that Ms. Easter had the experience and knowledge to do everything needed for the ADON position is in stark contrast to complainant's testimony and should not be accorded the same weight.

Mr. Harris testified that the complainant's job evaluation could only be used to evaluate complainant in her current position as charge nurse, but not to evaluate her promotion potential for the

ADON position. This reasoning defies logic and is obviously pretextual.

Complainant received an above average evaluation from Jim Harris on August 11, 1989. Complainant was three points short of receiving an outstanding evaluation and was rated as above average or outstanding in six out of seven criteria (including economy, judgement, planning, etc.). In the comments section of this evaluation, Mr. Harris noted that complainant has "good leadership qualities."

Logically, promotions are based, at least in part, on one's current job performance. How else would employees be promoted? Indeed, respondent's own policy states that performance evaluations will serve as a basis for promotions. Apparently, Mr. Harris promoted Ms. Easter based on his familiarity with her work performance but chose not to do this with complainant.

Again, respondent's asserted reason makes no sense and is pretext.

At the hearing, respondent articulated another reason for not promoting complainant. Jim Harris testified that, unknown to complainant, he reviewed complainant's personnel file to determine if she was qualified for the ADON position. The commission asserts that this reason is pretext.

First, this reason is contrary to respondent's earlier position that complainant never formally applied.

Second, the assertion that complainant was, in fact, considered for the ADON position is a recent claim and was not raised until this stage of the proceedings. Furthermore, this claim is directly

contradicted by respondent's earlier statements. For example, in respondent's supplemental answers to discovery, respondent provided an outline of Mr. Harris' anticipated testimony that "complainant could not have been considered as a candidate because of her lack of supervisory experience." In addition, in Carolyn Mandela's letter to Paul Hamilton, Human Rights Commission Investigator, dated November 27, 1989, she wrote that "complainant could have applied" because the opening was advertised and discussed in staff meetings. Finally, Jim Harris, in his memo dated September 5, 1989, quotes complainant's protest that she was not considered for the ADON position. Surely, if complainant had been considered for the ADON position, Mr. Harris would have mentioned it in the memo. He did not.

In general, estoppel will apply where one party has induced another to act or refrain from acting to her detriment by a misrepresentation or concealment of a material fact. Ara v. Erie Ins. Co., ___WV___, 387 S.E.2d 320 (1989). Specifically, estoppel has been invoked to prevent a litigant from asserting inconsistent factual positions in the course of a legal action. Dillon v. Board of Education, ___WV___, 301 S.E.2d 588 (1983); United States v. 198.73 Acres of Land, 800 F.2d 434 (4th Cir. 1986); Bloss v. Plymale, 3 WV 393 (1969).

Respondent's theory that complainant was considered for the ADON position flies in the face of its original assertion that complainant did not formally apply. Only now, at the hearing in this case, has respondent asserted that complainant was considered for the ADON position.

In determining which side to believe, it is up to the factfinder to assess the credibility of witnesses and the persuasiveness of the evidence. Westmoreland Coal Co. v. Human Rights Commission, ___WV___, 382 S.E.2d 562, 567, n.6.

The complainant, Virginia White and Diane Fitch testified credibly, consistently and convincingly as to respondent's policy on promoting from within, posting of job openings, complainant's qualifications, and Jim Harris' harsher treatment of African American employees compared to white employees. In contrast, the testimony of respondent's witnesses, Jim Harris and Randall Spears, was inconsistent and not believable.

Accordingly, the undersigned determines that, considering the evidence of the record as a whole and the demeanor of witnesses, the complainant has compellingly established respondent's articulated reasons to be pretextual and has sustained her claim by a preponderance of the evidence that respondent failed to promote her based on her race.

CONCLUSIONS OF LAW

1. The complainant, Mary Davis, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, WV Code §§5-1-3(a) and 5-11-10.

2. The respondent, Capital City Nursing Home, dba Triad Medical Services, is an employer as defined by WV Code §5-11-1 et

seq., and is subject to the provisions of the West Virginia Human Rights Act,

3. The complaint in this matter was properly and timely filed in accordance with WV Code §5-11-10. The amended complaint was also timely filed. It clarifies and amplifies the allegations contained in the original complaint. Thus, the amended complaint relates back in time to the filing of the original complaint.

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to WV Code §5-11-9 et seq.

5. Complainant has established a prima facie case of race discrimination.

6. The respondent has articulated legitimate nondiscriminatory reasons for its action toward the complainant, which the complainant has established, by a preponderance of the evidence, to be pretext for unlawful race discrimination.

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to backpay in the amount of \$8,645.00 plus compounded prejudgment interest at the statutory rate of \$945.78 for a total of \$9,390.78.

8. The complainant is entitled to reinstatement of any benefits she lost as a result of respondent's discriminatory conduct.

9. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of \$2,950.00 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of receipt of this decision, the respondent shall pay to the complainant \$9,390.78 as stated in Finding of Fact Number 37.

3. Within 31 days of receipt of this decision, the respondent shall reinstate any benefits complainant lost as a result of respondent's discriminatory conduct.

4. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of \$2,950.00 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

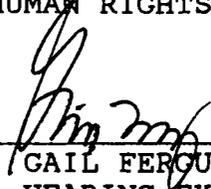
4. The respondent shall pay ten percent per annum interest on all monetary relief.

It is so **ORDERED**.

Entered this 17th day of November, 1992.

WV HUMAN RIGHTS COMMISSION

BY


GAIL FERGUSON
HEARING EXAMINER