



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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2 August 1990

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Re: Dennis Eye v. Union Carbide Corporation
Docket No. EH-641-82

Dear Parties and Counsel:

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 July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for a review of this Final Order.

Sincerely,

Quewanncoii C. Stephens
Executive Director

Enclosures

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

cc: Secretary of State

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed, is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code § 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DENNIS EYE,

Complainant,

v.

DOCKET NO. EH-641-82

UNION CARBIDE CORPORATION,

Respondent.

FINAL ORDER

This matter matured for public hearing on the 2nd and 3rd day of June 1987. The hearing was held at 405 Capitol Street, Daniel Boone Building, Fourth Floor Conference Room, Charleston, West Virginia. The hearing panel consisted of Theodore R. Dues, Jr., Hearing Examiner, and Jack McComas, Hearing Commissioner.

The complainant appeared in person and by his counsel, Mary Catherine Buchmelter. The respondent appeared by its representative, Fred McKenzie, and by its counsel, Gene Bailey and Charles Q. Gage.

On 5 April 1988 the hearing examiner submitted his recommended findings of fact, conclusions of law and proposed order.

On 16 March 1990 the Commission reviewed all recommendations and stipulations, as well as the exceptions filed in response thereto by the respondent, all communications received from the parties relative to said recommendations, and the briefs filed by

the parties addressing the impact on this matter of Chico Dairy Co. v. Human Rights Commission, 382 S.E.2d 75 (1989).

After a review of the record, any exhibits admitted into evidence, any stipulations entered into by the parties, any matters for which the examiner took judicial notice during the proceedings, assessing the credibility of the witnesses, and weighing the evidence in consideration of the same, the Commission makes the following findings of fact and conclusions of law. To the extent that these findings and conclusions are generally consistent to any proposed findings of fact and conclusions of law submitted by the parties, the same are adopted, and, conversely, to the extent the same are inconsistent to the findings and conclusions, they are rejected.

ISSUE

1. Is the complainant a qualified handicapped individual within the meaning of the West Virginia Human Rights Act?

2. If so, did the respondent unlawfully discriminate against the complainant because of his handicap, or fail to make reasonable accommodation for his handicap, in violation of the West Virginia Human Rights Act?

3. If so, to what relief is he entitled?

FINDINGS OF FACT

1. The complainant, Dennis Eye, was at all times relevant to this action, a resident and citizen of the State of West Virginia.

2. The complainant lost the use of his right eye at birth and currently has an artificial right eye.

3. In 1972, the complainant obtained his driver's license.

4. The complainant graduated from high school and attended Marshall University where he majored in recreation.

5. While attending Marshall University, the complainant was a part-time employee at a meat packing company where he loaded and unloaded company trucks. In addition, he was employed by the university's agricultural department in the pest control department.

6. The complainant ran track in college. He held several Marshall records as a runner. He also competed in Golden Gloves boxing from 1973 to 1976. In 1975, he was voted outstanding boxer in the Charleston Golden Gloves tournament.

7. In December 1976, the complainant graduated from college.

8. In 1977, complainant was employed on a civil engineering land survey crew for Urban Engineering in South Charleston. Mr. Eye took measurements and worked around heavy equipment and moving vehicles.

9. From 1978 to 1984, Mr. Eye was the assistant manager of the North Charleston Community Center. He was in charge of athletic leagues, swimming pool operation, and building and grounds maintenance. This job entailed a lot of climbing to change light bulbs, backboards, and ballasts. It also entailed roof work to repair heating and cooling systems and frequent leaks.

10. In or about February 1982, the complainant applied for employment with the respondent.

11. The complainant's first interview with respondent was on or about 18 March 1982, after which the complainant was called back for a second interview.

12. During the second interview, the complainant was advised by management that there were openings in the construction department. Mr. Eye interviewed for the position of general laborer. The duties of a general laborer are to clean restrooms, sweep, dig ditches, mix concrete, run errands, and clean work areas.

13. The complainant was requested to report for a physical examination.

14. Upon reporting for the physical examination, the complainant was seen by a nurse who performed certain preliminary medical checks; specifically, his blood pressure was taken and visual acuity and color blindness were checked. This was followed by an examination by a Dr. Avashia, then medical director at respondent's facility.

15. After he observed that the complainant had only one eye, Dr. Avashia did not perform any physical examination of the complainant.

16. Under the respondent's employment practice for new hires, it was not the province of the medical department to make employment determinations. The medical department was authorized only to render a medical opinion and recommendation on the issue of ability to work and any restriction under which an applicant must be placed if employed.

17. Dr. Avashia advised the complainant that Union Carbide could not hire him because he had only one eye.

18. The complainant requested to see a higher management individual or someone in charge. Acting upon that request, Dr. Avashia contacted the Employee Relation Liaison representative, Mr.

McKenzie. In response to the inquiry from Dr. Avashia, Mr. McKenzie contacted the craft manager and the construction manager. The aggregate time for the conversations between Mr. McKenzie and the two managers was less than fifteen minutes. After concluding conversations with the managers, Mr. McKenzie went to Dr. Avashia's office where he represented to the complainant that Carbide could not hire him.

19. Approximately three hundred seventy-five (375) laborers were hired by the respondent into its construction department from late 1981 to the completion of the relevant project in 1983.

20. It is not in dispute that persons were hired by the respondent for the construction department as laborers after the complainant's rejection.

21. Monocular, or one-eyed individuals, often have poor peripheral vision. However, Dr. Stephen Cassis, an ophthalmologist and witness for Union Carbide, affirmed that an individual who has been monocular since birth may compensate so that his peripheral vision becomes equivalent to that of a binocular person.

22. Dr. Thomas Griffith, an optometrist and witness for the complainant, testified that Dennis Eye has a full vision field in his left eye.

23. The area in which the complainant would have worked as a laborer was densely occupied by moving vehicles, other equipment, and employees. Mr. Eye testified that he has worked in similar environments such as a loading dock and a land survey site. He also faced and mastered peripheral vision challenges as a record-holding runner and a champion boxer. Dr. Cassis expressed trepidation about Mr. Eye's ability to function in this environment if he had to operate heavy equipment or climb at unguarded heights. Dr. Cassis did not examine Mr. Eye in order to assess his field of peripheral vision or the degree to which he possesses depth perception.

24. Dr. Cassis testified that persons like the complainant, who do not possess stereopsis, or the highest degree of depth perception, do not have the ability to perceive depth in three dimensions. However, monocular individuals do have some degree of depth perception. Some binocular individuals do not possess stereopsis, but Union Carbide does not measure the ability of binocular individuals to perceive three dimensions, nor does it require them to have stereopsis if they want to work as laborers. Average vision is satisfactory for persons hired as laborers in the chemical construction industry.

25. Although evidence suggests that the complainant cannot work safely at unguarded heights, the vast majority of a laborer's duties can be performed at ground level or from a ladder or scaffolding. Burl Bess, a Carbide Construction Department

assistant manager, testified that generally a laborer's duties involve cleaning restrooms, sweeping, digging ditches, mixing concrete, and transporting tools. The jobs that Mr. Bess described involving the operation of heavy equipment require special training and do not fall within the job description of a general laborer provided by Union Carbide. At times, craftsmen need laborers at unguarded heights to clean, but this activity is not part of the essential duties of a laborer enunciated by Mr. Bess or included in the job description. Although Dr. Cassis recommends that complainant not operate large vehicles, the vehicles operated by laborers are small enough under Dr. Cassis' guidelines for the complainant to operate. Carbide had fifty (50) to sixty (60) employees at the job site where Mr. Eye sought to work, and could have accommodated the restrictions on Mr. Eye's duties without disruption to the workplace.

26. If the complainant had been hired by the respondent, he would have been laid off no later than 29 April 1983, and would have earned approximately Twenty-Two Thousand Dollars (\$22,000.00) in wages during this period.

27. The complainant earned Fourteen Thousand Three Hundred Sixty-Two Dollars and Eighty-One Cents (\$14,362.81) in gross income from other employment during this period of time.

28. The complainant suffered mental pain and anguish as a result of the respondent's refusal to hire him.

ULTIMATE FINDINGS OF FACT

29. Complainant has a handicap that substantially limits a major life activity, employment.

30. In spite of his handicap, complainant could perform the essential duties required of a laborer.

31. Respondent intentionally discriminated against complainant because of his handicap, in violation of W. Va. Code § 5-11-9(a)(1), by rejecting him for the available position of general laborer.

DISCUSSION

A. COMPLAINANT HAS AN "ACTUAL EXISTING" HANDICAP AS REQUIRED BY CHICO DAIRY.

Because Carbide refused to hire Mr. Eye in 1982, he must prove that he had a "physical or mental impairment which substantially limits one or more of an individual's major life activities." W. Va. Code § 5-11-3(t). When Mr. Eye filed his complaint, the Commission had Interpretive Rule § 77-1-2.7 in effect, which expanded the definition of a handicapped person to include one who is "regarded" as having a handicap. Chico Dairy v. West Virginia

Human Rights Commission, 382 S.E.2d 75 (1989) invalidated this regulation as being improperly promulgated. This invalidation does not effect Mr. Eye's complaint.

Unlike in Chico Dairy, the complaint here did not maintain that the respondent discriminated against Mr. Eye because of a perceived handicap. Union Carbide discriminated against him because it feared that his "actual, existing handicap," monocularly, rather than its mere physical appearance, would effect his work. Chico Dairy, on the other hand, discriminated against Terrah Alfred only because of her appearance. This distinction between the acts of Union Carbide and Chico Dairy was specifically enunciated by the Supreme Court of Appeals in Chico Dairy:

Our holding in this case is narrow and compelled by two factors: (1) the complainant did not allege discrimination on account of her blindness in one eye, but, instead, solely on account of her employer's perception of her physical appearance and (2) at the time in controversy the legislature had decided not to protect against the mere perception of a handicap.

Chico Dairy, at 18.

Mr. Eye's complaint never alleged that the respondent concerned itself with his appearance. Respondent has always maintained that its concerns involved the impact that Mr. Eye's visual impairment would have on his performance. Therefore, the improperly

promulgated definition of handicap does not effect Mr. Eye's complaint and this case is not impacted by the Chico Dairy decision.

B. COMPLAINANT HAS A PHYSICAL IMPAIRMENT THAT "SUBSTANTIALLY LIMITS" EMPLOYMENT, A MAJOR LIFE ACTIVITY.

The record contains sufficient evidence to conclude that Mr. Eye's visual impairment fits within the 1982 definition of a handicap even though the hearing examiner relied upon pre-Chico Dairy rules in reaching his decision.

The Supreme Court of Appeals has held that because the Human Rights Act, as effective in 1982, did not define the terms in § 5-11-3(t), the Human Rights Commission rules may provide guidance in determining the standard that § 5-11-3(t) sets. Benjamin R. v. Orkin Exterminating Company, 390 S.E.2d 814 (1990). Mr. Eye's disability clearly fits the rules' definition of physical impairment: "Physical or Mental Impairment includes but is not limited to such diseases and conditions as orthopedic, visual, speech and hearing impairments." 6 WVCSR § 77-1-2.4.

Because Mr. Eye has made such a superlative effort to compensate for his disability, at first glance one might conclude that his impairment does not fit the category of substantially limiting major life activities. However, the definitions of these terms reveal that Mr. Eye's impairment does indeed fit within the

category of disabilities that the legislature wanted to encompass. 6 WVCSR § 77-1-2.5 includes employment in its definition of "major life activities." Evidence presented by the respondent at the hearing revealed that monocular persons cannot enlist in the Armed Forces, operate a vehicle in interstate commerce, or work at unguarded heights. Mr. Eye testified that he had not yet encountered limitations on his employment prospects, but because of his preference and training for physical types of employment, these restrictions do limit his employment options even more than they would for the average monocular individual. A monocular lawyer, for example, would not find many options in his line of work that fall into the above categories.

Moreover, the definition of "substantially limits" indicates that evidence in the record does not have to show that Mr. Eye's employment options are severely limited in order to qualify him as a handicapped person. 6 WVCSR § 77-1-2.6. defines "substantially limits" as follows: "Means interferes with or affects over a substantial period of time. Minor temporary ailments or injuries shall not be considered physical or mental impairments which substantially limit a person's major life activities. Examples of minor temporary ailments are colds or flu, or sprains or minor injuries." The definition suggests that "substantially" simply refers to the time span of a handicap, and Mr. Eye's disability is permanent. In conclusion, the complainant clearly established at the hearing that his visual impairment has limited his employment opportunities over a substantial period of time. Therefore, he is

a handicapped person according to the 1983 definition of the Human Rights Act.

C. COMPLAINANT POSSESSES THE SKILLS TO PERFORM THE
JOB OF LABORER WITH REASONABLE ACCOMMODATION
BY THE EMPLOYER.

In order to establish a prima facie case of discrimination the complainant must prove that he (1) meets the definition of a handicap, (2) possesses enough skill to perform the job with reasonable accommodation, and (3) applied for the job and was rejected. Ranger Fuel Corporation v. Human Rights Commission, 376 S.E.2d 154 (1988). The parties do not disagree about the latter, and Part B concerns the first requirement. The complainant also established that he could perform the job with reasonable accommodation by the employer.

Union Carbide contended that moving vehicles in the workplace and the number of duties at unguarded heights make reasonable accommodation of the complainant's disability impossible. Due to the complainant's stereopsis, or lack of three-dimensional depth perception, the evidence presented suggests that he cannot climb safely at unguarded heights. However, the vast majority of a laborer's tasks take place at ground level, and respondent could simply assign him tasks that do not involve climbing. Respondent's fears that Mr. Eye cannot perform a job around moving vehicles and considerable activity are unfounded. Mr. Eye is a champion Golden Gloves boxer, and he had worked in several environments that

contain high activity levels and moving vehicles. He established that his condition has never compromised safety or caused an accident previously.

Respondent's concern regarding the operation of company vehicles is also unsupported. Union Carbide's expert testified that Mr. Eye could safely operate smaller vehicles (Tr. 120), and Union Carbide manager Burl Bess testified that laborers usually drive only smaller vehicles. Mr. Eye has operated vehicles safely in his previous jobs, and the evidence suggests that he could operate company vehicles with no materially increased risk.

In Coffman v. West Virginia Board of Regents, 386 S.E.2d 1, 4 (1988), the West Virginia Supreme Court of Appeals stated that an employer does not have to modify the "essential functions" of a position to accommodate an employee. The complainant clearly established that climbing at unguarded heights is not an "essential function" of the laborer's job within the meaning of Coffman. West Virginia University Hospital modified Dorothy Coffman's custodial position so that she did not have to bend, an activity that her duties normally required half of the time. Coffman, at 4. Here, however, according to the job description and the evidence, climbing at unguarded heights is only a small part of a laborer's duties. Most of the examples of climbing at the job site cited by Mr. Bess involve laborers who are in specialized positions rather than general laborers. The essential duties of a general laborer

that Mr. Bess describes are ground level duties such as sweeping, mixing concrete, and running errands. (Tr. 94-95).

Although laborers on a Union Carbide job site can perform duties at unguarded heights, the day-to-day, essential duties of the general laborer are within Mr. Eye's capabilities. Union Carbide had more than sufficient personnel on hand so that it would not suffer undue hardship if it simply avoided assigning Mr. Eye to duties performed at unguarded heights.

D. UNION CARBIDE FAILED TO REBUT MR. EYE'S PRIMA FACIE CASE OF DISCRIMINATION.

Once a complainant establishes a prima facie case of discrimination, the burden shifts to the respondent to rebut the case with a legitimate reason, supported by objective criteria, for the complainant's rejection. Ranger Fuel, 376 S.E.2d at 160. Respondent had to show that Mr. Eye would have created a "reasonable probability of a materially enhanced risk of substantial harm" to himself or to his colleagues. Ibid. Carbide failed to prove that complainant's employment at ground level would create a risk. The evidence of record is clear that the complainant has overcome major hurdles in adapting to his handicap. Specifically, the complainant has established that he is capable of operating a motor vehicle upon busy city streets, working at a meat packing plant unloading and loading products and undertaking the performance of other positions and activities which would

indicate that he is capable of performing within the physical constraints of the plant and within the parameters of his job responsibility as long as he is not assigned work to perform at unguarded heights.

We must also note with concern the manner in which Carbide made the decision to reject Mr. Eye. The law requires that such a decision be based on the gathering of substantial information, including "competent medical testimony" and "objective medical evidence" rather than a "subjective evaluation" or "merely on medical reports." Davidson v. Shoney's Big Boy Restaurant, 380 S.E.2d 232, 237 (1989) (quoting Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir. 1985)). In addition, the employer's judgment "must be individualized 'based on a consideration of the job requirement in light of the [individual's] handicap, and the [individual's] work history.'" 380 S.E.2d at 237 (quoting Ranger Fuel, 376 S.E.2d at 160).

Here, when Dr. Avashia found out that the complainant had only one eye, he immediately told him that respondent could not hire him, in spite of the absence of an official policy or precedent on visually impaired applicants. After consulting a supervisor at Mr. Eye's request, respondent took only ten to fifteen minutes to decide that Mr. Eye could not perform the job. Carbide could not prove that it gathered substantial information on Mr. Eye's capabilities or his monocularly.

E. RESPONDENT FAILED TO DEMONSTRATE THAT BINOCULARITY IS A BONA FIDE OCCUPATIONAL QUALIFICATION.

Respondent failed to demonstrate that binocularity and stereopsis are bona fide occupational qualifications for the position of laborer. Most significantly, Union Carbide did not perform tests on all workers to determine whether they possessed stereopsis. Evidence presented suggested that binocular persons can also lack stereopsis.

Respondent also failed to prove that climbing at unguarded heights is an essential part of the laborer's job, a key requirement for a bona fide occupational qualification. See, Dothard v. Rawlinson, 433 U.S. 321 (1977).

CONCLUSIONS OF LAW

1. The respondent is an employer within the meaning of W. Va. Code § 5-11-3(d).

2. The complainant is a citizen of the State of West Virginia and a person within the meaning of W. Va. Code § 5-11-3(a).

3. The West Virginia Human Rights Act is violated when an employer refuses to hire a handicapped person, and such decision is not based on reasoned and medically sound judgment and is not

substantiated by objective medical evidence showing that the handicapped person is not able and competent to perform the duties in question.

4. The complainant made a prima facie case showing that respondent unlawfully discriminated against him because of his handicap.

5. The respondent failed to meet its subsequent burden of proof that hiring Mr. Eye would have created a reasonable probability of a materially enhanced risk to him or others.

6. The respondent failed to establish that binocularity is a bona fide occupational qualification for a laborer.

7. Having proven that Union Carbide violated the Human Rights Act, the complainant is entitled to damages for loss of pay in the amount of Seven Thousand Six Hundred Thirty-Seven Dollars and Nineteen Cents (\$7,637.17).

8. The complainant is entitled to incidental damages in the amount of Two Thousand Five Hundred Dollars (\$2,500.00).

9. The complainant is entitled to prejudgment interest on his lost wages at the statutory rate of ten percent (10%) per annum, to accrue commencing with the last day of each calendar

quarter of the back pay period, on the total amount then due and owing.

10. The record reflects that persons hired during the complainant's application period have been laid off and not recalled. Therefore, the Commission does not order reinstatement in this matter.

ORDER

Accordingly, it is the Order of the Commission that judgment be entered in favor of the complainant and that the following relief be granted:

1. Back pay be awarded to the complainant (with ten percent prejudgment interest to be calculated at the last day of each calendar quarter of the back pay period, on the total amount then due and owing) in the amount of Seven Thousand Six Hundred Thirty-Seven Dollars and Nineteen Cents (\$7,637.19).

2. That the complainant be awarded incidental damages in the amount of Two Thousand Five Hundred Dollars (\$2,500.00).

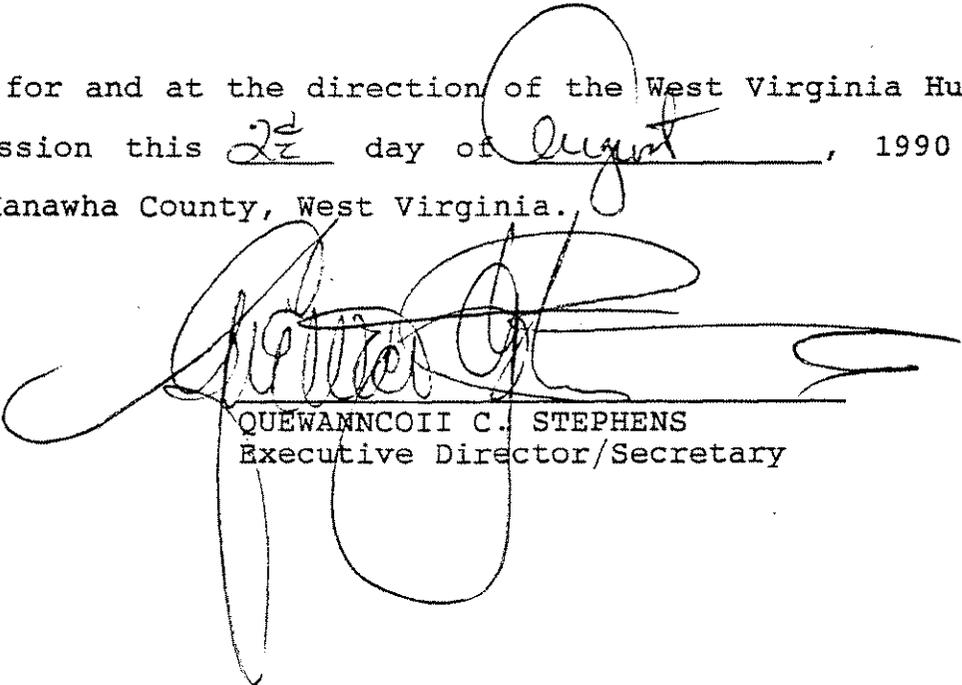
3. That a cease and desist order issue directing the respondent to discontinue any further unlawful handicap discrimination in its hiring practices.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 22^d day of August, 1990 in Charleston, Kanawha County, West Virginia.



QUEWANNCOLL C. STEPHENS
Executive Director/Secretary