



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

8 August 1991

Larry W. Given
1555 Lewis Street, Apt. 2
Charleston, WV 25302

Civic Center Holiday Inn
100 Civic Center Drive
Charleston, WV 25302

Kevin A. Nelson, Esquire
Kay, Casto, Chaney, Love & Wise
Post Office Box 2031
Charleston, WV 25327

Lawrence Deringer
Personnel Manager
Columbia Sussex Corporation
207 Grandview Drive
Fort Mitchell, KY 41017-2799

Mary Catherine Buchmelter
Deputy Attorney General
812 Quarrier Street, 5th Floor
Charleston, WV 25301

Re: Given v. Holiday Inn Civic Center
Docket No. ES-629-87

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled and numbered case. Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 1990, 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 review of this Final Order.

Sincerely,

QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

QCS/jm
Enclosures
Certified Mail/Return
Receipt Requested
cc: The Honorable Ken Hechler
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

LARRY W. GIVEN,
Complainant,

v.

DOCKET NO. ES-629-87

HOLIDAY INN CIVIC CENTER,
Respondent.

FINAL ORDER

On June 12, 1991, the West Virginia Human Rights Commission reviewed the recommended findings of fact and conclusions of law as set forth in the Recommended Decision of the Hearing Examiner filed in the above-styled action by Hearing Examiner Gail Ferguson. After consideration of the aforementioned Recommended Decision, and after a thorough review of the transcript of record, arguments and briefs of counsel, the Commission decided to, and does hereby, adopt said Recommended Decision of the Hearing Examiner as its own, encompassing the findings of fact and conclusions of law set forth therein, without modification or amendment.

It is, therefore, ADJUDGED, ORDERED, and DECREED that the Recommended Decision of the Hearing Examiner, encompassing findings of fact and conclusions of law, be attached hereto as this Commission's Final Order, and that a result thereof

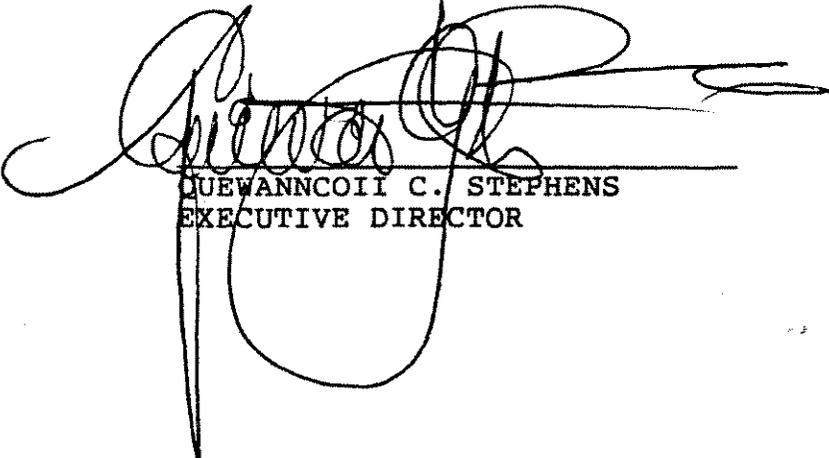
the complaint filed in this matter by Larry W. Given be, and the same is hereby DISMISSED with prejudice.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State, the parties are hereby notified that they have ten (10) days from the date of receipt of this Final Order to request that the Human Rights Commission reconsider this Final Order, or 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 8th day of August, 1991 in Charleston, Kanawha County, West Virginia.



QUEWANNCOLL C. STEPHENS
EXECUTIVE DIRECTOR

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

LARRY W. GIVEN,

Complainant,

v.

DOCKET NUMBER: ES-629-87

COLUMBIA SUSSEX, INC.,
DBA HOLIDAY INN CIVIC CENTER,

Respondent.

HEARING EXAMINER'S RECOMMENDED DECISION

A public hearing, in the above-captioned matter, was convened on December 8, 1988, in Kanawha County, at the office of the West Virginia Human Rights Commission, 1036 Quarrier St., Charleston, WV 25301, before Gail Ferguson, Hearing Examiner.

The complainant, Larry W. Given, appeared in person and by counsel, Deborah E. Reed, Assistant Attorney General. The respondent, Columbia Sussex, Inc., dba Holiday Inn Civic Center, was represented by William Swope, District Manager and by counsel, Kevin Nelson, 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.

FINDINGS OF FACT

1. The complainant, Larry W. Given, is a male.

2. Respondent, Columbia Sussex, Inc., owns and operates a chain of Holiday Inns in Charleston, West Virginia, which provide lodging, entertainment and various personal services for the public. They are: the Charleston House; the Civic Center; and the Heart of Town.

3. Since graduating from West Virginia State College in 1979, the complainant had held, at the time that he applied for employment with the respondent, four jobs.

4. Upon graduation, the complainant was initially employed at Sincerely Yours, where he answered a telephone switchboard, a duty similar to that performed by a hotel desk clerk.

5. Complainant was discharged from this position after approximately three months of employment.

6. Complainant was next employed, for five months, at the El Rancho Motel. Complainant performed the duties of a desk clerk at the El Rancho on weekends.

7. In March, 1983, complainant obtained part-time employment at the Charleston Civic Center as a ticket taker. He left this job in May, 1985.

8. Finally, complainant was subsequently employed at a Foodland grocery store as a cashier from March 1985 through October 1986.

9. In late May, 1987, the manager of respondent's Civic Center Holiday Inn facility was transferred to another property operated by respondent. The front desk manager of the Civic Center Holiday Inn was also transferred. This resulted in two openings at the Civic Center location: the manager's position, and a front desk position.

10. In accordance with respondent's policy, William Swope, district manager of the area that included the Civic Center Holiday Inn, assumed the managerial oversight of the Civic Center Holiday Inn until a new manager was hired. Among these duties was the hiring of individuals to fill the vacant positions at the Civic Center Holiday Inn.

11. As part of the effort to obtain a desk clerk, Swope directed Lisa Ward, the bookkeeper at the Civic Center Holiday Inn, to place an advertisement in the Charleston newspapers. The advertisement ran June 2 through 4, 1987, and read as follows:

"The Holiday Inn Civic Center has openings for front desk clerk. Good benefits. Apply in person only."

12. According to the respondent, before the advertisement ran, Swope decided to fill the full-time desk clerk vacancy at the Civic Center Holiday Inn through an internal transfer of one of its

employees. Swope reassigned Maureen Babcock, a van driver at the Charleston House Holiday Inn, who had become apprehensive about driving following a van accident, to the position of desk clerk.

13. No full-time desk clerks have been hired to work at the Civic Center Holiday Inn since Babcock was transferred.

14. On June 5, 1987, Paula Rosenberg, a full-time college student, was hired by respondent's manager, Swope, for summer employment as a part-time desk clerk. Although Rosenberg applied at the Charleston House location, she was used on an as needed basis at respondent's Civic Center location. On August 18, 1987, Rosenberg left the employ of respondent to return to school.

15. The complainant submitted an application for employment at the Civic Center Holiday Inn on June 5, 1987, after the position had been filled by Babcock. The application was submitted in response to the advertisement in the Charleston newspapers.

16. After submitting his application, the complainant asked Jill Ramsey, a desk clerk at the Civic Center Holiday Inn, why he had never been granted an interview pursuant to his previous applications there. Ramsey responded that she did not know why he had not been interviewed previously, but that she believed that her manager was interested in hiring a female. The manager to whom Ramsey was referring was Richard Easton, the manager who had left the Civic Center Holiday Inn in late May, 1987, and not the acting manager in June 1987, Bill Swope.

17. According to Ramsey, she formed this opinion because Easter had asked her in the past if she had any girlfriends who were

interested in working and not because she had been told by management that only a females would be hired as desk clerks.

18. Ramsey had no input into the hiring decisions made at Civic Center Holiday Inn, and the complainant was not given the impression that she had such a role at the hotel.

19. The respondent had the same number of males (three) as females (three) employed as desk clerks on June 5, 1987, when the complainant submitted his application for employment.

20. The starting salary for desk clerks of respondent's in June 1987 was \$3.50 per hour.

21. After submitting his application to respondent, the complainant obtained employment at the Video Mall and Rite Aid. His total earnings for 1987 were \$2,363.58. All amounts were earned after June 5, 1987.

22. Complainant continued working at the Video Mall in 1988, until he began full-time employment at Chilton Research beginning on July 25, 1988. His starting hourly wage at Chilton Research was \$4.25 per hour, which was subsequently raised to \$4.50 per hour in September, 1988.

DISCUSSION

Judicial precedent has established that a prima facie case of discrimination can be proven by direct or circumstantial evidence, or by a combination of evidence. McDonnell Douglas Corp. v. Green, 411 U.S. 792; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248; State ex rel. State of West Virginia Human Rights Commission v.

Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d 77 (1985);
Shepherdstown VFD v. WVHRC, 309 S.E.2d (1983).

Under the McDonnell Douglas formula, a prima facie case of unlawful failure to hire can be established by showing: (a) the complainant belongs to a protected class; (b) the complainant was qualified for the job which the employer was seeking applicants; (c) that despite his overall qualifications, the complainant was rejected for the job; and (d) that after the complainant's rejection, the job remained open and the employer continued to seek applications from persons of complainant's qualifications. Shepherdstown, supra. As the West Virginia Supreme Court of Appeals has pointed out, the requirements of the McDonnell Douglas prima facie case are not inflexible and must be tailored to each factual situation.

If the complainant established a prima facie case under McDonnell Douglas, the burden shifts to the employer to rebut the presumption of discrimination by articulating a legitimate nondiscriminatory reason for its actions. The employer need not prove the legitimate nondiscriminatory reason but must only articulate it. It is sufficient if the respondent's evidence raises a genuine issue of fact as to whether or not it discriminated illegally against the complainant. Shepherdstown, supra; Furnco Construction v. Waters, 438 U.S. 567 (1978).

If the employer articulates a legitimate nondiscriminatory reason for its actions, the complainant may still prevail by persuading the trier of facts that a discriminatory reason more likely than not motivated the employer, or indirectly by showing that the employer's explanation is a pretext and unworthy of credence.

The ultimate burden of proof always rests on the complainant. McDonnell Douglas Corp., supra.

The complainant, in the case at bar, has not met his burden of establishing a prima facie case of sex discrimination. Although the complainant's class membership is undisputed; and the complainant has presented evidence that there was an advertised opening for a front desk clerk placed in the newspaper by respondent; which he applied in person for, the issues of whether the complainant has established his qualification for the position as well as whether in fact the advertised desk clerk position was available become pivotal areas of inquiry.

The complainant maintains that he had previously worked as a desk clerk and in similar positions, thereby evidencing his qualification for the position in issue. The respondent, on the other hand, argues that what an employer may consider in determining qualifications is an applicant's work history, and that complainant's work history is replete with short term jobs, with limited experience as a desk clerk, and significantly, with a termination from a prior position, which the complainant omitted from his application and resume for employment with respondent. The respondent concludes, therefore, that complainant did not meet the qualifications for any position and that it should not have been compelled to hire him. Lee v. National Coal Corp., 699 F.2d 932 (7th Cir. 1983). While respondent's argument might have some merit in an appropriate set of circumstances, under the instant facts, it is unpersuasive. This is because the respondent did not review the

application of the complainant or weigh these articulated factors prior to the time it made its employment decision.

Further, it is unclear under the holdings of Shepherdstown and Logan whether the term "qualifications" for a position, at the prima facie stage, requires any more than a showing by the complainant of the actual skills or ability possessed by that individual in relationship to those needed for the job in question.

Resolving this uncertainty in the complainant's favor, the complainant has established that he was qualified for the advertised position, given his prior experience as a desk clerk. The complainant must next prove that after he applied that he was rejected; and that the respondent continued to seek applicants possessing his qualifications outside the protected class. The complainant has failed to satisfy these requirements. The evidence of record reveals that the complainant applied for a desk clerk position on June 5, 1987, in response to an advertisement that ran in the Charleston newspapers:

"The Holiday Inn Civic Center has openings for front desk clerk. Good benefits. Apply in person only."

However, credible evidence was presented that in late May before the advertisement ran and before the complainant's application was submitted, that the position in issue was filled by respondent through a transfer of one of its employees from its Charleston House location to the Civic Center. The complainant does not dispute the validity of the transfer. The complainant focuses instead on respondent's action in hiring Paula Rosenberg, a female desk clerk on

June 5, 1987, the date he submitted his application in response to the newspaper advertisement.

Unrebutted evidence of record supports a finding that the advertised desk clerk position in issue was full-time and that Rosenberg, a full-time student, who applied for a summer position, was hired by respondent and worked as a part-time desk clerk, on an as needs basis through August of 1987. In summary, Rosenberg was not hired instead of the complainant. They were applicants for two different job positions. Complainant has not established a prima facie case.

The complainant alternatively argues that the gender based discriminatory animus of the respondent was manifested by the comment of one of respondent's representatives, Jill Ramsey, made at the time the complainant submitted his application. At that time, the complainant asked Ramsey why he had never been granted an interview based on past applications he had filed. Ramsey responded that she believed that her manager was interested in hiring females.

However, the overwhelming weight of the evidence reveals that Ramsey, a desk clerk, who had no input into the hiring practice of respondent formed this opinion based on a query by a former manager (not the manager at the time the complainant applied) as to whether she had any girlfriends who were interested in work.

Finally, the evidence of record reveals that respondent did hire both men and women as full-time desk clerks, and did, in fact, employ three of each gender at the time the complainant applied. The complainant did not offer any statistical data to support a disparity in respondent's hiring practices based on sex. The complainant has

failed to establish the requisite elements of a prima facie case based on disparate treatment, and has failed to produce any other direct or circumstantial evidence establishing by a preponderance of the evidence unlawful sex discrimination by respondent.

CONCLUSIONS OF LAW

1. The complainant is, and has been at all relevant times, a citizen and resident of the State of West Virginia. The West Virginia Human Rights Commission has jurisdiction over the parties herein.

2. The respondent, Columbia Sussex, Inc., dba Holiday Inn Civic Center, is, and has been at all relevant times herein, an employer within the meaning of WV Code §5-11-3(d) and §5-11-9(a).

3. On July 24, 1987, a verified complaint executed by the complainant was timely filed under the terms of the commission's rules, section 3.05(d)(3).

4. The West Virginia Human Rights Commission has jurisdiction over the parties and the subject matter of this action pursuant to WV Code §5-11-8 through §5-11-10.

5. The complainant has not established a prima facie case of sex discrimination.

ORDER

Pursuant to the above findings of fact and conclusions of law, it is the recommendation of the undersigned examiner that this case be dismissed with prejudice and be closed.

Entered this 15th day of March, 1991.

WV HUMAN RIGHTS COMMISSION

BY



GAIL FERGUSON
HEARING EXAMINER