



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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**CERTIFIED MAIL
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April 22, 1996

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Re: Gum v. AFL-CIO Millwright Local 1755
EA-66-92A

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge 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 administrative law judge'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 judge, 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 administrative law judge shall not operate as a stay of the decision of the administrative law judge 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 administrative law judge, or an order remanding the matter for further proceedings before a administrative law judge, 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 administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge'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;

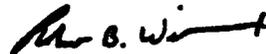
10.8.4. Supported by substantial evidence on the whole record; or

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 administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge'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,



Robert B. Wilson
Administrative Law Judge

RW/mst

Enclosure

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

PAUL R. GUM,

Complainant,

v.

DOCKET NUMBER: EA-66-92A

AFL-CIO MILLWRIGHT LOCAL 1755,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on January 30, 1996, in Wood County, at the Municipal Building, in Parkersburg, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, Paul R. Gum, appeared in person and by counsel, Paul R. Sheridan, Senior Assistant Attorney General. The respondent, AFL-CIO Millwright Local 1755, appeared by its representative, Mark Estlack, Business Manager and by counsel, Carl E. Hostler.

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 administrative law judge 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.

A.

FINDINGS OF FACT

1. Respondent, Millwright Local 1755, is an unincorporated labor organization based in Parkersburg, West Virginia. Its membership consists of crafts people performing construction work for contractors in an industrial setting. A millwright is a person who installs, aligns and maintains heavy machinery and components in powerhouses, chemical plants, locks and dams, and manufacturing facilities. At the time relevant to this matter, the geographic territory of the respondent local included western West Virginia and a small portion of Ohio centered in Steubenville, Ohio. The membership is approximately 300 members.

2. Complainant, Paul R. Gum, was born on April 10, 1927. At the time the alleged incidents of discrimination occurred around February, 1991, the complainant was 63 years old. Since 1985, and at all times relevant to this matter, the complainant was a member of the respondent local. Complainant was a millwright for 43 years.

3. Respondent is a craft union which operates a hiring hall referral list.

4. Mark Estlack was the respondent's representative at hearing and its chief witness. He was the assistant business manager, also known as business agent, from September 1981 to February 1991, and the business manager from February 1991 to the present. Mr. Estlack handled the referrals of millwrights for the periods relevant to this case.

5. Respondent's referral list is established by contract. The Union Local maintains a referral list of union members. The union members sign the list any time they do not have a job. At times relevant hereto, the names of union members were taken off the list at any time they worked at least 80 hours in a job in the zone in which they lived, or if they refused to accept a job to which they had been referred in zone. If workers were working outside of their zone, or if they were laid off in zone before completing 80 hours, their name stayed on the list. The referral list is revised as needed.

6. Referrals are made sequentially from the referral list. Exceptions to this rule include where a contractor requests a specific foreman by name, selection of the job steward by the business agent, and appointment of apprentices based upon a set formula.

7. The contract between the Contractor and the Millwright's Local 1755 contained the following provision: "When the employer states bona fide requirements for special skills and abilities in his requests for applicants, the business manager shall refer the first applicant on the register possessing such skills and abilities."

8. Mr. Estlack stated that in making referrals he would go down the list and pick the first man on the list who possessed the requested special skill. Although Mr. Estlack testified that he did not call and ask each man on the list sequentially if they had the particular skill, his handwritten notes on the referral list utilized at the time of the alleged failure to refer complainant, indicate that other millwrights on the list had been called and turned down the work because they felt they were not qualified. Testimony of Harold Ullum, the business manager for Millwright Local 1755 between 1983 and 1991, was that each member qualifies himself for the job and that if complainant had told him he was qualified, he would refer him to the employer.

9. Mr. "Sonny" Ross was the field superintendent for Bechtel Construction Company on the Beechhurst cogeneration project at Morgantown, West Virginia. On February 22, 1991 he made a request for

manpower to the Millwright Local, which is the subject of the complaint filed by complainant in this action. The records indicate that two requests were faxed, one for two journeymen experienced in reading precision electronic level and one foreman. The second was the one which Mr. Estlack testified he filled from the list. It was for a journeyman experienced in using a precision electronic level, a welder to certify on one inch plate and foreman "Jeff Kracun".

10. Ron Workman, age 54; Jeff Kracun, age 30; and John Henderson, age 51, were referred by Mr. Estlack and started work for Bechtel on February 25, 1991. Complainant was higher on the list than each of those selected.

11. Mr. Estlack's testimony indicates that his testimony regarding specifics about the referral at issue is not based on independent recollection. Therefore, his testimony regarding specific events he contends transpired regarding those members on the list which the notes on the list itself indicate had been contacted in regards to filling the manpower request is not deemed credible.

12. The complainant testified credibly that he was spending much of his time in Morgantown, West Virginia where his daughter was having a complicated pregnancy. While there he ran into fellow Millwright Local member, Mike Collins who informed him that Bechtel was hiring. As a result, the complainant telephoned Mr. Estlack on February 23, 1991 in the evening and asked him about a job with Bechtel. The complainant testified credibly that Mr. Estlack told him that he

wanted "younger qualified men". He further testified credibly that Mr. Estlack indicated that the necessary workers had already been referred and that Mr. Estlack did not ask him if he were qualified to operate an electronic level or could certify as a welder on one inch plate.

13. Mr. Estlack denied telling complainant that only younger workers would be hired by Bechtel or that he conspired with Bechtel to deprive complainant of work on the basis of age.

14. Complainant testified that he was upset when he was told he was too old for the Bechtel job.

15. Complainant almost immediately hired a lawyer and shortly thereafter received a referral to a job at the Harrison Power Station beginning March 10, 1991 and lasting between three and four weeks.

16. The practice in the industry is to have each welder referred by the Union Local tested on site by the contractor to verify their ability. As to precision electronic level operators, they are evaluated based upon their performance on site. Mr. Ross testified that approximately 25% of the time welders have to be rejected after testing and another referral requested when someone does not meet the special skills required standards. Again if the precision electronic level operator is not sufficiently skilled they are let go and another referral is made. Although specific training for these skills is

periodically available to members, abilities are mostly developed through on the job experience and not through training.

17. Agents of the respondent testified credibly that there is a concern that the excessive referral of insufficiently skilled members in response to these special skills requests by the contractor results in significant cost and inconvenience to the contractor. This in turn creates loss of competitiveness with other trade unions such as boilermakers, construction, etc. which are in competition for the work at these construction projects.

18. Although testimony of others establishes that members are permitted to self select for special skills requests, it is found that Mr. Estlack considered it to be his province to make the determination as to the qualifications of the various Millwrights' Local's members who possessed the skills needed for the the special skills requests at issue in the referral alleged in the complaint in this matter. In selecting Mr. Workman and Mr. Henderson from lower on the list than the complainant, Mr. Estlack did so based upon his assessment that these individuals possessed the skills to certify on one inch steel for welding and to operate a precision electronic level; while Mr. Kracun was selected by name, probably based upon Mr. Estlack's recommendation to Mr. Ross that he would make a good foreman.

19. The complainant testified credibly that he has in the past operated a precision electronic level while a member at another local of the Millwrights.

20. Complainant did not have a reputation for either welding or operation of a precision electronic level at the respondent Union Local.

B.

DISCUSSION

West Virginia Code §5-11-9(3) makes it unlawful "for any labor organization because of ... age, ... to deny full and equal membership rights to any individual or otherwise to discriminate against such individual with respect to hire, tenure, terms, conditions or privileges of employment or any other matter, directly or indirectly related to employment;..." The complainant has alleged that he was discriminated against on the basis of age by the respondent when they failed to refer him to a job at the Bechtel cogeneration project in Morgantown, West Virginia in February of 1991. In Conaway v. Eastern Associated Coal Corporation, 178 W.Va. 164, 358 S.E.2d 423 (1986), the West Virginia Supreme Court articulated a general three-part test for a circumstantial prima facie case of employment discrimination. In order to prove a prima facie case the complainant must offer proof of the following:

(1) That the complainant is a member of the protected class;

(2) That the employer (or labor organization) made an adverse decision concerning the complainant;

(3) But for the complainant's protected status, the adverse decision would not have been made.

A prima facie showing may be made by showing that the complainant was discriminated against where there is some circumstantial evidence which would sufficiently link the employer's (or labor organization's) decision and the complainant's status as a member of a protected class so as to give rise to an inference that the employment decision was based upon an unlawful discriminatory criterion. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490, 495 (1989).

The complainant has established a prima facie case in that he was a 64 years old in February 1991; the respondent took a negative employment action against him in failing to refer him for a job with Bechtel on February 25, 1991; and he has offered direct evidence that Mr. Estlack told him he wanted "younger qualified men" and circumstantial evidence that those men referred who were lower on the list were significantly younger than he, from which it could be inferred that age played a role in the decision not to refer him. In the recently decided case of O'Connor v. Consolidated Coin Caterers Corporation, 1996 WL 142564 (U.S.), the United States Supreme Court has held that age discrimination is actionable even where the plaintiff was replaced by other members of the protected class if those replacements were substantially younger than the plaintiff. Having met the burden of establishing a prima facie case, the complainant seeks to establish age based discrimination based upon a disparate treatment theory.

Disparate treatment may be established through the three step inferential proof formula first articulated in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and adopted by the West Virginia Supreme Court in Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983). The complainant must first establish a prima facie case of discrimination. The burden of production then switches to the respondent to articulate a legitimate nondiscriminatory reason for its action. Finally, the complainant may show that the reason proffered by the respondent was not the true reason for the employment decision, but rather a pretext for discrimination. Pretext may be shown through direct or circumstantial evidence of falsity or discrimination. Where pretext is shown discrimination may be inferred. See Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995).

The respondent has articulated a legitimate nondiscriminatory reason for failing to refer the complainant, stating that the complainant was not qualified for the special skills request for manpower which Bechtel made on February 23, 1991. Although the complainant has demonstrated through complainant's credited testimony that he was qualified to operate the precision electronic level, there is no evidence to discredit respondent's representations that it did not have reason to believe complainant possessed those skills and refused to refer him on that basis. Complainant has not demonstrated that he was qualified as a welder able to certify on one inch plate. Thus, there is no grounds to conclude that the articulated

nondiscriminatory reason for failing to refer the complainant is pretextual.

The complainant may also demonstrate disparate treatment under the mixed motive analysis established by the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), and recognized by the West Virginia Supreme Court in West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490 (1989). Mixed motive analysis applies where an articulated legitimate nondiscriminatory motive is shown to be nonpretextual, but where the complainant asserts that illicit discriminatory motives played a part in the decision. If the trier of fact concludes that complainant's age played some part in the decision, the respondent can avoid liability only by proving that it would have made the same decision even if it had not considered the complainant's age. Barefoot v. Sundale Nursing Home, 457 S.E.2d at 162 and 164. Where complainant offers direct evidence of discriminatory intent under the disparate treatment theory, the burden shifts to the respondent to prove 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. 11, 36 F.E.P. Cases 977 (1985).

The complainant has offered direct evidence of discriminatory motive, a statement by respondent's agent Mr. Estlack, that he wanted "younger qualified men". After hearing the evidence and evaluating the demeanor of the witnesses while testifying, the undersigned concludes that Mr. Estlack's emphasis was upon the adjective qualified rather than younger in making his referral of other men in response to

Bechtel's request for manpower on February 23, 1991. The evidence preponderates on the side of a determination that Mr. Estlack made subjective decisions concerning the special skills possessed by each of the Union Local's members and that he would only send in response to a special skills request those members who he felt were qualified based upon his assessment of those skills. While the alleged remark may indicate a personal age bias by Mr. Estlack, there was no evidence to establish that this bias, if it existed, played any part in the decision at issue. In fact, Mr. Estlack testified that he would not have contacted complainant in any event to fill this request because he was not qualified. Thus, the decision to refer others in response to the February 23, 1991 request for manpower would have been made regardless of the age of the complainant.

C.

CONCLUSIONS OF LAW

1. The complainant, Paul R. Gum, is an individual aggrieved by an alleged unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, WV Code §5-11-10.

2. The respondent, AFL-CIO Millwrights Local 1755, is a labor organization 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.

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 age discrimination.

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has failed to establish, by a preponderance of the evidence, to be pretext for unlawful age discrimination.

D.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** that this case be dismissed with prejudice and be closed.

It is so **ORDERED**.

Entered this 22nd day of April, 1996.

WV HUMAN RIGHTS COMMISSION

BY: 

ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

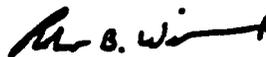
I, Robert B. Wilson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing FINAL DECISION by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 22nd day of April, 1996, to the following:

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4600 Camden Ave.
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ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE