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June 9

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

**215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301**

ARCH A. MOORE, JR.
Governor

TELEPHONE: 304-348-2616

May 2, 1986

Daniel F. Hedges, Esq.
1116-B Kanawha Blvd E.
Chas, 25301

Lacy I. Rice Jr, Esq.
P.O. Box 808
Martinsburg, Wv 25401

RE: Raymond F. Gibson, SR v. O'Boyle Tank Lines, Inc EA-153-76

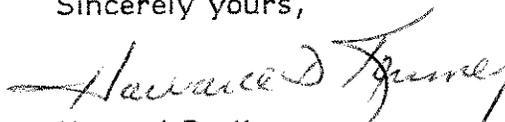
Dear Above parties,

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Gibson v. O'Boyle Tank Lines EA-153-76

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

The Respondent is required to provide to the Commission proof of compliance with the attached Order by affidavit, cancelled check or other means calculated to provide such proof within 35 days of service of the enclosed Order.

Sincerely yours,


Howard D. Kenney
Executive Director

HDK/kpv/dlw
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RAYMOND F. GIBSON, SR.,

Complainant,

vs.

Docket No. EA-153-76

O'BOYLE TANK LINES, INC.,

Respondent.

O R D E R

On the 8th day of April, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Paul R. Stone. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own.

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order.

By this Order, a copy of which shall be sent by Certified Mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 21 day of April, 1986.

Respectfully Submitted,



CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

WEST VIRGINIA SUPREME COURT OF APPEALS
FOR THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

RAYMOND F. GIBSON, SR.,

Complainant

v.

CASE NO. EA-153-76

O'BOYLE TANK LINES, INC.,

Respondent

RECOMMENDED DECISION

PRELIMINARY MATTERS

This case (involving employment discrimination by Respondent against Complainant, for "re-hire", due to age) is before the undersigned Hearing Examiner upon a remand of same by the W. Va. Human Rights Commission ("HRC") for hearing (incl. adduction of answers by Respondent to the prior Interrogatories of Complainant, and otherwise honoring such pre-hearing Discovery procedure, full compliance with which was lacking by the Respondent). The case had been previously heard by Hearing Examiner David Webb who -- unlike the HRC -- did not see fit to require more comprehensive answers by Respondent to Complainant's Interrogatories. Hearing Examiner Webb again processed the case, but without full participation by Complainant's

counsel, there then being no rehearing, and what still appeared to be insufficient answers by Respondent to Complainant's Interrogatories.

Obviously, it was the intent of the HRC that the Interrogatory Answers be made a part of the record for its later adequate review of the case. Instead of the adduction* into evidence, by virtue of a new hearing or otherwise, Hearing Examiner Webb repertorily stated, in a closing ORDER issued October 29, 1985 (which, for the second time, was unfavorable to the Complainant), that he "understands" [Query: from whom?] that Discovery had been complied with. Webb indicated, in consultation with the undersigned, that a "fresh face" (i.e., a new Hearing Examiner) probably should be assigned to the case.

As time was then drawing nearer the second deadline set by the W. Va. Supreme Court of Appeals under the Allen decision (324 S.E.2d 99 (1984)), and as a hearing extension past the deadline had to be secured in this and several other cases, it devolved upon the undersigned Hearing Examiner to re-hear this case. (The HRC, in the meantime, had considered

* Discovery Interrogatories and Answers thereto are not automatically a part of the record; they must be proffered just as any other exhibit.

Hearing Examiner Webb's Order of October 29, 1985, and still not being satisfied, ordered a continuation of the original remand for the purpose of hearing, and/or further evidential adduction , per Section 7.25 of the HRC Regulations).

ISSUES

1. Whether there is proven age discrimination in employment by Respondent against Complainant, pursuant to Complainant's application (filed on September 2, 1975).
2. If discrimination is proven, what damages, and/or other relief is appropriate?

EVIDENCE AND EVALUATION

Upon due notice, a supplemental hearing was scheduled before the undersigned Hearing Examiner on November 20, 1985. The parties, waiving a Hearing Commissioner, appeared through their respective counsel (Daniel Hedges, Esquire, for the Complainant; and Lacy Rice, Jr., for Respondent); the hearing then commenced, with Raymond Gibson again giving testimony in his own behalf. (The prior record was incorporated, by use of "official notice")

After cross-examination by Attorney Rice, the latter -- pursuant to a prior arrangement, approved by the undersigned

Hearing Examiner -- presented telephonic testimony from Mr. Richard O'Boyle and another O'Boyle Company official, Mr. Ervin J. (Jack) Benner . Previously, due to a labor problem in New Jersey, said Mr. O'Boyle was unable to assemble the necessary records in answer to Complainant's renewed request (with the prior imprimatur of the HRC, as noted); however, as a result of such telephonic testimony, Richard O'Boyle-- actually utilizing his records in answer to what drivers* (and dispatchers) and when such were hired (as close as possible to the pertinent time frame encompassed by the Complaint herein) with their ages (actual, or approximated by him)--later followed up by adducing written evidence of same. Mr. Ervin J. Benner, being another O'Boyle supervisor, also gave his own approximations as to time hired, age, and names of drivers, or dispatchers.

From the evidence now of record, it does appear that a permissible inference could be drawn that there was some age discrimination ^{**} (marked disparity between Exs. C-3A & R-3A; in one category, drivers were quite young -- well under the protected threshold age of 40); however, it was testified that tank trucking business is seasonal, there being no openings at the time Complainant applied (for re-hire) in early September, 1975.

* Complainant, having previously been employed, at differing times, as tank truck driver, and dispatcher, had applied for re-hire to either job.

** Pattern and practice, re evidence of other drivers hired,

It also appears from the evidence that there was not even one single job opening for truck driver, or dispatcher, for more than six months after such allegedly actionable application of Complainant (Compl's Exhibit, "C-3A"). It was also instanced that the federal government, in its then more stringent regulation of the trucking industry, did not require a trucking company to retain an application for employment any longer than six months, and that Respondent disposes of employment applications just after six months have elapsed (as herein pertinent, provided, of course, that the Respondent received Complainant's application, which the latter asserted to be the case, but which the former denied).

In various pleadings filed by Complainant's and by Respondent's respective counsel, several cases were presented on the issue of whether or not there has to be an actual job opening at, or soon after, an employment application is filed, as a necessary pre-requisite to a case of employment discrimination. These cases have been studied carefully, at and after the Nov. 1985 hearing by the undersigned. Even during the luncheon recess of such hearing, the undersigned procured a copy of Thaw v. Charleston Area Medical Center*, an HRC Administrative decision, urged inter alia by Complainant's counsel on this point; such case was not unequivocal, and decidedly not adequate precedent in support of Complainant's position--it even used the concept of job availability being required (at least such was implied therein), also citing precedent in this same vein,

* HRC Docket ES-9-78, 1983.

as being an implicit predicate for any actionable case of alleged discrimination in hiring a job applicant.

SUBSIDIARY FINDINGS

Based on the evidence (both oral testimony, as well as the documentary exhibits), the undersigned finds:

1. The Complainant, then being between the ages of 40 and 65, is a covered "person" within the meaning of the W. Va. Human Rights Act.

2. Respondent, then known as O'Boyle Tank Lines, Inc. (now merged with another company, "Quality Express", and operating now under such latter name) was, at all times pertinent herein, an "employer" within the meaning of said Act.

3. The Complaint (of September 23, 1975) herein was timely filed.

4. The HRC has jurisdiction as to the parties and subject matter of this case.

5. At the time Complainant applied for re-hire by Respondent as a truck driver or dispatcher, there was no job opening in either category.

6. The Complainant, and also Mr. Richard O'Boyle, are found to have been credible witnesses in this case.

7. Both Respondent's own policy, and as minimally then required by the federal government (U. S. Department of Transportation, known as "DOT"), was not to retain a job application for more than six months.

8. Complainant's job application (and those of others) was disposed of, immediately after the six-month period aforesaid (assuming, as Claimant stated, he filed it on Sept. 2, 1975).

9. There was no job opening, with Respondent, in either the category of truck driver or dispatcher, at the time of Complainant's job application, nor for well over six months from the time such was filed (the first "hire" of such, by Respondent, was upon the close of the first week in April, 1976).

CONCLUSIONS OF LAW

I. The HRC has jurisdiction over the subject matter of this age discrimination complaint (W. Va. Code, 5-11-4); and of the parties (Complainant being a "person" in the protected class, and Respondent being an "employer", within these respective definitions (W. Va. Code, 5-11-3(a), and 5-11-3(d), respectively).

II. The Complainant, while otherwise presenting some evidence of job discrimination based on age, did not prove

(within his required burden of proof) the existence of an available job opening within the applicable time period (six months) for which his application was effective; accordingly, the Complaint in this case should be dismissed, as a matter of law.

The various cases, cited by both sides herein, on the issue of whether or not a vacancy needs to exist to support an actionable job discrimination charge, have been thoroughly considered.

In Phillips v. Joint Legislative Com., Etc., 637 F.2d 1014 (1981), at page 1029 (footnote 34), for example, it is stated that whereas there does not have to be a vacancy in existence on the date of application, nevertheless, one must occur during the time such application "remains active". In this case, O'Boyle --in disposing of applications after such had been on file for 6 months--was within its rights (and also in compliance with minimal DOT standards); obviously, then, there was no viable vacancy until well after claimant's application (if such were filed Sept. 2, 1975, as Complainant stated) would have expired, and been discarded.

In Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976), at page 269, it is implied only that the absence of a vacancy is insufficient reason to deny an incumbent employee "back pay" for discriminatorily failing to promote him --no answer to the issue in this case involving Mr. Gibson.

As noted in McLean v. Phillips-Ramsey, Inc., 624 F.2d 70 (9th Cir.1980), at page 72, & most explicitly, any vacancy must exist during the time a person's application is "on file"

The case of East v. Romine, Incorporated, 518 F.2d 332 (5th Cir.1976), at page 337, is germane on the point that is herein involved, viz., the need for a viable application at the end of six months. Plaintiff East's was not so viable, and he --as a consequence--lost his discrimination case.

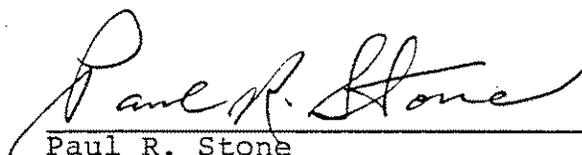
A case cited by Respondent's counsel, among others studied by the undersigned, is not, however, dispositive on the issue involved herein. Marsall v. Airpax Electronics, Inc., 595 F.2d 1043 (5th Cir.1979), which he cited, is only applicable tangentially, and held that--on the particular set of facts therein involved--a vacancy needed to have existed on the day of application.

In a case cited by Complainant's counsel, among others, Ostroff v. Employment Exchange, Inc., 683 F.2d 302, 29 FEP Cases 683 (9th Cir.1982), it is also evident therein by implication (as well as in the Nanty decision cited in Ostroff) that an available job may be a sine qua non element of proof for actionable job discrimination; where it is shown that a job applicant is either not qualified, or that no vacancy exists, and that such was the prime reason for not hiring (and not an a priori blanket refusal to hire, absent considerations of either above reason), it is implied in Ostroff there's no discrimination.

RECOMMENDATION

It is, therefore, recommended by the undersigned Hearing Examiner that the W. Va. Human Rights Commission dismiss the Complaint herein, with prejudice.

Dated this 31st day of December, 1985.



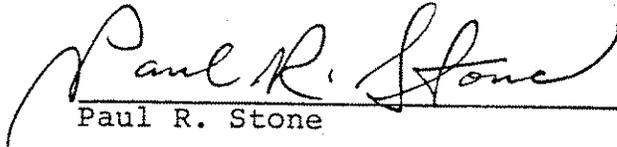
Paul R. Stone
Hearing Examiner
Room E-312, State Capitol
Charleston, West Virginia 25305

CERTIFICATE OF SERVICE

I, Paul R. Stone, hereby certify that I have this 31st day of December, 1985, mailed a true copy of the foregoing Recommended Decision by depositing same in the United States Mail in properly addressed and stamped envelopes to the following persons:

Lacy I. Rice, Jr.
Attorney at Law
P. O. Box 808
Martinsburg, WV 25401

Daniel F. Hedges
Attorney at Law
1116-B Kanawha Boulevard, E.
Charleston, WV 25301



Paul R. Stone



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
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TELEPHONE: 304-348-2616

ARCH A. MOORE, JR.
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May 2, 1986

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RE: Raymond F. Gibson, SR v. O'Boyle Tank Lines, Inc EA-153-76

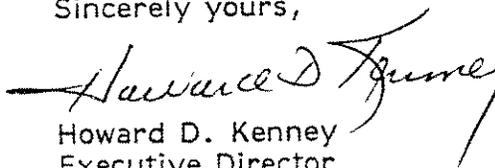
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The Respondent is required to provide to the Commission proof of compliance with the attached Order by affidavit, cancelled check or other means calculated to provide such proof within 35 days of service of the enclosed Order.

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Executive Director

HDK/kpv/dlw
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It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order.

By this Order, a copy of which shall be sent by Certified Mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 21 day of April, 1986.

Respectfully Submitted,



CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

WEST VIRGINIA SUPREME COURT OF APPEALS
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ISSUES

1. Whether there is proven age discrimination in employment by Respondent against Complainant, pursuant to Complainant's application (filed on September 2, 1975).
2. If discrimination is proven, what damages, and/or other relief is appropriate?

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From the evidence now of record, it does appear that a permissible inference could be drawn that there was some age discrimination ^{**} (marked disparity between Exs. C-3A & R-3A; in one category, drivers were quite young -- well under the protected threshold age of 40); however, it was testified that tank trucking business is seasonal, there being no openings at the time Complainant applied (for re-hire) in early September, 1975.

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In various pleadings filed by Complainant's and by Respondent's respective counsel, several cases were presented on the issue of whether or not there has to be an actual job opening at, or soon after, an employment application is filed, as a necessary pre-requisite to a case of employment discrimination. These cases have been studied carefully, at and after the Nov. 1985 hearing by the undersigned. Even during the luncheon recess of such hearing, the undersigned procured a copy of Thaw v. Charleston Area Medical Center*, an HRC Administrative decision, urged inter alia by Complainant's counsel on this point; such case was not unequivocal, and decidedly not adequate precedent in support of Complainant's position--it even used the concept of job availability being required (at least such was implied therein), also citing precedent in this same vein,

* HRC Docket ES-9-78, 1983.

as being an implicit predicate for any actionable case of alleged discrimination in hiring a job applicant.

SUBSIDIARY FINDINGS

Based on the evidence (both oral testimony, as well as the documentary exhibits), the undersigned finds:

1. The Complainant, then being between the ages of 40 and 65, is a covered "person" within the meaning of the W. Va. Human Rights Act.

2. Respondent, then known as O'Boyle Tank Lines, Inc., (now merged with another company, "Quality Express", and operating now under such latter name) was, at all times pertinent herein, an "employer" within the meaning of said Act.

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CONCLUSIONS OF LAW

I. The HRC has jurisdiction over the subject matter of this age discrimination complaint (W. Va. Code, 5-11-4); and of the parties (Complainant being a "person" in the protected class, and Respondent being an "employer", within these respective definitions (W. Va. Code, 5-11-3(a), and 5-11-3(d), respectively).

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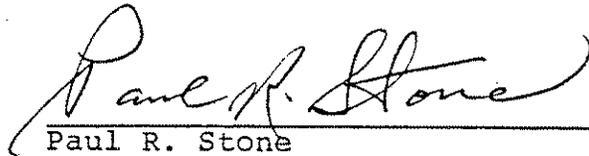
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RECOMMENDATION

It is, therefore, recommended by the undersigned
Hearing Examiner that the W. Va. Human Rights Commission
dismiss the Complaint herein, with prejudice.

Dated this 31st day of December, 1985.



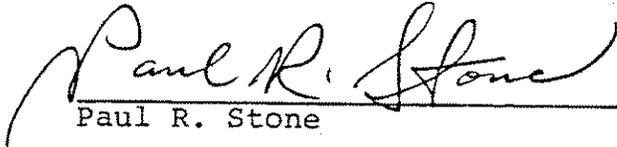
Paul R. Stone
Hearing Examiner
Room E-312, State Capitol
Charleston, West Virginia 25305

CERTIFICATE OF SERVICE

I, Paul R. Stone, hereby certify that I have
this 31st day of December, 1985, mailed a true copy of the
foregoing Recommended Decision by depositing same in the
United States Mail in properly addressed and stamped
envelopes to the following persons:

Lacy I. Rice, Jr.
Attorney at Law
P. O. Box 808
Martinsburg, WV 25401

Daniel F. Hedges
Attorney at Law
1116-B Kanawha Boulevard, E.
Charleston, WV 25301



Paul R. Stone