

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

BERTHA HAIRSTON,

Complainant,

v.

DOCKET NO. ER-195-71

STEVENS CLINIC HOSPITAL, INC.,

Respondent.

FINAL ORDER

On the 20th day of November, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner, Juliet Rundle, herein incorporated by reference. After consideration of the aforementioned and the entire record, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own, with the exceptions and amendments set forth below.

The Commission does hereby adopt the Procedural History and the Issue presented.

The Commission hereby amends the Recommended Decision of the Hearing Examiner by deleting from the section titled Findings of Fact the following:

Paragraph 4 of said Findings of Fact is amended following the words "Black female" by deleting the language "married, and a high school graduate."

The Commission further, hereby, amends the Recommended Decision of the Hearing Examiner by adding to the section titled Findings of Fact the following:

"13. That the respondent retained Blacks as 'tray-girls' with less seniority than the complainant."

"14. That, at the time of incident, the respondent was, in fact, overstaffed; and the respondent did reduce said workforce which resulted in the lay off of two 'tray-girls;' one, the complainant, a black female and one white female."

"15. That the respondent based its decision upon the evaluation of all employees and its need to reduce the workforce when deciding which employees would be discharged."

The Commission hereby amends the Recommended Decision of the Hearing Examiner by adopting Paragraph 1 of the section titled Conclusions of Law as conclusion number one.

The Commission hereby amends the Recommended Decision of the Hearing Examiner by deleting Paragraph 2 of said section and substituting for it the following prefatory language as number two:

"2. The West Virginia Supreme Court in State ex rel. State Human Rights Commission and Bradsher v. Logan-Mingo Area Mental Health Agency, 329 S.E.2d 77 (W. Va. 1985), relying on Burdine v. FMC, 566 F. Supp. 808 (N.D. W. Va. 1983), held that a complainant in a disparate treatment, discriminatory discharge case brought under the WV Human Rights Act, WV Code 5-11-1, et seq., may meet the initial prima facie burden by proving, by a preponderance of the evidence: (1) that the complainant is a member of a group protected by the Act; (2) that the complainant was discharged, or forced to resign, from employment; and (3) that a non-member of the protected group was not disciplined or was disciplined less severely than the complainant, though both engaged in similar conduct."

"3. In allowing a flexible application of the requirement of the McDonnell-Douglas prima facie showing, the West Virginia Supreme Court acknowledged the United States Supreme Court observation in McDonnell-Douglas, supra that, "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." McDonnell-Douglas, supra at 802, n. 13. Bradsher, supra. See also Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, (1978); and Burdette v. FMC Corp., 566 F. Supp. 808, 815 (N.D. W. Va. 1983)."

"4. In the instant case, the Commission also recognizes a need to modify the prima facie elements of proof based on the factual allegations, adopting one and two, and modifying three. See Bradsher, supra.

The complainant has established a prima facie case of race discrimination in employment.

(1) Bertha Hairston, a black female, is an individual claiming to be aggrieved by an alleged unlawful discriminatory practice and is a proper complainant for the purposes of the WV Human Rights Act, WV Code 5-11-10;

(2) The complainant was discharged by Stevens' Clinic Hospital, Inc. on September 24, 1971, following her normal two days off, having last worked for respondent on September 21, 1971; and

(3) The complainant proved, by a preponderance of the evidence, that non-members (whites) were not permanently laid-off or discharged at the time she was discharged, who were under apparently similar circumstances thereby raising an inference of unlawful discrimination."

"5. Respondent has articulated a legitimate, non-discriminatory reason for complainant's lay-off/discharge, to wit, that the complainant's discharge was motivated by a reduction in the work force and by an evaluation of the complainant's work performance in relationship to her co-workers. The evidence reveals that the respondent did, in fact, permanently lay-off or discharge two employees -- the complainant and one white tray girl based on the evaluation -- and the respondent retained non-members of the protected class and members of the protected class with less seniority than the named complainant. The evidence further reveals that the respondent made a decision to reduce the staff by two, and that based upon the evaluations, a white co-worker and the complainant, who is black, were released; and finally, it is undisputed that the respondent retained co-workers black and white based upon this evaluation; and, further, that seniority was not the basis for laying off or retaining said workers."

"6. Complainant has not demonstrated that the reasons articulated by respondent for discharging her are pretextual."

"7. Respondent has not discriminated against complainant on the basis of her race by discharging her. WV Code, Section 5-11-9(a)."

The Commission hereby amends the Recommended Decision of the Hearing Examiner by deleting the entire section titled Determination and adopts as its own a section titled Discussion of Conclusions, Determination and Order in that sequence, as follows:

Discussion of Conclusions

In fair employment, disparate treatment cases, the initial burden is upon the complainant to establish a prima facie case of discrimination.

Shepherdstown Volunteer Fire Dept. v. WV Human Rights Commission, 309 S.E.3d 342, 352-353 (W. Va. 1983); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); and State ex rel State of WV Human Rights Commission and Rose Bradsher v. Logan-Mingo Area Mental Health Agency, 329 S.E.2d 77 (W. Va. 1985). If the complainant makes out a prima facie case, respondent is required to offer or articulate a legitimate, non-discriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunteer Fire Dept., supra; McDonnell-Douglas, supra; Bradsher, supra. If respondent articulates such a reason, complainant must show that such reason is pretextual. Shepherdstown Volunteer Fire Dept., supra; McDonnell-Douglas, supra; Bradsher, supra. In the instant case, complainant has established a prima facie case of race discrimination. Complainant has proven that she is black, that she was permanently laid-off or discharged by respondent and that white co-workers with less seniority were retained.

Respondent has articulated a legitimate, non-discriminatory reason for its action in discharging the complainant. Respondent's reasons that the basis of the lay-off was a need to reduce the workforce; that a subjective evaluation was applied to all employees, in determining who would be laid off and who would be retained; that two co-workers were laid-off, the complainant, who is black, and a white co-worker; and that black and white co-workers were retained who had less seniority than the complainant, as such, was found to be credible by the Hearing Examiner, as an articulated, legitimate and non-discriminatory reason for discharging the complainant.

At the time of the "lay-off" there was black and white "tray-girls." Some of the white "tray-girls" had less seniority than the complainant

while others had more. Likewise, there was a black "tray-girl" with less seniority than complainant, and other black employees with more seniority, were not laid off.

Complainant has not demonstrated, by a preponderance of evidence, that the reasons articulated by respondent is pretextual. Complainant's testimony along with respondent's, verifies that at least one black female was retained. The black employee retained, also had less seniority than complainant. Such action by the respondent does not constitute race discrimination in employment.

Determination

The complainant in this matter is not supported by the preponderance of the evidence.

Order

Based upon the foregoing, the Commission dismisses the complaint in this matter with prejudice.

Entered this 29th day of December, 1986.

RESPECTFULLY SUBMITTED

BY Betty A. Hamilton
 BETTY A. HAMILTON
 VICE-CHAIR
 WV HUMAN RIGHTS COMMISSION

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

BERTHA HAIRSTON,

COMPLAINANT,

*Approved
A.M.S.
5/5/86*

VS.

CASE NO. ER-195-71

STEVENS CLINIC HOSPITAL, INC.,

RESPONDENT.

RECOMMENDED DECISION

I. PROCEDURAL HISTORY

A complaint was filed before the West Virginia Human Rights Commission on the 3rd day of October, 1971, alleging Respondent discriminated against the Complainant in regards to her race. A pre-hearing conference was held on April 1, 1985.

A hearing was held on November 18, 1985. The Complainant, Bertha Hairston, appeared in person and by counsel, J. Franklin Long, and the Respondent, Stevens Clinic Hospital, Inc., appeared by counsel, Harold Brewster. The testimony of five (5) witnesses was taken. The following individuals appeared on behalf of the Complainant, Bertha Hairston: Bertha Hairston, Nathaniel Burroughs and Julia McGuire. The following witnesses appeared and testified on behalf of the Respondent, Stevens Clinic Hospital, Inc. : Joe Perry and Thelma A. Copley.

Proposed Findings of Fact and Conclusion of Law were to have been submitted by counsel for both parties within ten days after receipt of the transcript of the hearing; however, neither party submitted proposed findings.

II. ISSUE

The issue presented by the complaint is whether the race or color of the complainant was the basis for her discharge by the respondent.

III. FINDINGS OF FACT

1. The respondent is a corporation with its name being Stevens Clinic Hospital, Inc., and was incorporated on or about June 1, 1977.

2. That prior to June 1, 1977, the respondent was owned by Bluefield Sanitarium, Inc.

3. That 95% of all stockholders of Stevens Clinic Hospital, Inc., are now different than in 1971, at which time the alleged discrimination took place.

4. The complainant is a black female, married, and a high school graduate.

5. The complainant on or about December 8, 1969, was employed as a "tray-girl" by Stevens Clinic Hospital.

6. The complainant was discharged on September 24, 1971, following her normal two-days-a-week off. Her last date of work was September 21, 1971.

7. That the supervisor of the complainant and all other dietary employees was Thelma Copley.

8. That no evaluations or complaints were made known to employees related to their work.

9. That Thelma Copley, Supervisor, had not been trained in the use of the evaluation forms and had not even read the instructions on the face of the evaluation forms as to their proper use.

10. That there were at least two white "tray-girls" who had less seniority that were not laid off.

11. That at the time of the lay-off of the complainant, there was a white female with more seniority who was laid off.

12. That the complainant did not seek other employment at the time of her discharge, as she was married.

IV. CONCLUSIONS OF LAW

A complainant in a disparate treatment, discriminatory discharge case brought under the West Virginia Human Rights Act, Code, 5-11-1, et seq. may meet the initial prima facie burden by proving, by a preponderance of the evidence (1) that the complainant is a member of a group protected by the Act; (2) That the complainant was discharged, or forced to resign, from employment; and, (3) that a nonmember of the protected group was not disciplined, or was disciplined less severely, than the complainant, though both engaged in similar conduct. State Ex Rel. State of W. VA. Human Rights Commission and Rose Bradsher v. (No. 16015) Logan-Mingo Area Mental Health Agency, Inc. 329 S.E. 2d. 77 at page 79 (WV1985)

The complainant is found to be a member of a protected group under the West Virginia Human Rights Act of 1967, West Virginia Code, Chapter 5, Article 11, Section 1, et seq., and it is undisputed that the complainant was discharged. The complainant must, however, fail in her complaint because the reliable, probative and substantial evidence in the record of this action shows that a nonmember of the protected group was treated as severely as members of the group.

V. DETERMINATION

This examiner finds that the respondent's method of evaluating employees is a disgrace as the employees do not know that they are being evaluated. Secondly, there is no opportunity for the employee to conform his/her actions to the expectations of the employer as these expectations are apparently a guarded secret. Further, the employee does not know that he has had an evaluation that may have adverse effects on his/her continued employment. Finally, the supervisor who completed the evaluation forms admitted that she really didn't understand the proper use of the forms. All of this is unfortunate as there are negative results for both employees and the employer. The employer denies itself of one of the finest training opportunities as well as an opportunity to strengthen employee/employer relationships. The evaluations, however unsavory, are not a determining factor in this case as they were applied in an equally reprehensible manner to all employees. At the time of the "lay-off" there was black and white "tray-girls." Some of the

white "tray-girls" had less seniority than the complainant while others had more. Likewise there were black "tray-girls" with less seniority than complainant and other black "tray-girls" with more seniority.

Two "tray-girls" were laid off. The Complainant (black) and another female with more seniority than the complainant (white).

The respondent's administrator and Thelma Copley both testified that they knew they had to lay off some "tray-girls" as they were over-staffed; and that they decided to determine who would be laid off based on the result of the evaluations. The respondent's witnesses' testimony was found to be credible, and the respondent met its burden of successfully rebutting the complainant's allegations of discrimination.

Although no discrimination is believed to have occurred and, therefore, the question of damages can never be reached, it is noteworthy that the complainant testified that she did not seek other employment as "she was married by then." This is mentioned to illustrate that even if illegal discrimination had been found the damages would be limited, as the complainant apparently had no intentions to continue working.

This examiner recommends that the Human Rights Commission find for the respondent.


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