



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**WV HUMAN RIGHTS COMMISSION**

**1321 Plaza East**

**Room 104/106**

**Charleston, WV 25301-1400**

**TELEPHONE 304-348-2616**

**GASTON CAPERTON**  
GOVERNOR

**Quewanncoii C. Stephens**  
Executive Director

March 28, 1990

Deborah Hairston  
73 Bills Branch St.  
Logan, WV 25601

Logan Medical Foundation  
20 Hospital Drive  
Logan, WV 25601

Fred Holroyd, Esq.  
209 W. Washington St.  
Charleston, WV 25302

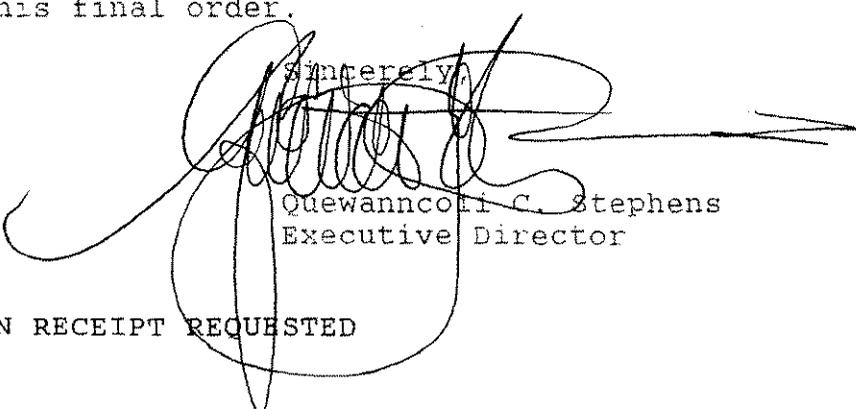
Mike Kelly  
Deputy Attorney General  
812 Quarrier St.  
L & S Bldg. - 5th Floor  
Charleston, WV 25301

Re: Hairston v. Logan Medical Foundation  
ER-341-86

Dear Parties:

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 with the WV Supreme Court of Appeals within 30 days of receipt of this final order.

Sincerely,

  
Quewanncoii C. Stephens  
Executive Director

Enclosures  
CERTIFIED MAIL-RETURN RECEIPT REQUESTED

## 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 non-resident of this state, the non-resident 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 Section 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DEBORAH A. HAIRSTON,

Complainant,

v.

DOCKET NO. ER-341-86

LOGAN MEDICAL FOUNDATION,

Respondent.

FINAL ORDER

On 10 January 1990 the West Virginia Human Rights Commission<sup>1</sup> reviewed the Proposed Order and Decision filed in the above-styled matter by the hearing examiner, James Gerl, and also reviewed the hearing examiner's Supplemental Proposed Order and Decision. After consideration of both of the aforementioned, and all exceptions filed in response thereto, the Commission decided to, and does hereby, adopt said Proposed Order and Decision and the Supplemental Proposed Order and Decision, encompassing all of the Findings of Fact and Conclusions of Law in those documents, as its own, with no modifications.

It is, therefore, the Final Order of the Commission that, consistent with the hearing examiner's recommendations, the complaint of Deborah D. Hairston against Logan Medical Foundation be dismissed, with prejudice.

---

<sup>1</sup>It is noted for the record that Commissioner William L. Williams, Jr., deeming himself disqualified, took no part whatsoever in the consideration of this matter.

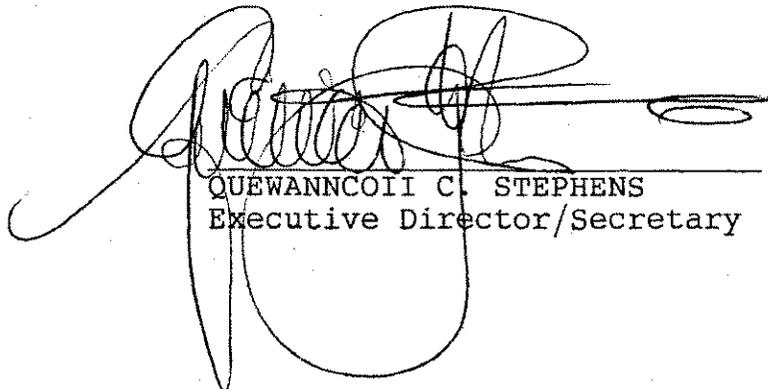
It is the further Order of this Commission that the hearing examiner's Proposed Order and Decision, and his Supplemental Order and Decision be attached hereto and made a part of this Final Order.

By this Final Order, a copy of which shall be sent certified mail to the parties and their counsel, and to the Secretary of State of the State of West Virginia, the parties are hereby notified that they have ten days to request a reconsideration of this Final Order and that they may seek judicial review.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 22<sup>d</sup> day of March, 1990, in Charleston, Kanawha County, West Virginia.



QUEWANNCOII C. STEPHENS  
Executive Director/Secretary

STATE OF WEST VIRGINIA  
HUMAN RIGHTS COMMISSION

**RECEIVED**

MAR 10 1987

W.V. HUMAN RIGHTS COMM.

---

DEBORAH D. HAIRSTON

Complainant,

v.

Docket No. ER-341-86

LOGAN MEDICAL FOUNDATION

Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on December 26, 1986 in Logan, West Virginia. Commissioner Jack McComas served as Hearing Commissioner. The complaint was filed on December 30, 1985. The notice of hearing was issued on April 30, 1986. Respondent answered on May 14, 1986. A telephone Status Conference was convened on July 21, 1986. Subsequent to the hearing, both parties filed written briefs and proposed findings of fact.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions, and arguments advanced by the parties are in accordance with the findings, conclusions and views as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord

with findings as stated herein, it is not credited.

CONTENTIONS OF THE PARTIES

Complainant contends that respondent failed to promote her to the position of charge nurse because of her race. Respondent maintains that complainant was not as qualified as the successful applicant for the position of charge nurse.

FINDINGS OF FACT

Based upon the parties stipulations on the record at the outset of the hearing, the Hearing Examiner has made the following findings of fact:

1. Complainant is black.
2. Complainant was hired by respondent as a licensed practical nurse in August 1979.
3. Complainant became a temporary registered nurse at respondent in June, 1984.
4. Complainant became a registered nurse at respondent in August, 1984.
5. In October, 1985, complainant earned \$9.31 per hour plus a 40 cents per hour shift differential at respondent.
6. If complainant would have been promoted to the charge nurse position which she sought, she would have earned an additional 40 cents per hour.

Based upon a preponderance of the evidence, the Hearing Examiner has made the following findings of fact:

7. Complainant applied for promotion to an open position as charge nurse on respondent's fourth floor, in October 1985.
8. Complainant was not promoted to the charge nurse position.
9. Watts, another registered nurse for respondent ap-

plied for the charge nurse position. Watts had had more experience as a registered nurse than respondent. Watts was not promoted to the charge nurse position.

10. Ooten, respondent's Director of Nursing, determined that complainant and Watts lacked the length of experience and leadership ability to be promoted to the charge nurse position.

11. Ooten hired Barker, who is white, for the charge nurse position.

12. At the time of her hire as charge nurse, Barker was not an employee of respondent.

13. Respondent's Employee Handbook states that it will select the best qualified employee for each position and that outside applicants will be considered if no qualified employee applies for a position.

14. The minimum requirements as stated on the October 1985 posting for the charge nurse position were the following: two years experience as registered nurse on the med/surg. floor preferred; knowledge of pre-op, and post-op; must know administration of all medications; knowledge of cardiac telemetry preferred; have demonstrated leadership ability.

15. Barker had at least 5 years experience as a registered nurse, including experience as a charge nurse, a head nurse and a Director of Nursing, prior to October, 1985.

16. Barker received excellent references.

17. Complainant's supervisors gave her only satisfactory references. Complainant had difficulty communicating with her fellow nurses. In some instances, complainant exercised poor nursing judgment. Complainant did not show any initiative.

18. Respondent's fourth floor is not a special care unit as catheters, cardiac output and all monitors are read by the Intensive Care Unit nurses.

19. Barker was better qualified for the charge nurse position than was complainant.

#### CONCLUSIONS OF LAW

1. Deborah D. Hairston is an individual claiming to be aggrieved by an alleged unlawful discriminatory practice and is a proper complainant for purposes of the Human Rights Act. West Virginia Code, §5-11-10.

2. Logan Medical Foundation is an employer as defined by West Virginia Code Section 5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. Complainant has established a prima facie case of race discrimination.

4. Respondent has articulated a legitimate no-discriminatory reason for its failure to promote complainant.

5. Complainant has not demonstrated that the reason articulated by respondent for failing to promote her is pretextual.

6. Respondent has not discriminated against complainant on the basis of her race by failing to promote her. West Virginia Code, Section 5-11-9(a).

#### 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 Department v. West Virginia Human Rights Commission 309 S.E2d 342, 352-353

(WVa 1983); McDonnell-Douglas Corporation v. Green 411 U.S. 792 (1973). 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. If respondent articulates such a reason, complainant must show that such reason is pre-textual. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra.

In the instant case, respondent concedes in its post-hearing brief that complainant has established a prima facie case by proving that she is black, that she applied for a promotion to the charge nurse position; that she was not promoted and that Barker, who is white, was placed in the job.

Respondent has articulated a legitimate non-discriminatory reason for not promoting complainant to the charge nurse position. Ooten, respondent's Director of Nursing, testified that complainant was not qualified for the charge nurse position. Complainant lacked the minimum requirements of two years experience as a registered nurse which was preferred by respondent as stated on the job posting. Barker, on the other hand, had had five years experience as a registered nurse. Complainant also lacked the demonstrated leadership ability required for the position as stated on the job posting. Complainant's supervisors informed Ooten that complainant had difficulty communicating and lacked initiative. Barker, by contrast, had demonstrated leadership ability as a charge nurse, a head nurse and as a Director of Nursing. Barker received excellent ref-

erences. The record evidence clearly supports the conclusion that Barker was far more qualified for the charge nurse position than was complainant.

Complainant has not demonstrated that the reason articulated by respondent for failing to promote her is pretextual. The demeanor of respondents witnesses was more credible than the testimony of complainant and her witnesses.

Complainant contends in her post-hearing brief that leadership ability is a subjective criterion and should be viewed as a pretext. One factor which respondent utilized in determining leadership was prior experience as a leader, supervising employees, which is clearly an objective, not a subjective, criterion. Complainant's supervisory experience was limited to occasionally filling in as charge nurse on a rotating basis. In that capacity complainant had difficulty communicating with the nurses she supervised. Barker, on the other hand, had experience as a charge nurse, a head nurse and a Director of Nursing. Barker received excellent references. Although the criterion of "leadership" may in some cases be subjective, it was objectively applied in this case. Respondent did not use "leadership" as a pretext to hide race discrimination here.

Complainant also notes that the two years experience as a registered nurse was merely a preferred factor. Complainant, however, had barely one years experience as a registered nurse when she applied for the charge nurse position. Complainant had not met the experience qualification for the position. Barker, the successful applicant, had had at least 5 years ex-

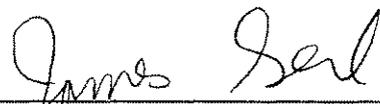
perience as a registered nurse. Barker was clearly more qualified for the charge nurse position than was complainant.

At the hearing herein, complainant called Smith, a black registered nurse formerly employed by respondent, apparently to attempt to show pretext by showing that other black employees of respondent also experienced discrimination. Although Smith testified that she experienced race discrimination, she clarified on cross-examination that there were only two incidents—one involving a question of her by the head nurse which resulted in no discipline of Smith, and one incident wherein Smith was accused by a non-supervisory co-worker of calling a patient a liar which resulted in no discipline of Smith. Smith suffered no racial discrimination at the hands of respondent. It is not surprising that Smith's testimony is not relied upon by complainant in her brief or proposed findings of fact.

Hannah, an expert witness called by complainant, testified that complainant was more qualified than Barker for the charge nurse position. Hannah's opinion was based upon the premise that respondent's fourth floor was a special care unit. Hannah reasoned that because Barker was not working in nursing for some period of time prior to October 1985, she would have had difficulty keeping up with advances in cardiac output and monitor reading. The uncontroverted evidence in the record, however, was that respondent's fourth floor was not a special care unit and that cardiac output, monitor reading, etc. is done by the nurses in the intensive care unit. Thus, Hannah's opinion was based upon a flawed premise and her testimony is not credited.

PROPOSED ORDER

Based upon the foregoing, the Hearing Examiner hereby recommends that the Commission dismiss the complaint in this matter, with prejudice.

  
\_\_\_\_\_  
James Gerl  
Hearing Examiner

ENTERED: March 9, 1987

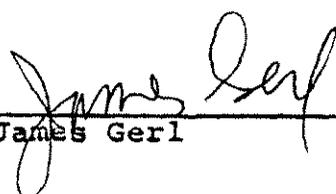
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served  
the foregoing Proposed Order and Decision  
by placing true and correct copies thereof in the United States  
Mail, postage prepaid, addressed to the following:

Sharon Mullens  
Assistant Attorney General  
1204 Kanawha Blvd., East  
Charleston, WV 25301

Fred F. Holroyd, Esq.  
Holroyd & Yost  
209 Washington St., West  
Charleston, WV 25302

on this 9th day of March, 1987.

  
\_\_\_\_\_  
James Gerl

STATE OF WEST VIRGINIA  
HUMAN RIGHTS COMMISSION

**RECEIVED**  
OCT 06 1988  
W.V. HUMAN RIGHTS COMM.

DEBORAH D. HAIRSTON

Complainant,

vs.

Docket No. ER-341-86

LOGAN MEDICAL FOUNDATION

Respondent.

SUPPLEMENTAL  
PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

This matter is before the Hearing Examiner pursuant to the remand by the Human Rights Commission. The Hearing Examiner's Proposed Order and Decision was issued on March 9, 1987. The decision to remand was made at the May 1987 decision of the Commission. The Executive Director of the Human Rights Commission failed to provide the Order of Remand to the Hearing Examiner until October 20, 1987. The Executive Director failed to provide the official record to the Hearing Examiner until April 18, 1988.

DISCUSSION

The Order of Remand indicates that the Commission seeks clarification as to the issue of complainant's qualifications. In the original Proposed Order and Decision, the Hearing Examiner concluded that because respondent had conceded the issue in its brief, complainant had established a prima facie case of race discrimination.

The Hearing Examiner believes that the confusion in this case may be with the most common formula for establishing a prima facie case which includes as a necessary element that a complainant demonstrate that she is qualified for the position in question. See Shepherdstown Volunteer Fire Dept. v. W.Va. Human Rights Commission 309 S.E.2d 342, 352-353 (W.Va. 1983); McDonnell Douglas Corporation v. Green 411 U.S. 792 (1973).

It must be noted, however, that there can be no mechanically applied formula for determining what constitutes a prima facie case. Indeed, the only test is whether the complainant has proven facts which if otherwise unexplained, would raise an inference of discrimination. Furnco Construction Company v. Waters 438 U.S. 567, S77 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981).

In the instant case it is clear based upon a determination of the demeanor and credibility of the witnesses, as well as a review of all other evidence in the record that complainant, with barely one year of experience as a registered nurse, was not qualified for the position of charge nurse. Nonetheless, as respondent's analysis correctly points out, complainant has established a prima facie case of discrimination. Even though not qualified, complaint's proof included sufficient facts to conclude that, unless otherwise explained by respondent, raise an inference of discrimination.

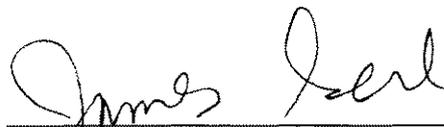
Respondent did, however, explain these facts further by articulating a legitimate non-discriminatory reason for failing to promote complainant. Specifically respondent articulated that its Director of Nursing determined that both complainant and Watts, an

employee of respondent with more experience than complainant, lacked the length of experience and the leadership ability to be a charge nurse and therefore, Barker, who was much better qualified than complainant, was selected for the charge nurse position. Based upon the demeanor and credibility of the various witnesses, as well as the other factors outlined in the original Proposed Order and Decision, the Hearing Examiner concluded that complainant failed to demonstrate by a preponderance of the evidence that the reason articulated by respondent was a pretext for discrimination.

PROPOSED ORDER

In view of the foregoing the Hearing Examiner recommends the following:

1. That the original Proposed Order and Decision be amended to include the foregoing clarifications; and
2. That the complaint in this case be dismissed with prejudice.

  
\_\_\_\_\_  
James Gerl  
Hearing Examiner

ENTERED: October 4, 1988

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served the foregoing PROPOSED ORDER AND DECISION by placing true and correct copies thereof in the United States Mail, postage prepaid, addressed to the following:

Mary Lou Hill  
P.O. Box 2757  
Greenville, SC 29602

Brenda Waugh  
8520 Artillery  
Manassas, VA 22110

Billy Atkins  
Furbee, Amos, Webb & Critchfield  
5000 Hampton Center  
Morgantown, WV 26505

Barbara Fleischauer  
346 Watts Street  
Morgantown, WV 26505

on this 25th day of October, 1988.

  
\_\_\_\_\_  
James Gerl