



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
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11 May 1992

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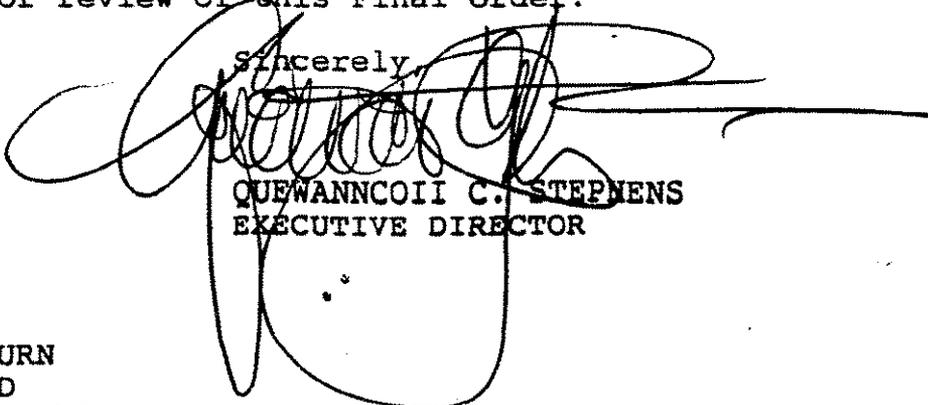
William H. Duty, Esquire
Assistant Prosecuting Attorney
Mingo County Courthouse
Post Office Box 2236
Williamson, WV 25661

Re: Hatfield v. Office of the
Sheriff of Mingo County
Docket No. EH-117-90

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, as 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,



QUEWANNOII C. STEPHENS
EXECUTIVE DIRECTOR

QCS/jm
Enclosures
CERTIFIED MAIL/RETURN
RECEIPT REQUESTED
cc: The Hon. 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

RANDY L. HATFIELD,

Complainant,

v.

DOCKET NO. EH-117-90

OFFICE OF THE SHERIFF
OF MINGO COUNTY,

Respondent.

FINAL ORDER

On April 8, 1992, the West Virginia Human Rights Commission reviewed the Hearing Examiner's Final Decision in the above-styled action issued by Hearing Examiner Richard M. Riffe. After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the exceptions filed in response to the Hearing Examiner's Final Decision, the Commission decided to, and does hereby, adopt said Hearing Examiner's Final Decision as its own, except for such modifications and amendments as are set forth immediately hereinbelow:

On page 27, Subsection 5. Job as Deputy Sheriff or Front Pay, is hereby modified as follows:

The first paragraph:

Accordingly, it is further ordered that Mr. Hatfield be awarded retroactive monetary and nonmonetary seniority benefits which shall accrue beginning August 15, 1989 (the date complainant would have been hired as a deputy sheriff

absent respondent's unlawful discrimination). Monetary and nonmonetary seniority benefits shall include, but not be limited to, salary, job security, retirement, medical benefits, and all other benefits offered by respondent.

Replace the last sentence of the second paragraph with the following sentence:

Therefore, it is further ordered that if the deputy sheriff position is not presently available, complainant is awarded full monetary and nonmonetary benefits until the job becomes available. Said monetary and nonmonetary benefits shall accrue beginning August 15, 1989, and shall include, but not be limited to, salary, job security, retirement, medical benefits and all other benefits offered by respondent. At such time the deputy sheriff position becomes available, complainant shall continue to receive monetary and nonmonetary benefits with an accrual date of August 15, 1989.

It is, therefore, the order of the Commission that the Hearing Examiner's Final Decision be attached hereto and made a part of this Final Order, except as modified by this Final Order hereinabove.

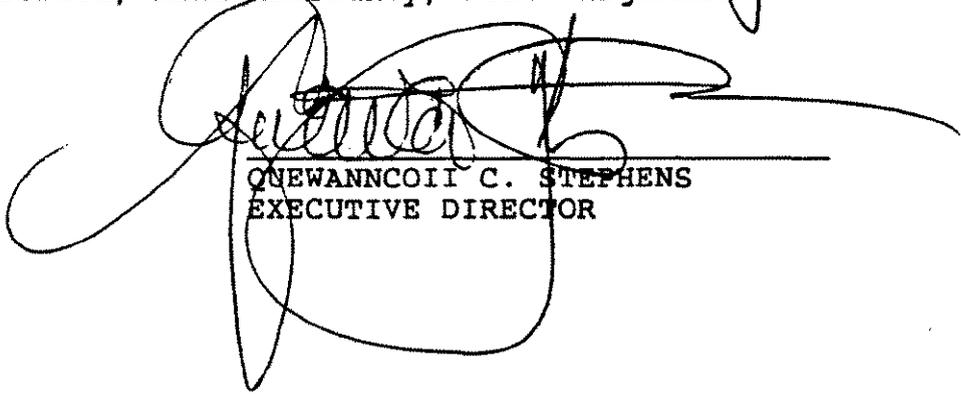
By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial

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 1st day of May, 1992 in Charleston, Kanawha County, West Virginia.



QEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RECEIVED

RANDY L. HATFIELD
Complainant,

JAN 21 1991

ATTORNEY GENERAL
CIVIL RIGHTS DIV.

v.

DOCKET NUMBER(S): EH-117-90

SHERIFF OF MINGO COUNTY
Respondent.

HEARING EXAMINER'S FINAL DECISION

This matter came on for hearing on 16 September 1991 in the Mingo County Courthouse in Williamson, West Virginia. The complainant appeared in person; the Commission appeared by its attorneys Jim Carbone and Paul Sheridan; the respondent appeared by Bill Duty, its attorney. The respondent did not make a personal appearance. The Commission's proposed findings of fact, conclusions of law and argument have been considered. Although the respondent requested and received a twenty-one day extension to file proposed findings and conclusions it did not file them. To the extent that the proposed findings, conclusions and arguments are consistent with this Order, they have been adopted; to the extent that they are inconsistent with this Order they have been rejected. Each proposed finding and conclusion that does not appear in this Order has been rejected as unnecessary to the outcome of this case, irrelevant, cumulative or not supported by the evidence. To the extent that the testimony of any witness is not in accord with the findings of fact as stated herein, such testimony was not credited. To the extent that any finding of fact should have been labeled a conclusion of law or vice versa, they should be so read. The findings of fact are

based upon the testimony and documentary evidence produced, considering the credibility of witnesses and the plausibility of the proffered evidence in view of the other evidence of record, taking into account each witness' state of mind, strength of memory and demeanor while on the witness stand and considering whether a witness' testimony was internally consistent and the bias, prejudice or interest, if any, of each witness. The following facts are found by a preponderance of the evidence:

A. FINDINGS OF FACT

1. Complainant applied for a deputy sheriff position with the respondent, Sheriff of Mingo County on June 15, 1989.

2. The complainant took and passed the entry level deputy sheriff examination that was administered by the Mingo County Deputy Sheriff's Civil Service Commission.

3. On August 2, 1989 complainant had an interview with Chief Deputy Bush for the deputy sheriff position.

4. On or about August 14, 1989, complainant was given and successfully completed a pre-employment medical examination with respondent's physician, Dr. Angco.

5. On or about August 21, 1989, complainant provided Sheriff Chafin with a doctor's report from Dr. Jameson, a physician who had examined complainant on August 16, 1989, stating that complainant was physically able to work as a deputy in the Sheriff's Department.

6. On August 3, 1989, Sheriff Chafin recommended to the Mingo County Commission that complainant be hired as a deputy sheriff.

7. The general work of a deputy sheriff is accurately described in the statement of qualifications provided by the Sheriff of Mingo County. (EXHIBIT 18, incorporated herein by reference.)

8. Complainant's diabetes does not prevent him from driving.

9. Complainant's diabetes does not prevent him from talking.

10. The official policy of the West Virginia State Police Academy as represented by Captain Shaw is that the Academy has no categorical exclusion of insulin dependent diabetics who are seeking certification for positions as deputy sheriffs.

11. Sheriff Chafin is the Sheriff of Mingo County and is responsible for hiring deputy sheriffs in Mingo County and for the employment policies and practices of the office of the Sheriff of Mingo County.

12. Complainant, Randy Hatfield has insulin-dependent diabetes mellitus.

13. Complainant is a handicapped person as defined in section 5-11-3(t)(3) of the West Virginia Human Rights Act. A deputy earns approximately \$1500 a month plus medical benefits and vacation time.

14. Each of the foregoing findings of fact is based upon the stipulations filed by the parties at the hearing herein.

15. Complainant, a white male, was born on 27 July 1962. He has been an insulin-dependent diabetic for the last 23 years.

16. The complainant's diabetes is a permanent condition for which he takes an injection each morning. He monitors his blood sugar at least daily and sometimes more frequently.

17. The central characteristic of his condition is the inability of the pancreas to secrete insulin to insure adequate balance of the body's blood sugar level.

18. Insulin-dependent diabetes mellitus results from an autoimmune destruction of the beta cells, the insulin secreting cells in the pancreas.

19. Insulin is a hormone that is essential for the proper use and storage of glucose in the body. This hormone is secreted by the beta cells in the pancreas and provides the body with a relatively constant concentration of sugar. In addition, insulin facilitates the passage of glucose across cell membranes where the glucose is used as a source of energy by the body.

20. The pancreas of a person with insulin dependent diabetes does not secrete insulin; rather, insulin must be introduced into the body to simulate the action of a normal functioning pancreas.

21. Complainant has experienced only one incident of severe hypoglycemic shock during the 23 years he has been diagnosed as an insulin dependent diabetic.

22. Hypoglycemia is a condition in which the blood sugar level is excessively low.

23. Glucose is normally replenished in the blood by the ingestion of food containing carbohydrates.

24. Hyperglycemia is a condition in which the blood sugar level is excessively high.

25. Complainant Hatfield maintains his blood sugar levels under good control. His condition does not require that he eat meals at fixed intervals. He does carry a glucose meter about with him. It

is a small, transportable device which provides quick blood sugar level readings.

26. Deputy sheriff duties include investigating accidents and administering first-aid, patrolling assigned areas for the protection of life and property, apprehending and transporting inmates, service of legal papers, the convening and maintaining of order in the court, and the receipt and investigation of criminal complaints.

27. A substantial amount of the work done by deputy sheriffs involves routine patrolling during regular working hours with no heavy physical exertion.

28. In neither the written application nor in Don Bush's August 1, 1991 interview was the complainant asked whether he was taking medication or whether he was a diabetic.

29. The complainant meets all of the requirements for submitting an application for the deputy sheriff's position.

30. The complainant took and passed the entry level deputy sheriff examination.

31. On 5 August 1989 Sheriff Chafin recommended to the Mingo County Commission that complainant be hired as a deputy sheriff.

32. Sheriff Chafin rescinded his recommendation to the Commission after he learned that complainant was an insulin-dependent diabetic.

33. On 15 August 1989 Chief Deputy Bush sent a letter to the Mingo County Commission indicating that he was returning complainant's application for the deputy sheriff position because complainant was an insulin dependent diabetic. Every doctor to examine the complainant either reported or testified that his medical

condition would in no way interfere with his ability to perform the duties of a deputy sheriff. Likewise, the medical reports and doctor's recommendations which the Sheriff had in his possession at the time of complainant's application all indicated that he was physically capable of performing the duties of a deputy sheriff.

34. On 21 August 1991 complainant went back to Sheriff Chafin's office and was instructed by the Sheriff to obtain a second opinion indicating that he was physically able to perform the duties of a deputy sheriff. This the complainant did.

35. On 26 August 1989 Sheriff Chapin requested that the Civil Service Commission disqualify the complainant from consideration for the deputy sheriff position based upon his perception that because complainant was an insulin-dependent diabetic he would not be able to handle the stress of the job and would likely develop future complications.

36. On 30 August 1989 complainant spoke to Sheriff Chafin to see if he had decided whether to hire him. The Sheriff responded that he "could not hire him because of his diabetes." In addition, Sheriff Chafin stated that he was "looking down the road" and that his decision was not appealable.

37. Probationary deputy sheriffs are required to go through the State Police Academy before they may become certified deputies.

38. Complainant had previous employment which would have approximated some of the job stress that a deputy sheriff might have to endure. He was a public inebriate monitor at the Logan-Mingo Area Mental Health Facility for approximately 6 years. He worked irregular shifts, irregular hours, and ate his meals at irregular

intervals. He experienced no diabetes related problems while so employed.

39. The complainant is a fit man who engages in a fairly strict exercise regimen which includes playing full court basketball for a couple of hours at a time. He has worked as a surface-coal miner performing fairly heavy duties.

40. The parties entered the following stipulations regarding damages:

a. Had Hatfield been employed by the Sheriff of Mingo County his wages and benefits would have been \$45,334 for the period of 15 August 1989 through 15 September 1991.

b. The complainant earned \$18,880.50 in gross income from other employment for the period of 15 August 1989 through 15 September 1991.

c. The complainant's net earnings (gross back-pay less mitigation) plus interest were \$28,647.76 for the period of 15 August 1989 through 15 September 1991.

d. Respondent continued to solicit and hire persons for the deputy sheriff's position after rejecting complainant.

e. The West Virginia Attorney General's Office has incurred costs in the prosecution of this case, including: deposition and expert witness fees and transportation and accommodation expenses.

B. CONCLUSIONS OF LAW

1. The respondent Sheriff of Mingo County is an employer within the meaning of W. Va. Code §5-11-3(d).

2. Complainant Randy L. Hatfield is a citizen of the State of West Virginia and a person within the meaning of W. Va Code §5-11-2(a). He was a qualified applicant for the position of deputy sheriff.

3. Complainant Hatfield is a handicapped person as defined in W. Va. Code §5-11-3(t).

4. Complainant filed a timely complaint of discrimination on the basis of handicap with the West Virginia Human Rights Commission pursuant to W. Va. Code §5-11-10.

5. The complainant made a prima facie showing that respondent denied him an equal employment opportunity because of his handicap.

6. The respondent articulated a legitimate nondiscriminatory reason for its refusal to hire complainant: that he failed to disclose that he was an insulin dependent diabetic, and that such failure constituted dishonesty.

7. The complainant proved that respondent's alleged legitimate nondiscriminatory reason was pretextual.

8. The respondent failed to make an individualized determination substantiated by competent medical evidence that complainant was unable to perform the job duties without the risk of

harm to himself or others. Thus, this reason for not hiring complainant was not a legitimate nondiscriminatory reason.

9. The respondent failed to establish that freedom from diabetes is, in this case, a bona fide occupational qualification.

C. DISCUSSION AND ORDER

I. THE RESPONDENT'S REFUSAL TO HIRE COMPLAINANT BECAUSE HE IS AN INSULAN DEPENDENT DIABETIC CONSTITUTES UNLAWFUL DISCRIMINATION.

The West Virginia Human Rights Act protects qualified handicapped individuals from discrimination by employers (including the State and its political subdivisions). W. Va. Code §5-11-3(d). Section 5-11-9(a)(1) provides in part:

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification. . .

(1) For any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is . . . handicapped.

In this case the respondent Sheriff of Mingo County, a covered employer, has unlawfully discriminated against complainant by refusing to extend an equal employment opportunity to him because of his handicap, diabetes, in violation of W. Va. Code § 5-11-9(a)(1).

A. COMPLAINANT ESTABLISHED A PRIMA FACIE CASE OF HANDICAP DISCRIMINATION.

In order to state a prima facie case, a person claiming employment discrimination on the basis of handicap must prove that: (1) he is a handicapped individual; (2) he possesses the skills to do

the desired job with reasonable accommodation; and (3) he applied for and was rejected for the desired job. Ranger Fuel Corp. v. West Virginia Human Rights Commission, 376 S.E.2d 154, 158 (syl. pt. 2) (W.V. 1988). Once an applicant has established a prima facie case, the burden then shifts to the employer to rebut the prima facie case by presenting a legitimate nondiscriminatory reason for the applicant's rejection. Id. at 160, syl. pt. 2.

1. Complainant Hatfield is Handicapped

The term "handicap" is defined in W. Va. Code § 5-11-3(t) as any person who:

(1) Has a mental or physical impairment which substantially limits one or more of such person's major life activities . . . which includes such functions as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working;

(2) Has a record of such impairment; or

(3) Is regarded as having such an impairment . . .

Complainant proved both that diabetes is an actual physical impairment which substantially limits one or more of his major life activities, and that he is regarded by his putative employer as having such an impairment. The statutory definition of handicap set forth in W. Va. Code § 5-11-3(t), and the Commission's legislative rules promulgated thereunder are based upon and are virtually identical to the definition of "handicap" set forth in the federal Rehabilitation Act of 1973 and accompanying regulations. 29 U.S.C. § 701 et seq.

While the West Virginia Human Rights Act does not define the terms "physical or mental impairment" or "substantially limits", the Rules of the West Virginia Human Rights Commission Regarding Discrimination Against the Handicapped (Title 77 Series I) do. Although Rule § 77-1-2.4. was not in effect when complainant filed this action, this rule nonetheless provides guidance in defining this phrase. See, Coffman v. West Virginia Board of Regents, 386 S.E.2d 1 (W.V. 1988) (applying subsequently-promulgated rules). The "phrase physical or mental impairment":

"includes but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, autism, multiple sclerosis, cancer, heart disease, diabetes, mental retardation and emotional illness." (Emphasis added).

Likewise, 29 C.F.R. § 32.3 (B)(1)(iii), after which the Commission's Rule § 77-1-2.4. was modeled, includes diabetes in the definition of the phrase "physical or mental impairment."

In addition, from a medical standpoint, persons with insulin dependent diabetes mellitus are physically impaired. Dr. Grubb, a diabetes specialist, testified that diabetes mellitus results from an inability of the pancreas to produce the hormone insulin. (Grubb Deposition, p.8). Insulin is the sole glucose (sugar) lowering hormone in the body. As a result of the impairment of the pancreas, insulin dependent diabetics are forced to rely upon an exogenous source of insulin to maintain their blood sugar level.

The physical impairment, insulin dependent diabetes, also "substantially limits" one or more of complaint's major life activities. "Substantially limits" is defined in §77-1-2.5 of the Commission's rules to mean "interferes with or affects over a substantial period of time." "Major life activities" is defined in W. Va. Code § 5-11-3(t)(1) in a nonexclusive manner: it includes (not means) functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

Insulin dependent diabetes mellitus is a chronic disorder which interferes with an individual's employment opportunities and his ability to care for himself. (Tr. 23-24). Insulin dependent diabetics have been categorically excluded from certain jobs and encounter limitations in their employment options solely as a result of their condition. See, e.g., 14 C.F.R. §§ 61.123 (Federal Aviation Administration regulation excluding insulin dependent diabetics from being certified as commercial pilots). Diabetes has interfered with Mr. Hatfield's ability to care for himself over a substantial period of time because of the constant attention he must devote to monitoring and maintaining his blood sugar level through daily injection of insulin. (Tr. 23-24). He is a slave to these devices and substances, even though his condition is wholly manageable.

A substantial number of jurisdictions addressing the issue have also held that diabetes constitutes an actual handicap under either

their respective state statutes or the federal Rehabilitation Act of 1973. See, Serrapica v. City of New York, 708 F. Supp. 64 (S.D. N.Y. 1989); Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988); and Bentivegna v. United States Department of Labor, 694 F.2d 619, 621 (9th Cir. 1982) (interpreting "handicapped person" under the federal Rehabilitation Act of 1973); see also, Hines v. Grand Trunk Western Railroad Company, 391 N.W.2d 750 (Mich. App. 1985) (interpreting "handicapped person" under their respective state statutes).

Effective July 1, 1989 the Legislature amended the Act to afford protection to individuals who were perceived by their employer as being handicapped. It wasn't until August that Sheriff Chafin found out Hatfield had diabetes. Mr. Hatfield filed his complaint in August 1989 and therefore can avail himself of the protections of the "perceived handicap" definition.

In this case it is uncontroverted that Sheriff Chafin perceives all insulin dependent diabetics as having a physical impairment which substantially limits major life activities. The parties stipulated prior to hearing that complainant is a handicapped person as defined in § 5-11-2(t)(3) of the West Virginia Human Rights Act, as amended. (Tr. 13). In addition, Sheriff Chafin stated during a deposition that Hatfield's diabetes was a serious illness that would impair complainant's ability to perform the duties of a deputy sheriff despite competent medical evidence to the contrary. (Respondent's Exhibit No. 2, pp. 19-20). Further, Sheriff Chafin

stated that while a diabetic could function very well at a desk job, he could not work in law enforcement because he might put his partner in danger at a time of great stress. (Respondent's Exhibit No. 2, p. 41). Thus, Mr. Hatfield is also a handicapped individual as defined in § 5-11-3(t)(3) because he is perceived by Sheriff Chafin as having a physical impairment which substantially limits one or more of his major life activities.

2. Complainant Hatfield is Able and Competent to Perform the Job of Deputy Sheriff.

In determining if an individual is "able and competent to perform the services required," the employer must consider if, with or without reasonable accommodation: (1) the individual is currently capable of performing the work and (2) the individual can do the work without posing a serious threat of injury to the health and safety of either the individual, other employees or the public. See, Rules of the West Virginia Human Rights Commission Regarding Discrimination Against the Handicapped, § 77-1-4.3.; Ranger Fuel Corp. v. West Virginia Human Rights Commission, supra. Such a showing must be "based on a consideration of the job requirements in light of the applicant's handicap, and applicant's work and medical history." Id. at 155. Hiring decisions should not be based on general assumptions or stereotypes about persons with that particular handicap. The employer has the burden of demonstrating that its decision was based on objective criteria specific to the employment decision at issue. Id. at 160.

The requirement that employers engage in a careful review of a handicapped applicant's medical condition before denying him or her employment is designed to replace reflexive reactions to actual or perceived handicaps with decisions based upon medically competent evidence. School Board of Nassau County, Florida v. Arline, 107 S. Ct. 1123, 1129 (1987). The decision to reject a handicapped applicant because he or she would pose a serious threat to the health and safety of himself or others must be individualized and based upon competent medical evidence that would validate the employer's decision. Davidson v. Shoney's Big Boy Restaurant, 380 S.E.2d 232, 237 (W.V. 1989).

Sheriff Chafin's decision to refuse complainant employment because he is an insulin dependent diabetic was based upon his subjective evaluation that insulin dependent diabetics are not capable of working in certain environs. (Respondent's Exhibit No. 2, p. 41). The Sheriff admitted during deposition that he neither requested a release nor reviewed complainant's medical records, and never conferred with complainant's family doctor. (Respondent's Exhibit No. 2, pp. 32-33). In fact, the only medical recommendation before Sheriff Chafin prior to denying complainant employment was that of Dr. Angco, respondent's physician, who concluded that complainant was capable of performing the duties of a deputy sheriff. (Joint Exhibit No. 33). Nevertheless, the Sheriff ignored the recommendation of Dr. Angco and decided to follow his "gut instinct" that complainant would incur diabetes-related complications "down the road." (Tr. 53-54). Sheriff Chafin persists in his belief

that insulin dependent diabetics are not capable of performing certain tasks despite competent medical evidence to the contrary. (Respondent's Exhibit No. 2, p. 21). It is precisely this type of flawed decisional process which the West Virginia Human Rights Act is designed to eradicate.

In contrast, the complainant produced substantial evidence that he is able and competent to perform the duties of a deputy sheriff. The complainant produced four doctors' opinions at hearing which indicated that he is physically capable of performing the duties of a deputy sheriff without risk of injury to himself or others. First, the recommendation of respondent's physician, Dr. Angco, who had conducted the pre-employment physical examination, stated that although complainant is an insulin dependent diabetic, he is physically and mentally healthy. (Joint Exhibit No. 14; Tr. 30). Second, complainant furnished a recommendation from Dr. Jameson which stated that Hatfield was examined on August 21, 1989 and that he is capable of working as a deputy sheriff. (Joint Exhibit No. 9; Tr. 33). Third, complainant produced a recommendation from his family physician, Dr. Vellayan, stating that Mr. Hatfield is a well controlled diabetic and that he has no restrictions on his ability to work. (Joint Exhibit No. 13; Tr. 35-36). Fourth, Dr. Stephen Grubb testified in an evidentiary deposition that Mr. Hatfield is able to perform the duties of a deputy sheriff. (Grubb Deposition, p. 10). Therefore, all four medical opinions in the record indicate that Hatfield is medically qualified for the job.

The respondent offered no medical evidence to rebut the four medical opinions recommending complainant for employment. Dr. Yajnik, respondent's expert, stated in his medical report, "I have not detected any limitations or compromise in the ability of this diabetic individual to perform any duties that may be undertaken by a nondiabetic individual." (Joint Exhibit No. 2). Thus, there is a unanimity of opinion that complainant can perform the duties of a deputy sheriff.

Complainant's prior employment history likewise suggests that he can perform the job duties. (Joint Exhibit No. 7). Complainant worked for approximately six years as a public enibriate monitor at Logan Mingo Area Mental Health. (Tr. 25). His supervisor, Jerry Pinney, testified that complainant often worked long and irregular hours which caused him to miss meals, but that he never experienced any health problems. (Tr. 58-59). Mr. Pinney also stated that the work of a public enibriate monitor is highly stressful and physically demanding. (Tr. 60). After complainant was refused employment by respondent he worked as a surface coal miner for Supreme Fuels from November 1989 to March 1990 and did not experience any diabetes-related physical problems. (Tr. 47-49).

The respondent failed to produce any evidence to support its base allegation that complainant would pose a serious threat of injury to the health and safety of either himself, other employees, or the public. The Sheriff made a categorical statement during deposition that insulin dependent diabetics often go into diabetic

shock when put in highly stressful situations. (Respondent's Exhibit No. 2, p. 22). However, the Sheriff did not make an individualized determination that Mr. Hatfield has a medical history of severe incapacitating diabetic shock. Had Sheriff Chafin reviewed complainant's medical history and consulted with an expert on diabetes, he would have learned that Mr. Hatfield does not have a history of recurrent hypoglycemic shock and that severe incapacitating hypoglycemia occurs only in a very small percentage of the diabetic population. (Grubb Deposition, pp. 12, 49).

Dr. Grubb, a recognized expert on diabetes, dismissed Sheriff Chafin's exaggerated fear of Mr. Hatfield having a severe hypoglycemic reaction in the line of duty. Dr. Grubb testified at his evidentiary deposition that while some individuals are prone to severe hypoglycemia, this becomes evident very early in their diabetic history. (Grubb Deposition, p. 49). Dr. Grubb stated that Mr. Hatfield does not have a history of recurrent severe hypoglycemia and has only had one severe hypoglycemic episode in twenty-one years of having the condition of insulin dependent diabetes mellitus. (Grubb Deposition, p. 49). Dr. Grubb further testified that mild hypoglycemia is easily recognizable by the individual and quickly reversible through either the body's counter regulatory hormones or through the individual's ingestion of sugar. (Grubb Deposition, pp. 11, 13-14).

In summary, the overwhelming weight of the competent evidence, including past medical history, prior employment history and current

medical reports, indicates that Mr. Hatfield is currently "able and competent" to perform the duties of a Deputy Sheriff and would not pose a danger to himself, other employees or the public at large.

"Reasonable accommodations," in the "refusal to hire" context, are reasonable modifications or adjustments that employers are required to provide to handicapped employees to enable them to be hired in the position for which they applied. See, Rule 77-1-4.4., Rules of the West Virginia Human Rights Commission Regarding Discrimination Against the Handicapped.

Dr. Grubb testified that any accommodation which respondent would have to make for Hatfield's diabetic condition would be minimal. (Grubb Deposition, p. 30). He stated that complainant takes only a single injection of insulin a day, which would make substantial accommodations unnecessary. (Grubb Deposition, p. 25).

Dr. Grubb's testimony proved erroneous Sheriff Chafin's assertion that his office is unable to accommodate Mr. Hatfield's diabetic condition because they are unable to provide refrigerators in each squad car to store complainant's insulin. (Respondent's Exhibit No. 2, p. 34). First, insulin does not need to be refrigerated and can be taken at room temperature. (Tr. 44). Second, Mr. Hatfield only takes one injection of insulin each day, in the morning, and as a result, does not need a readily available supply of insulin. (Tr. 24). I find Sheriff Chafin's stated concern about accommodating Mr. Hatfield's diabetic condition without merit.

3. Complainant Applied For and Was Rejected For the Job of Deputy Sheriff.

It is uncontroverted that complainant Hatfield applied for the deputy sheriff position on June 15, 1989 and was denied employment for that position in the middle of August 1989.

B. THE RESPONDENT'S ARTICULATED "LEGITIMATE NONDISCRIMINATORY REASONS" FOR REJECTING COMPLAINANT FAIL.

Once complainant established a prima facie case of discrimination on the basis of handicap, the burden shifted to the respondent "to rebut the prima facie case by presenting a legitimate nondiscriminatory reason for the applicant's rejection." Ranger Fuel Corp. v. West Virginia Human Rights Commission, supra. The respondent articulated that it rejected complainant for two reasons: (1) complainant is an insulin dependent diabetic and may have future complications which could pose a materially enhanced risk of substantial harm to himself or others; and (2) complainant did not disclose that he is a insulin dependent diabetic. I find the former reason improper and the latter pretextual.

The respondent bears the burden of proving that complainant's condition creates a materially enhanced risk of substantial harm to the handicapped person or others. Davidson v. Shoney's Big Boy Restaurant, supra. In Bentivegna v. United States Dept. of Labor, 694 F.2d 619 (9th Cir. 1982) the court rejected the "risk of future injury" justification for terminating a diabetic employee. The Bentivegna court reasoned that allowing remote concerns to legitimize discrimination against the handicapped would vitiate

legislation protecting the handicapped from employment discrimination. Id. at 623.

Similarly, in this case I reject Sheriff Chafin's justification that he properly rejected complainant because of the possibility of diabetes-related long-term health effects and the risk of future injury to himself or others. Sheriff Chafin's conclusions about the long-term health effects of insulin dependent diabetes mellitus are simplistic, factually erroneous and contrary to the testimony of the medical experts. Dr. Grubb testified that not all insulin dependent diabetics experience diabetic complications and that Mr. Hatfield has shown no evidence of complications, such as diabetic neuropathy or retinopathy, in his twenty-one year medical history as a diabetic. (Grubb Deposition, p. 60). Therefore, the prospect of Mr. Hatfield experiencing future complications is hardly certain. Furthermore, Dr. Grubb testified that emotional trauma can have a positive influence on diabetes because of the tendency for blood sugar levels to increase through the release of counter regulatory hormones. (Grubb Deposition, p. 42). In summary, Sheriff Chafin's justification that complainant was rejected because of the increased risk of injury is not supported by the evidence, and the rejection of Mr. Hatfield based on the possibility of remote, long-term diabetic complications does not constitute a legitimate nondiscriminatory defense. It is clear that complainant was rejected because of the respondent's misperceptions and unfounded prejudices about diabetics.

Respondent's defense that complainant was refused employment because he lied about having the condition of insulin dependent diabetes mellitus is pretextual. Respondent did not raise this concern until well after complainant was rejected. Chief Deputy Bush and Sheriff Chafin sent letters to the Mingo County Commission, dated August 15, 1989 and August 26, 1989, respectively, requesting that Hatfield be disqualified because he is a diabetic. (Joint Exhibit No. 8 and No. 10). These letters make no mention that complainant be disqualified because he lied about his physical condition. Respondent first raised the "veracity defense" in an April 26, 1990 letter to Norman Lindell, Assistant Director of the West Virginia Human rights Commission, nearly nine months after complainant was refused employment. (Joint Exhibit No. 16). Late or untimely asserted reasons for rejecting an applicant are strong indicators of pretext.

C. RESPONDENT FAILED TO ESTABLISH THAT
FREEDOM FROM INSULIN DEPENDENT
DIABETES MELLITUS IS A BONA FIDE
OCCUPATIONAL QUALIFICATION.

West Virginia Code § 5-11-9 provides an exception to the prohibition of discrimination in employment when such discrimination is based upon a bona fide occupational qualification (hereinafter BFOQ). The Commission construes BFOQ very narrowly and requires that in order to establish a BFOQ which excludes all persons with a particular handicap, an employer must prove that all or virtually all persons with that particular handicap would be unable to perform the essential functions of the job involved. See, Rule 77-1-4.10.,

Rules of the West Virginia Human Rights Commission Regarding Discrimination Against the Handicapped. In order to establish a BFOQ defense, an employer must produce evidence that: (1) the essential duties of the position require that it exclude persons with the disease or disorder; and (2) it had an objective, factual basis to conclude that all or substantially all persons with the disorder would be unable to safely or efficiently perform the duties of the job. Dothard v. Rawlinson, 433 U.S. 321 (1977).

In Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), the United States District Court for the Eastern District of Pennsylvania upheld a blanket exclusion of all insulin dependent diabetics from the job categories of special agent and investigative specialist only after the defendant employer, the Federal Bureau of Investigation (FBI), produced substantial evidence that insulin dependent diabetics could not perform the essential functions of the job with or without reasonable accommodations. The FBI performed extensive tests and submitted evidence from a diabetes expert which indicated even the slightest risk of a severe hypoglycemic reaction would present substantial danger to the diabetic, his co-workers and the public in those highly sensitive job categories. Id. at 518.

First, I think that Davis is wrong, and second, this case is distinguishable from Davis because Sheriff Chafin provided mere speculation, unsupported by objective medical evidence, that there was a possibility that insulin dependent diabetics would have difficulty performing in highly stressful situations. There was no

evidence presented by the respondent from which I could make findings similar to those in Davis. Moreover, the essential duties of a special agent are significantly different from the essential duties of a deputy sheriff. The main duty of a deputy sheriff is patrolling (joint Exhibit No. 18), while the duties of a special agent often include the investigation of sensitive matters affecting the entire country. In contrast to the fitness standards for a special agent in the FBI, the standards maintained by the respondent are lax and flexible. Sheriff Chafin admitted that he routinely waives the "weight in proportion to height" requirement. (Respondent's Exhibit No. 2, p. 38).

Respondent failed to produce any medically competent evidence that diabetics could not perform the job duties, and also failed to meet Dr. Grubb's opinion that insulin dependent diabetics are capable of performing the duties. Therefore, respondent's BFOQ defense is rejected.

The Commission having proved unlawful discrimination, I shall award such relief as will effectuate the purposes of the Human Rights Act and make Mr. Hatfield whole for injuries suffered on account of unlawful discrimination. Albermarle Paper Co. v. Moody, 422 U.S. 405, 418, 45 L. Ed. 2d 280, 95 S.Ct. 2362 (1975).

An appropriate remedy for complainant under the "make whole" rule is back pay with prejudgment interest, incidental damages, a job

as deputy sheriff (or front pay, if a job is not presently available), and a cease and desist order.

1. Back pay

The Commission is authorized to issue an order awarding back pay where it finds that the respondent has engaged in an unlawful discriminatory practice. W. Va. Code § 5-11-10. In order to establish entitlement to back pay, the plaintiff must establish that he has in fact sustained an economic loss from respondent's discrimination. Frank's Shoe Store v. West Virginia Human Rights Commission, 365 S.E.2d 251 (W. V. 1986). This showing requires that complainant prove the existence of a loss and a causal link to the defendant's discrimination. Complainant demonstrated that he sustained a loss of almost two years employment as a deputy sheriff as a result of respondent's discrimination. (Tr. 30).

In calculating an award of back pay, it is incumbent upon me to attempt to recreate the conditions and relationships that would have existed absent illegal discrimination. International Brotherhood of Teamsters v. United States 431 U.S. 324, 372, (1977). The parties stipulated that had complainant been employed by Mingo County after he satisfied the requisite pre-employment criteria in August 1991, the amount he would have earned in back pay, after deducting mitigation, is \$28, 082.11.

2. Prejudgment interest on back pay

The parties stipulated that interest has accrued in the amount of \$565.65. Thus, the complainant is entitled to a total of \$28,647.76. (Joint Exhibit No. 20).

3. Incidental damages

The Commission is authorized to award incidental damages up to \$2,500.00. Bishop Coal Co. v. Salyers, 380 S.E.2d 238 (W. V. 1989). Complainant is entitled to that amount for the humiliation, embarrassment, emotional and mental distress and loss of personal dignity suffered as a result of respondent's unlawful acts. He testified at hearing that he was extremely distraught when he was rejected by Sheriff Chafin because he had resigned from his previous job at Logan Mingo Area Mental Health in reliance upon his promise to hire him. (Tr. 38). In addition, complainant was humiliated because he was unable to support his family and was forced to apply for public assistance. (Tr. 38-39). The evidence indicates that complainant suffered grave emotional injuries and he is awarded incidental damages in the amount of \$2,500.00.

4. Cease and desist order

West Virginia Code § 5-11-13(c) allows the Commission to issue a cease and desist order with equitable provisions preventing the respondent from continuing a discriminatory policy or practice. A cease and desist order is hereby issued which requires that the respondent cease discriminatory practices and post notices in its

offices stating that it is an equal opportunity employer and that unlawful discriminatory practices may be reported to the West Virginia Human Rights Commission, and showing the address and telephone number of the Commission.

5. Job as Deputy Sheriff or Front Pay

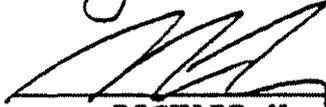
The record indicates that complainant is qualified for hire as a probationary deputy sheriff. (Tr. 28-30). His rejection was based solely upon impermissible discriminatory considerations. Therefore, it is further ordered that he be hired for the position for which he was unlawfully rejected.

When an individual has been denied an employment opportunity on an impermissible basis and the position denied is not presently available, the Commission may award front pay until the job becomes available. Casteel v. Consolidation Coal Co., 383 S.E.2d 305, 311 (W. V. 1989). Therefore, if the position is not presently available, Mr. Hatfield is awarded the salary and benefits of a deputy sheriff until the job becomes available.

6. Costs

The Attorney General is awarded his costs in the amount of \$896.15.

Entered this 16th day of January, 1992.



RICHARD M. RIFFE
HEARING EXAMINER

9.3.3. Award such other equitable relief as will make the complainant whole, including, but not limited to, an award of attorney's fees and costs.

9.3.4. If upon all the testimony, evidence and record of the hearing the hearing examiner shall find that the respondent has not engaged in any unlawful discriminatory practice as defined in the Act, the hearing examiner shall issue a decision dismissing the complaint as to such respondent.

9.5. Copies of the hearing examiner's final decision shall be served by certified mail, return receipt requested, on the complainant, the respondent, all intervenors, and counsel of record, and by personal delivery or first class mail on the Commission's attorney and all other persons, offices or agencies deemed appropriate by the hearing examiner or the Commission.

9.6. All final decisions rendered by a hearing examiner shall be filed at the central office of the Commission and shall be open to public inspection during regular office hours of the Commission.

§77-2-10. Appeal to the Commission.

10.1. Within thirty (30) days of receipt of the hearing examiner'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 examiner, 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 hearing examiner shall not operate as a stay of the decision of the hearing examiner 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 hearing examiner, or an order remanding the matter for further proceedings before a hearing examiner, 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 hearing examiner, the Commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the examiner on remand.

10.8. In considering a notice of appeal, the Commission shall limit its review to whether the hearing examiner'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 hearing examiner's final decision is not filed within thirty (30) days of receipt of the same, the Commission shall issue a final order affirming the examiner'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.

§77-2-11. Judicial Appeal.

11.1. Judicial review of a final order of the Commission may be obtained by the complainant, respondent or other person aggrieved by such order.

11.2. A party who seeks judicial review must file his/her appeal within thirty (30) days after receipt of the final order of the Commission.

11.3. For purposes of judicial appeal, the decision of the Commission affirming, modifying or setting aside the final decision of the hearing examiner shall constitute the final order of the Commission.

§77-2-12. General Investigations.

12.1. The Commission may, at its discretion and in accord with the power conferred upon it by the Act, conduct such general investigations and hearings into problems of discrimination as it deems necessary or desirable and may study and report upon the problems of the effect of discrimination on any field of human relationships.

12.2. In pursuing its functions authorized by the Act and by this section, the Commission may exercise its full powers of discovery as set forth in the Act and in these regulations.

§77-2-13. Declaratory Rulings and Guidelines.

13.1. Petitions for declaratory rulings filed with the Commission pursuant to W. Va. Code § 29A-4-1 shall contain the following:

13.1.1. A statement of the question on which the declaratory ruling is sought.

13.1.2. A full statement of the facts giving rise to the question.

13.1.3. A statement of the basis for the petitioner's interest in the question.

13.1.4. Any legal argument which petitioner wishes to submit.

CERTIFICATE OF SERVICE

I, Richard M. Riffe, Hearing Examiner for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing Hearing Examiner's Final Decision by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 17th day of January, 1992, to the following:

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RICHARD M. RIFFE