



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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January 29, 1990

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Walker Machinery Co.
P.O. Box 2427
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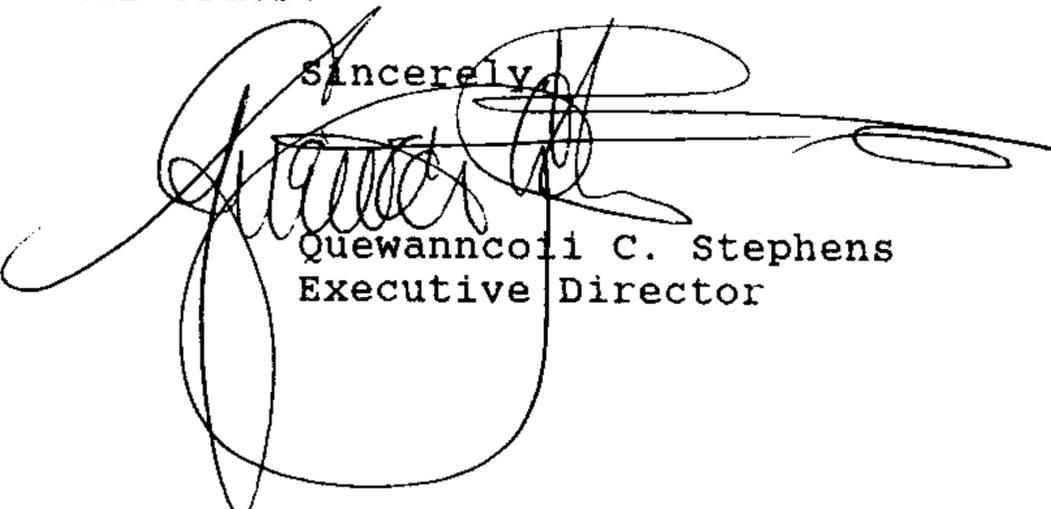
Fred Holroyd, Esq.
209 W. Washington St.
Charleston, WV 25301

Re: Hairston v. Walker Machinery Co.
ER-552-86 & REP-46-87

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,


Quewanncoi C. Stephens
Executive Director

QCS/mst

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

ROBERT HAIRSTON,
Complainant,

v.

DOCKET NOS: ER-552-86
REP-46-87

WALKER MACHINERY COMPANY,
Respondent.

ORDER

This matter matured for public hearing on 12 May 1987. The hearing was held in the Conference Room, Daniel Boone Building, 405 Capitol Street, Charleston, West Virginia. The hearing panel consisted of Theodore R. Dues, Jr., Hearing Examiner and Russell VanCleve, Hearing Commissioner. The complainant appeared in person and by his counsel, F. Layton Cottrill. The respondent appeared by its representative, Edgar Wode, and by its counsel, Fred F. Holroyd.

On 24 October 1989, the Hearing Examiner submitted his Recommended Findings of Fact and Conclusions of Law to the Commission. On 6 December 1989, and 10 January 1990 the Commission reviewed said recommendations, as well as the exceptions filed in response thereto by the respondent.

Upon mature consideration of the Examiner's recommendations, the respondent's exceptions and all proposed findings, conclusions and supporting arguments submitted by

the parties, and upon an independent review of the entire record herein, the Commission does hereby enter its Findings of Fact and Conclusions of Law as set forth hereinbelow. To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion 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 as 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 the findings herein, it is not credited.

ISSUES TO BE DECIDED

1. Whether respondent violated W. Va. Code § 5-11-9(a)(1) by unlawfully discriminating against the complainant with respect to the tenure, terms, conditions or privileges of employment because of his race. Specifically, complainant alleges that respondent discriminated against him in regard to discipline, denial of equal opportunity for training, failure to place him in a job commensurate with his skills and by maintaining a racially hostile work environment.

2. Whether respondent violated W. Va. Code § 5-11-9(i)(3) (amended in 1989 to become § 5-11-9(a)(9)(c)) by

taking reprisal action against complainant because he filed a complaint with the West Virginia Human Rights Commission.

FINDINGS OF FACT

Upon thorough examination of the entire record, including the transcript of hearing, all documentary evidence and argument of counsel, the Commission finds the following facts to be true:

Preliminary Facts

1. Complainant, Robert Hairston, is a black male, who, at all times relevant to this action, was employed by respondent at its plant in Belle, Kanawha County, West Virginia.

2. Respondent Walker Machinery Company (hereinafter referred to as "Walker") is an employer as that term is defined by W. Va. Code § 5-11-3(d).

3. Complainant was first employed by Walker on 10 November 1969.

4. Complainant was hired as a helper at a salary of \$2.15 per hour.

5. Complainant was promoted to the position of Mechanic I on 6 June 1977. Complainant was the only black Mechanic I employed by the respondent on the day shift from 6 June 1977 through 17 July 1986.

6. Respondent's Belle plant, at all times relevant hereto, was subject to a collective bargaining agreement between respondent and International Union of Operating Engineers, L.U. 132.

7. Complainant was a member of the union and for a period of time served as a shop steward.

Facts Pertinent To The Original Complaint

8. After his promotion to Mechanic I, complainant worked on engine assembly.

9. In 1984, some seven years after his promotion, Hairston was removed from engine assembly and placed in the "pans and covers" area of the engine shop.

10. Complainant was transferred because an unacceptable volume of his work had to be re-done by himself or another employee.

11. Despite his transfer, Hairston retained his status as Mechanic I and the salary and benefits commensurate therewith.

12. Complainant produced no evidence tending to show that the reason articulated by Walker to explain the transfer, complainant's high "re-do" rate, was untrue and a mere pretext for discrimination.

13. The training Walker provided to its employees varied with the fortune of the company. In the leaner years, from 1981 through 1986, most of the training provided was "on-the-job."

14. While Hairston was not provided with training specifically geared to his desire to improve his skills in engine assembly, there were white employees (such as Thomas, who testified in favor of complainant) who were similarly not provided the type of training which they felt necessary to enhance their skills in a particular area.

15. One of the complainant's own witnesses, a white co-worker, testified that he was given the same opportunity for training and advancement as Hairston.

16. What training was provided by Walker was provided on an equal opportunity basis. Complainant produced no

evidence that he was denied an equal opportunity to participate in or attend any training that Walker made available. Nor did any evidence indicate that Walker failed to provide certain training because of a discriminatory intent. On several occasions, complainant's failure to attend a training was due to his own choice and not any act of Walker.

17. Respondent uses a system of progressive discipline. A first offense warrants a verbal reprimand, a second offense brings a written reprimand, a third offense results in suspension and a fourth offense may result in termination.

18. On 13 December 1985 complainant was given a three-day suspension for failing to place oil filters in an engine. This incident was the third "write up" concerning complainant's performance.

19. Complainant produced evidence that white employees engaged in similar or worse conduct and were not subjected to a three-day suspension. However, respondent provided evidence that the white employees (Terry White, Greg Foster, Willard Taylor and Bobby Casto) had fewer infractions than complainant and for that reason were disciplined less severely.

20. Walker produced additional evidence showing that it had laid off at least two other employees for disciplinary

reasons, both of whom are white. They were disciplined by Piggott, the same supervisor who disciplined complainant.

21. Complainant produced no evidence showing that the reason articulated by Walker for his three-day suspension was untrue and a mere pretext for discrimination.

22. Complainant produced credible evidence that the work atmosphere at Walker was racially hostile. Such evidence included racial taunts, slurs, jokes, drawings and graffiti, some, but not all of which, were specifically directed at Mr. Hairston.

23. On at least one occasion a manager for respondent used a racial epithet in complainant's presence.

24. When complainant reported racial incidents to his immediate supervisor, Piggott, no immediate action was taken. Piggott was considered a difficult supervisor by all employees, blacks and whites, but never directed any racial remarks or acts toward complainant.

25. When, a few days after speaking to Piggott, complainant brought the racial incidents to the attention of Walker's personnel director, Edgar Wode, immediate action was taken. Wode made clear to respondent's employees at the Belle plant, and subsequently at all of its facilities in West

Virginia, that racial incidents would not be tolerated by Walker and persons committing the same would be subject to disciplinary measures up to and including discharge. Individual disciplinary action was not taken because complainant refused to reveal the identity of the perpetrators.

26. Complainant admitted that after Wode's action incidents of racial harassment virtually ceased.

Reprisal Complaint

27. Complainant filed a complaint with the West Virginia Human Rights Commission on 15 May 1986 alleging that Walker had discriminated against him in the terms and conditions of his employment.

28. On 17 July 1986 complainant was laid off from his job with respondent.

29. On 26 July 1986 he filed a second HRC complaint against Walker alleging that Walker had laid him off in retaliation for the filing of the original discrimination complaint. He further claimed that less qualified white workers had been retained by Walker.

30. In response to the allegation of reprisal, respondent produced uncontroverted evidence that it suffered extensive economic losses in late 1985 and throughout 1986, resulting in a substantial lay-off of employees, up to and including almost 50% of its work force.

31. In July 1986 respondent determined that it would be necessary to lay off twelve (12) employees, including two from the service department, where complainant worked.

32. The collective bargaining agreement between respondent and the union permitted respondent to lay off employees outside seniority. To determine who was to be laid off, respondent was allowed to consider anticipated work requirements and the skills and abilities necessary to meet those requirements. Seniority would be the determining factor only if the skills and abilities of employees were equal.

33. At a series of meetings of Walker's supervisory personnel it was determined that complainant, among others, would be laid off because he did not have the level of skills necessary to meet the company's requirements.

34. Complainant failed to show that the reason articulated by respondent explaining his layoff was untrue and a mere pretext for discrimination.

Ultimate Findings of Fact

35. After careful review of the testimony, evidence and other matters of record in this case, the Commission finds that respondent did not violate W. Va. Code § 5-11-9(a)(1).

36. After careful review of the testimony, evidence and other matters of record in this case, the Commission finds that respondent did not violate former W. Va. Code § 5-11-9(i)(3), now codified as § 5-11-9(a)(9)(c).

DISCUSSION

In regard to the allegations of disparate discipline, denial of equal opportunity for training and failure to place him in a job commensurate with his skills, we rule against complainant because he failed to meet his burden of showing by a preponderance of the evidence that the reasons articulated by Walker in response to his charges were untrue and mere pretexts for discrimination. See, Shepardstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E.2d 342, (1983). In fact, for the most part, Mr. Hairston allowed Walker's explanations to go un rebutted. For example, complainant made no effort to show that respondent did not have a progressive discipline policy or that such a policy was implemented in a discriminatory fashion when he was given a three-day layoff.

Instead of focusing his attack on respondent's reason for its action, complainant chose to argue that certain white employees deserved equal, if not greater, discipline because their infractions were more costly to the company. While this argument might make sense in a different setting, here it was irrelevant since the quantity of infractions, not degree of egregiousness, was the uncontroverted basis of respondent's policy.

Similarly, complainant produced no evidence showing that his "re-do" rates were not at an unacceptable level, or that white workers with a comparable or higher "re-do" rate were not reassigned.

His case regarding the denial of equal opportunity for training was simply meritless. White employees testified that they, too, were not afforded training specific to their needs or desires and complainant himself admitted that he had rejected or failed to participate in various training opportunities offered by Walker.

Complainant did succeed in showing that the work atmosphere at Walker was racially hostile and that the acts of race harassment directed towards him by fellow employees were not isolated or sporadic incidents, but were sufficiently pervasive to constitute a violation of the HRA. See, Walker

v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982); Snell v. Suffolk County, 782 F.2d 1094 (2nd Cir. 1986).¹

As succinctly stated in Gilbert v. City of Little Rock, 722 F.2d 1390 (8th Cir. 1983):

A working environment dominated by racial hostility and harassment constitutes a violation of Title VII, regardless of any other tangible job detriment to minority employees. An employer violates Title VII simply by creating or condoning an environment at the work place which significantly and adversely affects the psychological well-being of an employee because of his or her race. 722 F.2d at 1394.

Once an employer "has knowledge of a racially combative atmosphere in the work place, he has a duty to take reasonable steps to eliminate it." Snell, 722 F.2d at 1104. An employer "may not stand by and allow an employee to be subjected to a course of racial harassment by co-workers." DeGrace v. Runsfeld, 614 F.2d 796, 803 (1st Cir. 1980).

The scope of an employer's duty to correct a racially charged work place was laid out by the First Circuit in DeGrace:

It may not always be within the employer's power to guarantee an environment free from all

¹There being no West Virginia appellate cases precisely on point, it is proper to look for guidance to federal court decisions interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., West Virginia Human Rights Commission v. United Transportation Union, 280 S.E.2d 653 (1981).

bigotry. He cannot change the personal beliefs of his employees; he can let it be known, however, that racial harassment will not be tolerated, and he can take all reasonable measures to enforce this policy But once an employer has in good faith taken those measures which are both feasible and reasonable under the circumstances to combat the offensive conduct we do not think he can be charged with discriminating on the basis of race.

Id at 805.

As applied by other courts, the DeGrace standard has been held to place a "reasonable duty on an employer who is aware of a racially discriminatory atmosphere adversely affecting the emotional well-being and productivity of its employees to take reasonable steps to remedy it. Whether an employer has fulfilled his responsibility in this regard is to be determined upon the facts in each case." Snell at 1104.

The factors that may be considered in determining whether an employer has met its duty include the gravity of the harm, the nature of the work environment and the resources available to the employer. Ibid.

Here, it cannot be denied that once Wode, Walker's personnel director, became aware of the harassment Mr. Hairston had been subjected to, he "let it be known. . . that racial harassment will not be tolerated," and he took "all reasonable measures to enforce this policy." DeGrace at 805. Wode acted despite complainant's refusal to provide him with the names of the perpetrators. He also went beyond the Belle

plant to Walker's other West Virginia facilities to assure that all of respondent's employees were made aware of Walker's insistence on a racially neutral atmosphere. Moreover, and of most importance, his initiative, as Mr. Hairston admitted, was effective.

Due to Mr. Wode's actions, Walker met the DeGrace/Snell test and cannot be held liable for the previous racist remarks and acts directed toward Mr. Hairston by non-management employees.²

The one isolated racial epithet complainant heard used by a management employee (and which was not directed at him) cannot, in and of itself, constitute racial harassment. See, Powell v. Missouri State Hqwy. & Trans. Dept., 822 F.2d 798, 801 (8th Cir. 1987). Likewise, Piggott's inaction when informed by Mr. Hairston that he was tired of the racial insults, though reprehensible, was cured by Mr. Wode's immediate efforts to address the problem. Had there been a racial incident after complainant spoke to Piggott, but before he went to Mr. Wode, a period of several days, our ruling on

²Though it is hard to believe that no management personnel were aware of the racist drawings and literature being circulated in the plant before Mr. Hairston spoke to Piggott, it was incumbent on complainant to provide proof of the same. This, he failed to do. At best his evidence consisted of one witness who testified that Piggott used the same rest area as Mr. Hairston, the walls of which were marked with a racist drawing. There was no follow-up examination of any of the witnesses, including Piggott, about his knowledge of the drawing or other racial acts.

this issue may be different. Again, however, complainant provided no evidence that an incident occurred within that timeframe, or that anything of substance happened after he spoke to Mr. Wode.

Finally, though complainant established a prima facie case of retaliatory discharge, Frank's Shoe Store v. Human Rights Commission, 365 S.E.2d 251 (1986), he failed to prove that the explanation for his layoff proffered by Walker, that other persons had skills and experience more attuned to its then current needs, was pretext.

While producing no evidence that he was better or equally qualified than the persons retained by Walker, complainant admitted that the layoff of some employees was necessary and not a ruse to cover an act of reprisal aimed at him.

CONCLUSIONS OF LAW

1. The complainant is a citizen of the State of West Virginia and a person within the meaning of W. Va. Code § 5-11-3(a).

2. The respondent is an employer within the meaning of W. Va. Code § 5-11-2(d).

3. The West Virginia Human Rights Act is violated when an employer discriminates against an employee because of his race and with respect to the tenure, terms, conditions or privileges of employment.

4. The West Virginia Human Rights Act is violated when an employer creates or condones a work place environment that is dominated by racial hostility and harassment.

5. The West Virginia Human Rights Act is violated when an employer discharges or otherwise takes adverse action against an employee because he engaged in protected activity.

6. Complainant established a prima facie case showing that respondent unlawfully discriminated against him in regards to discipline , denial of training opportunities and failure to promote him to a job commensurate with his skills.

7. The respondent articulated legitimate non-discriminatory reasons for disciplining complainant and not promoting him, which complainant did not prove were pretextual. Respondent produced evidence showing that complainant had an equal opportunity for training, which complainant did not rebut as untrue.

8. Complainant established that respondent's work place was racially hostile to the pervasive degree necessary to constitute a violation of the Human Rights Act.

9. Respondent established that once it became aware of racial hostility it undertook reasonable and effective measures to remedy the situation.

10. Complainant established a prima facie case of retaliatory discharge.

11. Respondent articulated a legitimate, non-discriminatory reason for complainant's layoff, which complainant did not prove was pretextual.

12. Viewing all the evidence of record, complainant failed to prove by a preponderance of the evidence that Walker violated any provision of the Human Rights Act.

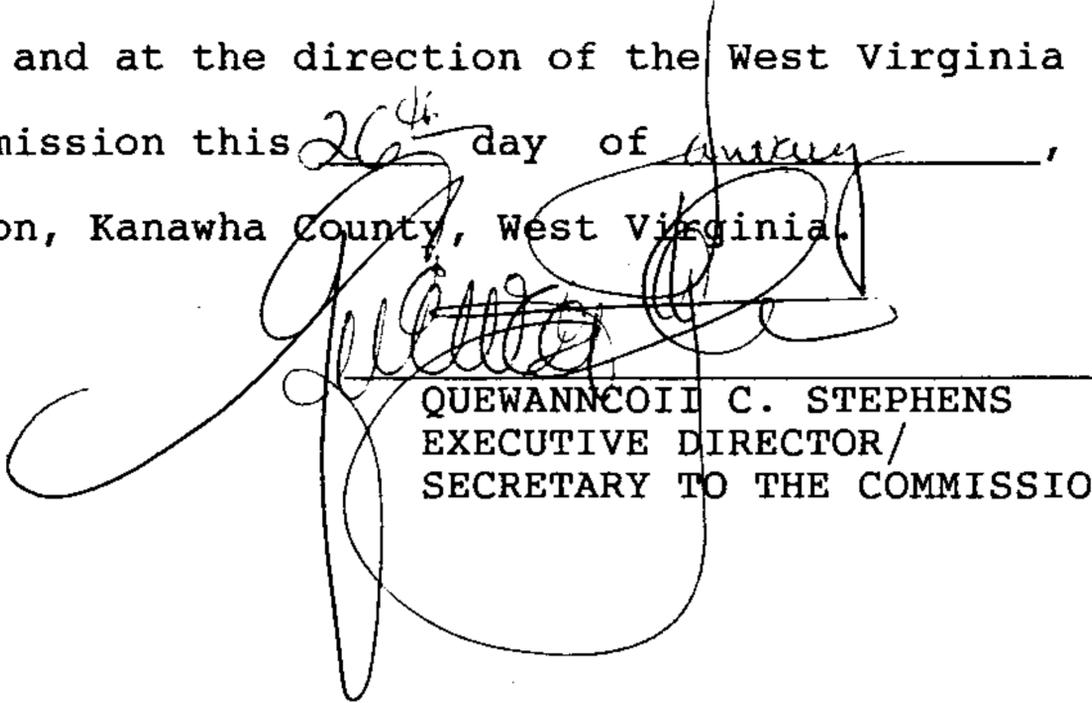
ORDER

The Commission having found that respondent has not engaged in any unlawful discriminatory practice, the complaints filed against it should be, and hereby are, dismissed with prejudice.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS
COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 26th day of August, 1990 in Charleston, Kanawha County, West Virginia.



QUEWANNCOLL C. STEPHENS
EXECUTIVE DIRECTOR/
SECRETARY TO THE COMMISSION