



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE: 304-348-2616

ARCH A. MOORE, JR.
Governor

September 23, 1988

Michael Isbell
475 Walhalla Dr.
Columbus, OH 43202

Poor Richard's, Inc., dba
Sebastian's Restaurant
3215 Murdoch St.
Parkersburg, WV 26101

Bill Turner, Esq.
P.O. Box 3465
Charleston, WV

George J. Cosenza, Esq.
408 Juliana St.
Parkersburg, WV 26101

Sharon Mullens
Deputy Attorney General
L & S Bldg. - 4th Floor
812 Quarrier St.
Charleston, WV 25301

Re: Isbell v. Poor Richards d/b/a Sebastian's Restaurant
EH-352-87

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 April 1, 1987, any party adversely affected by this final order may file a petition for review with the supreme court of appeals within 30 days of receipt of this final order.

Sincerely,

A handwritten signature in cursive script, appearing to read "Howard D. Kenney".

Howard D. Kenney
Executive Director

HDK/mst
Attachments

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE
OF STATUTORY RIGHT TO JUDICIAL REVIEW
AMENDED AND EFFECTIVE
AS OF APRIL 1, 1987

Enr. H. B. 2638]

8

116 this article.

§5-11-11. Appeal and enforcement of commission orders.

1 (a) From any final order of the commission, an
2 application for review may be prosecuted by either
3 party to the supreme court of appeals within thirty days
4 from the receipt thereof by the filing of a petition
5 therefor to such court against the commission and the
6 adverse party as respondents, and the clerk of such
7 court shall notify each of the respondents and the
8 commission of the filing of such petition. The commis-
9 sion shall, within ten days after receipt of such notice,
10 file with the clerk of the court the record of the
11 proceedings had before it, including all the evidence.
12 The court or any judge thereof in vacation may
13 thereupon determine whether or not a review shall be
14 granted. And if granted to a nonresident of this state,
15 he shall be required to execute and file with the clerk
16 before such order or review shall become effective, a
17 bond, with security to be approved by the clerk,
18 conditioned to perform any judgment which may be
19 awarded against him thereon. The commission may
20 certify to the court and request its decision of any
21 question of law arising upon the record, and withhold
22 its further proceeding in the case, pending the decision
23 of court on the certified question, or until notice that the
24 court has declined to docket the same. If a review be
25 granted or the certified question be docketed for
26 hearing, the clerk shall notify the board and the parties
27 litigant or their attorneys and the commission of the fact
28 by mail. If a review be granted or the certified question
29 docketed, the case shall be heard by the court in the
30 manner provided for other cases.

31 The appeal procedure contained in this subsection
32 shall be the exclusive means of review, notwithstanding
33 the provisions of chapter twenty-nine-a of this code:
34 *Provided*, That such exclusive means of review shall not
35 apply to any case wherein an appeal or a petition for
36 enforcement of a cease and desist order has been filed
37 with a circuit court of this state prior to the first day
38 of April, one thousand nine hundred eighty-seven.

39 (b) In the event that any person shall fail to obey a
40 final order of the commission within thirty days after
41 receipt of the same, or, if applicable, within thirty days
42 after a final order of the supreme court of appeals, a
43 party or the commission may seek an order from the
44 circuit court for its enforcement. Such proceeding shall
45 be initiated by the filing of a petition in said court, and
46 served upon the respondent in the manner provided by
47 law for the service of summons in civil actions; a hearing
48 shall be held on such petition within sixty days of the
49 date of service. The court may grant appropriate
50 temporary relief, and shall make and enter upon the
51 pleadings, testimony and proceedings such order as is
52 necessary to enforce the order of the commission or
53 supreme court of appeals.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

MICHAEL L. ISBELL,

Complainant,

vs.

Docket No. EH-352-87

POOR RICHARD'S, INC. d/b/a
SEBASTIAN'S RESTAURANT,

Respondent.

O R D E R

On the 31st day of August, 1988, the West Virginia Human Rights Commission reviewed the proposed order and decision of Hearing Examiner, James Gerl, in the above-captioned matter. After consideration of the aforementioned and exceptions thereto, the Commission does hereby adopt said proposed order and decision, encompassing proposed Findings of Fact and Conclusions of Law, as its own, with the modifications and amendments set forth below.

In the subsection entitled "Relief", p. 18, last complete paragraph and in the subsection entitled "Proposed Order", par. 4, p. 20, the Commission is of the opinion that the complainant should be awarded incidental damages in the amount of \$5,000.00 and therefore deletes the figure "2,000.00" and substitutes therefor the figure "\$5,000.00."

In the subsection entitled "Proposed Order", par. 9, p., 21 is deleted. Although the discussion of this provision in the subsection entitled "Relief" on p. 17 sets forth worthwhile aims,

the Commission is not a party to this action and, in any case, may not order itself to take any action. The Commission may, on its own initiative, undertake to implement the sort of programs suggested by the Hearing Examiner for educating the public about AIDS, but may not "order" itself to do so in the context of this case. Therefore this suggested remedy must be deleted from the decision.

It is hereby ORDERED that the Hearing Examiner's proposed order and decision, encompassing Findings of Fact and Conclusions of Law, be attached hereto and made a part of this final order except as amended by this final order.

By this final order, a copy of which shall be sent by certified mail to the parties, the parties are hereby notified that they have ten days to request a reconsideration of this final order and that they may seek judicial review.

ENTERED this 16th day of Sept, 1988.

Respectfully Submitted,

George Ruthford

CHAIR/VICE-CHAIR
WV HUMAN RIGHTS COMMISSION

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

MICHAEL L. ISBELL,

Complainant,

v.

DOCKET NO. EH-352-87

POOR RICHARD'S, INC., dba
SEBASTIANS RESTAURANT,

Respondent.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing for this matter was convened on November 4-5, 1987 in Parkersburg, West Virginia. Commissioner Russell Van Cleve served as Hearing Commissioner. The complaint was filed on January 27, 1987 and amended on October 14, 1987. The notice of hearing was issued on May 12, 1987. Respondent answered the amended complaint on October 27, 1987. A telephone Status Conference was convened on August 13, 1987. Subsequent to the hearing, both parties filed written briefs and proposed findings of fact. In addition the Human Rights Commission filed a brief and the Mountain State AIDS Network and the National Lawyers Guild of West Virginia have filed a motion to file a brief as amici curia. Said motion is granted.

All proposed findings, conclusions and supporting arguments submitted by the parties, the Commission and amici have been

RECEIVED
JAN 18 1988
HUMAN RIGHTS COMMISSION
MOUNTAIN STATE AIDS NETWORK

considered. To the extent that the proposed findings, conclusions, and arguments advanced by the parties, the Commission and amici 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 fired him from his job as a waiter because of a perceived handicap; he alleges that he was fired because respondent thought he had AIDS. Respondent maintains that AIDS is not a handicap and that complainant was fired because of problems with his job performance.

FINDINGS OF FACT

Based upon the parties' stipulations of uncontested facts as set forth in the joint pre-hearing memorandum, the Hearing Examiner has made the following findings of fact:

1. Complainant, at all times pertinent hereto, was employed by respondent in the State of West Virginia.

2. Complainant was employed by respondent from July 11, 1985, until October 4, 1986, when he was suspended without pay. On November 11, 1986, complainant was officially discharged by respondent.

3. Prior to his discharge, respondent required complainant to produce medical evidence that he did not have Acquired Immune Deficiency Syndrome (AIDS) because respondent believed that complainant might have AIDS. Complainant visited Dr. Braffman in Philadelphia, Pennsylvania and underwent various tests. The tests were negative for AIDS but sero-positive for antibodies of the Human Immunodeficiency Virus (HIV). On November 10, 1986, complainant presented a letter to respondent from Dr. Braffman dated October 31, 1986, to the effect that he did not have AIDS; complainant was officially discharged on November 11, 1986.

4. Complainant was compensated by respondent at a rate of \$2.01 per hour, plus tips.

5. Fringe benefits furnished by respondent included a free dinner on complainant's birthday, free parking, and the issuance of a shirt, apron, and hot pad.

6. After being discharged by respondent, complainant drew unemployment benefits in the amount of \$749.00. On March 1, 1987, complainant secured substantially similar employment as a waiter at another restaurant in Parkersburg, West Virginia, where he has been compensated at a rate of \$2.01 per hour, plus tips.

7. Respondent, Poor Richard's, Inc., d/b/a Sebastian's Restaurant, owns and operates a restaurant open to the public and employing more than twelve employees. Respondent exercises and, with respect to complainant has exercised, ultimate authority over personnel matters, including the discharge of employees.

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

8. Acquired Immune Deficiency Syndrome (hereafter referred to as "AIDS") is a virally caused disease caused by the human immunodeficiency virus (HIV). The HIV infects a subset of white blood cells, the T-lymphocytes. This infected state may progress to a situation where the individual is susceptible to infections and malignancies. The syndrome is acquired by infection and it renders the patient immunodeficient, that is unable to fight off the stresses of daily living.

9. There is currently no effective treatment for the disease and 100 percent of the diagnosed cases are now fatal. Other consequences of the disease include various types of debilitating illnesses, infections, weakness, malaise, fever, malignancy and cosmetic and internal disfigurement. AIDS can affect the neurologic system and it can produce a variety of rheumatologic and immunologic manifestations. The complications of AIDS include opportunistic infections or malignancies.

10. A person who tests seropositive for the antibodies to HIV has been exposed to the AIDS virus. Approximately 20-40% of the individuals who test positive will go on to develop AIDS.

11. The AIDS virus cannot be transmitted by casual contact. Casual contact includes being in the same household, kissing on the lips, washing laundry, sharing utensils, sharing toothbrushes, caring for an AIDS patient, close hugging, and sharing and

preparing food together. The AIDS virus may also not be transmitted by sneezing, coughing, crying, insect bites, sharing beds and sharing bottles.

12. The AIDS virus may be transmitted from one individual to another only by three specific avenues: (a) the exchange of bodily fluids during sexual contact; (b) the transfer of blood products, such as through transfusions or across the placenta from mother to fetus; and (c) the sharing of hypodermic needles among intravenous drug users. There are no other viable methods of transmission of the AIDS virus.

13. The Federal Centers of Disease Control, the American Medical Association, the National Restaurant Association and the Surgeon General have taken positions that food service workers who have AIDS pose no risk for the transmission of the AIDS virus.

14. Complainant returned to work on October 3, 1986 after medical treatment for shingles and a growth in his throat. On the morning of October 4, 1986, McCain, one of the co-owners of respondent, told complainant that he had heard a rumor that complainant had AIDS and he required complainant to produce medical evidence that he did not have AIDS before returning to work at respondent.

15. At the meeting during which complainant was fired on November 11, 1986 McCain mentioned the rumor that complainant has AIDS as the reason why complainant was being fired.

16. Complainant performed his duties as a waiter well while employed by respondent. He consistently made "the list", an incentive system developed by respondent in which the five waiters with the highest tips in a pay period received privileges with respect to setting their schedules and with respect to parking.

17. Complainant did occasionally flaunt his homosexuality at work and make crude comments to co-workers. On at least a few occasions complainant used the women's restroom.

18. Respondent never warned, counselled, reprimanded or otherwise disciplined complainant regarding any problems with his job performance.

19. Complainant was discharged by respondent because of a rumor that he had AIDS.

20. As a result of his discharge by respondent, complainant felt betrayed and humiliated.

21. A reasonable hourly rate for the legal services rendered in this matter by complainant's attorney Crandall, is \$125.00 per hour.

22. Complainant's attorney Crandall reasonably expended 121.15 hours in preparing and litigating this matter.

23. A reasonable hourly rate for the legal services rendered in this matter by complainant's attorney Turner, is \$80.00 per hour.

24. Complainant's attorney Turner reasonably expended 232.95 hours in preparing and litigating this matter.

25. Complainant expended \$5,778.96 in costs reasonably necessary for the litigation of this matter

CONCLUSIONS OF LAW

1. Michael L. Isbell 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. Poor Richard's Inc., d/b/a Sebastian's Restaurant 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. Acquired Immune Deficiency Syndrome is a handicap as defined by the Human Rights Act, West Virginia Code §5-11-3(+).

4. Discrimination based upon the perception of handicap is prohibited by the West Virginia Human Rights Act.

5. Complainant has established a prima facie case of perceived handicap discrimination.

6. Respondent has articulated a legitimate non-discriminatory reason for its decision to fire complainant.

7. Complainant has demonstrated that the reason articulated by respondent for firing him is pretextual.

8. Respondent discriminated against complainant on the basis of a perceived handicap by firing him. West Virginia Code, Section 5-11-9(a).

DISCUSSION OF CONCLUSION

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.E.2d 342, 352-353 (W.Va. 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 pretextual. Shepherdstown Volunteer Fire Dept., supra; McDonnell-Douglas, supra.

The threshold legal issue in the prima facie case analysis in the instant case is whether AIDS constitutes a handicap within the meaning of the West Virginia Human Rights Act. The Hearing Examiner concludes that AIDS clearly is a handicap for purposes of the Act.

The Human Rights Act defines the term "handicap" to mean any physical or mental impairment which substantially limits one or more of an individual's life activities. West Virginia Code §5-11-3(t). The Human Rights Commission has promulgated Interpretive Rules Governing Discrimination on the Handicapped to provide further guidance as to the definition of handicap. §2.02 of the Interpretive Rules defines "physical impairment"

to mean "...any physiological disorder or condition...affecting one or more of the following body systems: neurological, ... genito-urinary, hemic and lymphatic." §2.05 of the Interpretive Rules defines "major life activities" to include "...communication, ambulation, self-care, socialization, learning, vocational training, employment, transportation, and adapting to housing." §2.06 of the Interpretive Rules defines "substantially limits" to mean non-temporary conditions that "interferes with or affects over a substantial period of time."

AIDS is a virally caused disease that infects certain white blood cells. It is a physical impairment because it is a physiological disorder or condition that adversely affects the neurologic, rheumatologic and immunologic body systems. Inasmuch as all cases of AIDS result in death and there is no cure for AIDS, it is by no means a temporary condition. AIDS substantially limits its victims' major life activities because it is fatal and because the consequences of the disease include debilitating illnesses, malignancies, infections, weakness, malaise and disfigurement.

It must be concluded, therefore, that AIDS constitutes a handicap for purposes of the West Virginia Human Rights Act. Other states that have considered the question have similarly concluded that AIDS is a handicap. Cronan v. New England Telephone Co. 1 IER 651, 41 F.E.P. Cases 1273 (Mass.Super.Ct. 1986), Shuttleworth v. Broward County Office of Budget and Management Policy Case No. FCHR 85-0624, 54 U.S.L.W. 2330 (Florida Commission

on Human Relations December 11, 1985); Department of Fair Housing and employment v. raytheon co. Precedential Decis. No. 87-04 (California Fair Housing and Employment Commission February 5, 1987). According to a survey of the 50 states and the District of Columbia by a public interest organization, two-thirds of the states have indicated taht they are willing to accept AIDS-related discrimination complaints, and only one state, Kentucky, has indicated that AIDS is not a handicap which is protected under the state anti-discrimination law. Brown, "AIDS Discrimination In The workplace: A Legal Dilemma," Case and Comment Vol. 92, 3, 5-6 (May-June 1987). The analogous federal law that prohibits handicap discrimination, §504 of the Rehabilitation Act, has also been interpreted to prohibit discrimination on the basis of AIDS as unlawful handicap discrimination. Chalk v. Orange County Superintendent of Schools No. 87-6418, _____ F.2d _____ (9th Cir. November 18, 1987).

The only authority cited by respondent in support of its argument that AIDS should not be included within the definition of protected handicaps is a position paper filed by the United States Justice Department. This argument is rejected for several reasons. First, the memorandum has no precedential value. Second, although the memorandum contends that the ability to transmit AIDS is not a protected handicap, it admits that the disabling effects of AIDS do indeed constitute

a handicap. Third, the reasoning of the memorandum is strained and totally unpersuasive. Fourth, the reasoning of the memorandum was rejected by the United States Supreme Court in School Board of Nassau County v. Arline _____ U.S. _____, 107 S.Ct. 1123 (1987). In Arline, the Court held that tuberculosis, which is a contagious disease, is a handicap under the Federal Rehabilitation Act. Respondent's argument is rejected.

It should be noted that amici cite an abundance of medical literature regarding AIDS. The bulk of said medical literature is not evidence in the record of this case. Accordingly, none of the medical literature cited by amici, with the exception of that contained in exhibits or testimony offered by the parties and admitted into evidence at the hearing herein, has been considered by the Hearing Examiner in reaching the conclusion that AIDS is a handicap within the meaning of the Human Rights Act.

A second legal issue which must be addressed prior to the prima facie case analysis involves the issue of perceived handicap. Complainant contends that respondent fired him because of a perceived handicap, that is, respondent thought that complainant had AIDS. Under the Human Rights Act, a handicapped person is a person who (a) has a handicap, (b) has a record of such handicap or (c) is regarded as having such a handicap. Interpretive Rules Governing Discrimination on the Handicapped §2.07. The reason that the scope of the prohibition against handicap discrimination has been extended to persons regarded as having a handicap is to make it clear that the law prohibits discrimination against persons

who are incorrectly perceived as handicapped as well as persons who are correctly perceived as handicapped. Interpretive Rules n.8. The majority of jurisdictions make it unlawful to discriminate against persons who are incorrectly perceived to be handicapped. Barnes v. Washington Natural Gas Co. 22 Wash.App. 576, 591 P.2d 461 (1979); Rogers v. Campbell Foundry Co. 185 N.J.Super. 109,447 A.2d 539(1982), City of LaCrosse Police & Fire Commission v. Labor and Industry Review Commission 139 Wisc.2d 740, 407 N.W.2d 510 (1987); Kelley v. Bechtel Power Corp. 633 F.Supp. 927 (S.D.Fla. 1986) (applying Florida law); Pennsylvania State Police v. Pennsylvania Human Rights Commission 433 A.2d 1039; 36 F.E.P. 614 (Pennsylvania Commonwealth (Ct.1984)). Indeed, discrimination against persons who are incorrectly perceived or regarded as having a handicap is rooted in the same type of stereotypical and prejudiced thinking about handicapped people that caused the passage of laws prohibiting handicap discrimination. See, E. E. Black, Ltd. v. Marshall 497 F.Supp. 1088 (D.Hawaii 1980). It is the public policy of the state of West Virginia to provide equal opportunity in employment, and any denial of this right is contrary to the principles of freedom and equality and akin to treason in our democratic society. West Virginia Code §5-11-1, Allen v. Human Rights Commission 324 S.E.2d 99 (1984). Thus, if the legislative intent underlying the Human Rights Act is to be achieved, the prohibition against handicap discrimination must be construed to include perceived handicaps.

Closely related to the concept of perceived handicap is the

concept of customer preference. One of the defenses raised by respondent at the hearing involves the potential effect on its business of customer reaction to a rumor that complainant has AIDS. An employer cannot rely upon customer preference to justify an employment decision that would otherwise be unlawful. See, Interpretive Rules Governing Discrimination on the Handicapped, §4.06(2) (a). The courts have uniformly rejected a defense based upon the unwillingness of customers to accept blacks or women. Rucker v. Higher Educational Aids Bd. 669 F.2d 1179, 28 E.P.D. ¶ 32442 (7th Cir. 1982); Diaz v. Pan American World Airways, Inc. 442 F.2d 385, 3E.P.D. ¶ 8166 (5th Cir. 1971), cert. den. 404 U.S. 950 (1971) on remand 346 F.Supp. 1301 (S.D.Fla. 1972), amended 348 F.Supp. 1083 (S.D.Fla. 1972); Brown, "AIDS Discrimination in the Workplace: A Legal Dilemma." Case and Comment Vol. 92, 3, 6 (May-June 1987). Just as an employer cannot argue that it will not hire a black waiter or a female waitress because its customers will not tolerate it, so too an employer may not justify an employment decision on the basis that its customers will not tolerate a waiter with a handicap which is not related to the ability to do the job. As the United States Supreme Court has found in interpreting the federal Rehabilitation Act, "society's accumulated myths and fears about disability and disease are as handicapping as the physical limitations that actually flow from actual impairment." School Board of Nassau County v. Arline, supra, 107 S.Ct. at 1128-1130. Myths, fears and stereotypes whether held by employers, co-workers and customers, are the cause of discrimination in employment and, therefore,

cannot be a defense in a discrimination case. Respondent's reliance upon customer preference is misplaced.

Having resolved all threshold legal questions, it must now be determined whether complainant has established a prima facie case of perceived handicap discrimination. The parties have stipulated that complainant was employed by respondent; that prior to his discharge complainant was required to produce evidence that he did not have AIDS; that on November 10, 1986, complainant provided respondent with a medical report which showed that he did not have AIDS; and that complainant was fired by respondent on November 11, 1986. Complainant has proven that AIDS is a handicap protected by the Human Rights Act, see discussion above, and that at the time of his firing one of the owners of respondent made mention of the rumor that complainant had AIDS. Complainant also proved that the handicap that respondent or its customers thought complainant had is not related to the ability to perform the functions of the job in question. Complainant presented documentary evidence and expert testimony that proves that AIDS may not be transmitted through casual contact with a food service worker. AIDS may be transmitted from one person to another only through sexual contact, through the transfer of blood products and through the sharing of hypodermic needles. Accordingly, complainant is a qualified handicapped person. Interpretive Rules Governing Discrimination on the Handicapped, §4.02. Such facts are sufficient to make out a prima facie case because, if otherwise unexplained, they would raise an inference of perceived handicap

discrimination. Furnco Construction Company v. Waters 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981).

Respondent has articulated a legitimate non-discriminatory reason for firing complainant. Respondent presented testimony that complainant was disruptive and that he failed to perform some of his duties.

Complainant has demonstrated that the reason articulated by respondent is pretextual. The testimony of complainant and his witnesses was credible. The credibility of McCain is impaired by a nervous and evasive demeanor and by certain problems in his testimony. For example, McCain testified at the hearing that the AIDS rumor was not a factor in complainant's discharge. This testimony, however, is contradicted by his deposition testimony. The testimony of Miller, the other owner of respondent, is not credible because of his demeanor and because his testimony to the effect that the AIDS rumor was only one factor in the discharge is contradicted by the testimony of McCain and by respondent's position statement.

The pretextual nature of respondent's articulated reason is illustrated by the massive contradictions by respondent's witnesses regarding the point at which complainant's job performance became bad. McCain testified that complainant's performance became bad in the last six months of his employment at respondent. Samuels testified that complainant's performance was bad from the start. S. Eliopoulos testified that complainant's performance was bad

a few weeks after he started. P. Eliopoulos testified that complainant's performance was bad a month after he began, but that he had some very good days after that. Miller testified that complainant's performance was good for five months adequate for five months and bad for five months.

That respondent's articulated reason is pretextual is also clear from the fact that respondent never called the alleged performance problems to complainant's attention in order to afford him the opportunity to correct the problems. Flowers v. Crouch-Walker Corp. 552 F.2d 1277 (7th Cir. 1977). Complainant testified credibly that he was never disciplined, suspended or even counselled by respondent regarding the alleged problems with his performance as a waiter. This testimony is only slightly contradicted by the testimony of P. Eliopoulos, but the testimony of complainant is more credible on this point.

Complainant may not have been an ideal employee. He admits that he has occasionally entered the women's restroom at respondent. It is also clear from the record testimony that complainant often flaunted his homosexuality at work. As amici correctly point out, discrimination based upon sexual orientation is not prohibited by the Human Rights Act. These problems with complainant's work, however, did not concern respondent until the AIDS rumor surfaced, and these problems were not the reason for complainant's termination.

In their brief, amici attempt to show respondent's intent by the questions that counsel for respondent asked of various witnesses.

Trial strategy and tactics, however, are not equivalent to evidence. These arguments by amici were not considered in reaching the conclusion that the reason articulated by respondent is pre-textual.

Relief

Respondent's dilemma in this case was caused by the public hysteria concerning AIDS. The Hearing Examiner recognizes that given this hysteria, the business of a restaurant that employs, or is reputed to employ, a waiter with AIDS will suffer. The solution is not to fuel the hysteria by firing the employee who has AIDS, or who is rumored to have AIDS. Rather, the solution is to combat the hysteria which is nothing more than a widely-held and false stereotype about people who have AIDS. In order to fully remedy the injury suffered by complainant in this case, and in order to prevent unfair reprisals against those employers who resist the hysteria and stereotypes about AIDS, the Human Rights Commission must assume a leadership role in educating the citizens of West Virginia about the ways that AIDS can be transmitted from one person to another. This public education project can be based upon the excellent testimony of Dr. Gibofsky in this case. Such public education is included in the Commission's powers to strive to eliminate all discrimination and to advance tolerance, understanding and equal protection of the laws. West Virginia Code §§5-11-4, 5-11-8(b). In implementing this program it would be particularly appropriate for the Human Rights Commission to call upon the officers, departments and agencies of state government

to observe their mandatory duty to assist the Commission. West Virginia Code §5-11-7; Allen v. Human Rights Commission 324 S.E.2d 99 (W.Va. 1984). Certain agencies, such as the Department of Health, the Board of Regents, the State Board of Education and the State Bar, should prove most helpful in this public education effort.

Complainant is entitled to back pay for the period from the date of his discharge until March 1, 1987 when he secured substantially similar employment at another Parkersburg restaurant. Complainant's damages calculation accurately describes this amount to be \$6,305.97 (= \$1,482.48 in lost wages + \$83.22 in lost overtime + \$4,740.27 in lost tips.) Complainant's damages calculation also requests that he be awarded the difference in tips after he was reemployed. There is no credible evidence in the record, however, to support the conclusion that this decline in complainant's tips was caused by his termination by respondent. It is recommended that damages not be awarded for the difference in tips after complainant secured what the parties have stipulated to be substantially similar employment.

Complainant testified that he felt betrayed and humiliated by his termination. He should be awarded \$2,000.00 as incidental damages for the humiliation, embarrassment, loss of dignity and emotional distress caused by the unlawful termination.

Complainant has filed a petition for attorneys fees. The hourly rate of \$125.00 sought by complainant's attorney Crandall

is extremely reasonable. In view of his considerable skill and the contingency nature of his fee, the rate of \$125.00 is a bargain. Complainant's attorney Turner seeks an hourly rate of \$100.00. Although Turner did a good job at the trial of this case, he had only been practicing law for approximately one year as of the date of hearing. The rate of \$100.00 per hour is not reasonable for Turner. Rather, a rate of \$80.00 per hour is reasonable. Counsel for complainant seeks a multiplier of 1.5, but the mere fact that this is a case of first impression should not result in such a multiplier. The other relevant factors as recited in the caselaw have been taken into account in arriving at a reasonable hourly rate. It is recommended that a multiplier not be added to complainant's attorneys fees. Complainant's petition also appears to be seeking an award of attorney's fees for paralegal services. Because complainant cites no authority for this relief, no such award is recommended.

PROPOSED ORDER

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

1. That the complaint of Michael L. Isbell, Docket No. EH-352-87 be sustained.
2. That respondent rehire complainant into his former position at a rate of pay comparable to what he would be receiving but for the discriminatory termination.

3. That respondent pay complainant a sum equal to the wages he would have earned but for respondent's unlawful termination of complainant's employment. Such wages for the period from the date of complainant's discharge to the date that complainant secured substantially similar employment would have been \$6,305.97 (= \$1,482.48 for wages + \$83.22 for overtime + \$4,740.27 for tips). Respondent should also be ordered to pay complainant interest on the amount of back pay owed him at the statutory rate of ten percent.

4. That respondent pay to complainant the sum of \$2,000.00 for incidental damages for humiliation, embarrassment, emotional and mental distress and loss of personhood and dignity as a result of the discriminatory treatment toward him by the agents and employees of respondent.

5. That respondent be ordered to pay complainant's reasonable attorney's fees in the amount of \$33,779.75.

6. That respondent be ordered to pay complainant the sum of \$5,778.96 for costs reasonably expended by complainant and reasonably necessary to the litigation of this matter;

7. That respondent be ordered to cease and desist from discriminating against individuals on the basis of handicap in making employment decisions.

8. That respondent report to the Commission within thirty days of the entry of the Commission's Order, the steps taken to comply with the Order.

9. That the Human Rights Commission immediately implement a public education program concerning the ways that AIDS may be transmitted from one person to another.



James Gerl
Hearing Examiner

ENTERED: January 15, 1988