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STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING  
1036 QUARRIER STREET  
CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE, JR.  
Governor

TELEPHONE 304-348-2616

January 8, 1986

William C. Miller, II, Esq.  
Cannelton Industries, Inc.  
1250 One Valley Square  
Charleston, West Virginia 25301

Mr. Robert Lovell  
Smiley's, Inc.  
Smiley's Motel  
6210 MacCorkle Avenue, S. W.  
St. Albans, West Virginia 25177

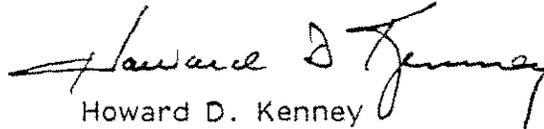
RE: Jones V Smiley's, Inc./EA-383-83

Dear Mr. Miller and Mr. Lovell:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Freda Jones V. Smiley's, Inc. EA-383-83.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,

  
Howard D. Kenney  
Executive Director

HDK/kpv

Enclosure  
CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

RECEIVED

DEC 17 1985

W.V. HUMAN RIGHTS COMM.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

FREDA L. JONES,  
Complainant,

vs.

Docket No.: EA-383-83

SMILEY'S INCORPORATED,  
Respondent.

ORDER

On the 11th day of December, 1985, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner Robert R. Harpold. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own.

It is hereby ORDERED that the Hearing Examiner's Findings of fact and Conclusions of Law be attached hereto and made a part of this Order.

By this 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 ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 19<sup>th</sup> day of Dec, 1985.

Respectfully Submitted,

  
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CHAIR/VICE-CHAIR  
West Virginia Human  
Rights Commission

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

*Approved*  
*A.P.S.*  
*10/24/85*

FREDA L. JONES

Complainant

vs:

CASE NO. EA-383-83

SMILEY'S INCORPORATED

Respondent

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

Pursuant to proper notice, this matter came on for hearing before the undersigned Hearing Examiner at 9:00 a.m. on Friday, May 3, 1985, in Conference Room E, Building 8, State capitol complex Charleston, West Virginia. The initial hearing was continued and subsequent hearing was held on Monday, September 2, 1985, in Conference Room E, Building 8, State Capitol Complex, Charleston, West Virginia.

The complainant, who died on October 15, 1983, was represented by her daughter and executrix of complainant's estate, Debra Sue Jones, and by counsel, William C. Miller II. Respondent was represented by Robert Lovell, its owner. Both parties waived the presence of a hearing commissioner.

Each of the parties were given a full and complete opportunity to present evidence and argument in support of their respective positions. Based upon review of the transcript of the witnesses' testimony and of the exhibits placed into evidence by the parties; and based further upon observation of the demeanor and relative credibility of the witnesses, the undersigned Hearing Examiner issues the following:

### FINDINGS OF FACT

1. The complainant, Freda L. Jones, age 59, was employed, as a desk clerk, by the respondent during the period from approximately October, 1979, to September 7, 1982, and earned approximately \$300 every two weeks.

2. Respondent employs and did employ more than 12 employees at all times pertinent to the instant matter.

3. Complainant became ill during July of 1982 and was hospitalized for approximately two weeks with double pneumonia.

4. Following her two weeks of hospitalization and an additional two weeks of recuperation, her physician issued a return to work slip dated August 4, 1984.

5. Complainant returned to work on or about August 4, 1982, and worked until she reported to work on September 7, 1982.

6. When complainant reported to work on September 7, 1982, she was told by a representative of respondent to return home.

7. Complainant died on October 15, 1983.

8. During the complainant's tenure as desk clerk, the respondent received numerous complaints from fellow employees that the complainant couldn't do the work. The complainant was slow, couldn't make corrections, had trouble counting money and at peak times had trouble placing people in rooms.

9. These complaints were constant, but got progressively worse in July of 1982.

10. Complainant was a honest and dependable worker but she was prone to make mistakes.

11. Complainant was counseled concerning her job performance 8 to 10 times during her period of employment; however, none of the discussions were reduced to writing. There was no warning, either oral or written, that complainant's work was such that a failure to improve would be grounds for dismissal.

12. Certain other desk clerks, Sherry LeMasters and Cheryl Summers, did not want to work with complainant because of her mistakes and that the complaints from the two former desk clerks, along with the fact that the complainant couldn't do her work, is what resulted in respondent terminating complainant.

13. Complainant was not given any reason in writing for her termination.

14. Respondent had no formal written policy on the conduct of its personnel.

15. Respondent maintained no personnel files on its employees.

16. Respondent hired two female desk clerks, both of whom were in their early 20's, within three or four weeks of the time it fired complainant.

#### CONCLUSIONS OF LAW

The hearing examiner, having heard the evidence and having reviewed the exhibits filed at the hearing, hereby makes the following conclusions of law:

1. Respondent, doing business as Smiley's Motel, is a "place of public accommodation" within the meaning of Chapter 5, Article 11, Section 3(j) of the West Virginia Code.

2. Respondent is an "employer" within the meaning of Chapter 5, Article 11, Section 3(d) of the West Virginia Code.

3. Complainant was an "employee" within the meaning of Chapter 5, Article 11, Section 3(e) of the West Virginia Code.

4. Complainant was 59 years of age at the time of her termination and was within the protected "age" group within the meaning of Chapter 5, Article 11, Section 3(q) of the West Virginia Code.

5. Debra Sue Jones, the complainant's executrix, is successor to the complainant in this matter.

6. That based upon the case of Stanley v. Sewell Coal Company, 285 SE2d 679 (W.Va. 1981), it is the opinion of this

hearing examiner that this case does survive the death of the complainant and that the complainant's executrix can properly maintain this action. Therefore, I conclude that the parties are within the jurisdiction of the West Virginia Human Rights Commission.

7. That there is insufficient evidence to infer that the complainant was, in fact, discriminated because of her age within the meaning of the provisions of the West Virginia Human Rights Act.

Under the provisions of West Virginia Code § 5-11-9(a), it is an unlawful discriminatory practice "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."

As this section applies to this case, the complainant has the burden of proof to show that the respondent's decision to terminate her was because of her age. The United States Supreme Court in the case of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 366 E2d 558, 93 S. Ct. 1917 (1973) set forth the necessary steps of proof for establishing whether or not in disparate treatment cases, a discriminatory motivation exists. Also see Shepherdstown VFD v. West Virginia Human Rights Commission, 309 SE2d 352 (1983).

The Court stated that in an action to redress unlawful discriminatory practices in employment cases the burden is on complainant to prove by a preponderance of the evidence a prima facie case of discrimination. If the complainant alleging unlawful discriminatory practices in employment is successful in creating rebuttable presumption of discrimination, burden then shifts to respondent to offer some legitimate and nondiscriminatory reason for complainant's rejection, and if the respondent succeeds in rebutting the presumption of discrimination, then the complainant has the opportunity to prove by a preponderance of

evidence that reasons offered by respondent were merely pretext for unlawful discrimination. See also Shepherdstown VFD v. W. Va. Human Rights, (supra); Phipps v. Greenbrier County Board of Education, Docket No. ES-110-77 (W.Va. Human Rights Commission).

The Courts have held that discrimination may be proven through direct evidence, inferentially when direct evidence of discrimination is unavailable or with a combination of inferential proof and direct evidence. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981). See also, Patricia Thaw v. Charleston Area Medical Center, Docket No. ES-9-78, (West Virginia Human Rights Commission). Once a prima facie case is made, the respondent must meet the burden by coming forward with a legitimate non-discriminatory reason for its actions respecting the complainant. These reasons must be identifiable as not containing an unlawful discriminatory motive. McDonnell Douglas Corp., supra; Shepherdstown V.F.D. v. W.Va. Human Rights Commission, supra. The employer need not prove a legitimate nondiscriminatory reason but must only articulate it. Texas Dept. of Community Affairs v. Burdine, 101 S. Ct. at 1094; 450 U.S. 248; 67 LEd 207 (1981).

Once the respondent has articulated a legitimate non-discriminatory reason for its actions, the burden shifts back to the complainant to rebut, if she can, the alleged nondiscriminatory reason by showing that the reason or reasons advanced by the respondent were in fact a pretext to mask or hide the discriminatory act or reason.

In cases where the complainant is deceased, the hearing examiner realized the additional burden on the complainant's survivor in trying to prove an act of discrimination.

A review of the evidence clearly shows that the complainant had considerable trouble with the many duties of a desk clerk. Five employees and former employees in addition to the owner testified that the complainant had considerable problems in handling the work and that they complained to the manager. It

was obvious that the respondent was fond of the complainant and gave her every chance to work out. As stated by the respondent, the complainant was a good, honest, loyal and dependable worker but she couldn't do the work. This was the reason they let her go.

If a person can not do the work, this, of course, would be a legitimate business reason which would rebut a prima facie case of discrimination.

Even if the complainant had made a prima facie case of discrimination which I do not find, the respondent has, to this examiner's satisfaction, successfully rebutted it.

Although there is some dispute as to whether the complainant's job performance was poor enough to warrant her dismissal, the reasons given by the respondent are sufficient, in my opinion, to preclude a finding that such discharge was unlawfully discriminatory. An employer is not prohibited under the West Virginia Human Rights Act from discharging an employee who is a member of a protected class for a legitimate nondiscriminatory reason.

The respondent is only prohibited from discharging such an employee where that discharge has an illegal, discriminatory, motivation. No such discriminatory motivation has been established, and the mere fact that another person might find complainant's job performance to be not so unsatisfactory as to warrant her dismissal does not, in and of itself, justify a conclusion that such dismissal had an illegal motive. It is the opinion of this hearing examiner that the real reason for the complainant's dismissal was her unsatisfactory work.

Therefore, based upon the facts and the law, it is hereby the opinion of the examiner that the respondent has not

engaged in any unlawful discriminatory practice with respect to the complainant.

Dated this 22<sup>ND</sup> day of October, 1985.

  
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Robert R. Harpold, Jr.  
Hearing Examiner