

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

Harriet Lee

COMPLAINANT,

v.

Docket Nos. EA-481-77 &  
ER-482-77

S. E. Nichols, d/b/a  
Nichols Discount City

RESPONDENT.

FINDINGS OF FACT  
CONCLUSIONS OF LAW & ORDER

I  
PROCEEDINGS

This case come on for hearing on June 28, 1982, at the Martinsburg Berkeley Public Library, in Martinsburg, West Virginia, before Hearing Examiner Emily A. Spieler and Hearing Commissioner George Rutherford. The Complainant appeared in person and was represented by Assistant Attorney General Mary Lou Newberger, who also represented the West Virginia Human Rights Commission. The Respondent appeared by its representative, Kenneth Rearick, and by its counsel Lacy I. Rice, Jr.

On June 10, 1977, the Complainant filed two verified complaints alleging that the Respondent, S. E. Nichols, Inc., had discriminated against her on the basis of race and age by paying unequal wages and terminating her from employment. The Human Rights Commission issued a letter of determination finding probable cause to believe that the Human Rights Act had been violated on November 5, 1979. The two complaints were consolidated for public hearing.

On May 10, 1982, the Human Rights Commission, by Howard D. Kenney, the Executive Director, served notice of public hearing upon the parties pursuant to W. Va. Code §5-11-10. On May 27, 1982, pursuant to §7.10 of the Administrative Regulations of the Human Rights Commission, a prehearing order was entered by Hearing Examiner Emily A. Spieler. No prehearing conference was held. The matters determined based upon the prehearing submissions of the parties were summarized by the Hearing Examiner in a prehearing order which was read into the record at public hearing.

The Complainant and Respondent had full opportunity at public hearing to call witnesses and present evidence relevant to this complaint. The Complainant offered the testimony of Harriet Lee, the Complainant; Kenneth Moore, plant manager of Nichols Discount City in Martinsburg prior to January 1975, and Frances Billmyer, a white former employee at Nichols. The Respondent called Kenneth Rearick, store manager from January 1975 at Nichols Discount City; Joseph Keller, Jr., district supervisor for S. E. Nichols during the time in question; and Dennis Fisher, who was assistant manager of the store in Martinsburg until August 1977.

After full consideration of the testimony, evidence, and arguments of counsel, the Hearing Examiner recommends that the Commission make the Findings of Fact and Conclusions of Law set forth herein.

## II ISSUES

The ultimate issues to be resolved in this matter are: Did the Respondent engage in illegal discriminatory employment practices by

paying lower wages to Complainant than to other employees or by terminating the Complainant from employment because of her age and/or race?

III  
FINDINGS OF FACT

1. Nichols Discount City is a discount department store selling all types of merchandise except food and is a part of a multi-state chain of such stores. The store manager is responsible for all personnel matters including hiring, firing, and scheduling, as well as building operations and public relations. The store manager is supervised by a district supervisor. During the time relevant to this complaint, three or four assistant store managers were responsible for directing certain departments, supervising employees, and reported directly to the store manager. The head cashier and certain department heads also reported directly to the store manager (Tr. 89, 90, 112, 125).
2. In May 1977, Joseph Keller was the district supervisor over the Martinsburg and eight other stores, and had held this position since 1973 (Tr. 138-139). Kenneth Rearick was the store manager for the Martinsburg store, having succeeded Kenneth Moore in January 1975 (Tr. 62). Dennis Fisher was an assistant store manager in the Martinsburg store from May 1973 to August 1977 (Tr. 154).
3. The Complainant, Harriet Lee, is a black woman. She was hired by the Respondent in 1967 as a cashier and terminated involuntarily on May 10, 1977. At the time of her termination she was 47 years old (Tr. 10-11).

4. At all times during her employment Harriet Lee was classified for payroll purposes as a cashier or a clerk/cashier (Tr. 91). She worked 38 to 40 hours a week (Tr. 27). At the time of her termination her duties included: acting as head of the candy department, including responsibilities for maintaining and rotating stock on shelves, keeping inventory and writing orders, and waiting on customers in that department, but not supervising other employees; acting as relief head cashier which involved performing cashier duties, changing detail tapes at all registers, and calling other cashiers to the registers; working in the smoke shop one day per week; and working as a regular cashier on an on-call basis when the store was busy (Tr. 12, 16, 26-27, 42, 53, 91).
5. Rearick regarded Lee's job as assistant head cashier as an important job (Tr. 134).
6. Lee was supervised by assistant store managers for her work in the candy and smoke shops (Tr. 93, 120, 168). The assistant store managers' duties were to insure shelves were stocked, merchandise properly displayed, departments neat, and personnel were doing their jobs (Tr. 167).
7. Lee was terminated by Kenneth Rearick on the instructions of Keller (Tr. 13, 142). On the day of her termination, Lee had been working as head cashier all week and her regular supervisor was out-of-town (Tr. 19-20, 167-168). The state of the department at that specific time therefore did not reflect upon Lee's own performance.

8. Respondent maintains that the justification for Complainant's termination was poor job performance, including poor housekeeping in contravention of the Employee Handbook, failure to stay in her work area, talking too much to other employees, and failure to keep her inventory and order books up to date (Resp. Ex. 1; Tr. 97, 98, 99, 114).
9. Respondent further alleges that due to poor work practices on the part of the Complainant, \$600 to \$700 worth of candy had to be discarded after her termination because it had not been rotated properly on the shelves and therefore had become stale (Tr. 108, 114).
10. All business losses resulting from the necessity of discarding unsold stale stock would be shown in a markdown book kept by Respondent and sent to the central office in New York (Tr. 135). No such corroborative documentary evidence of the lost merchandise was offered by the Respondent.
11. As head of the candy department Lee did not have sole responsibility for ordering candy and making sure that the shelves were stocked; this responsibility also lay with the assistant store manager and manager (Tr. 24-25, 57, 120-121).
12. Lee also did not have the authority to throw out or discard candy without permission of a supervisor (Tr. 23-24, 59-60).
13. Supervisors checked the candy department regularly but failed to note whether the merchandise was being rotated and failed to insure that the shelves were stocked or candy ordered. No supervisor was assigned to monitor the candy department more closely

because of alleged problems with its upkeep during the months prior to Lee's termination. (Tr. 120-123).

14. Lee maintained that, insofar as possible, given her multiple job functions, she did rotate candy and perform housekeeping in the candy department<sup>1</sup> (Tr. 21-24). We find, based upon the credibility of the witnesses, that this testimony was substantially true.
15. No special time was set aside for employees who were responsible for keeping books to do that task. Lee, like other employees, did fall behind in keeping up with her books (Tr. 18, 54, 72-73, 96, 176).
16. There is no dispute that prior to the time that Rearick assumed duties as store manager in Martinsburg that Lee was a good worker, performing her work adequately, followed instructions, and was sent on training relays to train employees in other new stores. She was observed to have been good at her job in the candy department by Dennis Fisher when he was responsible for the

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<sup>1</sup> The Respondent relies in its brief upon a statement made by the Complainant during her testimony at hearing, when she said, "I never put old candy on top of new, I didn't do that at all." (Tr. 22). It is important to note that the Hearing Examiner in this matter observed, at the time that the testimony was taken, that the Complainant misspoke in making this statement, and that this was clear in the course of her testimony. It should further be noted that it was evident to the Hearing Examiner that Ms. Lee was not a well-educated woman, nor was she familiar with proceedings of this kind. However, this does not reflect upon the overall credibility of her testimony.

candy department approximately one and one-half years prior to the Complainant's termination (Tr. 22, 54, 58, 60-61, 164).

17. At the time that Rearick assumed the duties of store manager over the Martinsburg store, Moore was transferred to a similar position for the same company in North Carolina (Tr. 51). According to Keller and Rearick, but disputed by Moore, this change in management was necessitated by problems with the condition and the sales in the Martinsburg store (Tr. 101, 139). Nevertheless, no changes were made in merchandising or personnel policies after Rearick's arrival (Tr. 163).
18. Lee requested to be returned to a position as regular cashier because she was concerned about her failure to keep up with her books in the candy department, which she attributed to her multiple job duties. This request was refused (Tr. 47, 133). Rearick explained that he was unwilling simply to move someone into a cashier position and did not feel that there was cause to switch Lee and a regular cashier (Tr. 134, 137).<sup>2</sup>

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<sup>2</sup> Rearick and Keller both testified that at one time there were no Hershey candy products, an important product for the candy department, available at Respondent's store, and indicated that they felt that this was a result of the failure of Lee to order candy (Tr. 94, 145-146). We find it remarkable that the Respondent would allow the shelves to become depleted, merchandise to become unsellable due to staleness and poor housekeeping to persist in the candy department while at the same time insisting that Lee continued her duties as assistant head cashier and candy department head despite her requests for a transfer and while failing to assign someone to monitor the department on a close and regular basis.

19. Bertha Hoffman, a white employee who was 62 years old at the time of Lee's termination, also found that she got behind in keeping her books because she had to stop and wait on customers (Tr. 176-177, 169, 170). Hoffman was transferred from her position as head of the lamp department back to a cashier's job by Rearick upon her request (Tr. 175).
20. All hourly employees at Nichols Discount City were started at minimum wage and given annual increases (Tr. 128). Wage increases were generally based on length of service although they could also depend on quality of work (Comp. Ex. 1; Tr. 111).
21. At some time between January 1975 and May 1977, a general increase of 15¢ per hour was given to store employees at Martinsburg. Complainant Lee was given a 5¢ an hour increase. The remainder of the increase was given to her when she requested it and without explanation (Tr. 28, 48, 111).
22. Lee was terminated without having received any written notices or formal warnings (Tr. 13, 56, 115).
23. Moore testified that policy regarding reprimands required that a written note be put in a personnel file after verbal reprimand and that this procedure was never necessary with the Complainant (Tr. 56). Rearick, on the other hand, testified that there was no company policy regarding written notations of reprimands until 1979 or 1980, but agrees that no written warnings or notations were ever made regarding Lee's performance (Tr. 115-117).
24. Rearick alleges that he talked with Lee several times regarding the condition of the candy department and her failure to stay in her

work area (Tr. 95, 98,99, 97, 117). Fisher confirmed and Lee recalled that on at least one occasion Rearick told her to stay in her department. Lee did not take this as a formal warning nor was her conduct written up (Tr. 34, 36, 95, 157, 160). Fisher, her immediate temporary supervisor at the time of her termination, never spoke to Lee regarding her job performance. (Tr. 157).

25. During her ten years of employment at Nichols Discount City, Lee received at most three informal verbal warnings regarding her work performance. All three came from Rearick, and were agreed over a 28-month period during which time Respondent alleges that Lee's job performance was alarmingly bad.
26. Lee was replaced by a white 19 year old woman (Tr. 110; Comp. Ex. 2).
27. Lee's salary at the time of her termination was \$2.70 per hour (Tr. 28). Between May 1977 and December 1978, Lee did not seek other employment. She was extremely upset by her discharge and unable to seek a job during that period. In January 1979 Lee began working part-time at Martin's Food Market for \$3.35 per hour, 20 to 30 hours per week. Because of raises she received at Martin's Food Market, Lee began earning more money at the food market than she would have had she continued her employment with the Respondent sometime during the later half of 1978 (Tr. 29-34).
28. According to Rearick, at the time that Lee was discharged there were approximately 70 employees in the Martinsburg store. Of these, 13 to 15 had more than ten years of service with the store

and approximately five were black. Lee was the only black with ten years of service (Tr. 119, 124, 129, 130).

29. An analysis of lists of employees and employees terminated submitted by the Respondent and incorporated into this record as Commission Exhibits 1, 2, and 3, reveal the following:
- (a) Between May 10, 1976 and May 10, 1977, the Martinsburg Nichols Discount City employed a total of 115 people. Of these, 106 (92%) were white, and nine (8%) were black; 32 (28%) were 40 years or older, and 93 (72%) were under forty.
  - (b) Of the total 115, 65 were clerks, cashiers, clerk/cashiers, or department heads (that is, the sales force of which Lee was part). Of these, 61 or 94% were white and 4 or 6% were black; 23 or 35% were 40 or older. Twenty-four people who worked in the sales force from May 1976 to May 1977, or 37%, were black and/or 40 years of age or older.
  - (c) Between 1976 and 1978, Respondent terminated seven employees with five or more years of service. All seven of these employees were black or were over the age of forty.
  - (d) Thirteen clerks and/or cashiers who were listed as employees in the year May 1976 to May 1977 were involuntarily terminated in 1976, 1977, or 1978.<sup>3</sup> Of these, three, or 23% were

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<sup>3</sup> Commission Exhibits Nos. 2 and 3 indicate the reasons for termination for each terminated employee. Involuntary terminations were considered to be all terminations, including those for lack of work, but not those indicating that the employee left voluntarily, such as to find other work, and those indicating that the employee was only hired on a temporary basis. Lack of work terminations are included in involuntary terminations for the purpose of this discussion because they were based on both seniority and job performance, and therefore their distribution was not based on objective factors.

black. Eight, or 62%, were 40 or over, and ten (77%) were 40 and/or had more than five years of service. Nine, or 69%, were black and/or 40 years or older, a rate of representation almost double that in the sales workforce as a whole.

(e) Although no tests for statistical significance were performed on these data, common sense indicates that blacks and those over forty were excessively represented in those employees employed during 1975-1976 who were involuntarily terminated by the Respondent during the period of time in question. Further, the termination of long term employees was limited to those in protected categories.

30. Based upon the overall credibility of the witnesses and the entirety of the evidence offered in this matter, we find that the explanation offered by the Respondent for Complainant's termination is not credible.
31. The record established based on evidence introduced at the hearing and thereafter as reopened for purposes of additional evidence on damages, that had Complainant continued to work for the Respondent, she would have earned \$5,730.40 during 1978. This is based on full backpay. Legal interest at 8% per annum through September 1983 amounts to \$36.78. This is based on \$2.90 per hour for 38 hours per week or \$110.20 per week, multiplied by 52 weeks, which includes vacation pay.
32. Complainant sought to mitigate her damages by obtaining employment with Giant Food Stores, Inc., in January 1978. During the period her interim earnings were \$5,664.44, as reflected by W-2

forms supplied by Complainant for 1978. Complainant is therefore entitled to the difference in pay plus legal interest compounded annually, between what she could had earned at Nichols and the amount she actually earned through subsequent employment, namely \$65.96 plus interest of \$36.78 for a total of \$102.74.

IV

CONCLUSIONS OF LAW

1. At all times referred to herein the Respondent S. E. Nichols, d/b/a Nichols Discount City, is and has been an employer within the meaning of Section 3(d), Article 11, Chapter 5 of the Code of West Virginia.
2. At all times referred to herein the Complainant Harriet Lee was a citizen and resident of the State of West Virginia and is a person within the meaning of Section 3(a), Article 11, Chapter 5 of the Code of West Virginia.
3. On June 10, 1977, the Complainant filed two verified complaints alleging that the Respondent had engaged in discriminatory practices against her as an individual in violation of Section 9, Article 11, Chapter 5 of the Code of West Virginia.
4. The complaints in this matter were timely filed within 90 days of an alleged act of discrimination and properly alleged illegal discrimination based on age and race.
5. The West Virginia Human Rights Commission has jurisdiction of the parties and subject matter of this action pursuant to Sections 8, 9, and 10, Article 11, Chapter 5 of the Code of West Virginia.

6. The Complainant did not present evidence nor pursue her claim of unequal pay.<sup>4</sup> Complainant did not urge (in opening statement or post-hearing memorandum) or prove that unequal pay scales constituted a basis for a finding of liability in this matter.
7. To prevail in the claim that she was illegally terminated, the Complainant must prove by a preponderance of the evidence that race and/or age were factors in the decision of the Respondent to discharge her from employment on May 10, 1977. Race and/or age need not be the sole factor in the decision to terminate.
8. This Commission has consistently followed the lead of the federal courts in holding that a Complainant may prove a prima facie case of race discrimination inferentially or through the presentation of direct evidence of discrimination or through a combination of evidence. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973); Texas Department of Community Affairs v. Burdine, \_\_\_ U.S. \_\_\_ 101 S.Ct. 1089 (1981). These same standards have generally been applied to age complaints under the federal Age Discrimination in Employment Act. See, e.g., Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980).
9. Complainant made an initial prima facie showing that the Respondent discriminated against her on the basis of age and/or race by

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<sup>4</sup> Complainant did prove that on one occasion Respondent did not give her a raise commensurate with that given other employees. See Findings of Fact, ¶21. However, such proof was insufficient to support this claim.

demonstrating that she was a black forty-seven year old female at the time of her termination; that she was performing her duties and was qualified to continue to perform them at the time of her termination; and that the Respondent terminated her and replaced her with a white nineteen year old female.

10. Once the Complainant has established a prima facie case of discrimination the burden shifts to the employer to rebut the presumption of discrimination by articulating a legitimate nondiscriminatory reason or reasons for its actions. The employer need not prove the legitimate nondiscriminatory reason but must only articulate it. Texas Department of Community Affairs v. Burdine, 101 S.Ct. at 1094; Furnco Construction v. Waters, 438 U.S. 567 (1978). The Respondent did articulate a legitimate nondiscriminatory basis for its decision to terminate the Complainant. In particular, Respondent maintained that the decision to terminate her was based on her poor work performance, including the failure to maintain good housekeeping in her department as required by the Employee Handbook, the failure to maintain her inventory and order books, and the failure to remain in her department when appropriate.
11. Once the Respondent has articulated a legitimate nondiscriminatory reason for its action the Complainant must show by a preponderance of the evidence that discriminatory reasons more likely than not motivated the Respondent or that the Respondent's explanation is unworthy of credence. Based upon the entire record before us we find that the Complainant has met this latter burden of proof.

We base this conclusion upon the following considerations: that the Complainant's work performance was viewed as entirely satisfactory by the store manager Kenneth Moore, who supervised her until January 1975; during the time that she was directly supervised by Dennis Fisher, assistant store manager, he saw nothing wrong with her job performance in the department for which she was responsible; general animus by the Respondent toward the Complainant can be seen both in the failure to give the Complainant a pay raise when it was given to other employees, while not indicating to her that her performance was unsatisfactory, and in Respondent's refusal to transfer the Complainant back to a cashier's job after she so requested although they allowed a white employee a similar job adjustment upon request. Despite claims that, due to the Complainant's failure to rotate stock a considerable amount of stock had to be discarded after her termination, notwithstanding the fact that written corroboration would have been readily available. Further, no attempt was made by Respondent to monitor carefully Complainant's department, and, in fact, she was assigned outside the department as head cashier, a position of considerable responsibility, at the time of her termination. With the exception of the testimony of the two managers responsible for the decision to terminate, no witness offered specific evidence of the Complainant's failure to do her job in the candy department properly,<sup>5</sup> and

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<sup>5</sup> Bertha Hoffman, a white 67 year old employee, did indicate generally that she felt that upkeep of the candy department was not always proper (Tr. 170). However, she worked during this period at the opposite end of the store, was not regularly in the candy department and had no responsibility for it, and offered no specifics at all with regard to this alleged inadequacy. Further, she never saw Lee do anything other than her normal duties (Tr. 171).

several corroborated her claim that she performed adequately. Finally, a careful analysis of the employee rolls and terminations in 1976 through 1978 reveal, as noted in the Findings of Fact, a tendency to terminate older, more senior, or black employees.

12. Where a complainant relies upon inferential proof to prove claims of discrimination involving both race and age, we do not hold the Complainant to a requirement that he or she provide proof to indicate which category of discrimination was involved. To do so would require direct evidence of discrimination, which is often unavailable, and thereby remove the inferential mechanism of proof in cases involving dual claims.
13. The Respondent unlawfully discriminated against the Complainant on the basis of race and/or age in violation of the West Virginia Human Rights Act, Section 5, Article 11, Chapter 5 of the Code of West Virginia.
14. The Complainant is entitled to monetary relief in the form of backpay and mental anguish and humiliation damages, W. Va. Code §5-11-10, State Human Rights Commission v. Pearlman Realty Agency, 211 S.E.2d 349 (W.Va. 1975). The Complainant was unemployed as a result of the Respondent's discriminatory actions from May 10, 1977 until December 31, 1977, when she found alternative employment. During this period of unemployment she failed reasonably to attempt to mitigate her backpay damages. For the calendar year of 1978 she was employed but made earnings of less than those she would have earned had she continued to be employed by the Respondent. She suffered significant anxiety, frustration, and mental anguish during her seven and one-half month

period of unemployment and should be compensated with damages in the amount of \$5,000.00. She is further entitled to an award of backpay for the difference between her actual earnings and the earnings she would have received had she continued to be employed by the Respondent for the calendar year 1978, or backpay in the amount of \$65.96.

V  
ORDER

Therefore, pursuant to the above Findings of Fact and Conclusions of Law, it is hereby ordered as follows:

1. The Respondent is hereby permanently ordered to cease and desist from engaging in employment practices that discriminate against the Complainant and all other persons on account of their race and/or age.
2. The Respondent is hereby ordered to pay to the Complainant, Harriet Lee, the sum of \$65.96 plus interest of \$36.78 at the rate of eight percent (8%) per annum compounded.
3. The Respondent is hereby ordered to pay to the Complainant, Harriet Lee, the sum of \$5,000 which represents damages for mental anguish and humiliation.
4. Respondent shall comply with provisions 2 and 3 of Section V of this order within 35 days of its receipt of this order.

Nov 28 1983  
DATE

Enter:

Russell Van Cleve  
Russell Van Cleve  
Chairperson