



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION

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Quewanncoii C. Stephens
Executive Director

28 February 1991

Helen Lambert
Route 2, Box 445-35
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Elkins Lumber Company
P. O. Box 927
Elkins, WV 26241

Richard H. Talbott, Jr., Esq.
P. O. Box 1333
Elkins, WV 26241

Re: Lambert v. Elkins Lumber Company
Docket Nos. ES-113-87 & EA-116-87

Dear Parties and Counsel:

Herewith please find enclosed the Final Order of the West Virginia Human Rights Commission in the above-styled and numbered case. Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for review of this Final Order.

Sincerely,

A handwritten signature in cursive script, reading "Q C Stephens/jm".

Quewanncoii C. Stephens
Executive Director

QCS/jm
Enclosures
Certified Mail - Return
Receipt Requested
cc: Secretary of State

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

HELEN LAMBERT,
Complainant,

v.

DOCKET NO. ES-113-87
EA-116-87

ELKINS LUMBER COMPANY,
Respondent.

FINAL ORDER

On 13 February 1991 the West Virginia Human Rights Commission reviewed and discussed the Findings of Fact, Conclusions of Law and Recommended Decision filed in this matter by hearing examiner Christine M. Hedges.

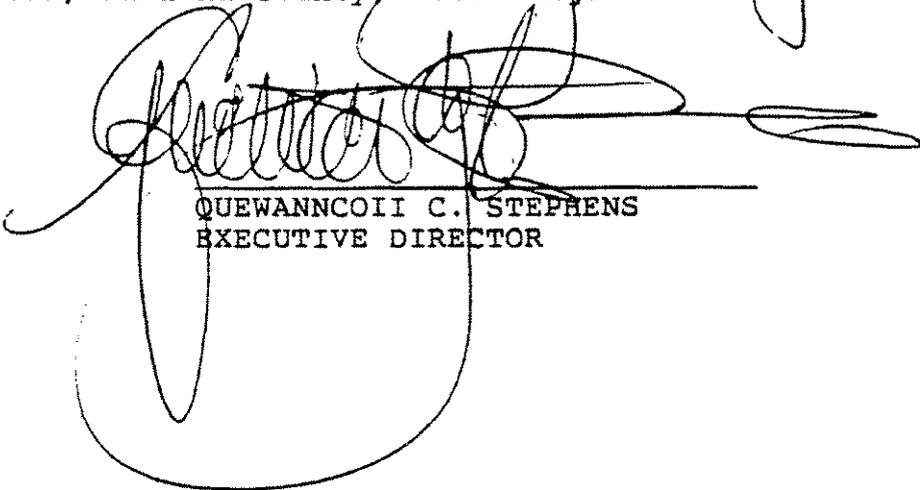
Upon a review of this Recommended Decision, and a thorough review of the record and documents filed herein, the Commission decided to, and does hereby, affirm and adopt the hearing examiner's Recommended Decision as its own, without modification, and hereby incorporates said Recommended Decision as a part of this Final Order.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia
Human Rights Commission this 20th day of February,
1991 in Charleston, Kanawha County, West Virginia.



QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed, is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code § 5-11-11, and the West Virginia Rules of Appellate Procedure.

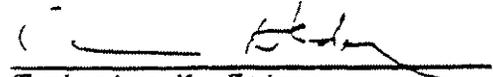
evidence that complainant took any previous legal action against other employers. Complainant even denied it.

It was not the respondent's burden to prove its reason for not hiring. The respondent had only to articulate it. It was complainant's burden to rebut that reason, and complainant failed to rebut it. The complainant felt treated unfairly, and perhaps was treated unfairly. The reasons for this treatment were not, however, discrimination on the basis of sex or race.

D. CONCLUSION

For all these reasons, I recommend that the complainant's charges of discrimination be dismissed.

Recommended by:



Christine M. Hedges
Attorney at Law

HEDGES, JONES, WHITTIER & HEDGES
P.O. Box 7
Spencer, WV 25276

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

HELEN LAMBERT,

Complainant,

vs.

Docket No. ES-113-87
EA-116-87

ELKINS LUMBER CO., INC.,

Respondent.

RECOMMENDED DECISION

A. Preliminary Matters

The complainant charged the respondent with violation of the Human Rights Act on August 11, 1986, by two verified complaints filed September 8, 1986. The Commission found probable cause. A public hearing was scheduled for July 24, 1987 by notice from the Commission dated June 10, 1987. The respondent filed an answer on June 19, 1987 denying the charges of discrimination. A status conference was held by telephone on July 7, 1987, wherein the parties agreed that the hearing in this matter would be held December 17-18, 1987, in Randolph County, West Virginia. On or around December 14, 1987, this hearing examiner was substituted for the original hearing examiner. A public hearing was held on December 17-18, 1987, at the Randolph County Courthouse in Elkins, West Virginia. The complainant appeared in person and represented by Antoinette Eates, Assistant, Attorney General, and Sharon M. Mullins, Senior Assistant Attorney General, who also appeared for the West Virginia Human Rights Commission. The respondent was present by it's agent, Thomas A. Royce, General Manager of Elkins Lumber Company and by counsel, Richard H. Talbott, Jr. Also present was

Commissioner Nathaniel Jackson. Stipulations were agreed upon by the parties and testimony was taken from the complainant, Mary Ann Daft, Thomas A. Royce, Cheryl A. Simmons, David A. Walker and Robert L. Taylor. Counsel submitted memoranda of law and proposed findings of fact and conclusions of law. Upon consideration of all of which, I recommend to the Commission the following findings of fact and conclusions of law.

B. ISSUES

1. Whether the respondent unlawfully discriminated against the complainant on the basis of sex in failing to hire her.
2. Whether the respondent unlawfully discriminated against the complainant on the basis of age in failing to hire her.
3. If such discrimination occurred, what is the remedy.

C. FINDINGS OF FACT

1. The complainant, Helen Lambert, is a female and was 51 years of age at the time she applied for a job at Elkins Lumber Company, on August 11, 1987.
2. The complainant was not hired by the respondent on or after August 11, 1987 and the respondent continued hiring people after the complainant applied.
3. Between July 1986 and November 1986, the respondent hired all employees through referrals from the Elkins Job Service under Human Resources Development Fund contracts. A portion of the salary paid the new employee was obtained from the HRDF program for a period of time considered on-the-job training.
4. Elkins Job Service identified persons eligible to be referred under the HRDF program and gave preference to the following categories in

order of priority: veterans, black youth (18-21), handicapped individuals, female heads of households, ex-offenders, families receiving AFDC, older workers (age 55 and over), limited English speaking, and others.

5. The complainant was referred to Elkins Lumber Company by Cheryl Simmons, Elkins Job Service, through the HRDF program.

6. Sixty-four job applicants were referred to Elkins Lumber between July 30, 1986 and October 29, 1986. Twenty-three, or 35%, of these were hired.

7. Fifty-one of the referrals, or almost 80%, were under 40 years of age, and of those, 21 were hired, or 41%, of those referred. Thirteen of the referrals were over age 40, and 2 were hired, or about 15% of those referred.

8. Fifty-two males were referred and 19 hired, and 12 females were referred with 4 being hired. In percentages, 36.5% of the males referred were hired and 33% of the females referred were hired.

9. There were ten more people hired between September 29, 1986 and January 1987, three of whom were women whose ages weren't specified but whose work experience indicated they were probably over 40.

10. The Elkins Lumber Company work force as of March 1987 consisted of 112 employees. Twenty-three or 21% were women. Forty-seven, or 40% were over 40 years of age. The jobs open in August 1986 were blue collar jobs such as machine operators, off bearers and sanders.

11. The complainant was a high school graduate and had work experience including 14 years in a sewing company; work in a lumber company for two years, work in a furniture making factory for two years; three years of hospital work as a nurse's aid, in the kitchen and in housekeeping; and

private housekeeping jobs. The twenty-three persons hired by the respondent had similar qualifications.

12. The complainant received a forty-five day evaluation from her previous hospital housekeeping job which showed an above average job performance.

13. The complainant's previous lumber company experience was at Kitzmiller Lumber Company from 1978 to 1980. At that time the respondent's General Manager, Jim Swisher, was also the manager of Kitzmiller lumber company. The complainant's immediate supervisor was Amelio Frank "Shorty" Gola, who worked at Elkins Lumber Company in August 1986.

14. The complainant was laid off at Kitzmiller Lumber and was not recalled.

15. Mary Ann Daft, the personnel coordinator for the respondent, had been employed there for 20 years. She screened all job applicants based on her knowledge of the person, upon references if the person was unknown to her, based upon the application, and based upon her analysis of certain subjective criteria including attitude toward employment, ability to work compatibly with others, and desire for long term employment.

16. The Elkins Job Service referred three persons for each opening. Mary Ann Daft eliminated one of these three in her preliminary screening and referred two for interviews with the general manager.

17. The complainant was not referred by Mary Ann Daft for an interview with the general manager. Mary Ann Daft had heard things about the complainant from the general supervisor of Kitzmiller Lumber (who was also Daft's supervisor) while the complainant worked there and from Emilio Frank "Shorty" Gola, who worked with the complainant. Ms. Daft had taken calls

from the complainant to Mr. Gola at Elkins Lumber which Mr. Gola made known he did not want to return. Mary Ann Daft's reason for screening out the complainant's employment application was that she felt the complainant would be a disruptive force in the plant, she had a less than desirable personality and because Ms. Daft felt the complainant would not make a good employee.

18. After the complainant filed her charge of discrimination in September 1986, the general manager, Thomas Royce, investigated the circumstances surrounding Ms. Daft's rejection of the complainant's application. Royce found that people at Elkins Lumber who had previously worked with the complainant indicated she had trouble getting along with other employees.

19. The respondent answered the charge of discrimination on October 2, 1986 saying that better suited and/or more qualified people were selected over the complainant. On October 3, 1986, HRDF wrote to the Human Rights Commission investigator that "further information regarding Mrs. Lambert's denial by Elkins Lumber Company appears to be the result of her prior employment with that firm". Interrogatories answered by the respondent on September 11, 1987, indicated that "better suited and/or more qualified" referred to the respondent's employment standards, including "primarily subjective criteria such as attitude of the applicant toward employment with regard to willingness to work, willing application to the tasks assigned, diligence in completing assigned tasks, punctuality and reliability in attendance at the job, ability to work compatibly with other members of the work force and not interfere with or disrupt the orderly operations of the facility, the desire of the applicant for employment, honesty and desire for long term employment, all of which are measured by preliminary and final

interviews, and contact with references supplied by the applicant and other sources".

20. The complainant did not testify concerning her work experience at Kitzmiller Lumber, or concerning her ability to get along with other employees.

21. Applications of 29 employees hired between July 30, 1986 and January 1987 show that on 8 of these applications prospective employees were asked to state their date of birth. Eight other applications had the age noted. The application had instructions not to answer certain questions marked out, and job applicants were required to answer questions as to their gender, their marital status and length of marriage, whether they had been convicted of a felony, whether they had handicaps and whether they had received Workmen's (sic) Compensation.

22. Thomas Royce testified that he had been informed that the complainant's previous employer, Elkins Industries, that they would not comment on her performance because she had filed a Human Rights complaint against them for age and sex discrimination. Complainant denied that she had filed discrimination complaints.

23. Daft testified that she would not consider previous lawsuits when screening an applicant. General manager Royce testified that his consideration of an applicant's legal action against a former employer would depend on whether the complaint had merit, and whether the person who told him of the legal action was someone whose opinion he would find valid. He would hire some people even with bad references, but he would be influenced not to hire someone who had a pattern of filing discrimination complaints on everyone who did not hire that person.

24. There is no charge of retaliation for enforcing rights under the Human Rights Act in this case.

D. CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the parties and the subject matter of this action pursuant to West Virginia Code 5-11-1 et seq.

2. The complaints and answers were properly and timely filed pursuant to West Virginia Code 5-11-10.

3. The complainant was a citizen of the State of West Virginia within the meaning of West Virginia Code 5-11-2.

4. The respondent is an employer within the meaning of West Virginia Code 5-11-3(d).

5. The complainant established a prima facie case of age and sex discrimination, under the McDonnell Douglas case standard adopted in Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E. 2nd 342 at 352 (1983). The complainant established by a preponderance of the evidence the four elements of a prima facie case:

- a) That she was a member of the protected groups (age - over 40; sex - female.
- b) That she had applied for and was qualified for the jobs the respondent had open.
- c) That she was not hired for a job despite her qualifications.
- d) That after complainant's rejection, jobs remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Although the West Virginia Supreme Court proposed a slightly different test for a prima facie case in Conaway v. Eastern Associated Coal Corporation, 358 S.E. 2nd 423 (W.Va. 1986) this test does not conflict with the McDonnell Douglas test and line of cases, but clarifies it for different kinds of cases. The McDonnell Douglas and Shepherdstown Volunteer Fire

Department cases were hiring cases. Conaway, a discharge case, proposed a "general test" for all kinds of employment discrimination cases:

- a) That the plaintiff is a member of a protected class.
- b) That the employer made an adverse decision concerning the plaintiff.
- c) But for the plaintiff's protected status, the adverse decision would not have been made.

While the "but for" language seems like a stricter test to meet, the court specifically notes that this test does not overrule or modify the previous test adopted in Shepherdstown Volunteer Fire Department. *Id.* at 430. The third step in Conaway does not require direct proof that age or sex caused the complainant's employment application to be required. "What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion". *Id.* at 429-30. It is the complainant's burden to present facts that create an inference of discrimination under the third step of the Conaway test. The complainant did this. The subjective criteria used in the hiring process, and the age questions on the application are the facts which establish a prima facie case using the Conaway standard.

6. Since the complainant established a prima facie case, the burden of proof shifted to the employer to articulate a legitimate non-discriminatory reason for its rejection of the complainant's application. The proffered reason was that the person responsible for the initial screening of applications, Mary Ann Daft, knew of the complainant's work problems some 6-8 years earlier when the complainant worked for respondent's sister company, Kitzmiller Lumber. Daft's testimony as to her knowledge of

the complainant was credible. Daft and the Complainant had both worked under the same general manager. Daft had heard about the complainant's past performance from the general manager for whom she acted as secretary. She later took phone calls from the complainant to Frank Gola, the complainant's immediate supervisor at Kitzmiller, now at Elkins Lumber. Frank Gola apparently did not want to talk to the complainant.

The complainant's testimony had many small conflicts in it, and showed a poor memory or a selective memory. The complainant at first denied ever calling Frank Gola, but later remembered her supervisor's name and admitted calling him. Although this appeared to just be confusion on the complainant's part, there were many confusions in her testimony. The employer's reason for screening out the complainant's application met the employer's burden of proof. The fact that very soon after rejecting the complainant, two other women over 40 years of age were hired, then according to the applications, within the next three months, three more older women were hired, indicated that older women were not being rejected just because of their sex or age. Both Daft and Royce denied using sex or age as criteria in hiring, and their hiring statistics during this time lends credence to what could be viewed as self serving statements by the respondent's witnesses. The fact that the October 3, 1986, letter to the Commission investigator, from HRDF, a third party, indicated the reason the complainant was not hired was "the result of her prior employment with the firm" indicated that the respondent has been consistent in its explanation for rejection.

7. The complainant failed to establish that respondent's articulated reason for rejecting her was pretextual. The complainant failed

to even deny herself that she had problems with others in her job at Kitzmiller Lumber. The complainant did not present one shred of evidence to show that her prior employment at Kitzmiller had not given her the reputation alleged. Although complainant produced an evaluation of her performance in a hospital housekeeping department, this evaluation was after only 45 days in the job.

Even though the respondent's proffered reason that the complainant hadn't gotten along with previous employees may not have been true with a different set of employees, it was Daft's belief that the complainant would not fit in the plant. Even if Daft came to this belief in an intuitive or subjective manner, she came to this conclusion. "If the fact finder believes the proffered reason for the decision, then the employer, which may be guilty of poor business practices, is not guilty of discrimination". Conaway at 430.

Even though the employer's application process allowed illegal questions about age, the complainant was not rejected because of her age. Even though the employer included subjective criteria in its hiring process, it hired 5 older women in 5 months. The fact that the employer used subjective criteria does not relieve the complainant of the burden to prove the employer's reason for not hiring was pretextual. The employer didn't really use its subjective criteria in rejecting the complainant. The employer used knowledge of previous employment and co-worker problems to reject the complainant.

If complainant was not considered for a job because the employer knew of complainant's past complaints of discrimination, it would weigh strongly in convincing this hearing examiner that retaliation was the motive for not considering complainant for a job. There is, however, no convincing