



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION

1321 Plaza East

Room 104/106

Charleston, WV 25301-1400

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GASTON CAPERTON
GOVERNOR

Quewanncoii C. Stephens
Executive Director

May 9, 1990

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Kellwood Corp.
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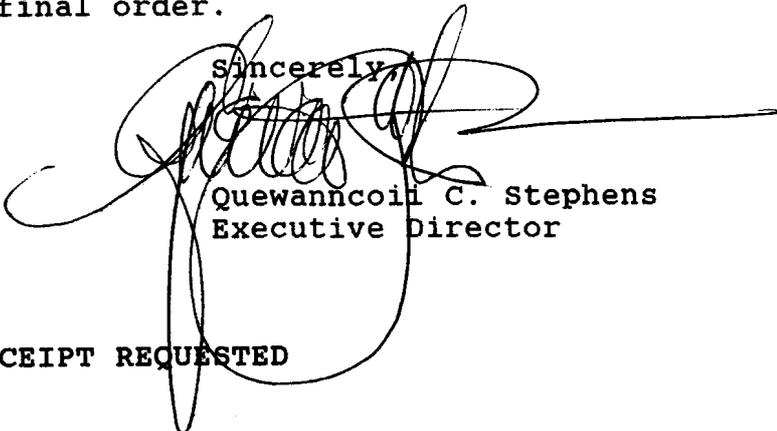
Mike Kelly
Deputy Attorney General
L & S Bldg. - 5th Floor
812 Quarrier St.
Charleston, WV 25305

Re: Lupardus v. Kellwood Corp.
EH-130-87

Dear Parties:

Herewith, please find the final order of the WV Human Rights Commission in the above-styled and numbered case. Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective July 1, 1989, any party adversely affected by this final order may file a petition for review with the WV Supreme Court of Appeals within 30 days of receipt of this final order.

Sincerely,



Quewanncoii C. Stephens
Executive Director

Enclosures
CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE OF RIGHT TO APPEAL

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

In some cases the appeal may be filed in the Circuit Court of Kanawha County, but only in: (1) cases in which the commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

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

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JOYCE F. LUPARDUS,

Complainant,

v.

DOCKET NO. EH-130-87

KELLWOOD CORPORATION,

Respondent.

ORDER

On 14 March 1990 the West Virginia Human Rights Commission reviewed the recommended findings of fact and conclusions of law filed in the above-styled matter by hearing examiner Theodore R. Dues, Jr. After consideration of the aforementioned, and all exceptions filed in response thereto, the Commission decided to, and does hereby, adopt said recommended findings of fact and conclusions of law as its own, with no modifications.

Accordingly, it is hereby ADJUDGED, ORDERED and DECREED that the complaint filed in this matter by Joyce F. Lupardus against Kellwood Corporation be, and the same is hereby, dismissed with prejudice. The examiner's recommended findings of fact and conclusions of law are to be attached hereto and made a part of this Final Order.

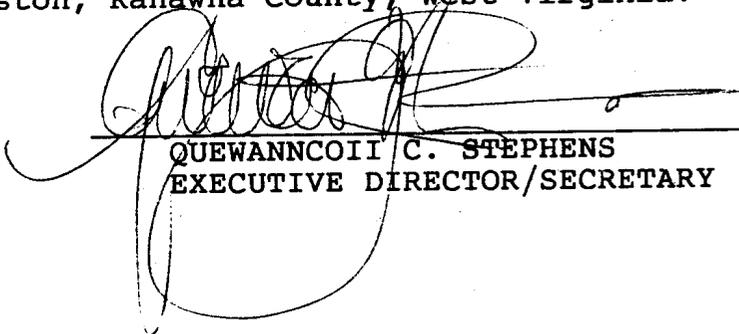
By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first

class mail to the Secretary of the State of West Virginia, the parties are hereby notified that they have ten (10) days to request that the West Virginia Human Rights Commission reconsider this Final Order or 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 30th day of March, 1990, in Charleston, Kanawha County, West Virginia.



QUEWANNCOTT C. STEPHENS
EXECUTIVE DIRECTOR/SECRETARY

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JOYCE F. LUPARDUS,
Complainant,

v.

KELLWOOD CORPORATION,
Respondent.

DOCKET NO: EH-130-87

RECEIVED

MAR 10 1989

WV HUMAN RIGHTS COMM.
Answered _____

**EXAMINER'S RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

This matter matured for public hearing on the 21st day of July, 1987. The hearing was held in the County Commission Court Room, Roane County, Spencer, West Virginia. The hearing panel consisted of Theodore R. Dues, Jr., Hearing Examiner, and Russell VanCleve, Hearing Commissioner. The Complainant appeared in person and by her counsel, Sharon Mullens. The Respondent appeared by its representative Jean McCoy and its counsel Steven Wall.

After a review of the record, any exhibits admitted in evidence, any stipulations entered into by the parties, any matters for which the Examiner took judicial notice during the proceedings, assessing the credibility of the witnesses and weighing the evidence in consideration of the same, the Examiner makes the following findings of fact and conclusions of law. To the extent that these findings and conclusions are generally consistent to any proposed findings of fact and conclusions of law submitted by the parties, the same are adopted by the Examiner, and

conversely, to the extent the same are inconsistent to the findings and conclusions, the same are rejected.

ISSUES

1. Did the Respondent discriminate against the Complainant in its decision to discharge her on or about July 19, 1986, on the basis of her handicap?

2. If so, to what relief is the Complainant entitled.

FINDINGS OF FACT

1. It is stipulated by the parties that the Complainant is a qualified handicapped individual within the meaning of the West Virginia Human Rights Act.

2. It is also stipulated that the period of back wages for the Complainant is September 15, 1986 to July 1987. It was further stipulated by the parties that the Complainant was unavailable for work from her date of discharge to September 15, 1987.

3. At time of hearing, the Complainant was 41 years of age. The handicapping condition from which she suffers is Crohn's Disease, a chronic gastro intestinal disorder.

4. The Respondent is engaged in the manufacturing of clothing and operates a plant at Spencer, West Virginia. On or about July 6, 1986 the Complainant left West Virginia for Iowa Park, Texas. The evidence indicates that the Complainant left for Texas due to certain personal problems

she was experiencing with her husband, her mother's recent diagnoses of cancer, and problems associated with the stress caused by her daughter having recently given birth.

5. Prior to leaving for Texas, the Complainant telephoned a co-worker at the plant and asked the co-worker to report her off sick for July 7. This co-worker later spoke with the Complainant's sister who informed the said co-worker that the Complainant had left for Texas because of personal reasons. As a result of this information, the co-worker decided not to report the Complainant as sick on July 7, but instead, reported the Complainant off for personal business. This was conveyed to the Complainant's supervisor. Prior to July 7, 1986, the Respondent's Spencer plant was closed for a one week vacation. All employees were expected to return to work on July 7, 1986. On or about Wednesday July 9, the co-worker that the Complainant had called to have the Respondent notified of her inability to return to work on July 7, called the Complainant in Texas. The Complainant was informed at that time that she had been reported off as being on personal business and she was further advised that she should contact her doctor.

6. The Complainant had no intention of calling her physician prior to this phone conversation with her co-worker.

7. Subsequent to this phone conversation, the Complainant had requested her co-workers to have the company to contact her physician. The company refused in, as much

as, the company felt it was not its responsibility to arrange a medical leave of absence for the Complainant, provided one was appropriate.

8. The evidence reflects that the Respondent received further confirmation, from the daughter-in-law of the Complainant, that in fact the Complainant was in Texas for personal reasons and not due to illness.

9. The Complainant conceded in her testimony, that she was aware that the Respondent had received conflicting reasons for her absence from work and that they were attempting to determine her whereabouts. However, notwithstanding this knowledge, the Complainant made no effort during the two week period from July 7 thru July 18 to contact the Respondent and inform it of the reason of her absence, or, to request a personal or medical leave of absence.

10. After July 9, the Respondent received no notification from the Complainant or any of her co-workers concerning the Complainant's whereabouts.

11. On or about July 15 the Respondent received a letter from Complainant's physician which indicated that the Complainant would be out of work for approximately one month because of continuing illnesses which she had suffered over a number of years. Due to the conflicting, and in some instances, nonexistent information concerning the specifics of the Complainant's status and her reason for being absent from work, the Respondent did not accept the letter from the

Complainant's doctor, on face value. Accordingly, the Respondent directed that the Complainant's physician be personally contacted for clarification. After two efforts to make such a contact with Complainant's physician, to no avail, on the evening of July 18, 1986, the Respondent decided to terminate the Complainant because of her unexcused absence for a period of two weeks.

12. Previously, during her tenure, the Complainant had requested and received medical leaves of absence related to her illness. In fact, the Complainant conceded, in her testimony, that she was never refused a medical leave of absence by the Respondent and that she was never threatened with discharge because of the numerous leaves of absence she had previously received.

13. Additionally, the Complainant indicated on these previous leaves of absence that she was seen by her physician on numerous occasions and that she remained in the state of West Virginia during these times.

14. During the Complainant's tenure, several other employees have experienced longer periods of absence, due illness, than was realized with the Complainant. None of these persons were discharged.

15. Additionally, the evidence reflects that the Respondent has accommodated the Complainant's disabilities in the past when, it was requested by the Complainant. Specifically, the Complainant was never forced to work overtime after indicating that her illness was aggravated by

the same and that no disciplinary action was taken against her because of her request not to work overtime.

DISCUSSION

Due to the fact that the parties stipulated to the Complainant's qualification as a handicap individual within the meaning of the West Virginia Human Rights Act it is not necessary to analyze the evidence in that light. Accordingly, the focus will begin with whether or not the Complainant's discharge was motivated by her handicap condition, and more particularly, the allegation of the Complainant that the excessive medical bills incurred, as a result of her condition, placed in her in a position where the company felt that the costs were too exorbitant and needed to be eliminated.

The preponderance of the evidence in this case reflects that the Complainant has failed to establish a prima facie case of handicap discrimination, in as much as, the evidence reflects that the Complainant was provided medical leave, due to her illness, on previous occasions, at times which she requested the same. In fact, the Complainant was never denied a medical leave of absence. It is also clear that the purpose for the trip to Texas, which ultimately effected the Complainant being absent from work for two weeks, was for personal reasons. The Complainant's physician's letter suggesting she needed a month off, even though it indicated for problems which she had experienced

over the years, was not so definitive that it was improper or unreasonable for the Respondent to seek clarification of the exact medical reasons necessitating the Complainant's absence. Further, given the conflicting information as to why the Complainant was absent from work, the Respondent had a reasonable expectation for the Complainant personally to make contact with it, for the purpose of clarifying the reasons necessitating her absence, as well as, making a specific request for a medical leave of absence; which she obviously had done on numerous previous occasions. Accordingly, it is the determination of the Examiner that the Complainant failed to establish a prima facie case of discrimination based upon her disability. West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d 77 (W.Va. 1985); Shepherdstown Volunteer Fire Department v. Human Rights Commission, 309 S.E.2d 342 (W.Va. 1983); United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 716 (1983).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter herein.
2. The Complainant failed to establish a prima facie case of handicap discrimination in this matter by specifically failing to introduce evidence which established that the motivating factor for her discharge was in fact the high medical cost being realized by the Respondent due to

her Chron's Disease.

3. The competent evidence reflected that the Complainant was discharged, from what can be inferred to be, an intentional failure to contact the Respondent and request a medical leave of absence, under circumstances if they in fact existed, she knew or should have known required such action on her part. Further, the conflicting statements received by the Respondent from the Complainant's co-workers and relatives of the Complainant justified the Respondent's deviation from its normal practice, of relying face value, on physician's reports. The Complainant was aware of these attempts of the Respondent to clarify her status and apparently chose to do nothing to assist in mitigating any negative effect that her absence may cause.

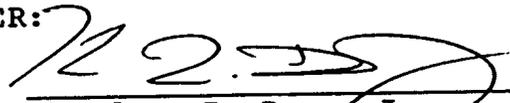
4. Accordingly, the Respondent is determined to not be in violation of the West Virginia Human Rights Act in its discharge of the Complainant.

PROPOSED ORDER

Accordingly, its the recommendation of this Hearing Examiner that the Commission award judgment for the Respondent and that the Complainant take naught under her complaint.

DATED: February 23, 1989

ENTER:


Theodore R. Dues, Jr.
Hearing Examiner