



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

**1321 Plaza East
Room 104/106
Charleston, WV 25301-1400**

**Gaston Caperton
Governor**

**Telephone (304) 558-2616
FAX (304) 558-0085
TDD - (304) 558-2976**

Executive Director

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

May 10, 1995

Gereinda Moore
Box 45
Summerlee, WV 25931

Tom Louisos, Steve Louisos, Joseph Dombly
c/o New Western Pancake House
Tomco Enterprises Inc.
PO Box 1462
Oak Hill, WV 25901

Tomco Enterprises Inc.
dba New Western Pancake House
PO Box 1462
Oak Hill, WV 25901

Erwin L. Conrad, Esq.
Conrad & Clay
215 West Maple Avenue
PO Drawer 958
Fayetteville, WV 25840

Mary C. Buchmelter
Deputy Attorney General
L & S Bldg. - 5th Floor
812 Quarrier St.
Charleston, WV 25301

Re: Moore v. Tom Louisos, Steve Louisos, Joe Dombly, Tomco
Enterprises, Inc. dba New Western Pancake House
ER-315-91

Dear Parties:

Enclosed, please find the final decision of the undersigned
administrative law judge in the above-captioned matter. Rule
77-2-10, of the recently promulgated Rules of Practice and Procedure

Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before a administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

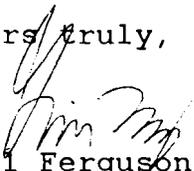
10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,


Gail Ferguson
Administrative Law Judge

GF/mst

Enclosure

cc: Norman Lindell, Acting Director

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

GEREINDA MOORE, .

Complainant,

v.

DOCKET NUMBER(S): ER-315-91

TOM LOUISOS, STEVE LOUISOS,
JOSEPH DOMBY, AND TOMCO ENTERPRISES,
INC., DBA NEW WESTERN PANCAKE HOUSE,

Respondents.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on July 7 and 8, 1994, in Fayette County, at the Law Library of the Fayette County Courthouse, 200 West Maple Avenue, Fayetteville, West Virginia, before Administrative Law Judge Gail Ferguson. Briefs were received through October, 1994.

The complainant, Gereinda Moore, appeared in person and by counsel for the commission, Deputy Attorney General Mary C. Buchmelter. The respondents, Tom Louisos, Steve Louisos, Joe Dobby and Tomco Enterprises, Inc., dba New Western Pancake House, appeared in person and were represented by counsel, Erwin L. Conrad, Esq., as well as Jimmy Sexton, who represented Tomco Enterprises, Inc.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to

the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited. A jurisdictional ruling on respondent's prehearing motions to dismiss the individually named respondents--Tom Louisos, Steve Louisos and Joe Dobby as party respondents was held in abeyance until all the evidence had been presented.

PART I

A.

JURISDICTION

The West Virginia Human Rights Act makes it unlawful for "any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment...." WV Code §5-11-9(1). The term "employer" is defined to mean "the state, or any political subdivision thereof, and any person employing twelve or more persons within the state." WV Code

§5-11-3(d). The term "discriminate" is, in turn, defined to mean "to exclude from, or fail or refuse to extend to, a person equal opportunities because of race...." WV Code §5-11-3(h).

After outlining the liability of an employer for unlawful race discrimination, the Act goes on to extend liability to "any person" who aids or abets in an act of discrimination. West Virginia Code §5-11-9(7)(A) provides as follows:

It shall be an unlawful discriminatory practice..."

(7) For any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution to:

(A) Engage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or to aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section;....

The term "person" is defined by the Act to mean, among others, "one or more individuals." WV Code §5-11-3(a).

The Commission asserts that the use of the terms "aid" and "abet" indicates the intent of the Legislature to enlarge culpability under the Act to any individual who assists an employer or other institutional respondent in the commission of an unlawful discriminatory practice.

If the person incited, encouraged, advised or assisted in the act done, "he is deemed to be an aider and abettor and is liable as principal." 1A.M.J. Accomplice and Accessories, § 4 at 69, 70 (1980). Here there is no such showing.

The evidence of record does not clearly establish that either Tom Louisos, Steve Louisos or Joe Domy participated in any overt individual conduct outside their collective culpability as officers and agents of respondent's corporate principal, Tomco Enterprises, Inc. There is simply no showing that any of the individually named respondents engaged in conduct based on the complainant's race, which would make them individually liable within the meaning of WV Code §5-11-9(7)(a).

B.

FINDINGS OF FACT

1. The complainant, Gereinda Moore, is an African American male, born and raised in Fayette County, West Virginia. The complainant is a high school graduate and has been and is now a care taker for elderly and disabled persons. Prior to his hire by respondent, the complainant had previous experience as a cook.

2. Respondent, Tomco Enterprises, is a West Virginia corporation doing business as New Western Pancake House with a principal location situate between Fayetteville and Oak Hill in Fayette County, West Virginia and operated as a restaurant.

3. Steve Louisos is an officer and stockholder of the respondent corporation serving as secretary of the corporation.

4. Tom Louisos is an officer and stockholder of the respondent corporation.

5. Joseph Domy serves as respondent's management consultant providing business and operational advice to respondent.

6. The complainant began work as a cook with respondent on July 19, 1989. Initially, he was hired on as a cook on the second shift, 3:00 p.m. to 11:00 p.m. and was paid \$3.35 per hour. Sometime thereafter, complainant's wage was raised to \$3.50 per hour.

7. The complainant's first supervisor was Robert Gunther, respondent's manager and a white male. Mr. Gunther characterized complainant as a reliable employee and as the second best cook he had. He gave complainant a raise within four months of his hire and scheduled the complainant as a substitute when the number one cook could not work. In fact, complainant was moved to first shift by Mr. Gunther because he was the "most logical choice to work the day shift." Day shift is the most advantageous. The shifts become prospectively disadvantageous, progressing to third shift, which is the least desirable in terms of work security.

8. Mr. Gunther testified that not long after he had given the complainant a raise, he was directed by either Tom or Steve Louisos to demote the complainant to busboy. Mr. Gunther testified that he was not told why the demotion was occurring.

9. The complainant was returned to the position of cook after he suggested he would hire a lawyer and after he complained directly to Tom Louisos.

10. Gunther testified that, although he was also told to move the complainant to third shift (11:00 p.m. to 7:00 a.m.) and to work the complainant fewer hours so as to get rid of him, that he continued to place the complainant on the schedule as frequently as possible. In response to his inquiries regarding why the complainant was placed on third shift and his hours cut, Gunther testified that he was told

by management that it was rumored that the complainant was a homosexual and that there was customer complaints about the complainant cooking food. Gunther further testified that in a conversation with Steve Louisos, Louisos made the comment "it is too bad that Gereinda Moore is gay what makes it worse is that he is black." This statement has been denied by Steve Louisos.

11. While Gunther was manager, complainant worked consistently. Gunther placed complainant in the position of floor supervisor at one point, but apparently other management officials were unaware.

12. Respondent maintains that it received complaints concerning the complainant's sexual orientation, with more specific complaints coming from a judge or magistrate that Gereinda Moore was a "transsexual or homosexual."

13. While complainant was on sick leave after being burned by grease, Robert Gunther was demoted from manager to assistant manager and replaced by Frank Comer, a white male, as manager. When the complainant returned to work on July 11, according to the complainant Comer told the complainant that his "body guard" (Gunther) was gone.

14. Although the complainant worked 72.8 hours during the next two week period; and during the following pay period received 40 hours and one week's vacation, thereafter complainant's hours were gradually reduced until he was receiving eleven hours a week.

15. Joseph Dombly testified that he serves as respondent's management consultant providing advice concerning menu, selection and design, profit projections, costs/performance analysis, personnel paper work review and suggestions concerning operational changes based upon seasonal sales changes and gross revenue review. According to

Mr. Dobby, the complainant experienced the same type of shift changes and hours reduction as did respondent's other employees in the slow season which began in the fall of the year. Moreover, that managers and assistant managers were assigned to different shifts at varying times and served as cooks and bus persons as the needs and season dictated.

16. Mr. Dobby stated that he had been advised by a waitress and one management personnel about customer complaints about the complainant when Mr. Gunther was manager, and that the complaints concerned the complainant being a "gay" person who was cooking customers' food. He stated that he never had any complaints concerning complainant being a black person.

17. Tammy Cole, a waitress employed by respondent credibly testified as to the reduction in hours she observed for complainant after Frank Comer became complainant's supervisor. She further testified that Frank Comer made a remark to Jackie Parker which she overheard that having a black cook on the weekends was bad for business. Jackie Parker denied that the remark was made to him.

18. Pamela Frazier a former employee of respondent credibly testified about a conversation she had with Frank Comer wherein he commented when discussing the complainant that all black people should be put in a boat and shipped back to Africa.

19. Donald Maynus, a white male hired by respondent as a cook was shortly after his hire date, made an assistant manager under Frank Comer.

20. The complainant was hired at least one year before Maynus and "broke in" Maynus as a cook. After his promotion, Maynus

supervised complainant on third shift from time to time. Assistant managers made \$250.00 per week as opposed to \$3.50 per hour paid to a cook.

21. Maynus testified that he had not applied to be an assistant manager, but was placed in that position.

22. Mary Wallace, a black woman, testified that she had worked as a waitress at the Pancake House for a year. She stated that she quit because when there was a head waitress position open, it was given to a white waitress, with less experience. Ms. Wallace also testified that her hours were cut when other white employees hours remained the same.

23. Carl Kelly, a white male, testified that he was an employee when Robert Gunther, Frank Comer and Jackie Parker were all managers at different times and that when waitresses passed along customer complaints about complainant that he would cook in the complainant's place.

24. Jackie Parker testified that he was the assistant manager supervising the third shift and that the complainant never complained about his third shift assignment and never mentioned wanting to be a manager or assistant manager.

25. Complainant credibly testified that he called Jackie Parker at 7:00 p.m. on Friday, November 29th to advise him that he was sick and that he would not be in, even though Parker denied this claim.

26. Again the next day, Saturday, November 30, complainant credibly testified that he called in to find out if he was scheduled to work that night. Complainant spoke to Frank Comer, who told him

not to come back, that as far as he (Comer) was concerned, complainant had "quit."

27. Mr. Dobby testified that at the biannual "State of the Union" meetings respondent held with all employees to discuss the operations of the new Western Pancake House employees were encouraged to first utilize the chain of command by going to the assistant manager and the manager and then subsequently to Mr. Dobby and finally, if the matter could not be resolved, to Steve or Tom Louisos.

28. Complainant confirmed that when he was assigned as a bus person that he first spoke to Steve Louisos at the New Western Pancake House and then the next day he went to Tom's Carryout on Jones Avenue and spoke to Tom Louisos and that the next day he was returned to his position as cook.

29. Complainant admits that after respondent ended his employment, he never spoke or complained to anyone personally at New Western Pancake House about it.

30. Respondent permitted a racially hostile work environment at its workplace for complainant.

31. The complainant received substantially fewer hours than other white employees hired after him or other shifts.

32. Complainant's reduced hours, non-promotion, and ultimate termination by respondent were because of his race.

33. Wages reported received by the complainant from the respondent as reported to the West Virginia Division of Employment Security were \$6,203.03 a year or an average of \$516.92 per month for the most immediate four quarter periods preceding the quarter complainant's hours were reduced and he was terminated.

34. Complainant suffered humiliation, mental anguish and emotional distress because of respondent's conduct.

35. Since no longer being employed by respondent, the complainant has earned approximately \$300.00 per month from odd jobs such as housecleaning and painting.

36. Complainant suffered humiliation, mental anguish, and emotional distress because of respondent's conduct.

C.

DISCUSSION

The prohibition against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act. WV Code §§5-11-1 to -19. Section 5-11-9(1) of the Act makes it unlawful "for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment...." The term "discriminate" or "discrimination" as defined in §5-11-3(h) means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of...race...."

To recover against an employer on the basis of a violation of the Act, a person alleging to be a victim of unlawful discrimination, or the commission acting on his behalf, must ultimately show by a preponderance of the evidence that:

(1) the employer excluded him from, or failed or refused to extend to him, an equal opportunity;

(2) the impermissible classification was a motivating or substantial factor causing the employer to exclude the complainant

from, or fail or refuse to extend to him, an equal opportunity, Price Waterhouse v. Hopkins, 490 U.S. 228, (1989); and

(3) the equal opportunity denied the complainant is related to any one of the following employment factors: compensation, hire, tenure, terms, conditions or privileges of employment.

In general, a case of discrimination against a member of a protected class can be proven by direct evidence, or by circumstantial evidence, or by a combination of both. McDonnell Douglas Corp. v. Green, 411 U.S. 792, (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, (1981); State ex rel. WV Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E.2d 77 (1985).

Proof of discrimination by circumstantial evidence is more common, since discriminating employers usually attempt to hide their illegal motive, making direct evidence unavailable. A complainant may use circumstantial evidence to show discriminatory intent by the three-step inferential proof formula first articulated in McDonnell Douglas Corp. v. Green, supra, and adopted by the West Virginia Supreme Court of Appeals in Shepherdstown Volunteer Fire Dept. v. WV Human Rights Commission, 309 S.E.2d 342 (1983). The McDonnell Douglas method requires that the complainant first establish a prima facie case of discrimination. The burden of production then shifts to the respondent to articulate a legitimate, nondiscriminatory reason for its action.

Finally, the complainant or commission must show that the articulated reason proffered by respondent was not the true reason for the employment decision, but rather a pretext for discrimination. The

term "pretext," as used in the McDonnell Douglas formula, has been held to mean "an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance; pretense." WV Institute of Technology v. WV Human Rights Commission, 383 S.E.2d 490, 496 (1989).

Even where an articulated legitimate, nondiscriminatory motive is shown by the respondent to be nonpretextual, but in fact a true motivating factor in an adverse action, a complainant may still prevail under the "mixed-motive" analysis. This analysis was established by the United States Supreme Court in Price Waterhouse v. Hopkins, supra, and recognized by the West Virginia Supreme Court of Appeals in WV Institute of Technology v. WV Human Rights Commission, supra. If the complainant proves that his race played some role in the decision, the employer can avoid liability only by proving that it would have made the same decision even if it had not considered race.

While the test for establishing a prima facie case of employment discrimination has been variously articulated, the essential elements are that the complainant is a member of the protected class, that he suffered an adverse action, and that the adverse action was related to his protected status. The Court has articulated the test in slightly different ways, depending on the type of discrimination and the contest, i.e., failure to hire, failure to promote, discharge, etc.

The West Virginia Supreme Court has articulated the generic requirements as follows:

In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, WV Code §5-11-1 et seq. (1979), the plaintiff must offer proof of the following:

(1) That the plaintiff is a member of the protected class;

(2) That the employer made an adverse decision concerning the plaintiff;

(3) But for the plaintiff's protected status, the adverse decision would not have been made.

Conaway v. Eastern Associated Coal Corp., 178 WV 164, 358 S.E.2d 423, 430, syl. pt. 3 (1986); Kanawha Valley Regional Transportation Authority v. WV Human Rights Commission, 181 WV 675, 383 S.E.2d 857, 860 (1989) (Emphasis supplied).

Criterion number three (3) of this formulation has engendered some confusion because of the use of the words "but for," whereas other formulations have required a showing that other similarly situated individuals not in the protected class have been treated differently. But it is clear that it was not the intent of the West Virginia Court to heighten the standard to prove a prima facie case. In Kanawha Valley Regional Transportation Authority v. WV Human Rights Commission, 383 S.E.2d 857 (1989), the Court said:

However, it is clear that our formulation in Conaway was not intended to create a more narrow standard of analysis in discrimination cases than is undertaken in the federal courts. This is manifested by our reliance on applicable federal cases as illustrated by West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 WV 525, 383 S.E.2d 490, 495 (1989), where we cited a number of federal cases and described the type of evidence required to make a Conaway prima facie case:

"[B]ecause discrimination is essentially an element of the mind, there will normally be very little, if any, direct evidence available. Direct evidence is not, however, necessary. What is required of the complainant is to show some circumstantial evidence which would sufficiently link the employer's decision and the complainant's status as a member of a protected class so as to give rise to an inference that the employment

related decision was based upon an unlawful discriminatory criterion."

KVRTA, 383 S.E.2d at 860 (Emphasis supplied); see also Holbrook v. Poole Associates, Inc., 184 WV 428, 400 S.E.2d 863 (1990); WV Institute of Technology v. WV Human Rights Commission, 181 WV 525, 383 S.E.2d 490, 494-495 (1989); Dobson v. Eastern Associated Coal Corp., ___ WV ___, 422 S.E.2d 494 (1992).

This requirement that there be evidence of a "link" between the employer's decision and the employee's status may be satisfied by circumstantial evidence of various kinds, including evidence that other similarly qualified individuals not in the protected class were treated differently.

In a case of alleged termination of employment because of race, the prima facie burden is met under the McDonnell Douglas test upon a showing that: (1) complainant was a member of a protected class; (2) he is qualified to obtain or retain the position; (3) the respondent removed the complainant from his position; and (4) the respondent continued to accept or sought other qualified individuals who were not members of the protected class. See Ranger Fuel Corp. v. WV Human Rights Commission, 376 S.E.2d 154 (1988); Montgomery General Hospital v. WV Human Rights Commission, 346 S.E.2d 557 (1986); O.J. White Transfer & Storage Co., Inc. v. WV Human Rights Commission, 383 S.E.2d 323 (1989); City of Ripley v. WV Human Rights Commission, 369 S.E.2d 226 (1988); Pride, Inc. v. State ex rel. WV Human Rights Commission, 346 S.E.2d 356 (1986); Shepherdstown V.F.D. v. WV Human Rights Commission, supra. Texas Dept. of Community Affairs v. Burdine, supra.

Under the instant facts, the complainant has established a prima facie case of discrimination. First, complainant is an

African-American and is thus a member of a group protected by the Human Rights Act. Second, it is undisputed that he met the qualifications for the position he held. Third, the commission brought on testimony about how complainant was treated differently than white coworkers. His hours were severely reduced and he was not promoted or moved to different shifts when available. Ultimately, complainant was eased out and he was terminated; white employees continued to work regular and even overtime hours.

If the complainant establishes the link between his race, terms and conditions of employment including his termination, by use of circumstantial evidence and application of the McDonnell Douglas test, then his prima facie case gives rise to a burden of production on the part of the respondent. If the respondent then produces legitimate, nondiscriminatory reasons for its actions, the complainant can prevail by showing that the proffered reason is pretext. In other words, where the link is established, the case turns upon an examination of respondent's stated reasons.

Here the proffered reasons were that the level of complainant's performance was never an issue; that the complainant was never treated differently; and that he was assigned fewer hours because of seasonal changes in business. Respondent further asserts that complainant was never terminated, that he just did not show up for work any longer. At hearing, respondent offered testimony that if indeed the complainant was treated differently, it was because of complaints about his sexual orientation.

Finally, respondent raises as a buffer against liability the defense of after-acquired evidence, stating that it found out at a

discovery deposition that complainant pled guilty to a felony twenty years ago, and misrepresented that fact in response to a question on his application for employment with respondent. Moreover, that had they known complainant's past, that he would not have been hired.

However, it is not sufficient for respondent to give reasons for which the complainant could have been fired; the reasons must be those which actually motivated the adverse action. Hypothetical reasons, legitimate or not, which were not motivating factors, are pretext.

This gist of the testimony offered by respondent in support of its position is that all employees were moved around from time to time. This was clearly not what was happening to complainant. Robert Gunther, complainant's supervisor, testified about how he was told by one of the Louisos brothers to demote complainant to busboy. Mr. Gunther further testified that he did his best to "protect" complainant. Mr. Gunther was told to cut complainant's hours and move him "out of the public eye," to put complainant on night shift and to "hide him from the public." Joe Domby admitted this on the stand. He was asked:

Q. Did you tell Robbie Gunther to cut Mr. Moore's Hours?

A. No, we did not. We just told him whenever we had problems to assume that they were taken care of so that we did not lose our customers.

Q. How should they have been taken care of?

A. If a customer wanted someone else to cook their food, I told him, if he's the manager, "You go up there and cook it."

Although respondents have never asserted a defense of customer preference, Mr. Domby's testimony leans in that direction. And, although Mr. Domby's testimony asserts sexual orientation as the

reason, subsequent events indicate that it was complainant's race that generated adverse conduct during the latter tenure of his employment.

Robert Gunther testified that he ignored his supervisor's orders and circumvented directives to cut complainant's hours. The evidence reveals that when complainant returned from injury leave, he had a new manager, Frank Comer, and Mr. Comer's first words to him were "my bodyguard was gone...." Mr. Comer's comments to other employees were even more telling.

Mr. Gunther, who himself was terminated by respondent, reviewed the time cards submitted by respondents, and testified that complainant had usually worked an average of 31.74 hours per week while he was the manager. The time cards that reflect the time period when Frank Comer was complainant's supervisor show complainant working an average of 11.64 hours a week.

In addition to Mr. Gunther's testimony, other former coworkers of complainant testified to his ability as a cook and to the treatment he was given by respondent's management. Tammy Cole testified that she worked as a waitress at the Pancake House on the second and third shift during the time complainant was a cook. Ms. Cole testified that she was in a position to observe complainant's treatment by both Mr. Gunther and Mr. Comer. She testified as to complainant's treatment after Mr. Comer became his manager. She stated:

Q. Was there a change in the hours that he was assigned?

A. I remember on the weekend that he would only work like six hours a night on weekends, like on Friday and Saturday nights. And then they would have other people working lots of hours, and signs up advertising for help, for cooks and busboys.

Q. While Mr. Moore's hours were cut?

A. Cut, yes.

In answer to questions by the commission's counsel, the following testimony was received from Ms. Cole:

Q. Did you ever hear any remarks about Mr. Moore's race?

A. Yes, I believe I have.

Q. From whom?

A. From Frank, I remember--

Q. When Mr. Comer was their manager?

A. Yes.

Q. What was that?

A. It was said that they believe that having a black cook on the weekends was not a good idea, that it would hurt our business, that it has hurt our business.

Ms. Cole also testified that in the entire time she worked for respondents she never knew of the respondent having a black manager or assistant manager.

Pamela Kay Frazier, a Caucasian woman, testified that she had been a waitress at the Pancake House. Ms. Frazier testified about a conversation she had with Frank Comer while he was manager. She said that Mr. Comer had remarked to her that he believed that "all black people should be put on a boat and shipped back to Africa." Ms. Frazier stated that Mr. Comer made this remark while they were conversing about complainant.

Ms. Frazier also testified that Carl Kelly, while in the management position, made what she claimed as an "unsettling comment." She testified:

Q. What was the comment?

A. The comment was that he knew someone in the KKK or the Grandfather of the KKK and he couldn't have anything to do with Gereinda outside the Pancake House; but if he had to work with him, then he had to associate with him.

Mr. Kelly, when brought on by the respondents, testified that it was the Grand Wizard of the KKK and that he lived near him.

Testimony was elicited about the employment prospects for black people with respondent. Everyone, including respondent and their witnesses, testified that there had never been a black manager or assistant manager at the Pancake House. Mr. Gunther testified as to the procedure for choosing a manager or assistant manager:

Q. In your tenure with New Western Pancake House, throughout the time you worked there, Mr. Gunther, what was the procedure for a person moving to assistant manager from, say, cook or waiter?

A. There really wasn't no system. We moved as we saw fit with their ability.

Q. Did anyone have to ask or apply to be an assistant manager or a manager?

A. It would be good to ask. As far as applying, I never had anybody apply for the position.

Q. Who made the decisions on who was a (sic) assistant manager?

A. Tom and Steve Louisos.

Q. While you were manager, were you accessed for these decisions?

A. No, not really. Carl Kelly was made assistant manager. I didn't want him to be one, but they felt that it would be better so that's the way we went with it.

Other witnesses also testified about the procedure or lack of such for promotion to manager or assistant manager. Donald Maynus, a white male, testified that he became an assistant manager three months after he was hired. Mr. Maynus who was hired almost a year after complainant, became an assistant manager while Mr. Moore was off on sick leave in July. He had been the cook that complainant "broke in." Maynus testified that he had not formally applied to be an assistant manager, but was placed in that position.

Mary Wallace, an African American woman, testified that she had worked as a waitress at the Pancake House for a year. She stated that she quit because when there was a head waitress position open, it was

given to a white waitress, with less experience. Ms. Wallace also testified that her hours were cut when other white employees' hours remained the same.

Complainant conceded that he had never applied or asked to be an assistant manager nor had he ever manifested any interest in a promotion, because to do so, in his opinion, would have been futile. Although it can be argued that complainant's promotion claim has not been fully developed on the record, it is abundantly clear as revealed by complainant's exemplary work history and seniority that the complainant should have been promoted to assistant manager before Donald Maynus. The fact that there has been no proffered reason why he was not when coupled with respondent's conduct toward others African-American employees belies a racial motive.

The respondents' defense that complainant was treated the same as similarly situated white employees has been established as pretextual.

Complainant was first moved to the third shift because of customer complaints. Ultimately, when Robert Gunther could no longer intercede for him, complainant's hours were reduced. Then, the defense was made that during tourist season there was not enough business on third shift. The evidence shows that when complainant was working severely cut hours, other employees, hired after him and white, were still working regular hours and even overtime. If the business had cut backs, complainant could have been moved to another shift. Employees moved through the shifts at will. Although the complainant never complained about the third shift and may have liked it, he was stuck on that shift so the public would not see him.

Respondent maintains that if complainant's shift or duties were different, it was because of complainant's alleged homosexuality not his race. To be sure, Tom and Steve Louisos testified that the complaints directed to them were about the complainant's perceived sexual orientation.

Presently, the West Virginia Human Rights Act does not proscribe disparate treatment based on sexual orientation. However, in cases where defenses may be legitimate, as well as illegal, courts have shifted the burden to the employer to show that it would have made the same decision without the discriminatory motive. A complainant may still prevail under this "mixed-motive" analysis by proving that illegal criteria (in this case, complainant's race) played some role in the decision, and the employer can avoid liability only by proving that adverse action would have been taken even if it had not considered the unlawful ground); See Price Waterhouse v. Hopkins, and also WV Institute of Technology v. WV Human Rights Commission, supra. In other words, the respondent would have to show that their action was taken against the complainant because of his alleged sexual orientation or their perception thereof. In light of respondents' treatment of another individual, this burden has not been met.

Testimony was elicited that respondent employed another person, a Caucasian male who was openly gay. There is no evidence that this person was treated differently by respondent. He was not fired nor were his hours adjusted.

But here there is more. Even arguendo, if the impetus by respondent for complainant's shift change, and reduced hours had been complainant's perceived homosexuality and resultant customer

complaints, it is clear that this motive merged and was subsumed by one of racial animus against the complainant. The evidence reveals that after Robert Gunther was removed as complainant's supervisor, the die was cast. There can be no question that respondent subsequently employed as supervisors, persons in a position to effect the terms and conditions of employment for the complainant, who have been exposed by testimony to be bigoted and racially biased. It is equally compelling that, even if the alleged sexual orientation of the complainant was a non-issue, that in the minds of respondent's supervisors particularly Frank Comer and Jackie Parker, that the complainant's race was a critical factor in why he was set up for termination.

Assessing credibility in this case has been a painstaking and difficult exercise because the record abounds with half truths, innuendo and omission both from the perspective of the complainant and the respondent. However, weighing the evidence as fairly, completely and specifically as can be done, taking into account motive, bias and demeanor of witnesses and consistency of testimony, the commission has clearly shown the respondents' defenses and why he was never promoted to assistant manager to be contrived and pretextual. For this respondent is responsible.

In conclusion, the commission has shown by a totality of the evidence that complainant's unequal treatment and termination was due to his race, and as such is a violation of the West Virginia Human Rights Act.

PART II

A.

AFTER ACQUIRED EVIDENCE

FINDINGS OF FACT

1. During the discovery deposition of complainant on September 21, 1992, after discussion among counsel concerning the employment application and the forms which were filled out and signed which indicate whether or not an applicant has been convicted or entered a plea to a crime, the complainant stated "Yes" in response to the question "did you answer a question like that when you made an application for employment?" The complainant was then instructed to not answer the questions as to whether or not his answer on the application for employment was true.

2. When complainant filed his employment application, he denied that he had ever been convicted of a felony and denied that he had ever been incarcerated.

3. At the time of complainant's application for employment in July of 1989, the complainant had been previously convicted of grand larceny which is a felony conviction.

4. Prior to completion of his employment application with the respondent's corporation, complainant had spent 60 to 90 days in the Huttonsville prison at Huttonsville, West Virginia.

5. The complainant maintains that he was unaware that he had ever been convicted of a felony and unaware that he had ever been incarcerated when he made his employment application in July 1989.

6. Tammy Cole testified that she had been convicted of a felony before being employed at the New Western Pancake House and believed

that former Manager Chuck Simmons, knew of her conviction but did not know if he told anyone else and that she never made Mr. Domby or Steve Louisos and/or Tom Louisos aware of her conviction, although, she could always go to Tom Louisos with her problems.

7. Gunther testified that he was already working at the New Western Pancake House when Tammy Cole was hired, but that he, at some time, knew that she had been convicted of a felony. Although when Tammy Cole returned to work, Gunther admits that he did not remember advising either Tom Louisos or Steve Louisos that she had been convicted and did not have her fill out an application to return to work.

8. Mr. Domby testified that he was never aware of anyone being hired by the respondent who had answered on the questionnaire or application that they were convicted of a felony and that he was not aware that Tammy Cole was convicted, and further, that he would never recommend a felon for employment. The reasons assigned were that due to "pilferage" being one of a restaurant's largest costs.

B.

DISCUSSION

In a pretrial motion and at hearing, the respondent moved the Administrative Law Judge to dismiss this case because it discovered at a deposition that complainant had entered a guilty plea to a felony charge twenty years earlier and had falsified his application for employment.

In order to prevail in an after-acquired evidence charge, courts have ruled that an employer must show that (1) [they were] unaware of the wrongdoing when the employee was discharged; (2) the wrongdoing would have justified discharge; and (3) the employer would indeed have discharged the employee, had the employer known of the wrongdoing. O'Driscoll v. Hercules, Inc., 12 F.3d 176 (10th Cir. 1994); Summers v. State Farm Mutual Automobile Insurance Co., 864 F.2d 700, (10th Cir. 1988); see also Johnson v. Honeywell Information Systems, Inc., 955 F.2d. The respondent has met this burden.

The respondent has established that it was unaware of the complainant's misrepresentation of a felony conviction at the time he filed his employment application and would not have employed complainant had they known this fact. It is further apparent that respondent was unaware of the past conviction of any of its other employees prior to the time of their discovery of complainant's malfeasance. Moreover, complainant's testimony to explain or justify the application misrepresentations has been less than forthright. In addition, the evidence does not reveal any non-job related disparative input based on complainant's race, nor is there any showing that application fraud or dishonesty is not reasonably related to respondent's legitimate business purpose.

The focus now shifts to whether or not all relief must be denied when an employer later discovers some wrongful conduct that would have led to termination if it had been discovered earlier.

While the West Virginia Supreme Court of Appeals has not ruled on the issue of after acquired evidence, the United States Supreme Court of Appeals recently addressed the issue to resolve the conflicts upon

circuit courts of appeal on the question, in McKennon v. Nashville Banner Publishing Company, No. 93-1543, decided Jan. 23, 1995. In McKennon, the analysis proceeded on the assumption that an unlawful motive (age) was the basis for the employee's termination. Similarly, the instant case proceeds on findings of fact and conclusions of law that an unlawful motive (race) was the basis for respondent's adverse treatment of complainant. The threshold test then becomes balancing the respondent's unlawful act against the complainant's wrongdoing and the impact of that decision on remedy.

The Court in McKennon clearly distinguished between the public purpose of anti-discrimination legislation which is to deter unlawful discrimination and the private right of aggrieved individuals under the statutes to compensation for injury. McKennon compellingly provides as follows:

In giving effect to the ADEA, we must recognize the duality between the legitimate interests of the employer and the important claims of the employee who invokes the national employment policy mandated by the Act. The employee's wrongdoing must be taken into account, we conclude, lest the employer's legitimate concerns be ignored. The ADEA, like Title VII, is not a general regulation of the workplace but a law which prohibits discrimination. The statute does not constrain employers from exercising significant other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees. See Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989) supra at 239 ("Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice"). In determining appropriate remedial action, the employee's wrongdoing becomes relevant not to punish the employee, or out of concern "for the relative moral worth of the parties," Perma Mufflers v. International Parts Corp., 392 U.S. 134, 138 (1968) supra at 139, but to take due account of the lawful prerogatives of the employer in the usual course of its business and the

corresponding equities that it has arising from the employee's wrongdoing.

It is clear that complainant conduct is relevant to the remedies provided under the West Virginia Human Rights Act.

On the issue of compensatory relief, in situations such as presented in this section, the Court in McKennon lends the following guidance:

The proper measure of backpay presents a more difficult problem. Resolution of this question must give proper recognition to the fact that an ADEA violation has occurred which must be deterred and compensated without undue infringement upon the employer's rights and prerogatives. The object of compensation is to restore the employee to the position he or she would have been in absent the discrimination, Franks v. Bowman Transportation Co. 424 U.S. 747, 763 (1976) at 764, but that principle is difficult to apply with precision where there is after-acquired evidence of wrongdoing that would have led to termination on legitimate grounds had the employer known about it. Once an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent a suit. The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered.

The new information in the case at bar is twofold--complainant's prior conviction and his misrepresentation on his application. Accordingly, complainant's backpay is calculated from the date of his termination to September 21, 1992, the date of his discovery deposition.

PART III

A.

CONCLUSIONS OF LAW

1. Complainant, Gereinda Moore, is an individual claiming to be aggrieved by an unlawful discriminatory practice, and is a proper complainant for purposes of the West Virginia Human Rights Act. WV Code §§5-11-3(a) and 5-11-10.

2. Respondent, Tomco Enterprises, Inc., doing business as New Western Pancake House, is an employer as defined by WV Code §§5-11-3(d) and 5-11-9(1), and is a proper respondent in this action.

3. Respondents, Tom Louisos, Steve Louisos and Joe Dobby, are not persons as defined by WV Code §§5-11-3(a) and 5-11-9(7) and are not proper respondents in this action.

4. The complaint in this matter was timely filed pursuant to WV Code §5-11-10.

5. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of the complaint.

6. Complainant has established a prima facie case of race discrimination in terms and conditions of employment.

7. Respondent's articulated reasons for reducing complainant's hours and terminating complainant's employment have been shown to be pretextual.

8. As a result of respondents' discriminatory conduct, complainant suffered lost wages and benefits, as well as humiliation, embarrassment and emotional distress. (See Exhibit A.)

9. The complainant made diligent efforts to mitigate his damages, found other work, and did partially mitigate.

10. As a result of respondents' discriminatory conduct, complainant is entitled to the following relief:

(a) The respondent shall pay ten percent per annum interest on all monetary relief.

(1) Back pay is calculated on the basis of a \$250.00 per week salary as an assistant manger for respondent. Backpay of \$1,000.00 per month from November 30, 1990, to September 27, 1992, less \$300.00 per month as an offset based on complainant's interim earnings from odd jobs, including prejudgment interest on back wages. For the period preceding complainant's termination, complainant should have earned \$1,000.00 per month from July 1990 when Donald Maynus was made assistant manager, less complainant's actual earnings received from respondent through November 29, 1990.

(b) Incidental damages from the respondent in the amount of \$2,950, for humiliation, embarrassment and emotional distress;

(c) The Commission is entitled to travel expenses and costs associated with prosecuting this claim;

(d) Complainant's monthly income derived from caretaking his brother and another male is not an offset against backwages. The record reveals that complainant performed these ancillary services as well as received room and board from these individuals while he was employed by respondent.

ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. Respondent shall immediately cease and desist its discriminatory employment practices. Respondent shall post a prominently displayed notice at respondents' premises indicating that respondent is an equal opportunity employer and that violations may be reported to the West Virginia Human Rights Commission.

2. Within 6 months of receipt of this decision, respondent shall commence quarterly sensitivity training for all its employees, managerial and hourly, for a two year period. The training shall include but not be limited to sessions on cultural diversity and the fostering of racial tolerance. After the completion of each session, respondent shall provide a written report to the WV Human Rights Commission summarizing said sessions.

3. The WV Human Rights Commission may be contacted to assist in the planning and presentation of the training sessions.

4. The Commission's attorney shall within 10 days of receipt of this decision submit to the Commission and the respondent the following:

(a) Recalculations of complainant's backwages and interest for the period and amount set forth in Conclusions of Law 10(a); and

(b) An itemized statement of compensable expenses associated with prosecuting this case as set forth in conclusions of law 10(a).

These respective calculations shall be deemed supplements to this decision and incorporated by reference.

5. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of \$2,950.00 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

6. Within 31 days of receipt of this decision, the respondent shall pay to the complainant back pay and interest as recalculated by the Commission's counsel in its back pay submission addressed in 4(a) of this subpart.

7. Within 31 days of receipt of this decision, the respondent shall pay to the Commission its costs and expenses as set forth in Commission's itemized statement described at 4(b) of this subpart.

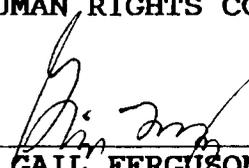
8. In the event of failure of respondent to comply with any of the provisions set forth in the decision, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Norman Lindell, Acting Director, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so ORDERED.

Entered this 8 day of May, 1995.

WV HUMAN RIGHTS COMMISSION

BY: _____


GAIL FERGUSON
ADMINISTRATIVE LAW JUDGE