STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
1321 Plaza East
Room 104/106
Charleston, WV 25301-1400

GASTON CAPERTON
GOVERNOR

TELEPHONE (304) 348-2616
FAX (304) 348-2248

Quewanncoii C. Stephens
Executive Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

February 6, 1992

Viola Mayes
8150 Fraziers Lane
Le Sage, WV 25537

Morris Memorial Convalescent
and Nursing Home, Inc.
Hospital Rd., Box 6
Milton, WV 25541

Lafe Chafin, Esq.
636 4th Ave.
PO Box 402
Huntington, WV 25708

Mary C. Buchmelter
Deputy Attorney General
Civil Right Division
812 Quarrier St.
Charleston, WV 25301

Re: Mayes v. Morris Memorial Convalescent and Nursing Home, Inc. Docket Number: EH-600-88

Dear Parties:

Enclosed, please find the final decision of the undersigned hearing examiner 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 hearing examiner'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 examiner, 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 hearing examiner shall not operate as a stay of the decision of the hearing examiner 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 hearing examiner, or an order remanding the matter for further proceedings before a hearing examiner, 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 hearing examiner, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the examiner on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the hearing examiner'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 hearing examiner's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the examiner'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
Hearing Examiner

GF/mst

Enclosure

cc: Quewanncoii C. Stephens, Executive Director
Glenda S. Gooden, Legal Unit Manager

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

VIOLA MAYES,

Complainant,

v. DOCKET NUMBER(S): EH-600-88

MORRIS MEMORIAL AND CONVALESCENT NURSING HOME, INC.,

Respondent.

HEARING EXAMINER'S FINAL DECISION

A public hearing, in the above-captioned matter, was convened on June 6, 1990, in Putnam County, West Virginia, before Gail Ferguson, Hearing Examiner.

The complainant, Viola Mayes, appeared in person and by counsel, Mary C. Buchmelter, Senior Assistant Attorney General. The respondent, Morris Memorial and Convalescent Nursing Home, Inc., was represented by John E. Green, Administrator and Betty Sunderland, its Business Manager and by counsel, Lafe C. Chafin, Esq..

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 hearing examiner 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.

FINDINGS OF FACT

1. The complainant, Viola Mayes, has a progressive hearing loss caused by nerve damage she suffered at the age of 12. Although the complainant does not use sign language, she has utilized a hearing aid as an amplification device.

2. Respondent, Morris Memorial Convalescent and Nursing Home, Inc., is licensed as an intermediate care facility by the State of West Virginia and employs approximately 132 individuals. The respondent cares for approximately 170 patients, of which 72% are room-confined.

3. The complainant applied for a position as dietary aide with respondent and listed on her application for employment that she had a hearing loss. She was hired on March 2, 1988, and continued in the position of dietary aide until terminated on March 23, 1988.

4. Although the complainant had no experience as a dietary aide prior to her employment by respondent, complainant had prepared food for her husband and four children for 37 years; and she had, for a short period, worked in a restaurant preparing food when she was a teenager.

5. While employed by respondent, complainant worked in the kitchen located in the basement of the facility along with approximately 10 other employees consisting of cooks and dietary aides. The complainant followed what the other aides did and what they showed her to do.

6. The complainant, as well as other dietary aides, was responsible for washing dishes, assisting the cooks in filling the patients' trays and placing the trays on a cart.

7. The food is placed on individual trays according to the patient's diet and then placed on a cart which is transported to the second and third floors of the building by the dietary aides where the trays are distributed by nursing aides to the various patient's rooms.

8. The dietary aides rotated taking the carts to the upper floors, together with preparing special diets and snacks for the patients. No great amount of skill is required to perform the assigned work and, no one aide was assigned a particular task. Each aide, however, worked whatever needed to be done in order to see that the operation flowed smoothly.

9. Sachiko Cunningham was the direct supervisor of the complainant and respondent's dietary manager over the entire kitchen. Freda Blake is an assistant supervisor and cook, but did not supervise the complainant.

10. The complainant can read lips and can understand the spoken word if the speaker faces her and speaks loudly. Although the complainant has a hearing aid, she testified that she did not wear it

during her employ with respondent because she was not asked to wear it.

11. While employed by the respondent, the complainant was never advised that her hearing impairment was affecting her performance nor that she was otherwise not performing her work.

12. The complainant assumed she was satisfactorily performing her job duties since no one at any time spoke with her about the quality of her work.

13. Freda Blake, complainant's supervisor, conversed with the complainant daily regarding routine tasks the complainant was assigned to perform until she believed the complainant understood such directions.

14. While employed by the respondent, the complainant never complained that she could not hear or understand instructions.

15. In administering to the nutritional needs of the patients of the respondent, it is necessary to prepare four to five different diets. According to the respondent, in order to assist the complainant in placing the proper diet on the proper tray, respondent adopted a numbering system and then a written system for complainant's use.

16. According to the respondent, other dietary aides it employed complained to their supervisors about the complainant's job performance and the fact that they could not perform their work and that of the complainant's; to wit; that because the complainant could not hear them even when they sought to communicate with her by yelling or in loud vocal tones that the work flow was being impeded.

17. Complainant's supervisors complained to the respondent that there was a problem in the dietary department regarding the complainant's inability to perform her assigned task on a daily basis, and that, unless some action was taken, the other dietary aides were going to quit respondent's employment.

18. Respondent's administrator, Mr. John E. Greene, knowing of complainant's hearing impairment, made the ultimate decision to terminate her employment.

19. There was never any dialogue between the complainant and her supervisor or other management officials of respondent as to any accommodation which could be made for the complainant.

20. Mr. Green instructed his business manager, Betty Sunderland, to advise the complainant of her termination. When Ms. Sunderland's efforts to reach the complainant proved unsuccessful, Ms. Sunderland asked the complainant's sister, Stella Alford, who is also respondent's in-service coordinator, to communicate to the complainant respondent's decision to terminate her.

21. Ms. Alford, when advised of the respondent's decision, inquired of Ms. Sunderland as to whether it was because of complainant's hearing. Ms. Sunderland responded that the complainant could not hear well enough to do her job.

22. On or about March 21, 1988, complainant received a telephone call from her sister informing her that the complainant was terminated from her position with respondent.

23. Complainant attempted to talk with respondent's management in an attempt to get her job back. Complainant wrote a letter to Mr. Greene asking why she was terminated.

24. Complainant received a letter from Mr. Greene stating that complainant may have had trouble understanding because of her hearing.

25. Complainant applied for various similar positions after leaving respondent.

26. After her discharge by respondent, complainant took a Civil Service Exam for food service helper, and her score was 85.62. Subsequently, complainant was hired as a food service helper at the Barboursville Veteran's Home on April 5, 1989.

27. The residents at this facility are basically ambulatory and are fed cafeteria style.

28. Complainant's primary duties as a food service helper at the Barboursville Veterans' Home are primarily in the kitchen helping the cooks in the preparation of food, preparing salads, making coffee, occasionally attending the serving line and putting food on the trays, as all food is served by the cooks in the dining room. Those physically challenged patients who can not walk are served their meals by the food service helpers, including the complainant.

29. Complainant does virtually the same work at the Barboursville Veteran's Home as she did with respondent.

30. Complainant, when first employed at the Barboursville Veterans' Home, informed her supervisor that she was not wearing her hearing aid and was advised by her supervisor to wear it which she did.

31. According to complainant's present supervisors and co-workers, they face her when speaking and speak in normal to loud tones. Complainant is highly regarded as a competent employee.

32. Complainant's present employer accommodates her handicap by speaking loudly and facing her when speaking.

33. Complainant earned $3.35 per hour for a 35 hour work week. The aggregate amount of complainant's earnings, had she continued employment with respondent from March 23, 1988 until April 3, 1989, the date she found comparable employment, is $6331.50

34. Complainant made every effort to mitigate. She ultimately obtained employment and is employed today. Had complainant remained with respondent, she would have earned approximately $3.35 per hour for 35 hours per week. From March 23, 1988, until April 3, 1989, when she began employment with her present employer, complainant would have earned $6,331.50.

35 hours per week @ $ 3.35 per hour
for 54 full weeks = $117.25 per week

$ 117.25 per week
x 54 weeks
$6,331.50 back pay due + 10% prejudgment interest thereon

35. The complainant suffered for the humiliation, embarrassment, emotional and mental distress, and loss of personal dignity as a result of the respondent's action in terminating her. The complainant testified compellingly about how she lost sleep and was emotionally traumatized by respondent's action.

DISCUSSION

The West Virginia Human Rights Act provides in pertinent part that:

> "[I]t shall be an unlawful discriminatory practice, unless based upon a bona fide occupational

> qualification...for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is handicapped...." WV Code 5-11-9(a) 1987.

The seminal case establishing the order, allocations of burdens, and standard of proof is McDonnell Douglas v. Green, 411 U.S. 792 (1973), adopted by the West Virginia Supreme Court of Appeals; Shepherdstown Volunteer Fire Dept. v. State of West Virginia, 309 S.E.2d 342 (1983). The plaintiff must demonstrate that he or she (1) belongs to a protected class, (2) applied and was qualified for a position for which the employer was seeking applicants, (3) was rejected despite adequate qualifications, and (4) after rejection the position remained open and the employer continued to seek applications from persons with plaintiff's qualifications. Establishment of the prima facie case gives rise to a presumption that the employer unlawfully discriminated against the applicant. The burden of going forward then shifts to the employer to rebut the presumption of discrimination by articulating a legitimate, nondiscriminatory reason for the employee's rejection. The plaintiff then has the opportunity to prove by a preponderance of the evidence that the legitimate nondiscriminatory reason articulated by the defendant was not the true reason for the employment decision but was merely a pretext for discrimination. In such cases the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff; only the burden of going forward shifts. In a handicap cases, the basic task usually is not discerning the reason for the discrimination, since that is generally conceded, but

rather with examining the reasonableness of the decision under the facts. With these principles in mind, we turn to the specific issues of this case.

Judicial precedent has established that the complainant has the burden of proving each element of a prima facie case of handicap discrimination. Coffman Tradewell v. Alexander, 707 F.2d 473 (11th Cir. 1983). Under the instant facts, the complainant must prove: that she is a physically handicapped individual under the West Virginia Human Rights Act; that she was able and competent to perform the job of dietary aide with a reasonable accommodation; and finally, that respondent did not provide that accommodation and instead terminated her. Ranger Fuel Corp. v. WV Human Rights Commission, 376 S.E.2d 154 (WV 1988); Coffman v. WV Board of Regents, 662 F.2d 292 (5th Cir. 1988).

The definition of handicap is contained in the West Virginia Human Rights Act as follows:

> "any physical or mental impairment which substantially limits one or more of an individual's major life activities."

The record contains ample evidence to sustain a finding that the complainant has a physical impairment, which limits her major life activities. Moreover, the parties have stipulated that the complainant's hearing impairment meets the statutory definition of handicap.

The complainant must next prove that she was qualified to perform the essential elements of the job of dietary aide with a reasonable accommodation. The complainant's threshold contention is that she experienced no difficulty in performing the requirements of

her job. This self-assessment can be readily understood in light of the weight of the evidence which clearly establishes that at no time prior to her termination was the complainant warned or made aware of any job related deficiency by respondent in her position as dietary aide.

Under the instant facts the respondent clearly knew the complainant had a hearing loss and yet chose to believe that she was having difficulty performing her job duties because she did not understand instruction.

The respondent argues that the complainant did not "understand" in the cognitive sense, however, this conclusion is incredulous given the demeanor, comprehension and presence of the complainant during her testimony as well as the corroborative testimony of her present employer, supervisor and others who observed the complainant to be a highly competent employee in a similar line of work, that of food helper. The issue then is not the complainant's cognitive ability but rather respondent's obligation to provide reasonable accommodation for the complainant's handicap.

Respondent's affirmative duty is clear in this regard. It is equally clear that the initial burden is on the complainant to make a prima facie showing that reasonable accommodation of her handicap is possible. Prewitt v. U.S. Postal Service, 662 F.2d 2921 (5th Cir. 1981); Coffman, supra. While it is true that the duty to accommodate is initiated in most cases by request of an employee, if, as is presented here, the respondent had a problem with the complainant's job performance, knowing the circumstance of her impairment, then the respondent de minimus should have engaged in

dialogue with the complainant to determine whether and what accommodation would enable her to adequately perform her job. It is inconceivable that the respondent would not question whether the complainant's alleged marginal performance might not be remotely related to her hearing loss and apprise her of the same.

The complainant provided substantial evidence that with a reasonable accommodation such as that provided by her subsequent employer, which was to have employees face her and speak loudly when communicating, that she was a qualified and respected employee who performed in an exemplary manner the work of dietary aide. Ample evidence was presented that the essential elements, of the position of dietary aide at each facility, were comparable. At each facility the primary duties of a food service helper/dietary aide, included: kitchen duties; assisting the cook in the preparation of food and trays based on a patient's diet; and placing trays either on a cart for distribution to patient floors or directly serving non-ambulatory patients. Complainant's witness, Ethel Dalton, corroborated the complainant's testimony that the job duties she performed at each facility were similar. Ms. Dalton worked with the complainant in both facilities, and therefore is in a unique position to evaluate the complainant's responsibilities.

Under the instant facts and in light of complainant's prima facie showing, the burden then shifts to the respondent to rebut the prima facie case by showing that the complainant could not perform the essential elements of the job, even with a reasonable accommodation; or by demonstrating its inability to accommodate the complainant's handicap because of undue hardship; or by presenting an

otherwise legitimate nondiscriminatory reason for its action. If the respondent presents such evidence, the burden then shifts back to the complainant to rebut the respondent's evidence. Prewitt, supra;

The respondent first argues that it made reasonable accommodations for the complainant's handicap in that it continually instructed her on a daily basis regarding the duties necessary to be performed and further that it adopted, for her benefit, a numbering system as well as written instructions for her use in performing dietary duties. Moreover, that in spite of this accommodation, the complainant was unable to perform those duties, and the respondent was not thereafter under any obligation to continue the complainant in its employment.

However, the substantial weight of evidence does not support a finding that the respondent's numbering system and written instructions were implemented solely for the use of the complainant but rather that they were in place during respondent's normal course of business.

Another of respondent's defenses dances around the issue of complainant's hearing impairment. Respondent characterizes complainant as someone who "was not working out," who was "unable to follow through on instructions," and who "was repeatedly asking what to do." Respondent's witness, Freda Blake, testified that complainant could not "understand" what she was supposed to do. Ms. Blake had trouble distinguishing between "understanding" and "hearing." Her testimony was that complainant could not do the work because she could not understand the instructions. As Ms. Blake's testimony progressed, however, it was obvious that what she meant was

that complainant could not hear her instructions. At no time, however, did anyone ask complainant to wear her hearing aid. Betty Sunderland also testified for respondent. She, as well, confused the terms "understand" and "hear." When pushed to clarify her testimony, Ms. Sunderland finally said, "I meant that if anytime you have a problem understanding something, maybe you just don't hear it well."

The most confusing testimony came from respondent's representative, John E. Greene, President and Administrator of Morris Memorial Hospital, who is himself disabled with Amyotrophic Lateral Sclerosis (Lou Gehrig's Disease). Mr. Green's testimony was obtained by means of an "interpreter," Betty Sunderland, respondent's business manager. The gist of Mr. Greene's testimony was that complainant's supervisors, Sachiko Cunningham and Freda Blake, came to him to complain about complainant's work. Mr. Greene testified that he then went to observe complainant at her work and decided to terminate her. He never met the complainant; he stated that someone pointed her out to him. At no time did he meet with complainant or ask about any difficulty she might have been having. Mr. Greene testified that he made the decision to terminate complainant based upon complaints of co-workers and his observation. He testified that he never asked the names of the co-workers. The testimony of Mr. Green and Ms. Sunderland was not credible. Respondent requested and received permission to hold the record open for the testimony of Sachiko Cunningham, complainant's supervisor. This testimony was never elicited.

The respondent has not met its burden of proposing a reasonable method of facilitating the complainant's handicap. Significantly,

the respondent presented little factually persuasive evidence as to why the complainant's continued employment would create a hardship. Respondent engaged in no dialogue with the complainant as to what accommodation might be the most effective. Moreover, given the level of co-worker complaints, it does not appear that respondent involved any of its other employees in sensitivity training regarding complainant's handicap and any attendant accommodation.

Lastly, respondent raises the issue of complainant's failure to wear her hearing aid while employed and argues that when complainant obtained subsequent employment with the Veterans Hospital she wore her hearing aid daily, and therein, lies the basis for the difference in her job performance. Concededly, it is troubling why the complainant, possessing such a device and aware of her own hearing impairment, would choose not to wear it; however, there was no expert evidence adduced as to whether complainant's use of a hearing aid would have enabled her to perform the duties of a dietary aide without the need of a reasonable accommodation such as that provided by her present employer. Nevertheless, it is not difficult to understand an argument that by this act of omission, the complainant may have contributed in a small manner to her own problem.

In summary, complainant, Viola Mayes, was terminated from her position as dietary aide, because the respondent did not accommodate her handicap in a reasonable way. No one asked her about a hearing aid. No one asked her if she needed them to speak loud. Respondent terminated complainant because it was just not convenient to accommodate her handicap. As pointed out by the court in a recent decision:

> "Reasonable accommodation by the employer may take many forms. It is only required to an extent that a refusal to provide some accommodation would be discrimination itself. The employer is required to act reasonably. Reasonableness, a flexible standard, must be measured not only by the disabled employee's needs and desires, but also by the economic and other realities faced by the employer...." Cerro Gordo County Cars Facility v. Iowa Civil Rights Commission, 401 N.W.2d 192 (Iowa 1987).

The respondent has presented no compelling reason, economic or otherwise, as to why it could not accommodate the complainant rather than terminate her.

CONCLUSIONS OF LAW

1. The complainant, Viola Mayes, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, WV Code §5-11-10.

2. The respondent, Morris Memorial Convalescent and Nursing Home, Inc, is an employer as defined by WV Code §5-11-3(a).

3. The complaint in this matter was properly and timely filed in accordance with WV Code §5-11-10.

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to WV Code §5-11-9 et seq.

5. The complainant is a handicapped person as defined by WV Code §5-11-3(t) in that she has a substantial hearing loss.

6. The complainant has established a prima facie case in that she has shown that she meets the definition of handicap, she

possesses the skills to do the desired job with reasonable accommodation, and she was terminated from her position.

7. Respondent's articulated nondiscriminatory reason for complainant's termination, that she was not qualified to perform the essential functions of the position, is shown to be pretextual.

RELIEF AND ORDER

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

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of receipt of this decision, the respondent shall pay to the complainant backpay in the amount of $6,331.50, plus prejudgment interest thereon at the rate of ten percent per annum, until said monies are paid;

3. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of $2,500.00 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

It is so ORDERED.

Entered this 6 day of February, 1992.

WV HUMAN RIGHTS COMMISSION

BY _____
GAIL FERGUSON
HEARING EXAMINER