



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
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CHARLESTON, WEST VIRGINIA 25301

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ARCH A. MOORE, JR.
Governor

April 27, 1987

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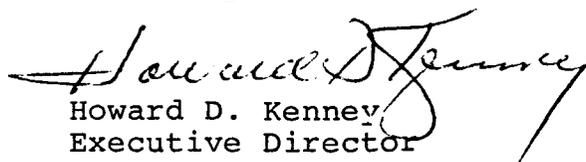
RE: Parsons v. Olin Corporation
EH-173-86

Dear Parties:

Herewith please find the 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 April 1, 1987, any party adversely affected by this final order may file a petition for review with the supreme court of appeals within 30 days of receipt of this order.

Sincerely,


Howard D. Kenney
Executive Director

HDK/mst
Enclosures

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE

AMENDED AND EFFECTIVE
AS OF APRIL 1, 1987

Enr. H. B. 2638]

3

116 this article.

§5-11-11. Appeal and enforcement of commission orders.

1 (a) From any final order of the commission, an
2 application for review may be prosecuted by either
3 party to the supreme court of appeals within thirty days
4 from the receipt thereof by the filing of a petition
5 therefor to such court against the commission and the
6 adverse party as respondents, and the clerk of such
7 court shall notify each of the respondents and the
8 commission of the filing of such petition. The commis-
9 sion shall, within ten days after receipt of such notice,
10 file with the clerk of the court the record of the
11 proceedings had before it, including all the evidence.
12 The court or any judge thereof in vacation may
13 thereupon determine whether or not a review shall be
14 granted. And if granted to a nonresident of this state,
15 he shall be required to execute and file with the clerk
16 before such order or review shall become effective, a
17 bond, with security to be approved by the clerk,
18 conditioned to perform any judgment which may be
19 awarded against him thereon. The commission may
20 certify to the court and request its decision of any
21 question of law arising upon the record, and withhold
22 its further proceeding in the case, pending the decision
23 of court on the certified question, or until notice that the
24 court has declined to docket the same. If a review be
25 granted or the certified question be docketed for
26 hearing, the clerk shall notify the board and the parties
27 litigant or their attorneys and the commission of the fact
28 by mail. If a review be granted or the certified question
29 docketed, the case shall be heard by the court in the
30 manner provided for other cases.

31 The appeal procedure contained in this subsection
32 shall be the exclusive means of review, notwithstanding
33 the provisions of chapter twenty-nine-a of this code:
34 *Provided*, That such exclusive means of review shall not
35 apply to any case wherein an appeal or a petition for
36 enforcement of a cease and desist order has been filed
37 with a circuit court of this state prior to the first day
38 of April, one thousand nine hundred eighty-seven.

39 (b) In the event that any person shall fail to obey a
40 final order of the commission within thirty days after
41 receipt of the same. or. if applicable. within thirty days
42 after a final order of the supreme court of appeals. a
43 party or the commission may seek an order from the
44 circuit court for its enforcement. Such proceeding shall
45 be initiated by the filing of a petition in said court. and
46 served upon the respondent in the manner provided by
47 law for the service of summons in civil actions: a hearing
48 shall be held on such petition within sixty days of the
49 date of service. The court may grant appropriate
50 temporary relief. and shall make and enter upon the
51 pleadings. testimony and proceedings such order as is
52 necessary to enforce the order of the commission or
53 supreme court of appeals.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

GARY A. PARSONS,

Complainant,

vs.

Docket No. EH-173-86

OLIN CORPORATION,

Respondent.

O R D E R

On the 8th day of April, 1987, the Commission considered the Findings of Fact, Conclusions of Law and Recommended Decision of the Hearing Examiner, Theodore R. Dues, Jr., and the exceptions thereto. After due consideration the Commission hereby adopts said Findings of Fact and Conclusions of Law as its own and it is ORDERED that the case be dismissed.

It is further ORDERED that said Findings of Fact and Conclusions of Law be attached to and made a part of this Order.

By this Order, a copy of which shall be sent by Certified Mail to the parties, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 22nd day of April, 1987.

Respectfully submitted,

Betty A. Hamilton
CHAIR/VICE-CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

GARY A. PARSONS,
Complainant,

v.

DOCKET NO.: EH-173-86

OLIN CORPORATION,
Respondent.

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

This matter matured for public hearing on May 8th and 9th and August 14th, 1986. The hearing was held at 405 Capitol Street, Daniel Boone Building, 4th Floor Conference Room, Charleston, West Virginia and at the West Virginia State Capitol Complex, Conference Room D, Charleston, West Virginia. The hearing panel on each day consisted of Theodore R. Dues, Jr., Hearing Examiner and Sid Allen, Hearing Commissioner.

The Complainant appeared in person and by his counsel, Sharon Mullens and Emily Speiler. The Respondent appeared by its representative, Thom Crimans and by its counsel, Robert M. Steptoe, Jr. and William B. Dickinson.

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 weighting 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 these findings and conclusions, the same are rejected.

and by its counsel, Robert M. Steptoe, Jr. and William B. Dickinson.

ISSUES

1. Whether the Complainant is a handicap person within the meaning of the Interpretive Rules and Regulations.
2. If so, did the Respondent unlawfully discriminate against the Complainant because of his handicap.
3. If so, to what relief is the Complainant entitled.

FINDINGS OF FACT

1. The Complainant was hired by FMC Corporation in 1974.
2. Chlorine dry bleach, hereinafter "CDB", was manufactured by the FMC plant until the plant was sold to the Respondent in the middle of 1985.
3. During his tenure with FMC, the Complainant worked a brief period of time at the West Plant (CDB plant). He worked four years in the East Plant (chlorine plant).
4. In April, 1978, the Complainant bid on a job in the CDB plant storeroom. Several months later, he developed a cough, sinus draining, chest congestion, and other cold symptoms which caused him to be treated initially by a FMC plant physician.
5. The Complainant followed up the medical visit at the

plant with his family physician. This occurred on or about the 26th day of June, 1978. The Complainant's family physician diagnosed him as having pneumonia in the left lower lobe.

6. The more competent medical evidence in this case on the issue of the type of pneumonia was received from Dr. Avashia who indicated that the Complainant's pneumonia was not chemical induced due to the fact that it was not bilateral. The point being, that chemical pneumonia, typically has a bilateral infiltrative effect on all five lobes of the lungs. In addition, Dr. Avashia testified that the treatment program utilized by the Complainant's family physician was consistent to the standard treatment for bacterial pneumonia.

7. Additionally, on this subject of the origin and type of pneumonia sustained by the Complainant, the Examiner was impressed with the testimony of Dr. Herbert Whittle, the Respondent's Medical Director for the Chemicals Division, who testified that the clinical picture for bacterial and chemical pneumonia differs. Specifically, it was noted that chemical pneumonia is usually diffuse, that is, involving all lobes of the lung and accompanied by a sudden onset and crippling effect requiring hospitalization, oxygen therapy, steroids and entirely different treatment than required for bacterial pneumonia. He too concluded, that the Complainant's treatment program was consistent to the treatment for bacterial pneumonia as opposed to chemical induced pneumonia.

8. The evidence is uncontroverted that the Complainant visited his family physician on one occasion and his family

physician did not follow up on the treatment afterwards.

9. During 1978 and 1979, the Complainant continued to work for FMC in the CDB storeroom. On August 10, 1979, the Complainant told his family physician, Dr. Vaughn, that he had a cough and cold. On August 22, 1979, Complainant was seen by the FMC physician for complaints of soreness throughout the lungs and severe cough. On August 23, 1979, Complainant's personal physician, diagnosed bronchitis and prescribed a shot of Penicillin and Phenergan.

10. Again, the Complainant's physician saw him only once.

11. Again, the Examiner was impressed with the testimony of Dr. Avashia and Dr. Whittle, who both concluded that the Complainant's bronchitis did not arise from chemical exposure.

12. The Complainant testified that he was thirty-five (35) years, of age at the time of the hearing, and that he has continuously smoked 1 to 1 1/2 packs of cigarettes per day since age 12; despite the recommendations of several physicians that he stop smoking.

13. It is the opinion of Dr. Avashia and Dr. Whittle that the more likely cause of the Complainant's bronchitis, at the time in question, was his smoking habits or "smoker's bronchitis".

14. On December 11, 1979, the Complainant bid on a separation operator's job in the processing department of the CDB plant. Approximately one week later, the Complainant complained to his family physician concerning a cough and chest cold. The

Complainant represented that he had been free of these symptoms for a short period after leaving the CDB plant storeroom but before bidding on the separation operator's job.

15. The evidence reflects that this is the first time that the Complainant's physician formed an opinion that the Complainant's three incidences of respiratory problems over the preceding two years could possibly be connected to the exposure to CDB. Accordingly, the Complainant's physician wrote a note to FMC restricting the Complainant from working around CDB.

16. FMC's plant physician responded the next day by restricting the Complainant from bleach "temporarily", noting the situation to be "non-occupational".

17. The convincing medical testimony in this case indicates that a patient with chemical pneumonia is a very sick person with a high respiratory rate and low blood oxygen, who cannot be treated as an outpatient with cough syrup and similar medications. That the Complainant's subjective history was not consistent with chemical pneumonia, but rather an ordinary respiratory infection that most people get two or three times per year, or more often if you are a smoker.

18. The Examiner finds that Dr. Vaughn, the Complainant's family physician, did not have the specialized expertise in this area of occupational medicine as did Dr. Avashia and further determines that Dr. Vaughn failed to commit himself to a reasonable degree of medical certainty pertaining to the causal connection between CDB and the Complainant's subjective complaints previously reflected herein.

19. There was no CDB causal connection of the Complainant's December, 1979, illness. Additionally, there was no CDB causal connection for any of the other incidents of respiratory illness previously discussed herein.

20. Subsequently, the Complainant transferred to the chlorine plant, where he worked until FMC sold the plant and terminated him in 1985.

21. His medical history from 1980 to 1985, as reflected by annual employment physical examinations records had no restrictions for the years 1980, 1981 and 1982.

22. However, on or about October, 1982, the Complainant approached the FMC plant physician and advised the physician that he did not feel that he should be assigned to work in the bleach area.

23. The FMC plant physician, based upon the Complainant's history, placed a restriction against exposure to bleach. Consistently, for the 1983 physical examination, the Complainant was restricted from CDB.

24. During his 1985 annual physical examination, the Complainant was given a rating with no restrictions. However, the Complainant was rated less than perfect due to his excessive weight. This physical examination was the last physical examination for the Complainant as an employee of FMC.

25. On or about July 11, 1985, the Complainant, applied for employment with Respondent.

26. At that time, the Complainant was fully aware and appreciated the fact that the Respondent was purchasing only that

CDB plant and the CDB was the primary product manufactured in the plant.

27. When hired by the Respondent, the Complainant had no current CDB restriction for the reasons that the January, 1985, physical examination performed by Dr. Avashia reflected no work restrictions and because FMC's medical restriction log reflected no current medical restrictions applicable to the Complainant at the time the plant was sold.

28. At the time the Complainant completed the Respondent's employment application, he did not provide any indication on the application form that he was under any medical restriction or perceived himself to have any impairment, even though he read the section at the end of the application which invited persons who perceived themselves to have a handicap to indicate the nature of the disability on the application. Additionally, the Complainant submitted a resume to the Respondent which accompanied the employment application wherein he detailed his work experience. The Complainant was later interviewed and during that interview at no time did he represent, or make reference to, any medical restriction or perceived impairment or disability relating to CDB.

29. On or about August 16, 1985, the Complainant, along with other former FMC employees, were offered positions with the Respondent. At that time, the Complainant was given a copy of the Respondent's Initial Operating Procedures, which specified the only three job classifications which the Respondent would utilize: Operations Technician, Maintenance Technician, and

Support Technician.

30. This Initial Operating Procedures manual was reviewed page by page with the Complainant and the other prospective employees. Specifically, it was explained to the Complainant and others that it was the Respondent's intention to achieve greater employee flexibility and efficiency within the three job classifications than FMC had been able to accomplish. At the conclusion of this meeting, the Complainant and others were given an opportunity to ask questions. The Complainant asked no questions.

31. Prior to his actual hiring, the Complainant told no one employed in management by Respondent, that he perceived himself as having a medical restriction, disability, or impairment. Notwithstanding the fact, that the Complainant understood that these were the only three job classifications within the Respondent's work force.

32. The Complainant accepted the Support Technician position which was offered by signing a letter dated August 16, 1985. It reiterated the Respondent's purpose and intent to operate in the most effective and productive manner.

33. The duties of a Support Technician had been explained and understood by the Complainant.

34. The letter, nor anyone present representing management at the meeting, made reference to storeroom work as being a distinct job classification that would be utilized by Respondent.

35. The Complainant began work for the Respondent on or

about August 19, 1985, by reporting to the CDB plant storeroom.

36. The environmental conditions in the storeroom, in terms of the amount of CDB exposure to the employees, were not materially different from that existing during the period of time that FMC had owned the plant.

37. The Complainant and others were upset about the job rotation system which was implemented by the Respondent. This system required the employees to rotate from position to position as demands required.

38. Shortly thereafter, the Complainant complained for the first time, that he was under a medical restriction which precluded CDB exposure. The Complainant was advised of the full face working respirator and other protective clothing readily available to the employees. But, the Complainant rejected this suggestion and contended that he had been hired originally by Respondent as a storeroom employee.

39. An additional meeting was held with the Complainant and two members of management, wherein the Complainant again refused to utilize protective clothing and a full face working respirator. Also, the Complainant failed to suggest what special considerations, if any, he felt were needed in order to accommodate his alleged disability.

40. Management contacted the plant physician, Dr. Avashia concerning the medical restriction claimed by the Complainant. It was Dr. Avashia's medical conclusion that there existed no medical reason why the Complainant could not work in the shipping and packaging department; the area in which the

Complainant was complaining of being assigned.

41. Again, it was suggested to the Complainant to try performing the job on the packaging line utilizing a respirator. The Complainant still did not suggest to management any type of special consideration or accommodation he felt was necessary or desired.

42. The shipping and packaging area in question was a large open area with good, natural ventilation. Although CDB dust appears on the floor, no dusty conditions in the air appeared to exist, even on the packaging line where CDB is being dumped into a bin and fed into paper fiber drums. The particular exhibits reviewed in this specific finding represented normal operations for the procedures and areas represented.

43. The Complainant on or about September, 1985, approached his family physician and requested a restriction for CDB exposure. The Complainant's physician recommended that he attempt to work in the packaging area. However, due to the Complainant's persistence, Dr. Vaughn provided a note saying that the Complainant should be restricted from open "heavy concentrations" of CDB because of "three documented cases of pneumonia related to dry bleach exposure".

44. At the time Dr. Vaughn wrote this note, he had no specific knowledge from the Complainant, or any other source, as to the type of work the Complainant would be doing, where the work would be done or what levels of CDB exposure would be involved.

45. The Complainant gave this note to a member of

management and returned to his work in the storeroom.

46. Shortly thereafter, the Complainant was called to a meeting in which he was advised due to the fact the Respondent's physician found no medical restriction applicable to CDB, yet Complainant's physician had restricted the Complainant from CDB exposure, the Respondent had no job available for the Complainant. At the same time, however, the Complainant understood that if he was willing to rotate, he still had a job with the Respondent as a support technician. Again, the Complainant persisted in his unwillingness to try to work in the Respondent's shipping and loading (packaging) department.

47. It is clear that the Complainant made this decision without information or knowledge, or without attempting to gain such information or knowledge about CDB levels in the shipper/loader position.

48. Complainant's position was that he was hired in the storeroom and that although all other Support Technicians were rotating he would not do so.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the subject matter and the parties herein.

2. The initial burden of establishing evidence to make a prima facie showing of discrimination rests firmly with the Complainant. Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, 309 S.E.2d 342, 352-53 (W.Va. 1983); Texas Department of Community Affairs v. Burdine, 450 U.S.

at 252-53, McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802, 804 (1973), Furnco Construction Company v. Waters, 438 U.S. 567, 577 (1978).

3. The first material question in the case at bar is whether the Complainant was a "handicapped" individual. The Act, as amended in 1981, defines "handicapped" as "any physical or mental impairment which substantially limits one or more of an individual's major life activities" W.V.C. § 5-11-3(t).

4. The Complainant has failed to establish by the preponderance of medical or lay evidence that he suffers from a physical impairment which essentially limited his ability to work as a Support Technician at the Respondents CDB plant. Based upon the record as a whole, and applying the evidence to the relevant statutory and case law, regarding employment handicaps, the Examiner finds that the Complainant has failed to make a prima facie showing of any handicap.

DISCUSSION

The testimony of Dr. Vaughn, the Complainant's family physician, did not establish a CDB related physical impairment which substantially limited the Complainant's ability to work in the Respondent's CDB plant. On the contrary, Dr. Vaughn advised the Complainant to try the job, and only after the Complainant insisted on the restriction, did Dr. Vaughn provide the same. Additionally, at the time Dr. Vaughn provided the restriction he was unaware of the type of work the Complainant would perform, the conditions in which the work would be performed and, perhaps

most importantly, the amount of CDB exposure that the Complainant would be exposed.

The evidence from Dr. Avashia and Dr. Whittle was very impressing and worthy of significant weight, given their work experience and training in the occupational disease area. It was their opinion that the Complainant suffered from episodic respiratory problems just as any other individual would, notwithstanding their job types, especially given the fact that the suffering patient was a long time heavy smoker. It was their conclusion that the Complainant's bronchitis was promoted, if not caused by, his heavy smoking habits.

It is further uncontradicted in the evidence, that the Complainant refused to stop smoking as he likewise refused to even attempt to utilize the protective clothing and full face respirator readily accessible and specifically urged to him to be worn.

The Complainant was aware of the fact that the Respondent dealt primarily with chlorine dry bleach. He also was aware of the fact that any job he took with the Respondent would require chlorine dry bleach exposure. Additionally, he failed to advise anyone about any perceived handicap he felt he had until such time that a portion of the job responsibilities was unacceptable to him; specifically, the job rotation system. It could be represented, that the offer by management of the protective clothing and the full face mask, although previously available at all times for the employees, was an effort by management to accommodate what they felt to be a concern of the Complainant.

However, the Complainant's attitude was inconsistent to that of a person one reasonably would consider to be sincerely concerned about his/her physical well being, and more likely to be the actions of an individual choosing to have his own way when terms and conditions proposed to him/her are unacceptable.

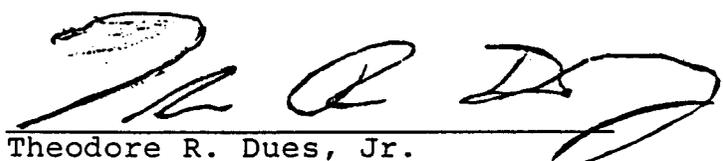
The medical evidence, including the evidence introduced by the Complainant, provides no credible basis upon which the Examiner can reasonably conclude that the Complainant suffered from a physical impairment which significantly affected his ability to perform the Support Technician position.

PROPOSED ORDER

Accordingly, it is the recommendation of this Examiner that the Commission issue an Order awarding judgment for the Respondent.

DATED: February 25, 1987

ENTER:


Theodore R. Dues, Jr.
Hearing Examiner

CERTIFICATE OF SERVICE

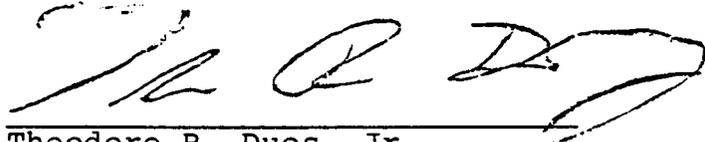
I, Theodore R. Dues, Jr., Hearing Examiner, hereby swear and say that I have served a true and exact copy of the foregoing EXAMINER'S RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW upon the following:

Sharon M. Mullens, Esq.
Assistant Attorney General
1204 Kanawha Blvd., E.
Charleston, WV 25301

and

Robert M. Steptoe, Esq.
Steptoe & Johnson
P.O. Box 2190
Clarksburg, WV 26302-2190

by mailing the same by United States Mail on this 2⁵th day of February, 1987.



Theodore R. Dues, Jr.
Hearing Examiner