

Miss Book

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JUDY PITTINGER and
PATRICIA WALDECK,

Complainants,

v.

Docket Nos. PAS 484-77
PAS 483-77

SHEPHERDSTOWN VOLUNTEER
FIRE DEPARTMENT,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER

I.
PROCEEDINGS

This case came on for public hearing on the 29th day of March 1979, in the Men's Club Building in Shepherdstown, West Virginia, and was concluded the 30th day of March 1979. The Complainants, Judy Pittinger and Patricia Waldeck appeared in person and by their counsel, Cheryl Fuller, Assistant Attorney General for the State of West Virginia. The Respondent, Shepherdstown Volunteer Fire Department appeared by its counsel, Peter L. Chakmakian. Officers of the Respondent fire department were present at all times throughout the hearings. This hearing was presided over by the Honorable Anne Maxwell, Commissioner of the West Virginia Human Rights Commission and the Honorable William W. Pepper, Hearing Examiner for the WV Human Rights Commission. Pursuant to a pre-hearing conference held on March 28, 1979, the admissibility and authenticity of several exhibits were stipulated to by the parties as appears of record at page 5-14. Also the following statement of facts were stipulated to by the parties and merit repetition in the Commission's decision:

Both Complainants were women over the age of eighteen (18) at the time their applications were submitted and rejected. Both submitted their first application on January, 1977, at a Shepherdstown volunteer Fire Department meeting. Both applications were rejected at the February 14, 1977, meeting of the Shepherdstown Volunteer Fire Department. At the time the applications were submitted and rejected the constitution of the Shepherdstown Volunteer Fire Department, Article XIII, limited membership to "any person who is at least eighteen (18) years of age," and further provided in Section 4 that "Election shall be by a WRITTEN BALLOT and ONE-THIRD of the votes cast against an application shall reject [sic]."

After full consideration of the entire testimony, evidence, motions, briefs, and arguments of counsel, and the Hearing Examiner's recommended decision, and exceptions of Respondent thereto, the Commission concludes and decides as follows:

II. FINDINGS OF FACT

1. The Complainants in this proceeding, Patricia Waldeck and Judy Pittinger filed complaints with the West Virginia Human Rights Commission on June 11, 1979. The basis of the complaints were identical, namely, allegations that the Respondent, Shepherdstown Volunteer Fire Department and Charles LeMasters, President, had rejected their applications for membership because they are females. They therefore charged the Respondent, Shepherdstown Volunteer Fire Department with sex discrimination in a place of public accommodation.

2. The Respondent, Shepherdstown Volunteer Fire Department is a non-profit corporation chartered under the laws of the State of West Virginia on February 14, 1913. (Exhibit 11, Tr. 42, 43, 44.)
3. Pursuant to the Constitution adopted on June 8, 1964, as amended on August 12, 1974, membership is limited to "any person who is at least eighteen (18) years of age. . ." (Exhibit 10). At the time Complainants were rejected on February 14, 1977, there had been only one female "member," Dr. Elizabeth McFetridge, one of "3 local physicians" who had been granted "honorary" membership on December 9, 1963. (Exhibit 16).
4. The Respondent's members are all volunteers who serve voluntarily. However, there are also members who serve as paid employees under the Comprehensive Employment Training Act (CETA) who are paid by the State under this federal program. (Tr. 370, 251, 510, 526.)
5. The Respondent provides fire and ambulance services to the residents of the Shepherdstown area. Officials of the Corporation and County government consider the Respondent to be performing a valuable and essential service to the public which would be difficult for these governmental units to provide if the Respondent failed to do so. (Tr. 501, 502, 547, 549, 550.)
6. The Respondent has received radios from federal funds through the Region 8 and 9 Regional EMS. (Tr. 302, 303, 304, 305, 306, 307.) Application was also made for an ambulance to be financed with State money. (Tr. 307, 308, 311, 312.)
7. The Respondent receives approximately 75% of its funds from public solicitation and 25% from the Jefferson County Commission.

(Tr. 330, 319, 329, 321, Exhibit 17 [a]-[g], 23.) The Department also has received money which the Corporation of Shepherdstown has placed as a line item in its budget. Some of this money has included Revenue Sharing funds received from the federal government by the town. (Tr. 332, 333, 502, 503, 505, 506, Exhibit 23.) Shepherd College has supplied the Department with equipment purchased with State money, through State bids, carried on State inventory, and yet delivered and housed as well as consumed, at and by the Department. (Tr. 374, 247, 248, 249, 276, 277, 284, 285.)

8. The Respondent participates in a county emergency communications system under the Jefferson County Commission. This system includes area fire, ambulance, and police participation. (Tr. 302, 303, 304, 548, 550, 551, 552, 554, Exhibits 28[a], 28[b], 28[c].)
9. Both Complainants, Patricia Waldeck and Judy Pittinger are females and were qualified to become members of Respondent Department at the time they applied in January, 1977.
10. Both Complainants were rejected on February 14, 1977, along with a third woman, Keitha LeMaster.
11. On February 14, 1977, when the Complainants and Keitha LeMaster were all three rejected, the Respondent accepted for membership two male members. (Exhibit 10)
12. After the rejection of the Complainants in February, 1977, including that date up to March 1979, the Respondents have accepted 21 new members. (Exhibit 22, 10)
13. From the period of January 14, 1974, through and including March, 1979, the Respondent voted on 47 male applicants accepting

41 and rejecting only 6. (Exhibits 10, 22) For that same period of five years, the Respondent voted on 6 women. One was rejected 4 times, (Willard), a second was rejected 4 times, (Pittinger), one was rejected once and later admitted, (LeMaster), one was rejected once and not later accepted, (Waldeck), and 2 were accepted the first time, (Miller, Wright). (Exhibits 10, 22)

14. After the complaints of both Patricia Waldeck and Judy Pittinger were filed and docketed with the West Virginia Human Rights Commission charging the Respondent Department with sex discrimination, an investigation commenced, a finding of Probable Cause was made and after unsuccessful attempts at conciliation ensued between the parties, the cases proceeded to public hearing.

III. ISSUES PRESENTED

The issues presented are whether the Respondent denied membership to the Complainants because of their sex and whether such a denial, if it did occur, constituted an "unlawful discriminatory practice" within the meaning of West Virginia Code §5-11-1 et seq.

VI. EVALUATION OF EVIDENCE AND DISCUSSION

There is very little case law in this State that would serve as precedent on this claim before the Commission. Consequently, the point of focus is to look to cases decided by the West Virginia Human Rights Commission and precedents from other jurisdictions for guidance.

The case which is the most similar to the one before the Commission is the matter of Swaim et al v. Berkeley Springs Volunteer Fire

Department, (PAS 220, 213, 215-78) decided March 14, 1980, wherein the Commission found three women applicants to have been the victims of sex discrimination in being refused membership in the Respondent Volunteer Fire Department and wherein the Commission found membership in the Respondent to be a "public accommodation" within the meaning of the Code of West Virginia.

The case relied on in Swaim by the Commission was the United States Supreme Court case of McDonnell Douglas Corporation v. Green, 411 U. S. 792, 93 S.Ct. 1817, 36 L. Ed 2d 668 (1973). In Green, the United States Supreme Court made a definitive statement on the critical issue of which party has the burden of proof in discrimination cases and when, if at all, the burden of proof shifts to the adverse party. The Court's holding in Green was summarized by the Commission in Swaim as follows:

1. The Complainant in a Title VII trial has the burden of establishing a prima facie case of discrimination.
2. A prima facie case in racial discrimination cases is established when the following is shown:
 - a. That the Claimant belongs to a racial minority; and
 - b. That he applied and was qualified for a job for which the employer was seeking applicants; and
 - c. That he was rejected despite his qualifications; and
 - d. That after his rejections, the position remained open and the employer continued to seek applicants from persons of Complainant's qualifications.
3. Once a prima facie case is proven, the burden shifts to the employer "to articulate some legitimate, non-discriminatory reason for the employee's rejection."

4. The employer, by articulating a legitimate, non-discriminatory justification for its alleged action, discharges its burden of proof and meets the prima facie case of discrimination.
5. The inquiry, however, does not end there. The Complainants are next entitled to prove that the stated justification or reason is a mere pretext or coverup for a discriminatory practice. Useful and relevant to that inquiry, the Court states, is among other things, evidence of defendant's general policy and practice with respect to minority employment and statistics as to its employment policy and practice.

The Court adopted this allocation of proof after concluding that one of the purposes of Congress in enacting Title VII was to "assure equality of employment opportunities and to eliminate those discriminatory practices. . ." Id. at 800. West Virginia Code §5-11-2 contains a "strong," see State Human Rights Commission v. Pauley, _____ W.Va._____, 212 SE 2d77 (1975), declaration of policy the Legislature of this State:

It is the public policy of the State of West Virginia to provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property. Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex or blindness.

The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age or blindness is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.

West Virginia Code §5-11-4 further states the purpose of the West Virginia Human Rights Commission to be as follows:

The West Virginia Human Rights Commission, heretofore created, is hereby continued. The Commission shall have the power and authority and shall perform the functions and services as in this article prescribed and as otherwise provided by law. The Commission shall encourage and endeavor to bring about mutual understanding and respect among all racial, religious and ethnic groups within the State and shall strive to eliminate all discrimination in employment and places of public accommodations by virtue of race, religion, color, national origin, ancestry, sex, age or blindness and shall strive to eliminate all discrimination in the sale, purchase, lease, rental or financing of housing and other real property by virtue of race, religion, color, nation origin, ancestry, sex or blindness.

Finally, West Virginia Code §5-11-15 says that the provisions of that article "are to be liberally construed to accomplish its objectives and purposes."

Therefore, relying on the above analysis, the Commission in Swaim adopted the approach the United States Supreme Court applied in Green.

The record in the instant case clearly shows that the Complainants are women and, thus, are members of a protected group under law; that they applied for membership in the Department at a time when members were being accepted; that they were qualified and able to meet the duties imposed on members but were nevertheless rejected; and that membership in the organization remained open and the Respondent continued to accept new members. (See Findings of Fact herein made for page references.) Thus, Complainants established a prima facie case in support of their claims, thereby shifting the onus to Respondent to show some justification for its actions.

A close review of the record herein reveals very little evidence that could support a finding that the sex discrimination with regard to membership in the Respondent was justified.

The Respondent's primary defense as set forth in its brief is that the Complainants were rejected by vote of the members because they possessed personalities that were "incompatible with the efficient operation of the fire department" and, as such, were rejected for a legitimate and non-discriminatory reason.

Under the Green and Swaim decisions, it must next be determined whether this reason articulated by Respondent is sufficient to meet the prima facie case of the Complainants. If it is found to be insufficient, the inquiry would normally end. However, if this reason is found to be sufficient to meet the Complainant's prima facie case, then the Complainants may show that the articulated reason is a "mere pretext or coverup" for a discriminatory practice.

The record is essentially devoid of any testimony showing the relationship, if any, between the efficient operation of a volunteer fire department and the personality of its members. In fact, the evidence taken as a whole does not really disclose what Respondent characterizes as the "subtle relationship among volunteer firemen." While it is true that several male members of the Respondent indicated they voted against the Complainants for that reason, there is little or no competent evidence to support the idea that such a subjective basis of determining membership is in furtherance of or even related to the efficient operation of the volunteer fire department. Consequently, such articulation may well not be sufficient to meet the prima facie case of Complainants. In order for an applicant from a protected class to be rejected solely or

primarily on personality, it would seem that there would have to be a compelling showing that the existing members' negative view of the applicant's personality is a legitimate ground for rejection that is directly related to the group's inability to serve its stated purpose. It is respectfully submitted that no such showing was made in this case.

Permitting an applicant from a protected class to be rejected upon such a subjective ground would be an extremely undesirable and dangerous practice, except, perhaps, in rare instances where a direct casual relationship is shown between the nature of the group endeavor and the personality of a single member.

Of course, in this case, it is actually quite unclear exactly what personality traits of the complainants, as reflected in outward behavior, were being labeled objectionable by the voting members. Witness Shultz said his opinion was formed over a long period of time, but that he could not really recall the nature of any specific instances upon which he forms his opinion. (Tr. 512) Witness Fuss merely stated he had known Complainant Waldeck for 4-5 years and that "he didn't think we would benefit from working together as a team." (Tr. 517) And witness Miller, who could not recall any specific instance upon which he forms his opinion, said that "in their type personality they could not function in the best interest of the fire department with the members that we do have. . . that they give me the feeling that I am inferior to them, that they feel they are above you." (Tr. 527, 529)

Assuming arguendo that Respondent did meet the prima facie case of Complainants by articulating the above-discussed reason for their rejection, there is considerable evidence that such reason is indeed a pretext or coverup for a discriminatory practice.

It is essentially undisputed that both Complainants met the constitutional requirements for membership and were very well qualified in the area of emergency ambulance care. Nevertheless, the review board questioning of the applicants tends to reveal possible discriminatory attitudes. Complainant Waldeck says she was asked such questions as whether they would lose her husband as a member if she applied (Tr. 56), what she would do with her children when she responded to a call (Tr. 57), and how would she feel if her husband were to run an ambulance call with a beautiful blonde (Tr. 57). Similarly, Complainant Pittinger said that they asked her what arrangements she would make for her little boy (Tr. 120) and what her reaction would be if a really good-looking blonde decided she was going to join the department and wanted to run ambulance duty at night with Doug Pittinger, her husband (Tr. 120). She further says that she was told at this review board meeting that if they took her in as a member, then they may have to open the door to other females and that they may not want any other females in the department (Tr. 120). This outward behavior of the members and officers of the Respondent, as presented by the undisputed testimony of the complainants, seems to show that the stated reasons for their rejection, i.e. their allegedly objectionable personalities, was a mere pretext or coverup.

Also, with regard to whether the stated reason is a pretext or coverup, the Green and Swaim decisions consider as useful and relevant evidence and statistics of the Respondent's general policy with respect to members of the protected class. Along these lines it is noteworthy indeed that there had been only one female member of the department prior to the time the Complainants applied, Dr. Sarah Elizabeth

McFetridge, who in 1963, was made an "honorary member" without submitting an application (Tr. 449) and that the constitution of the Respondent until sometime between 1968 and 1974 limited membership to "White Males Only." (Tr. 369)

Statistics and past practices such as these are often of critical importance in such matters. Accordingly, the Courts have relied upon statistics in discrimination cases involving membership in fire departments.

For example, in Arnold v. Ballard, 5 E.P.D. §8630 (D.C. Ohio 1973) the Court found that the fact that none of the 313 fire department personnel were Black while the city population was 17.5% Black indicated that the department's hiring procedures were racially biased.

In Vulcan Society v. Civil Service Commission, 6 E.P.D. §8904 (D.C. NY 1973) aff'd. 490 F. 2d 387 (2d Circ. 1973) the Court emphasized that bias was indicated where the fire department minority representation was 5% as opposed to 32% minority representation in the general city population within the age group eligible for appointment. See also, Commonwealth of Pennsylvania v. Glickman, 370 F. Supp. 724 (D.C. Pa. 1974); Boston Chapter NAACP, Inc. v. Beecher, 371 F. Supp. 507 (D.C. Ma. 1974) and EEOC Decision No. 74-25, September 10, 1973, for similar holdings.

Thus, even if one would hold that a legitimate justification for discrimination was articulated by Respondent, the evidence would seem to support a finding that such articulated justification was mere pretext.

Respondent submitted orally at the hearing (Tr. 23) that its actions do not constitute an "unlawful discriminatory practice" as that

term is used in West Virginia Code §5-11-3(i) and §5-11-9(f) and that the Respondent organization is not "a place of public accommodations" as that term is defined in West Virginia Code §5-11-3(j).

Complainants have convincingly dealt with these issues in their brief, and the West Virginia Human Rights Commission concludes that the arguments and authorities therein appearing coupled with the Commission's prior holding in the Swaim case support a finding that the actions of Respondent are within the jurisdiction of the West Virginia Human Rights Commission.

V.
CONCLUSIONS OF LAW

1. Respondent is a place of public accommodations as defined in West Virginia Code §5-11-3(j) and §5-11-9(f), and the accommodations provided by it are not private in nature as that term appears in West Virginia Code §5-11-9(j).
2. At all pertinent times the Complainants were citizens and residents of West Virginia within the meaning of West Virginia Code §5-11-1.
3. The complaints were timely filed herein by Complainants in accordance with the procedures set forth in West Virginia Code §5-11-1 et. seq. and regulations promulgated thereunder and stated sufficient facts upon which to charge a violation of the West Virginia Human Rights Act under West Virginia Code §5-11-9(f).
4. The West Virginia Human Rights Commission has jurisdiction over the parties and the subject matter involved herein.
5. The Complainants, although qualified, were denied membership in the Respondent because of their sex, which is an unlawful dis-

criminary practice in violation of West Virginia Code §5-11-9(f) as that term is defined in West Virginia Code §5-11-3(i).

VI. REMEDY

Given a finding of discrimination by the Respondents against the Complainants, the Commission is faced with the responsibility of fashioning an order that will effectuate the purposes and objectives of the Human Rights Act, i.e. "to eliminate all discrimination in places of public accommodation. . .by virtue of. . .sex. . ." West Virginia Code §5-11-4.

In construing the Commission's remedial power, the West Virginia Supreme Court of Appeals has stated in State of West Virginia Human Rights Commission v. Pauley, _____ W. Va. _____, 212 S.E. 2d 77 (W. Va. 1975):

"It is readily discernible that the Legislature, by its recent enactments in the field of human rights, intended to and did provide the Commission the means with which to effectively enforce the law and meaningfully implement the legislative declaration of policy. If our society and government seriously desire to stamp out the evil of unbridled bigotry, and we believe they do, then it is imperative that the duty of enforcement be accompanied by an effective and meaningful means of enforcement. . ."

In creating the order, the Commission is to be guided by the principles of preventing a recurrence of discrimination by the Respondents in the future, and of making whole the victim of the past discrimination, the Complainants.

Under Section 10 of the West Virginia Human Rights Act, West Virginia Code §5-11-10, after a finding that a Respondent has engaged or is engaging in an unlawful discriminatory practice, "the Commission

shall issue and cause to be served on such Respondent and order to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including but not limited to hiring, reinstatement or upgrading of employees, with or without backpay."

VII. ORDER

Therefore, pursuant to the above findings of Fact and Conclusions of Law by the West Virginia Human Rights Commission, it is hereby ORDERED as follows:

1. The Respondent, Shepherdstown Volunteer Fire Department, its officers, members, successors, and all persons and organizations in active concert or participation with them, are hereby permanently ordered to immediately CEASE and DESIST in its place of operation located in Shepherdstown, West Virginia, from engaging in any activities which deny full and equal access, advantage and privilege and rights thereto attached to any individual, or otherwise to discriminate against any individual, or otherwise to discriminate against any individual, on the basis of race, sex, religion, color, national origin or age with respect to tenure, terms and conditions of membership, or any other matter directly or indirectly related to accommodations, advantages, facilities, privilege or service of such place of public accommodation.
2. It is further ORDERED that there shall be no discrimination or retaliation of any kind against any person because of opposition to any practice declared unlawful under the West Virginia Human Rights Act, as amended, or because of the

filing of a complaint, giving of testimony or assistance, or participation in any investigation proceeding or hearing under the West Virginia Human Rights Act, as amended.

3. It is further ORDERED that Respondent will develop and disseminate a clear and direct policy forbidding intimidation and harassment and providing for disciplinary action against violations.
4. It is further ORDERED that the Respondent shall forthwith adopt and implement the following affirmative action program to eliminate the effects of any discriminatory practices:
 - A. Within thirty (30) days of the effective date of the Order, Respondent shall prepare and distribute a written statement of non-discriminatory policies to all of its present full-time and part-time members and agents. Such statement shall include, but is not necessarily limited to, a specific statement that neither Respondent, nor its members, shall discriminate against any individual with respect to terms, conditions or privileges of membership because of race, color, religion, national origin, ancestry, sex, or age as provided in Chapter 5, Article 11 of the Code of West Virginia, and that no direct or indirect means such as harassment or reprisal may be utilized to contravene such policy;
 - B. For a period of three (3) years from the effective date of the order, Respondent shall within five days of installing any new member, or within five days of admitting any new member, or upon rejecting any applicant for

membership provide each such member or applicant with a copy of this statement prepared in compliance with paragraph 2(A) above, generally explaining its contents to him or her and directing him or her to read it;

- C. Within thirty (30) days of the effective date of the Order, each present full-time or part-time official or supervisory member shall sign a statement indicating that he or she has been advised of the Respondent's non-discriminatory policies, that he or she has read and is familiar with the statement prepared in compliance with paragraph 2(A) of the Order, and that he or she is aware that any such official or supervisory member who fails or refuses to conform to these policies and practices shall be subject to discipline, including demotion, suspension, or dismissal by the Respondent.
- D. The Respondent, pursuant to Chapter 5, Article 11, Section 17, of the Code of West Virginia, shall post and maintain in all its offices or places of business, in a prominent place where it is clearly visible, the poster of the West Virginia Human Rights Commission advising the public of their rights under the West Virginia Human Rights Act.

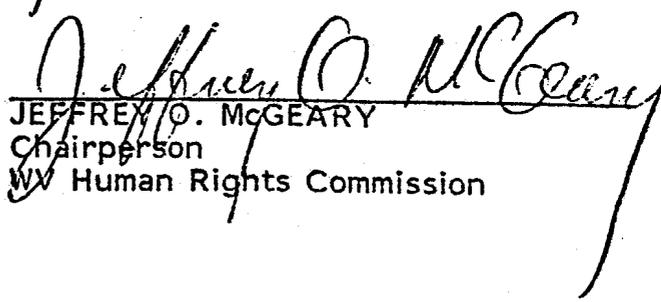
5. It is further ORDERED that within one hundred and eighty (180) days of the effective date of this ORDER, and thereafter within one hundred and eighty (180)-day intervals for a period of two (2) years, the Mayor, the town Council of Shepherdstown, or other responsible officer or representative of the Respondent shall file with the Commission a sworn

statement affirming that Respondent has fully and completely complied with this ORDER.

6. More specifically It is further ORDERED that Respondent shall install both Complainants as members of the Shepherdstown Volunteer Fire Department at its next regular meeting. Thereafter each Complainant is to enjoy the full rights, benefits, and dignity of a member as if her application had been approved by vote at the February, 1977, regular monthly meeting of Respondent.
7. It is further ORDERED that any state or federal funds received prospectively by the Shepherdstown Fire Department directly or indirectly shall be contingent on Respondent's compliance with this Order and subject to Respondent's adherence to a policy of non-discrimination under the West Virginia Human Rights Act, as amended.

It is so ORDERED.

Entered this 20 day of Aug 1980.


JEFFREY O. McGEARY
Chairperson
WV Human Rights Commission