

BEFORE THE STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

ROBERT POWERS,

Complainant,

VS.

DOCKET NO. EAN-171-75

KAISER ALUMINUM AND  
CHEMICAL CORPORATION,

Respondent.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER

I  
THE PROCEEDINGS

Pursuant to notice to the Respondent this matter came on for hearing on the 16th day of December, 1976, beginning at 10:30 a.m., at the Ripley City Hall Council Chambers at Ripley, West Virginia, before a panel consisting of the Honorable Ben R. Honecker, Commissioner for the State of West Virginia Human Rights Commission and Donald L. Pitts, Esquire, Hearing Examiner for the West Virginia Human Rights Commission.

It appearing to the panel that notice as required by law, setting forth the time and place of the hearing, and the matters to be heard, had properly been served upon the Respondent and that Respondent's agents did appear as well as the Complainant. Also that Respondent was represented by Robert J. Allen, Jr., Esquire and that the West Virginia Human Rights Commission was represented by Billy Jack Gregg, Assistant Attorney General assigned to the West Virginia Human Rights Commission.

The West Virginia Human Rights Commission upon due consideration of the entire record, testimony and evidence in this matter, the arguments of counsel, and the recommendations of the hearing examiner, makes the following findings of fact and conclusions of law.

II  
FINDINGS OF FACT

1. The Complainant in this proceeding while working in a supervisory capacity for the Akron Standard Mold Company (TR-10) where he had worked for 8 years or more, decided after several interviews with Respondent to uproot his family and take employment as a foreman at Respondent's Ravenswood plant beginning on June 7, 1972.

2. Complainant's training started in Respondent's scalping department and he was transferred to the Cold Rolling Department on May 1, 1973, where he worked until the date of his termination on January 23, 1975. Complainant was paid by Respondent until March 31, 1975.

3. Complainant claims that he was harassed and discriminated against by Respondent because of his ancestral background and national origin which is Polish, and as a result of this claimant was dismissed.

4. Complainant was the recipient of derogatory ethnic remarks. (TR-15)

5. Complainant did refer to himself on several occasions as "the Pollock", however, this did not extend to Complainant's supervisors the right to refer to Complainant as "Dumb Pollock" or to use other ethnic slurs concerning Complainant's ancestral background.

6. Complainant protested his treatment at the time he was transferred from the Scalping Department when he talked to plant manager Hopper. (TR at 17)

7. Complainant again protested his treatment from his supervisors to Mr. Suiter in the personnel department in December, 1974. (TR-59)

8. Complainant was conscientious in his role as a foreman. Additionally, foremen who worked before and after his shift did not complain concerning Complainant's alleged poor supervisory habits. To the contrary, they found his shift operations to be in good order. A poor work record would express itself in the foremen before or after him having to do extra work in order to make up for Complainant's inability to supervise. (TR at 80, TR at 90)

9. Respondent raises the question concerning Complainant's transfer from its Scalping Department to its Cold Roll Department by suggesting that Complainant's transfer was in fact a demotion. The evidence offered does not support this interpretation. It is sufficient to note that the personnel records show that Complainant was a foreman until his dismissal.

10. Of great weight in the present controversy are the evaluations by Respondent of Complainant's work history dated January 7, 1974 and November 15, 1974 which alone would appear to give Respondent sufficient grounds to dismiss Complainant. These evaluations, when viewed in the light of the testimony elicited during the hearing, articulate that Respondent had a policy which provided for the upgrading and improvement of company personnel. In particular, the appraisal and developmental questionnaire of January 7, 1974, reflects such a policy when it requests those in a position to critically appraise Complainant to give or list "two or three specific developmental activities planned for the employee during the next year". Yet Respondent and its agents undertook a policy of inaction and in so doing failed to give directed assistance to help the Complainant improve. The discussion between the trial examiner and the Complainant's supervisor brings to light the Respondent's own corporate policy. The statement made by Respondent on its evaluation questionnaire shows that Respondent would take no significant steps to aid the Complainant in improving. It is clear that the supervisory personnel at the Ravenswood Plant desired and perpetrated a scheme of activities designed to one end, the ultimate dismissal of Complainant. (TR-165 and 166)

11. Respondent's agent, John Rothwell, in an attempted and feeble response to Complainant's supposed weakness in supervision,

assigned Complainant the so-called remedial task of having the trash cans cleaned as a possible step to help Complainant with his deficiencies in supervision and production. However, having the trash cans assigned to Complainant was just an added burden or an extra chore which in no way helped the Complainant overcome any of his deficiencies.

12. Respondent's supervisory agent Griest indicated that Complainant had difficulty in supervising the truckers. (TR-204) Supervisory agent Griest mentioned that Complainant during a given "Seven day period. . . might not have any problems when he had a certain trucker." (TR-204) Respondent's agent Griest mentioned that Complainant did have problems supervising two particular truckers and that said problem truckers are "still employed at Kaiser" and that with new supervisors the problem truckers "still have the same habits." (TR-206)

13. Complainant only had problems in supplying the other foremen with essential metals when two certain truckers were working and the problems Complainant had in supervising these two particular truckers continues to be tolerated by the Respondent.

### III CONCLUSIONS OF LAW

Given the stated facts established hereinabove, the Commission comes to a consideration of the basic issue; whether Complainant, while employed by Respondent in Ravenswood, was subjected to

discrimination such that said discrimination was a factor in his discharge as a foreman in violation of the laws of the State of West Virginia.

1. The complaint in this matter was properly and regularly filed by Robert Powers, in accordance with the procedure defined by the West Virginia Human Rights Act, W. Va. Code, §5-11-10, and the administrative regulations [Section 111] promulgated pursuant thereto by the West Virginia Human Rights Commission. The complaint states sufficient facts upon which to charge violation of the West Virginia Human Rights Act, W. Va. Code, §5-11-9(a). That section makes it an unlawful discriminatory practice for an employer to discriminate because of national origin against any individual with respect to hire and tenure if the individual is able and competent to perform the services required, unless the practice is based upon a bona fide occupational qualification.

2. The complaint against the Respondent was timely filed within the meaning of the West Virginia Human Rights Act, W. Va. Code, §5-11-10. The incident complained of occurred on January 23, 1975, and the complaint herein was filed February 20, 1975, within the ninety (90) day limitation period.

3. The Respondent Kaiser Aluminum and Chemical Corporation located in Ravenswood, West Virginia is and has been an employer within the meaning of the West Virginia Human Rights Act. W. Va. Code, §5-11-3(d).

4. At all times referred to herein, the Complainant, Robert Powers, is and has been a citizen and resident of the State of West Virginia. W. Va. Code, §§5-11-2 and 3(a).

5. At all times referred to herein, the West Virginia Human Rights Commission has had jurisdiction over the parties and the subject matter herein.

6. The complaint in the herein proceeding was properly and regularly investigated, processed, and referred for public hearing, and notice of said hearing was properly served in accordance with the requirements of the West Virginia Human Rights Act. W. Va. Code, §5-11-10.

The West Virginia Human Rights Act provides in §5-11-9 that:

"It shall be an unlawful discriminatory practice unless based upon a bona fide occupational disqualification. . .

(a) For any employer to discriminate against any individual with respect to . . . hire, tenure. . ."

"The term 'discriminate' or 'discrimination' means to exclude from, or fail or refuse to extend to a person equal opportunities because of . . . national origin. . . (W. Va. Code, §5-11-3)"

Thus our attention is focused on discrimination in employment on the basis of national origin. Public policy as expressed by the statutory law of West Virginia commands that:

. . . Equal Opportunity in the areas of employment. . . is hereby declared to be a human rights or civil right of all persons without regard to . . . national origin. See W. Va. Code, §5-11-2.

Unfortunately there is no West Virginia case law to which one might view for purposes of guidance. The most obvious guide therefore is Title VII of the Federal Civil Rights Act of 1964 as amended in 1972. The 1964 Civil Rights Act, credited with parenthood of the West Virginia Law as well as the Human Rights Acts of other states governs all citizens of our nation and sets minimum standards for anti-discrimination laws.

Title VII states in part:

703(a) It shall be an unlawful discriminatory practice for an employer:

(1) to fail or refuse to hire, or to discharge any individual . . . because of such individual's national origin.

The findings of fact clearly demonstrate that Complainant was called a "dumb Pollock" by his supervisors and did complain to higher corporate authorities.

The Trial Record does not reflect any attempt by Respondent to vigorously investigate whether the Complainant's termination was predicated upon unlawful discrimination based upon national origin.

In EEOC Decision No. 72-0779, the Equal Employment Opportunities Commission stated that "Title VII requires an employer to maintain a working environment free of racial intimidation. That requirement includes positive action where positive action is necessary to redress or eliminate employee intimidation. In light of the foregoing evidence we (EEOC) infer that the . . . (national origin)

within the meaning of the Act." See Commission Decision No. Y-SF9-108. CCH Employment Practices Guide #6030 Cf NLRB v. Newspaper Printing Pressmen's Union, 443 F.2d 863.

In EEOC Decision No. CL68, 12-431, the federal Commission found harassment on the part of a company toward a Polish-born employee when its management permitted the existence of a working atmosphere in which the charging party was subjected to continued vulgar Polish names, Polish jokes told in his presence, and derogatory remarks about charging party's ancestry. <sup>1/</sup> It is the conclusion of the West Virginia Human Rights Commission that the Respondent, Kaiser Aluminum and Chemical Corporation did not conduct a significant investigation to determine whether Complainant had in fact been subjected to an atmosphere of national origin hostility.

Further, the EEOC has held in Decision No. 72-0957 that an employer was liable for the racially (national origin) derogatory remarks of one of its managers in that the remarks were made while the manager was acting within the normal course of his duties as employer's agent. Thus the West Virginia Human Rights Commission gives great weight to the testimony indicating that Complainant was subjected derogatory appellations, i.e. "dumb Pollock" by

---

<sup>1/</sup> Within this decision the Federal Commission also included within its category of discriminatees fellow Polish workers who were participants in harassing a fellow employee. Said the Commission, "We are aware of the fact that at least two of the employees accused by Charging Party of harassing him were of Polish descent, themselves. We find it unremarkable that persons of Polish descent have engaged in discrimination against a foreign born fellow employee."

Respondent's managers within the course of their employment.

Factually distinguishable from the decision reached today are Fekete v. U. S. Steel Corporation, 424 F.2d 331, (DC Pa. 1969), and Howard v. National Cash Register Company, CCH Equal Practices Guide #10, 177. In both the above cases, the Courts did not find evidence of harassment where the company itself did all that it could to stop the acts of harassment. In Howard, the Company disciplined an employee with a three-day suspension and it also removed the charging party to another shift to lessen the possibility of harassment. In Fekete, the company investigated the charging party's complaints and moved the charging party closer in proximity to the foreman in order to protect the charging party from harassment. Additionally in Howard and Fekete, the companies painted over derogatory signs and gave instructions to employees and supervisors alike that ethnic as well as other suspect forms of intimidation would not be tolerated.

Added to the non-isolated instances of uttering ethnic slurs and terms against the Complainant by supervisors of Respondent, there is the repudiation by management of its own policy for helping to upgrade its employees.

In light of the record as a whole, reasonable cause exists to believe that Respondent and its agents did commit an unlawful practice in its dismissal of Complainant based upon the following:

1. Failure to maintain a working atmosphere free from harassment of Complainant.

2. Failure to investigate allegations by Complainant of harassment by his supervisors.

3. Breach of Respondent's own corporate policy of helping to upgrade its employees where given deficiencies have been identified.

As Complainant has suffered as a result of Respondent's unlawful conduct, 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 employment by virtue of . . . national origin." W. Va. Code, §5-11-4.

In creating the Order, the Commission will be guided by the principles of preventing a recurrence of discrimination by the Respondent in the future and of making whole the victim of the past discrimination. =#F

IV  
ORDER

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

1. The Respondent, Kaiser Aluminum and Chemical Corporation (hereinafter called Respondent), its officers, agents, employees, successors, assignees and all persons and organizations in active concert or participation with it, are hereby permanently ordered to CEASE and DESIST at its Ravenswood, West Virginia plant and

all other units or places of business or operation of Respondent located in West Virginia from engaging in any employment practices which discriminate against persons on account of their sex, race, color, national origin, religion, age or blindness, or which perpetuates the effects of past discrimination against such. More specifically, (1) Respondent shall forthwith abrogate and cease its unwritten policy of allowing a working environment charged with ethnic hostility. (2) Respondent shall reinstate Mr. Powers to the position of supervisory foreman which he held before his termination. In the event such position is not now open, Respondent shall hire Mr. Powers into the closest position to the one from which he was terminated and shall compensate Mr. Powers at a rate equal to the rate he was paid while employed as a supervisory foreman. When the position of supervisory foreman, next becomes available, Respondent shall promote Mr. Powers to that position. Respondent shall reinstate Mr. Powers with full seniority and benefits credited to him at the time of his termination.

2. 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 this ORDER, Respondent shall prepare and distribute a written statement of non-discriminatory policies to all of its present full-time and part-time employees and agents. Such statement shall include, but is not necessarily

limited to, a specific statement that neither Respondent its agents or employees, shall discriminate against any individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment because of race, color, religion, national origin, ancestry, sex, age, or blindness, as provided in Chapter 5, Article 11, W. Va. Code, and that no direct or indirect means may be utilized to contravene such policy;

- B. For a period of three (3) years from the effective date of this ORDER, Respondent shall, within five (5) days of hiring any new full-time or part-time employee or agent provide each such employee or agent with a copy of the statement prepared in compliance with paragraph 2(A) of this ORDER, 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 this ORDER, each present full-time or part-time supervisory employee or agent 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 this ORDER, and that he or she is aware that any such supervisory employee or agent 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. For a period of three (3) years from the effective date of this ORDER, each new full-time or part-time supervisory employee or agent, within thirty (30) days from the commencement of his or her employment, 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 provisions of the statement prepared in compliance with paragraph 2(A) of this ORDER, and that he or she is aware that any supervisory employee or agent who fails or refuses to conform to these policies and practices shall be subject to discipline, including demotion, suspension or dismissal by the Respondent.
- E. As set forth in Chapter 5, Article 11, Section 17, W. Va. Code, the Respondent shall post and maintain in all its offices, units or detachments, in a prominent place where it is clearly visible, the poster of the West Virginia Human Rights Act.
- F. All future advertising by the Respondent, through whatever medium, shall contain the phrase, "Equal

Opportunity Employer." The Respondent shall not reduce, diminish or change the character of its advertising to avoid compliance with the requirement.

3. It is further ORDERED that the Respondent shall pay to the Complainant a sum equal to the expenses incurred during his search for employment or \$115.00 spent to obtain alternative employment. Respondent is further ORDERED to pay to the Complainant the sum of \$1,000.00 as compensation for his humiliation, pain and suffering incurred as a result of Respondent's discrimination. Total amount owed:

	\$1,000.00
	<u>115.00</u>
	\$1,115.00

Payment of said amount is to be made to the Complainant by sending a check to the West Virginia Human Rights Commission made payable to the order of Robert Powers for the aforesaid amount. The Commission shall then forward the check to the Complainant.

4. It is further ORDERED that within ninety (90) days of the effective date of this ORDER, and thereafter within one hundred twenty (120) day intervals for a period of three (3) years, the Superintendent or other responsible officer of representative of the Respondent shall file with the Commission a sworn statement affirming that Respondent has fully and completely complied with this ORDER. Such sworn statements shall be accompanied by a report which includes the following:

- (a) Copies of all statements of correspondence as are required in paragraph 2(A), (B), (C), (D), and (E) of this ORDER;

(b) Copies of all advertising made through any media, and the date or dates of its appearance.

It is so ORDERED.

ENTERED THIS 8<sup>th</sup> DAY OF December, 1977.

Russell Van Cleve  
Russell Van Cleve, Chairperson  
West Virginia Human Rights  
Commission