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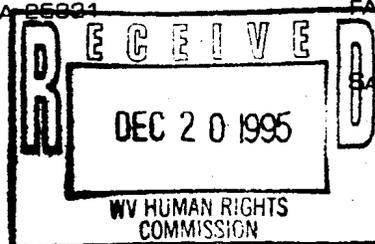
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NOTICE OF FINAL DECISION

PLEASE TAKE NOTICE that pursuant to W.Va. Code §5-11-8(d) and 6 WVCSR §77-2-10, any party aggrieved by the attached final decision shall file with the executive director of the West Virginia Human Rights Commission, **WITHIN THIRTY (30) DAYS OF RECEIPT OF THE DECISION**, a petition of appeal setting forth such facts showing that the party is aggrieved, stating all matters alleged to have been erroneously decided herein, the relief to which the party believes they are entitled and any argument in support thereof.

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

All documents shall be directed to:

Executive Director
West Virginia Human Rights Commission
1321 Plaza East, Room 104-106
Charleston, WV 25301

Dated this 19th day of December, 1995.

WV HUMAN RIGHTS COMMISSION

BY:



MIKE KELLY
Administrative Law Judge
Post Office Box 246
Charleston, West Virginia 25321
(304) 344-3293

cc: Norman Lindell, Assistant Executive Director
West Virginia Human Rights Commission

**BEFORE THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION**

VICKIE POLING,

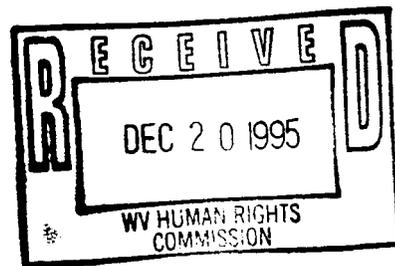
Complainant,

v.

Docket No. EH-135-93

DAVIS MEMORIAL HOSPITAL,

Respondent.



FINDINGS OF FACT

THIS MATTER matured for public hearing on 7 March 1995. The hearing was held at Davis & Elkins College, Elkins, Randolph County, West Virginia. The complainant appeared in person and her case was presented by the West Virginia Human Rights Commission and its counsel, Senior Assistant Attorney General Paul R. Sheridan. The respondent appeared by its designated representative, John Kenneth Corley, and by its counsel, David Thompson and Busch & Talbott.

I. ISSUE TO BE TRIED

Whether respondent violated W.Va. Code §5-11-9(1) by discriminating against complainant by failing or refusing to hire her for a vacant position for which she was qualified because of her handicap.

II. FINDINGS OF FACT

Based upon the credibility of the witnesses, as determined by the Administrative Law Judge, taking into account each witness' motive and state of mind, strength of memory, and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and the bias, prejudice and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence; and upon thorough examination of the exhibits introduced into evidence and the written recommendations and argument of counsel, the Administrative Law Judge finds the following facts to be true.¹

A. Preliminary Facts

1. Complainant Vickie Poling is a white female with a history of serious health problems who filed a complaint in a proceeding under the West Virginia Human Rights Act, W. Va. Code §5-11-1et seq. (HRA) and is a person protected by the Act. She resides in Elkins, Randolph County, West Virginia.

¹ To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issue as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

2. Respondent Davis Memorial Hospital (DMH) is a person and an employer as those terms are defined by W.Va. Code §5-11-3(a) and (d), respectively. DMH transacts business in Randolph County, West Virginia.

3. In July 1992, Ms. Poling tendered an employment application to respondent for a position for which DMH was accepting applications and for which complainant was clearly qualified.

4. Ms. Poling was not hired by respondent. On 19 October 1992, she filed a complaint with the West Virginia Human Rights Commission (HRC) charging that respondent failed to hire her because of her handicap.

B. Ms. Poling's Employment with DMH Prior to 1992 and Her History of Impairments.

5. Ms. Poling was hired by DMH as a respiratory therapy technician in April 1979. She worked in that position until August 1990 when she went on medical leave of absence. In December 1990, she was released to return to work but respondent had filled her position.

6. During the entire time of her employment with DMH, complainant's supervisor was John Kenneth Corley. Mr. Corley supervised Ms. Poling's initial on-the-job training, which included traditional classes and examinations, and oversaw the operation of the entire Respiratory Therapy Department. Mr. Corley testified that for the period of 1979 through 1990 he would characterize Ms.

Poling as a good worker with good evaluations. He stated that his department usually employs between 10 and 14 respiratory technicians.

7. In 1989, complainant was promoted to the position of 3-11 shift coordinator. She held this position through her last day of employment in August 1990. (Mr. Corley testified that Ms. Poling performed very well in this position.) As of her last day of work at DMH, Ms. Poling was making \$8.85 per hour, plus health insurance, life insurance and pension benefits.

8. As a result of a 1982 automobile accident, complainant suffered from a deteriorating jaw joint that caused problems with eating and balance. Ms. Poling testified credibly that she was in near constant pain and on occasion would lose consciousness because of the pain's intensity.

9. DMH agreed to pay for surgery on complainant's jaw despite some disagreement as to whether the procedure was covered under respondent's health benefits plan. However, when complainant sought to have a second surgery on her jaw in October 1989, respondent denied coverage and refused to pay.

10. On 31 December 1990, Ms. Poling was in a second car accident, this time injuring her back and suffering a herniated disc. Neither this accident nor her first injury were job related and Ms. Poling was not eligible for workers' compensation benefits.

11. Mr. Corley was aware of complainant's medical problems and the pain that she was in. While she could be moody due to pain and had to be careful when she bended, lifted or pushed, Mr. Corley testified that Ms. Poling "got the job done."

12. In August 1990, Ms. Poling's back condition deteriorated to the point that she was unable to work. She had surgery and used what little annual and sick leave she had accumulated. When her accumulated leave expired, she was placed on medical leave of absence beginning on 27 August 1990.

13. In a memo dated 6 June 1990, written in anticipation of complainant's possible back surgery, Mr. Corley advised Ms. Poling as follows:

Per our conversation of June 4, 1990, pertaining to your back problems, I want to review for you what we discussed.

At the present time, your absences are not causing a staffing problem within the Department. Should these absences increase and/or you have to go for the surgery you discussed with me per Dr. D'Amato, it would become necessary for me to place you on a Medical Leave of Absence for the duration of your hospitalization and recuperation. As we discussed, you have used all accrued sick leave and vacation to date.

At the point that you are able to return to work, you would be eligible for the next position open within your classification in Respiratory Therapy. However, you would also be eligible for any positions within the hospital for which you would be qualified and which would be open at that time.

As we discussed, I hope this does not happen. I know that you understand that to continue the operations of the Department in an efficient manner, I will need to seek a replacement.

Please take care of yourself and I hope that your condition will improve to the point that surgery is not necessary.

(HRC Ex. 6).

14. Mr. Corley testified that to him the term "eligible for" a position meant that Ms. Poling would be considered for hiring along with all other applicants but not given any type of priority.

15. In December 1990, after being released to return to work, Ms. Poling called Mr. Corley and expressed interest in returning. He informed her that he had no positions available since her job had been filled while she was on medical leave. Mr. Corley admitted that he made no inquiry as to whether there were other positions at DMH for which complainant was or might be qualified.

16. On 12 December 1990, complainant was afforded an exit interview by DMH. Ms. Poling stated at that time that she felt that she had been treated unfairly because "after 11½ years of service I feel I could have been placed in a position somewhere in the hospital." (HRC Ex. 10). Ms. Poling did not file a charge of discrimination over DMH's failure to rehire her in December 1990.

C. Ms. Poling Reapplies for Employment and Is Rejected

17. In January 1992, complainant had total reconstructive surgery on her jaw joint. After a lengthy recovery, she began looking for work. The record does not reveal that complainant was gainfully employed after she left DMH in December 1990.

18. On 31 July 1992, complainant applied for an opening in respiratory therapy at DMH. She left an application, her resume and a brief, handwritten note to Mr. Corley stating: "My back is stable, and I have also had my jaw reconstructed and don't anticipate any problems from either of these! Thanks, Vickie." (HRC Exhibit 15). Complainant stated that she wrote the note because "I felt the need to justify the fact that I was no longer having problems, and he shouldn't anticipate any problems from me." (Tr. 46).

19. According to Mr. Corley, in July 1992, he had available one full time position and one part time position (30 hours per week) for respiratory therapists. The pay for each position was \$6.00 per hour. DMH procedure was that Mr. Corley would make a recommendation for hiring, but that the final decision was made by DMH's chief executive officer, Robert Hammer.

20. Mr. Corley testified that he gave complainant a "courtesy" interview. He stated that he never had any intention of hiring her and that she had no chance of being hired. He discussed only the part time job with her, and made no mention of the full time position. He admitted that out of eight applicants interviewed, she was the most qualified and that none of the remaining seven had any experience at all in respiratory therapy. He also admitted that Ms. Poling was capable of performing certain treatment procedures that a completely new hire would not be capable of doing for at least six months and that their busy period, the "flu season," would have already begun by that time.

21. Ms. Poling stated that the interview with Mr. Corley lasted fifteen to twenty minutes. He made no mention of her physical problems. He informed her that he had a part time respiratory

therapist position available which paid \$6.00 per hour. Ms. Poling testified credibly that she informed Mr. Corley that she would accept the part time position at \$6.00 per hour if offered. At no time did Mr. Corley tell her that she was being given only a "courtesy" interview, nor did he mention a hospital policy that would prevent him from offering her a job at a rate of pay lower than that she was earning in August 1990.

22. On 17 September 1992, complainant was informed in writing that she had not been selected for the open positions. (HRC Ex. 15). The bad news caused her to feel "devastated" because "that's what I like to do, that was my type of work. That was my dream basically." (Tr 49). She filed her HRC complaint the next month.

D. Respondent's Reasons for Rejecting Ms. Poling

23. In its position statement, filed in response to the administrative complaint, respondent asserted that the two applicants hired over complainant, Ms. Cindy Howard and Ms. Robin McFarland, were the "two best overall candidates" and that "Ms. Poling ranked no higher than fourth on the selection list." (HRC Ex. 16). This position, of course, was contradicted by Mr. Corley at hearing and, based on evidence of record, is found to be unworthy of belief.

24. Respondent's second ground for refusing to rehire Ms. Poling was that hospital policy prevented rehiring a person at a lower wage or salary than they had previously earned while employed by DMH. This ground is also rejected as unworthy of belief based on the following findings of fact:

(a) Ms. Poling was not informed of such policy either at her interview or in her rejection letter. If legitimate, the policy could have been cited then and, most likely, this case would never have been filed.

(b) A written policy was never produced or submitted into evidence by respondent.

(c) Mr. Dale A. Biesecker, respondent's director of Human Resources, appeared to deny that the "policy" would prevent Ms. Poling's rehire.

Q. Mr. Biesecker, there have been situations where people have left the employ of the hospital at a higher wage and come back into other jobs at a lower rate; isn't that correct?

A. Yes. If they came into other jobs, not the exact same job and not necessarily experienced in the same way or it's in a different pay grade, that would be a different decision.

Q. But they could even come back into the same line of work in a different, you know, like a supervisor could come back in a non-supervisory job, couldn't he?

A. Yes, that's correct.

Q. And people could come back doing --

A. That's right.

Q. So there's no policy against that sort of thing?

A. No, except that each situation is evaluated separately, as to, you know, what's the appropriate rate to pay.

(Tr. 227-28).

(d) Finally the Commission produced credible evidence that another employee, Ms. Susie Moats, left employment as a full time respiratory therapist, making \$9.55 an hour, and was subsequently rehired on a temporary part time basis for \$6.00 per hour. She was then promoted to a full time position and was earning \$8.34 per hour as of the date of hearing.

25. Respondent's third articulated reason for not rehiring Ms. Poling is its then need to reduce labor costs. Since Ms. Poling testified credibly that she would have accepted the pay rate of \$6.00 per hour and so informed Mr. Corley during her interview, and given that respondent failed to show that complainant would otherwise still be more expensive to hire than the successful applicants, this ground, too, must be rejected as unworthy of belief and inconsistent with the credible evidence.

26. Respondent's fourth and final reason for not rehiring Ms. Poling concerned an allegation that Ms. Poling's father, C. Vernon Lowther, assaulted DMH chief executive officer Robert Hammer during a meeting in Mr. Hammer's office in October 1989. The meeting, at which Ms. Poling was present, was requested by complainant and her father to discuss the hospital's rejection of her second request for jaw surgery. The position that this meeting played a determining role in Ms. Poling's rejection for an open position in 1992 is not credible, based on the following findings of fact:

(a) The testimony of Mr. Hammer at hearing was inconsistent with his deposition testimony and, when compared to the testimony of Ms. Poling and Mr. Lowther, was simply not credible;

(b) Complainant and her father testified credibly that Mr. Lowther did not raise his voice to Mr. Hammer and did not curse him, shove him or strike him. They left the office when Mr. Hammer abruptly asked them to do so;

(c) Ms. Poling was not disciplined in any way as a result of the meeting, nor was she informed that she or her father had acted in an inappropriate manner. No one in upper management ever told Mr. Corley what had happened at the meeting;

(d) Mr. Corley testified that he first learned of Mr. Hammer's opposition to rehiring complainant while preparing for a company picnic on 11 September 1992. By that date he had already hired Ms. Howard and Ms. McFarland. Moreover, he had already decided, prior to the 19 August 1992 interview, that he would not hire Ms. Poling and would give her only a courtesy interview.

27. Based on the record as a whole, and after assessing the credibility of all witnesses, I find as fact that the reasons articulated by respondent for its failure to hire Ms. Poling are, singularly and together, unworthy of belief.

E. Post-Rejection Facts

28. After her rejection in September 1992, complainant continued to look for work. She was hired part time at a grocery store in January 1993 and was still employed there as of the date of

hearing. Respondent offered no evidence indicating that complainant had failed to mitigate her damages.

29. As of the date of hearing, complainant had suffered a loss of back pay in the amount of \$20,080.92. (HRC Ex. 25A). Back pay continues to accumulate at the rate of \$482.20 per month.

III. DISCUSSION OF EVIDENCE AND APPLICABLE LAW

A. Ms. Poling Meets the Statutory Definition of Handicap.

W.Va. Code §5-11-3(m) defines the term "handicap" to mean "a person who":

(1) Has a mental or physical impairment which substantially limits one or more of such person's major life activities. The term "major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;

(2) Has a record of such impairment; or

(3) Is regarded as having such an impairment.

The HRC Rules Regarding Discrimination Against the Handicapped, 6 W.Va. C.S.R. §77-1-1

et seq.², further define the key statutory terms as follows:

2.7. "Has a Record of Such Impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

2.8 "Is Regarded as Having an Impairment" means any of the following:

2.8.1. Has a physical or mental impairment that does not substantially limit major life activities but is treated by another as having such a limitation;

2.8.2. Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

2.8.3. Has none of the impairments defined above but is treated by another as having such an impairment.

Based on the statutory and regulatory definitions, it is clear that a person can state a cause of action under the HRA for discrimination on the basis of handicap even if he or she has no mental or physical impairment at the time of the alleged discriminatory act, provided that it can be shown that he or she has a record of such an impairment or is regarded by an employer as having an impairment.

Here, the Commission has shown that Ms. Poling is handicapped by virtue of having a history of a physical impairment that substantially limits or has limited in the past one or more "major life

² I apply the Rules in effect at the time the administrative complaint was filed in October 1992. Subsequent rule amendments did not change these definitions.

activities" as defined in W.Va. Code §5-11-3(m)(1). The "major life activities" involved in this case are working and performing manual tasks.

B. Discrimination Vel Non.

This case having been heard in its entirety, with all evidence submitted and considered, it is not necessary to address whether the Commission established a *prima facie* case. Once all the evidence has been heard, and the "defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether plaintiff really did so is no longer relevant." *U.S. Postal Service v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482 (1983). The job of the factfinder, after taking all of the evidence, is to address "the ultimate question of discrimination *vel non*." 103 S.Ct. at 1481.³

In other words, the factfinder must now determine, on the basis of all of the record, whether the Commission has proven by a preponderance of the evidence that the proffered reasons for respondent's failure to hire Vickie Poling are not the true reasons that she was not hired, but are a mere pretext for unlawful discrimination, or that her handicap was at least one of the motivating reasons for her rejection. *Barefoot, supra*. (Slip Opinion, p. 18, n. 18). I find that the Commission has met its burden of showing pretext.

³ The *Aikens* standard for assessing evidence was recently adopted by the West Virginia Supreme Court of Appeals for application in cases brought under the HRA. *Barefoot v. Sundale Nursing Home*, ____ W.Va. ____, 457 S.E. 2d 152(1995).

Pretext may be established by evidence supporting "the elimination of the apparent legitimate reasons for the decision," *Conaway v. Eastern Associated Coal Corp.*, 178 W.Va. 164, 358 S.E. 2d 423, 430 (1986), or by evidence showing that the proffered reason is "an absurd reason" and simply unworthy of belief, *Conaway*, at 430, n. 11. Here, respondent's articulated reasons have been eliminated and found not credible as indicated in Finding of Fact 23-26.

Once the factfinder has found that the reasons put forward by respondent are unworthy of belief and should be rejected, he or she is permitted "to infer the ultimate fact of intentional discrimination . . . and no additional proof of discrimination is required." *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2749 (1993); quoted with approval, *Barefoot, supra*. While I do not base my decision on "additional proof" of discrimination, I note that respondent failed to maintain a consistent defense, which has been found to be a strong indication of pretext, *Smith v. American Service Company of Atlanta, Inc.*, 611 F. Supp. 321 (N.D. Ga. 1984); *Townsend v. Grey Line Bus Company*, 597 F. Supp. 1287 (D. Mass., 1984), aff'd, 767 F.2d 11 (1st Cir. 1985), and I, therefore, infer the ultimate fact that respondent intentionally discriminated against complainant because of her handicap.

C. Instatement and Front Pay

The remedies applicable to this case are relatively routine except for the issues of instatement and/or front pay.

Instatement in a respiratory therapist position is the favored remedy in this case. Complainant is an experienced therapist with a good work record and respondent is the only employer in the immediate vicinity in need of her services. If instatement is not immediately possible due to lack of an open position, Ms. Poling is entitled to front pay in the amount of the difference between her actual monthly income and the income she would earn if employed by DMH. *Shore v. Federal Express Corp.*, 777 F.2d 1155 (6th Cir. 1985). Front pay should continue until such time as: (1) Ms. Poling is hired by respondent as a respiratory therapist; (2) Ms. Poling's income from other employment exceeds what she would have earned at DMH but for discrimination; or (3) three years have passed since this Order has become final as a matter of law; whichever occurs first.

IV. FINDINGS OF ULTIMATE FACTS

1. The Administrative Law Judge finds as fact that complainant, Vickie Poling, is a qualified handicapped person who is able and competent to perform the job of a respiratory therapist.

2. The Administrative Law Judge finds as fact that respondent failed to hire Ms. Poling because of her handicap and that, by doing so, respondent violated W.Va. Code §5-11-9(1).

4. The Administrative Law Judge finds as fact that as a result of respondent's unlawful act complainant suffered lost earnings and is entitled to a "make whole" remedy.

5. The Administrative Law Judge finds as fact that as a result of respondent's unlawful discriminatory act Ms. Poling suffered hurt and humiliation.

V. CONCLUSIONS OF LAW

1. The respondent is an employer within the meaning of W.Va. Code §5-11-3(d).
2. The complainant is a citizen of the State of West Virginia and a person within the meaning of W.Va. Code §5-11-3(a).
3. The Human Rights Commission has jurisdiction over this matter, complainant having filed a timely, verified complaint and complied with all procedural requirements of the West Virginia Human Rights Act W.Va. Code §5-11-1, et al.
4. The Commission showed by a preponderance of the evidence that respondent's explanations for failing to hire Ms. Poling are not the true reasons that she was not hired, but are mere pretext for unlawful discrimination, and that more likely than not complainant was not hired because of her handicap.
5. Respondent violated W.Va. Code §5-11-9(1) by failing or refusing to hire Ms. Poling because of her handicap.

6. Complainant is entitled to the following relief:

(a) Back pay of \$35,340 for the period of September 1992 through March 1995, minus interim earnings of \$15,259.08, for a net back pay amount through March 1995 of \$20,08.92.

(b) Back pay of \$10,260 for the period of April 1995 through December 1995, minus any interim earnings;⁴

(c) Prejudgment interest on back pay at the rate of 10% per annum, calculated quarterly, from the time it should have been paid to complainant up to the date of this decision, and postjudgment interest at the same terms until paid in full;

(d) Incidental damages in an amount of \$2,950.00 for the humiliation, embarrassment and loss of personal dignity suffered by complainant as a result of respondent's unlawful act; and

(e) Instatement to the first respiratory therapist position available and until that time front pay in the amount and for the time period described on page 15, infra.

7. The respondent shall reimburse the Commission and the Attorney General their costs in the amount of \$2,065.92.

8. Finally, a cease and desist Order is hereby directed against DMH to cease and desist from engaging in acts of unlawful discrimination in violation of the West Virginia Human Rights Act.

⁴ Within 15 days after the receipt of this decision, the Commission shall submit to respondent's counsel a verified statement of complainant's interim earnings in 1995. Should respondent desire to take evidence on this issue, it shall notify the Administrative Law Judge within fifteen days after receipt of the verified statement.

DMH is further ORDERED to post a copy of this decision on a bulletin board in its facility that is fully accessible to its employees, but not the public.

Decided this 19th day of December, 1995.



MIKE KELLY
Administrative Law Judge
Post Office Box 246
Charleston, West Virginia 25321
(304) 344-3293