



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE: 304-348-2616

ARCHA MOORE, JR.
Governor

September 23, 1988

Wavy Payne
Rock Gap Rd.
Rt. 1, Box 641
Berkeley Springs, WV 25411

Coolfont Recreation
Rt. 1, Valley Rd.
Berkeley Springs, WV 25411

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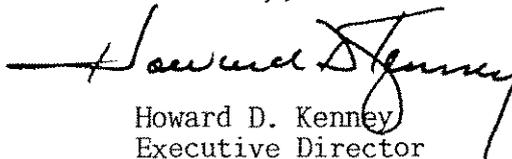
Re: Payne v. Coolfont Recreation
EH-531-86

Dear Parties:

Herewith, please find the final 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 final order.

Sincerely,



Howard D. Kenney
Executive Director

HDK/mst
Attachments

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE
OF STATUTORY RIGHT TO JUDICIAL REVIEW

AMENDED AND EFFECTIVE
AS OF APRIL 1, 1987

Ear. H. B. 263S]

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

WAVY P. PAYNE,

Complainant,

vs.

Docket No. EH-531-86

COOLFRONT RECREATION,

Respondent.

O R D E R

On the 31st day of August, 1988, the West Virginia Human Rights Commission reviewed the proposed order and decision of Hearing Examiner, Theodore R. Dues, Jr., in the above-captioned matter. After consideration of the aforementioned and exceptions thereto, the Commission does hereby adopt said proposed order and decision, encompassing proposed findings of fact and conclusions of law, as its own, with the modifications and amendments set forth below.

In the subsection entitled Conclusions of Law, par. 13, p. 12, and in the subsection entitled Proposed Order, par. 3, p. 13, the figure "\$25,000.00" shall be deleted and the figure "\$5,000.00" substituted therefor.

It is hereby ORDERED that the Hearing Examiner's proposed order and decision, encompassing findings of fact and conclusions of law, be attached hereto and made a part of this final order except as amended by this final order.

By this final 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 final order and that they must seek judicial review.

ENTERED this 16th day of Sept, 1988.

Respectfully Submitted,

George Ruthenburg
CHAIR/VICE-CHAIR
WV HUMAN RIGHTS COMMISSION

RECEIVED

JUL 12 1988

W.V. HUMAN RIGHTS COMM.

WAVY P. PAYNE,
Complainant,

v.

DOCKET NO.: EH-531-86

COOLFONT RE-CREATION,
Respondent.

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

This matter matured for public hearing on the 11th of December, 1986. The hearing was held in Morgan County Courthouse, Berkeley Springs, West Virginia. The hearing panel on each day consisted of Theodore R. Dues, Jr., Hearing Examiner and George Rutherford, Hearing Commissioner.

The Complainant appeared in person and by her counsel, Heidi A. Kossuth. The Respondent appeared by its representative, Martha Ashelman and by its counsel, Lacy I. Rice, Jr. and Joan Casale.

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.

ISSUES

1. Is the Complainant a qualified handicapped person within the meaning of the act.

2. If so, did the Respondent discriminate against the Complainant because of her handicap, or fail to make reasonable accommodation for her handicap.

3. If so, to what relief is the Complainant entitled.

FINDINGS OF FACT

1. The Complainant was employed by the Respondent from April 21, 1979, to February 28, 1986, at which time she was terminated.

2. The Complainant was initially examined by her physician, Dr. Gayle, on January 2, 1986 with a complaint of head ache and chest pains.

3. The Complainant performed the duties of housekeeper during her tenure with the Respondent. During the initial physical examination performed by Dr. Gayle, the Complainant, was determined to have high blood pressure. At that time Dr. Gayle was unable to determine the cause for the high blood pressure and prescribed Sectral, an anti-hypertensive. The Complainant was instructed to take the medication as prescribed and to return for further review at a later date.

4. The position of housekeeper entailed operating a vacuum cleaner, general cleaning, moving furniture and carrying

supplies and linen up to the rooms.

5. The Complainant was examined again by Dr. Gayle on January 6, 1986. Her blood pressure at that time was still in the hypertensive range. Dr. Gayle concluded, during this examination, that the Complainant was suffering from hypertension with a headache. At that time, he prescribed Capoten, another anti-hypertensive. Also, as a result of the personal problems the Complainant was realizing with her family and his concern for the same, Dr. Gayle prescribed Norpramine, an anti-depressant drug. The Complainant was instructed to take the medication as prescribed, to return in two days for a blood pressure check and in two weeks for a complete physical.

6. The conclusory diagnosis after the Complainant's January 6, 1986, examination was hypertension and depressive anxiety.

7. On January 8, 1986, a nurse at Dr. Gayle's office took the Complainant's blood pressure and the same was 138/76. On January 10, 1986, her blood pressure was 105/90.

8. The Complainant was released for work by Dr. Gayle effective January 13, 1986. The Complainant was restricted in her duties to no heavy lifting or pushing. Dr. Gayle defined this restriction to apply to anything more than 25 to 30 pounds for lifting and for pushing, anything that was not easily moved with a reasonable force.

9. The Complainant returned to work after January 13, 1986, for six or seven days after which time, the Complainant was notified by management of Respondent not to return to work until

she had a full release from the physician; meaning an unrestricted work release.

10. On January 17, 1986, Dr. Gayle performed a complete physical on Complainant. Of the tests performed on that date, the Complainant had an insignificant abnormal liver function, a normal EKG, normal chest x-ray, and normal blood results except for the liver function and cholesterol.

11. At this time, Dr. Gayle issued a modified restriction on Complainant's activities to the effect that she would be limited to routine housekeeping and no heavy pushing or lifting.

12. Dr. Gayle's last examination of the Complainant was on October 31, 1986, at which time the Complainant reported that she felt fine and no persistence in chest pains. The Complainant's blood pressure was still in a range that required continued medical supervision.

13. At that time Dr. Gayle concluded that the Complainant's hypertension problems were fairly under control.

14. Dr. Gayle was of the opinion that the hypertension realized by the Complainant was in part due to physiological reasons and in part psychological. The psychological source was stress and the physiological source was her weight.

15. After a review of the Complainant's job description, Dr. Gayle was of the opinion that the Complainant could perform each and every duty described; with the exception that the Complainant would need assistance to lift anything more than 25 to 30 pounds or if she had to move heavy furniture.

16. It was Dr. Gayle's opinion that the Complainant

would pose no potential hazzard to her coworkers nor would she be endangering herself with the normal activities of the job description provided. It was noted however, that the Complainant could not push the van that was used by the housekeepers to travel from building to building during the course of their work day; the Complainant had indicated that she was required to push the van on occasions when it would become stuck in the mud or snow.

17. Pushing of the van by housekeepers was not included within the job description listing the duties expected of housekeepers employed by the Respondent.

18. Management for Respondent had indicated to Dr. Gayle an apprehension to allowing the Complainant to return to work due to the possibility of her hypertension resulting in a injury or ailment which may ultimately be required to be compensated under worker's compensation. At the time of the public hearing, the Complainant was employed at a local restaurant performing cleaning and dishwashing duties.

19. Management for Respondent also informed the Complainant that her high blood pressure problem may result in her falling over dead at work which would cause the Respondent significant problems.

20. During her tenure with the Respondent, the Complainant was a conscientious and dilligent employee. In addition, she performed her work in a satisfactory manner.

21. The video tape exhibit, shown by the Respondent, did not reflect a normal days activity for the housekeepers, during

the employment period of the Complainant. Many tasks were added to the video and some of ordinary tasks which were actually performed during Complainant's tenure were performed different than usual.

22. The housekeepers employed by the Respondent work in crews. Each crew had one van from which they retrieved their supplies and was transported between the housing units that were to be cleaned.

23. Of those tasks assigned to the Complainant, the task which would need modification, to fall within the parameters of the restrictions placed on the Complainant by Dr. Gayle, would be the supply boxes, which ordinarily would be carried by one individual and exceeded the weight restriction the Complainant was to perform within.

24. An inexpensive modification with a resulting insignificant time delay would have been to reduce the amount of supplies in one box to be included in two boxes. This would reduce the weight considerably and put the same well within the weight restriction the Complainant was required to work within.

25. The Complainant gave each of the two return to work slips received from Dr. Gayle's office to Respondent.

26. Management for Respondent represented to the Complainant that she was being laid off effective January, 1986, but would be recalled in March, 1986. On or about February 28, 1986, Complainant received a letter from Respondent stating that she was terminated.

27. The Complainant cried for several days and was

unable to sleep for relatively the same period time as a result of having received the letter of termination. She was extremely embarrassed and humiliated to have been put in a position to disclose to her family that she had been terminated from employment that she had worked for more than seven (7) years. The Complainant continues to cry on occasion when reflecting on the termination and the circumstances surrounding the same.

28. After receiving her letter of termination, the Complainant approached Marc Zinder, a management employee of the Respondent. At that meeting, Mr. Zinder attempted to justify her termination by reading from a two page letter, purportedly written by Complainant's supervisor alleging that the Complainant dug through the trash, failed to scrubbed floors and failed to vacuum.

29. The Complainant at all times, during her tenure satisfactorily performed the duties requested of her by her superiors.

30. The Complainant reasonably mitigated her damages by seeking and obtaining employment subsequent to the receipt of her termination letter.

DISCUSSION

The Complainant, to establish a prima facie case of handicap discrimination must prove that she has a physical or mental impairment which substantially limited one or more of her major life activities, or who has a record of such handicap, or who is regarded as having a handicap. Harrah v. Central

Appalachian Coal Company, Docket No. EH-233-83 (West Virginia Human Rights Commission); Doe v. York University, 666 F.2d 761 (2nd Cir. 1981); Pushkin v. Board of Regents, 658 F.2d 1372 (10th Cir. 1981); Treadwell v. Alexander, 707 F.2d 473 (11th Cir. 1983).

In reaching a determination as to whether the Complainant has met her burden by establishing that she is in fact a handicapped individual, the number and types of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual's job expectation and training are all relevant to the determination. Forissi v. Bowen, 794 F.2d 931 (4th Cir. 1986); Jasseny v. United States Postal Service, F.2d 1244 (6th Cir. 1985).

After considering the evidence of record most favorable to the Complainant, the Examiner finds that the Complainant established that she was regarded by the Respondent as having a handicap; ie., hypertension, which Respondent perceived, and acted upon, as substantially affecting her ability to perform general housekeeping duties. Harrah, supra.; Doe, supra.; Pushkin, supra.

Complainant proved a prima facie case of handicap discrimination by establishing that she was capable of performing the duties of housekeeper, and, but for the Respondent's arbitrary decision (inconsistent to the medical opinion of Complainant's attending physician) that she was too much of an exposure to a future disability claim, she was laid off and

ultimately terminated as a result of the regarded handicap.
Harrah, supra.; Doe, supra.; Pushkin, supra.

The Respondent articulated reasons that Complainant's adverse employment treatment was a result of her failing to perform mopping and vacuum duties and pilfering the trash was inconsistent to the overwhelming evidence by her co-employees, and accordingly provided no weight.

Having failed to articulate a credible legitimate nondiscriminatory reason for its adverse employment action in this case, the Complainant has met her burden by a preponderance of the evidence that her layoff and termination were the result of unlawful handicap discrimination.

CONCLUSIONS OF LAW

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

2. The Complainant is a handicapped person within the meaning of the West Virginia Human Rights Act.

3. The Complainant proved that she was a handicapped individual within the meaning of the act. More particularly, hypertension is a physical condition which was regarded and acted upon by Respondent as substantially limiting one or more of Complainant's major life activities.

4. The Complainant proved a prima facie case in that she introduced evidence to show that she is handicapped individual under the meaning of the act, that she was capable of, and did, perform the duties of housekeeper, if accommodated for the 25 to

30 pound weight restriction, and that she was terminated from her employment because of her handicapp.

5. Complainant's layoff in January of 1986 and her subsequent termination on or about February 28, 1986, were solely on the basis of her handicapp and specifically, as a result of Respondent's anticipation and fear that her condition may worsen or become worker's compensation related in the future.

6. Respondent's articulated reasons for its layoff and termination of Complainant in Janaury and February of 1986, respectively is pretextual.

7. Had the Respondent retained the Complainant in her employment and accommodated her with the weight restrictions prescribed by her physician, the Complainant would have been able to continue her satisfactory performance as a housekeeper in Respondent's employment.

8. Respondent's articulated position specifically addressing their ability to accommodate the Complainant is also determined to be not credible. Particularly, since only a minimal time delay would have been realized to reduce any supplies carried by Complainant, from a one box situation, to more than one box, requiring more than one trip from the van. Further, inasmuch as, the housekeepers worked in a crew, assisting the Complainant in lifting or pushing furniture, weighing in excess of the applicable weight restrictions would have been insignifcant at best, and well within the normal conduct of the crew, as indicated by the testimony several crew members during the hearing. Also, the evidence supports the

conclusion that the Complainant's continued employment would not result in a substantial risk to herself or others. In fact, the evidence from other housekeeping employees was that members of the crew routinely would take up the "slack" when a member of the crew was not feeling up to par.

9. The Respondent has failed to show, by credible evidence, that its layoff and ultimate termination of Complainant was based upon a bonafide occupational qualification, upon undue hardship, or, upon a threat to safety, in that Respondent failed to show that there was a reasonable probability of substantial risk to Complainant or others if Complainant had been retained as an employee.

10. Respondent's employment procedures, as they were applied to Complainant, unlawfully discriminated on the basis of handicap in the following respects:

a. The failure of the Respondent to set a clear and reasonable timetable for Complainant to provide a full release from her physician represents a failure to offer reasonable accommodation in light of Complainant's handicap.

b. The failure of the Respondent to hold Complainant's former position open for the Complainant for a reasonable time, without proving that to do so would have imposed an undue hardship, represented a failure to reasonably accommodate Complainant's handicap.

c. The failure of Respondent to accept a

qualified release from the Complainant's physician, who was qualified to certify Complainant's ability to work with accommodation, violated Respondent's duty not to discriminate on the basis of what it believed to be a handicap.

11. Complainant is entitled to receive back pay in the amount she would have earned had she been retained by Respondent on or after January 21, 1986, in the amount of \$5,614.34 less interim earnings of \$1,693.40. The back pay is calculated based upon the Complainant's yearly average gross earnings from Respondent for the calendar years 1980, 1981, 1982, 1983, 1984 and 1985. Those figures are as follows:

1980	\$4,864.57	1983	\$4,743.00
1981	\$5,216.31	1984	\$5,928.14
1982	\$6,081.60	1985	\$6,852.41

12. West Virginia Department of Employment Security payments represent collateral benefits and should not be deducted from a back pay award.

13. In view of the seriousness of the offense and its effects upon the Complainant, she is further entitled to an award of \$25,000.00 as damages for humiliation and emotional distress.

14. The Human Rights Commission is entitled to recover its costs incurred in presenting proof of the Complainant's handicapping condition.

PROPOSED ORDER

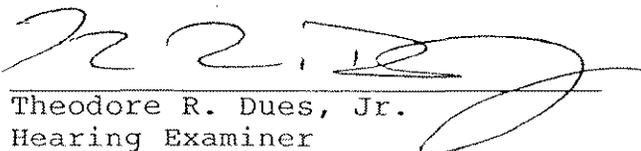
Accordingly, the Examiner does recommend the Commission

to issue an Order as follows:

1. Judgment be awarded to the Complainant;
2. That the Complainant receive back pay from January 21, 1986 to January 21, 1987 in the amount of \$3,920.94;
3. That the Complainant receive incidental damages in the amount of \$25,000.00;
4. That the Complainant receive prejudgment interest at the rate of 10% per annum for her back pay and incidental damages until such payments are made in full by the Respondent;
5. That the Respondent reinstate the Complainant to her former position of housekeeper with the award of full benefits for the severance period;
6. That the Respondent reimburse the West Virginia Human Rights Commission for any and all costs incurred in the prosecution of this matter to the chairperson of the Commission within two weeks from the date of entry of this recommended decision.
7. Respondent shall, within 30 days of the issuance of the final Order by the Commission in this matter, provide the Commission with proof of its compliance with this Order.

DATED: July 7, 1988

ENTER:


Theodore R. Dues, Jr.
Hearing Examiner