



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

215 PROFESSIONAL BUILDING  
1036 QUARRIER STREET  
CHARLESTON, WEST VIRGINIA 25301

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February 14, 1986

ARCH A. MOORE, JR.  
Governor

Andrew N. Frye, Esquire  
P.O. Box 446  
Petersburg, WV 26847

William T. Wertman, Esquire  
WV Legal Services Plan, Inc.  
P.O. Box 1898  
Martinsburg, WV 25401

RE: Benjamin O. Shreve v Vacuum Services, Inc., ER-354-85

Dear Mr. Frye and Mr. Wertman:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Shreve v Vacuum Services, Inc. ER-354-85.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,

Howard D. Kenney  
Executive Director

HDK/kpv /jcp  
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

**RECEIVED**

JAN 16 1986

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

W.V. HUMAN RIGHTS COMM.

BENJAMIN O. SHREVE,

Complainant,

vs.

Docket No. ER-354-85

VACCUUM SERVICES, INC.,

Respondent.

**ORDER**

On the 8th day of January, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner, James Gerl. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own.

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order.

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

Entered this 4 day of Feb., 1986.

Respectfully Submitted



CHAIR/VICE-CHAIR  
West Virginia Human  
Rights Commission

STATE OF WEST VIRGINIA  
HUMAN RIGHTS COMMISSION

BENJAMIN O. SHREVE

Complainant

vs.

Docket No.  
EH-451-85

VACUUM SERVICES, INC.

Respondent

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing was convened for this matter on September 27, 1985 in Petersburg, West Virginia. The complaint was filed on March 20, 1985, and was amended on April 6, 1985. The notice of hearing was served on June 7, 1985. A Status Conference was held on June 27, 1985. Subsequent to the hearing, both parties submitted written briefs and proposed findings as of fact.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions, and arguments advanced by the parties are in accordance with the findings, conclusions, and views 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 not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accord with findings as stated herein, it is not credited.

#### CONTENTIONS OF THE PARTIES

Complainant contends that respondent discriminated against him on the basis of his physical handicap by laying him off and by failing to accommodate his handicap. Respondent maintains that complainant was laid off because of a decline in respondent's business and that complainant's complaint was not timely filed.

#### FINDINGS OF FACT

Based upon the parties stipulations of uncontested fact as set forth on the record during the hearing, the Hearing Examiner has made the following findings of fact:

1. Complainant was employed by respondent from April 21, 1984 to December 28, 1984.
2. At the time of his employment by respondent on April 21, 1984, complainant knew that respondent's Petersburg, West Virginia office would be closing.
3. Complainant's physical condition substantially impaired his life activities.

Based upon a preponderance of the evidence, the Hearing Examiner has made the following findings of fact:

4. Complainant completed and notarized an employment complaint background information form for the Human Rights Commission on March 19, 1985. The Human Rights Commission reviewed this document on March 20, 1985.

5. The Human Rights Commission filed a memorandum of complaint on March 28, 1985.

6. Complainant's amended complaint was signed and notarized on April 6, 1985.

7. Respondent is in the business of using truck mounted vacuum cleaners to vacuum ash from power plants and settlement ponds from mines. In addition respondent utilizes high pressure equipment to clean out boilers and hoppers, and respondent hauls hazardous waste.

8. Complainant had previously been employed by respondent for approximately six years. As a result of an injury to his back during his previous employment with respondent, complainant has been diagnosed as having multiple level lumbar spondylosis and laxity of his lumbar spine.

9. Complainant was hospitalized as a result of the condition described in finding of fact number 8 in August 1983 and in October 1984.

10. On December 15, 1983, complainant's physician, McAllister released complainant to return to work effective January 1, 1984, but complainant was restricted to light duty work only (that is, no lifting).

11. Complainant was employed by respondent on April 21, 1984 as

a dispatcher, a light duty job. Respondent considered complainant to be a good employee and he received no discipline or complaints from respondent regarding his work performance.

12. Because the sources of respondent's business in the Petersburg, West Virginia area were declining, and, because such decline was affecting respondent's profitability, respondent decided to move its Petersburg, West Virginia operation and respondent decided to change the nature of its business by adding a high pressure operation.

13. As a result of the decision described in finding of fact number 12, respondent laid off approximately thirty of its West Virginia employees, including complainant at or near the time of the complainant's layoff.

14. Respondent still employs two employees outside of West Virginia who perform dispatching duties, but said employees also perform truck driving and other duties which entail heavy lifting.

15. The only light duty jobs in respondent's current operation are those of computer operator and office manager.

16. Complainant does not have the education and experience to qualify for the computer operator or office manager positions.

17. Respondent offered complainant an opportunity to relocate and accept another position with respondent, but complainant declined because he was still restricted to light duty work by his doctor.

18. Respondent's management was fully aware of complainant's handicap at the time of his employment by respondent on April 21, 1984.

19. Complainant's handicap played no part in respondent's

decision to lay him off.

20. Respondent did not consider any accomodation of complainant's handicap in lieu of terminating him or in addition to terminating him. Respondent never considered whether it could restructure a job which complainant would be able to perform. Respondent never explored the possibility of training or other educational programs for complainant. Respondent never determined whether it could train complainant in-house for the light duty jobs at respondent's.

21. A reasonable hourly rate for legal services rendered by complainant's attorney, William T. Wertman, Jr., is \$75.00 per hour.

22. Complainant's attorney reasonably expended 67.09 hours in the litigation of this case.

#### CONCLUSIONS OF LAW

1. Benjamin O. Shreve is an individual claiming to have been aggrieved by an alleged unlawful discriminatory practice and is a proper complainant for purposes of the Human Rights Act, West Virginia Code, Section §-11-10.

2. The complaint of discrimination herein was timely filed. West Virginia Code, Section §-11-10.

3. Vacuum Services, Inc. is an employer as defined in West Virginia Code, Section §-11-3(d) and is subject to the provisions of the Human Rights Act.

4. Complainant has not established a prima facie case that respondent discriminated against him on the basis of handicap by

laying him off.

5. Respondent has not discriminated against complainant on the basis of his handicap by laying him off. West Virginia Code, Section 5-11-9(a).

6. Complainant has demonstrated by the preponderance of the evidence that respondent failed to accommodate his handicap in violation of West Virginia Code, Section 5-11-9(a).

### Discussion of Conclusions

#### I. TIMELINESS OF COMPLAINT

Respondent contends that complainant's complaint of discrimination was not timely filed. The record evidence reveals that complainant was laid off on December 28, 1984. He completed and notarized an employment complaint background form for the Human Rights Commission on March 19, 1985, and the Commission received this document on March 20, 1985. On March 28, 1985, the Commission filed a Memorandum of Complaint. The complaint was amended on April 6, 1985.

The Human Rights Act requires that a complaint be filed within 90 days after the occurrence of any alleged unlawful discriminatory practice. West Virginia Code, Section 5-11-10. Where the Commission is informed by a complainant of an alleged violation of the Human Rights Act prior to the expiration of the 90-day limitation period, the Commission may institute a Memorandum of Complaint and any subsequent complaint is deemed filed as of the date of said Memorandum of Complaint. Rules and Regulations Pertaining to Practice and

Procedure before the West Virginia Human Rights Commission, Section 3.05(d)(3).

Thus, because the Memorandum of Complaint in the instant case was filed within 90 days of complaint's layoff, the complaint was timely filed. Moreover, because the effects of any alleged discrimination would carry over into the limitation period, the complaint would appear to allege a continuing violation under West Virginia law. West Virginia Human Rights Commission v. United Transportation Union 280 S.E.2d 653, 658-659 (W. Va. 1981). Furthermore, it is clear that complainant did everything within his power to file the complaint within the limitation period. It would, therefore, be manifestly unjust to dismiss the complaint where complainant is not at fault.

## II. HANDICAP DISCRIMINATION/LAYOFF

In fair employment disparate treatment cases, the initial burden is upon the complainant to establish a prima facie case of discrimination. Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission 309 S.E. 2nd 342, 352-353 (W. Va. 1983); McDonnell-Douglas Corporation v. Green 411 U.S. 792 (1973).

A complainant may establish a prima facie case of discrimination by setting forth facts which, if otherwise unexplained would raise an inference of discrimination. Furnco Construction Co. v. Waters 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1978). In the instant case, complainant has established no such facts.

In the instant case, complainant has established that he has a physical handicap. Subsequent to an injury while he was employed by respondent, complainant was diagnosed as having multiple level lumbar spondylosis and laxity of the spine. The parties have stipulated, and the preponderance of the evidence reveals, that complainant's physical condition substantially impairs his life activities. Interpretive Rules Governing Discrimination On The Handicapped, Section 2.01.

Complainant has also demonstrated by a preponderance of the evidence that he was laid off by respondent and that during his tenure as a dispatcher for respondent, his work performance was good.

Complainant has not established, however, any link between his handicap and respondent's decision to lay him off. The record evidence clearly establishes that respondent was experiencing some financial problems because of a decline in business in the Petersburg, West Virginia, area. As a direct result thereof, respondent decided to relocate its Petersburg operation and to change the nature of its business. Those decisions required the layoff of approximately thirty of respondent's West Virginia employees, including complainant. Although respondent continues to employ two employees who perform dispatching duties, said employees perform other duties which require heavy lifting. Complainant candidly admits that he cannot perform any job which requires heavy lifting. Complainant is not qualified

at his current level of training and experience to qualify for respondent's current light duty positions. Respondent offered complainant an opportunity to relocate, but complainant had to decline because he was still restricted to light duty work. It is significant that respondent's top management was aware of complainant's handicap at the time respondent re-employed complainant on April 21, 1984.

Based upon the demeanor of the witnesses and the points discussed above, it is concluded that complainant's handicap played no part in respondent's decision to lay him off. Complainant has not established by a preponderance of the evidence facts which would raise an inference of discrimination and, therefore, complainant has not established a prima facie case of handicap discrimination.

### III. REASONABLE ACCOMMODATION

An employer is under a duty to reasonably accommodate the handicaps of its employees; there is a particularly strong burden upon an employer to accommodate an individual who becomes handicapped in the course of employment with that employer. Interpretative Rules Governing Discrimination On the Handicapped, Sections 4.03, 4.07.

In the instant case, respondent concedes it never considered accommodation of complainant at the time of his layoff. Respondent did not consider whether it could restructure any job which complainant might

be able to perform. Respondent did not determine whether it could train complainant in-house for any of the light duty positions which respondent retained after the layoff. Respondent never explored the possibility of training programs or other educational programs which might benefit complainant at the time of his layoff. Rather, the record evidence is clear that respondent did not fulfill its duty to accommodate complainant's handicap, especially in view of the fact that complainant sustained the injury to his back as a result of his employment by respondent.

#### IV. RELIEF

In view of the foregoing discussion, it is clear that most of the relief requested by complainant is not appropriate. Back pay, "front" pay, compensatory damages for medical expenses and insurance, travel costs and finance charges and incidental damages for humiliation and loss of dignity do not apply in the instant case. It is appropriate, however, to enter an appropriate cease and desist order and to award complainant reasonable attorney's fees and costs. The cease and desist order should require respondent to evaluate complainant's current qualifications and abilities and make a determination as to some appropriate and reasonable accommodation which it might afford complainant, with special emphasis on training and/or educa-

tional programs which might qualify complainant for a light duty position, either with respondent or with some other employer.

Complainant's attorney has submitted a motion for attorney's fees and an affidavit in support therefor. The number of hours claimed is reasonable for the instant case. The hourly rate of \$75.00 per hour is extremely reasonable. Despite the recommended outcome of this case, it is clear that Mr. Wertman is a highly skilled attorney with expertise in the field of civil rights law. Although \$75.00 per hour is an extremely low rate in view of the great skill and expertise of Mr. Wertman, the hourly rate recommended herein is \$75.00 per hour because that is all that Mr. Wertman has requested. It shall be understood, of course, that any award of attorney's fees shall not go to complainant since he has not paid any attorney's fees, but, rather, any such award should be paid to the West Virginia Legal Services Plan, Inc.

#### DETERMINATION

The complaint in this matter, to the extent that it alleges handicap discrimination with respect to complainant's layoff, is not supported by the preponderance of the evidence. The preponderance of the evidence supports the complaint to the extent that it alleges that respondent failed to reasonably accommodate complainant's handicap.

PROPOSED ORDER

In view of the foregoing, the hearing examiner recommends the following:

1. That the complaint of Benjamin O. Shreve, Docket No. EH-451-85, be sustained insofar as complainant contends that respondent failed to reasonably accommodate his handicap, and that his complaint be dismissed with prejudice to the extent that he contends that respondent discriminated against him on the basis of his handicap by laying him off.
2. That respondent be ordered to cease and desist from failing to reasonably accommodate complainant's handicap, including an assessment of complainant's current qualifications, abilities and skills, and the possibility that respondent could afford a reasonable accommodation of complainant's handicap, with special emphasis on training programs and/or educational programs which might qualify complainant for a light duty position, either with respondent or with some other employer.
3. That respondent be ordered to pay complainant's reasonable attorney's fees to the West Virginia Legal Services Plan, Inc., in the amount of \$5,025.00 and costs in the amount of \$261.25.

4. That respondent report to the Commission within sixty (60) days of the entry of the Commission's Order, the steps it has taken to comply with the Order.

*James Gerl*

James Gerl  
Hearing Examiner

Entered: November 27, 1985

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served  
the foregoing PROPOSED ORDER AND DECISION  
by placing true and correct copies thereof in the United States  
Mail, postage prepaid, addressed to the following:

Andrew N. Frye, Esq.  
P. O. Box 446  
Petersburg, WV 26847

William T. Wertman, Esq.  
W.V. Legal Services Plan, Inc.  
P. O. Box 1898  
Martinsburg, WV 25401

on this 27th day of November, 1985.

  
\_\_\_\_\_  
James Gerl