



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

1321 Plaza East

Room 104/106

Charleston, WV 25301-1400

Gaston Caperton
Governor

TELEPHONE (304) 558-2616

FAX (304) 558-0085

TDD - (304) 558-2976

Herman H. Jones
Executive Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

March 20, 1996

Diana Lynn Sharps
293 Pine St.
Glenville, WV 26351

Gilmer County Board of
Education
201 North Court St.
Glenville, WV 26351

Nancy S. Grossman, Esq.
Rt. 4, Box 362
Morgantown, WV 26505

Ricklin Brown, Esq.
PO Box 1386
Charleston, WV 25325-1386

Re: Sharps v. Gilmer County Board of Education
ES-347-94

Dear Parties:

Enclosed, please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a peti-

tion setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

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

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before a administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

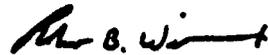
10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,



Robert B. Wilson
Administrative Law Judge

RW/mst

Enclosure

cc: Mary C. Buchmelter, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DIANA LYNN SHARPS,

Complainant,

v.

DOCKET NUMBER: ES-347-94

GILMER COUNTY BOARD OF EDUCATION,

Respondent.

FINAL DECISION

A public hearing, in the above-captioned matter, was convened on January 18, 1996, in Gilmer County, at the Gilmer County Courthouse, Glenville, West Virginia, before Robert B. Wilson, Administrative Law Judge.

The complainant, Diana Lynn Sharps, appeared in person and by counsel, Nancy Grossman. The respondent, Gilmer County Board of Education, was represented by Charles McCann, former Gilmer County Superintendent of Schools, and by counsel, Ricklin Brown.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to

the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

FINDINGS OF FACT

1. The complainant, Diana Lynn Sharps, is a female resident of West Virginia.

2. The respondent, Gilmer County Board of Education is and was at all relevant times herein, a person and an employer, within the meaning of West Virginia Code §5-11-3(a) and (d).

3. The complainant was employed by respondent, Gilmer County Board of Education, as a substitute teacher from 1985 until the fall of 1992, when she began working half days in a regular teaching position as a Physical Education Instructor at Norman Elementary, where she continues to work to date.

4. From 1985 to the present, the respondent has hired complainant for positions including fifth and sixth grade boys and girls basketball coach, ninth grade boys basketball coach, and high school softball coach.

5. Prior to the fall of 1993, the complainant's seventh and eighth grade boys basketball teams posted records of 8-5, 6-9, and 4-6.

6. In response to a job posting in the fall of 1993, complainant applied for the position of ninth grade boys basketball coach.

7. Richard Hardman, a man, also applied for the position.

8. Mr. Hardman had played high school basketball, earning all-state honors, and college basketball. Mr. Hardman did not possess a Physical Education degree and had no coaching experience.

9. Complainant and Mr. Hardman were interviewed for the position of ninth grade boys basketball coach by a committee of five, including several high school coaches and the high school athletic director. After conducting interviews, the committee recommended to the Superintendent, Charles McCann, that the complainant be selected as ninth grade boys basketball coach.

10. It was Superintendent McCann's job to recommend to the Board of Education the best person for the position of ninth grade boys basketball coach. The respondent, Board of Education met on November 8, 1993, at which time Superintendent McCann arose and recommended Mr. Hardman for the position of ninth grade boys basketball coach. The respondent, Board of Education voted to

approve Mr. Hardman's selection as recommended by Superintendent McCann.

11. Complainant was devastated by the failure to get the recommendation and the subsequent school board approval as ninth grade boys basketball coach.

12. Superintendent McCann claims that his decision was based upon unsolicited interaction with Mr. Hardman prior to the recommendation at which time Mr. Hardman expressed his interest and past history as a ballplayer in high school and college; and upon comments from some parents that Mr. Hardman "was qualified better to instruct kids at a higher level than what they had been in the past, meaning seventh and eighth grade."

13. Superintendent McCann never conducted any investigation into the relative qualifications of the candidates. The reasons purported for this recommendation by Superintendent McCann all relied upon information garnered outside of the interview and application process, and in total disregard of the recommendations of the committee which had investigated the relative experience of the applicants. Complainant was not informed that she should submit additional evidence of her qualifications to Superintendent McCann outside of the normal recommendation process.

14. Complainant was significantly more qualified for the position of ninth grade boys basketball coach, including significant history of athletic trainer experience, coaching experience, and a physical education degree. The committee which interviewed the candidates for the position of ninth grade boys basketball coach were aware of the qualifications of complainant and relied upon their

knowledge of the relative qualifications of the complainant and Mr. Hardman in making their recommendations to Superintendent McCann.

15. Complainant immediately prepared to file a grievance upon hearing of the selection of Mr. Hardman because she was the more qualified of the two, because she had been chosen by the selection committee, and because she was a regular teacher and not a substitute teacher as was Mr. Hardman.

16. Superintendent McCann met two weeks later with complainant and Linda Harrington, West Virginia Education Association representative to discuss complainant's grievance over being denied the ninth grade boys basketball coaching position in November 1993.

17. Superintendent McCann indicated that there was no problem with complainant's work.

18. Ms. Harrington told Superintendent McCann that complainant was more qualified for the position. Superintendent McCann said that he had received calls from parents "who were concerned about Diana having the job." He related that the parents were concerned "because the boys were a year older now," because "it might make a difference where the boys are more mature." She asked Superintendent McCann point blank, "Is it because she's a woman?" He said, "Yes". Superintendent McCann went on to state that maybe complainant would be better for the girls team, and that a woman coach would be better for the girls team because they would understand each other better. Complainant and Ms. Harrington testified credibly to the nature of Superintendent McCann's comments at this meeting. Superintendent McCann did not generally dispute their testimony as his testimony was

evasive, and to the extent that he did contradict their testimony in his testimony, his testimony is not deemed credible.

19. Complainant is the first and only woman to coach a boys team at the high school.

20. Complainant was subsequently chosen as ninth grade boys basketball coach for the following year, where she coached one year and quit after the season.

21. Complainant suffered no monetary loss from not being selected as ninth grade boys basketball coach.

22. Although complainant was not visibly upset following the meeting with Superintendent McCann, she was devastated at the time the Board of Education voted to make Mr. Hardman ninth grade boys basketball coach. Complainant was shaken in her confidence, resulting in her putting additional pressure on herself and her teams following the decision by respondent not to hire her for the position. Although complainant proved no additional medical damages or missed time from work as a result of not obtaining the position, complainant nevertheless clearly suffered emotional distress as a result of being denied the position.

B.

DISCUSSION

To make a prima facia case of employment discrimination under the West Virginia Human Rights Act, a complainant must offer proof that:

1. the complainant is a member of a protected class;

2. the employer made an adverse decision concerning the complainant;

3. but for the complainant's protected status, the adverse decision would not have been made. Conway v. Eastern Associated Coal Corp., 178 W.Va. 164, 358 S.E.2d 423 (1986).

The "but for" test of discriminatory motive making up the third prong of the Conway test is merely a threshold inquiry, requiring only that a complainant show an inference of discrimination. Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152.

The complainant is a member of a protected class in that she is a female. The complainant was denied employment as ninth grade boys basketball coach on November 8, 1993 by respondent Board of Education based upon Superintendent McCann's recommendation of Mr. Hardman, a male, for the position. The complainant offered testimony that Superintendent McCann's decision was based upon concerns raised by parents that complainant was unsuited to teach more mature boys, who were a year older, because she was a woman. Thus, complainant has established a prima facie case of employment discrimination.

Once the complainant has established a prima facie case of employment discrimination, the burden then shifts to the employer to proffer a legitimate nondiscriminatory reason for the employment action, finally the complainant is accorded an opportunity to establish that either age, gender or ancestry was a determinative factor in the respondent's employment decision or that the respondent's articulated rationale was merely a pretext for discrimination. Barefoot v. Sundale Nursing Home, 457 at 160. The appropriate analysis for mixed motive cases was enunciated by the U.S. Supreme Court of Appeals in Price Waterhouse v. Hopkins, 490

boys were a "year older now" and "more mature". These statements were never explicitly denied by Superintendent McCann, and the testimony of complainant and Ms. Harrington was straightforward and credible on this point. Superintendent McCann's assertion at hearing that Mr. Hardman could instruct at a "higher level" appears to be "the product of hindsight rather than a true barometer of what occurred at the time of the decision." West Virginia Institute of Technology v. West Virginia Human Rights Commission, 383 S.E.2d at 497, citing Taylor v City National Bank, 642 F.Supp. 989, 995 (S.D.W.Va. 1986) (Haden, C.J.), aff'd mem., 836 F.2d 547 (4th Cir. 1987).

Also advanced as a reason by Superintendent McCann for his decision was that Mr. Hardman was more qualified. This reason was never explained in objective terms by Superintendent McCann. Indeed the only qualification which he could point to was that Mr. Hardman had been a star basketball player in high school and college. It was apparent from the demeanor of his testimony that he viewed the value of boys basketball and those that played it as inherently superior to girls basketball. Indeed he did not bother to find out complainant's basketball playing experience. The U.S. Supreme Court of Appeals has found that partners' statements were sufficient to show that gender was a motivating factor:

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of the reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, he has acted on the basis of gender. Price

Waterhouse v. Hopkins, 490 U.S. at 250, 109 S.Ct.
at 1790-1791.

In the present case, Superintendent McCann was quoted as stating that complainant would be better suited for girls basketball coach because she, as a woman, would be better able to understand them. This is precisely the type of stereotyping which is prohibited by the West Virginia Human Rights Act. Superintendent McCann did not deny making comments of this nature and other denials regarding the motives for his decision were not credible. That sex was a motivating factor in his decision may also be inferred by his willingness to take the parents' purported appraisal of Mr. Hardman's skill at face value without ascertaining the relative experience of Mr. Hardman and the complainant. Discriminatory motive may be inferred from his valuation of Mr. Hardman's playing experience when he did not inquire as to complainant's playing experience, because in his mind hers could not compare with his because he played boys and/or mens basketball. To the extent that this is the real reason behind his decision, it is also illegal under the West Virginia Human Rights Act. This phenomenon has been disparagingly described by former State Senator Sondra Lucht as the "Jockocracy's" domination of the education hierarchy, which comes into fruition through the same subtle process as is evidenced in the present case.

The West Virginia Supreme Court of Appeals has held that a complainant is entitled to recover incidental damages for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity in a hearing before the Human Rights Commission under the Human Rights Act. Bishop Coal Co. V. Salyers, 181 W.Va.

71, 380 S.E.2d 238 (1989); State Human Rights Commission v. Pearlman, 161 W.Va. 1, 239 S.E.2d 145 (1977). As currently adjusted for inflation, the maximum amount of such an award is \$2,950.00. See generally, Morris Convalescent Nursing Home, Inc. v. West Virginia Human Rights Commission, 189 W.Va. 314, 431 S.E.2d 353 (1993).

The respondent urges that the complainant is not entitled to incidental damages because she did not prove that she had additional medical expenses or lost time as a result of the adverse employment decision. This argument is not meritorious. The complainant testified at length about changes in her behavior as a result of the illegal discriminatory failure to hire her as ninth grade boys basketball coach. Those changes included increased stress resulting in her placing undue pressure on her kids to perform thereafter and increased problems with high blood pressure, it included her crying after certain losses, which she had never done in the past. Furthermore, complainant testified that she was devastated by the respondent Board's vote to hire Mr. Hardman in her place when she was the most qualified person for the job and had been selected by the committee which interviewed the candidates. All of these facts make it clear that the complainant has sustained emotional and mental distress as a result of the discriminatory act of the respondent; and thus, complainant is entitled to the maximum award of incidental damages of \$2,950.00.

C.

CONCLUSIONS OF LAW

1. The complainant, Diana Lynn Sharps, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the Virginia Human Rights Act, WV Code §5-11-10.

2. The respondent, Gilmer County Board of Education, is an employer as defined by WV Code §5-11-1 et seq., and is subject to the provisions of the West Virginia Human Rights Act,

3. The complaint in this matter was properly and timely filed in accordance with WV Code §5-11-10.

4. The Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to WV Code §5-11-9 et seq.

5. Complainant has established a prima facie case of sex discrimination.

6. The respondent has articulated a legitimate nondiscriminatory reason for its action toward the complainant, which the complainant has established, by a preponderance of the evidence, to be pretext for unlawful sex discrimination.

7. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of \$2,950.00 for the humiliation, embarrassment, emotional and mental distress, and loss of personal dignity.

8. As a result of the unlawful discriminatory action of the respondent, complainant is entitled to an award of reasonable

attorneys fees and costs in the aggregate amount to be determined by the undersigned Administrative Law Judge upon presentation of an accounting thereof by complainant's attorney to be submitted to the undersigned and opposing counsel within ten days of the receipt of this Final Decision. Respondent's counsel has ten days from receipt of the requested attorneys fees and costs to make and file with the undersigned, objections to any items included therein.

D.

RELIEF AND ORDER

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

1. The respondent shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of receipt of the undersigned's decision as to the amount of attorneys fees and costs, the respondent shall pay to the complainant attorney fees and costs in the amount as subsequently determined.

3. Within 31 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of \$2,950.00 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

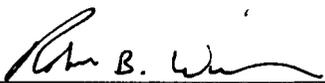
4. The respondent shall pay ten percent per annum interest on all monetary relief.

5. In the event of failure of respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Norman Lindell, Deputy Director, Room 106, 1321 Plaza East, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so ORDERED.

Entered this 20th day of March, 1996.

WV HUMAN RIGHTS COMMISSION

BY: 
ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

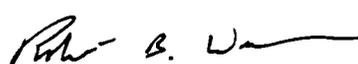
I, Robert B. Wilson, Administrative Law Judge for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing FINAL DECISION by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 20th day of March, 1996, to the following:

Diana Lynn Sharps
293 Pine St.
Glennville, WV 26351

Gilmer County Board of
Education
210 North Court St.
Glennville, WV 26351

Nancy S. Grossman, Esq.
Rt. 4, Box 362
Morgantown, WV 26505

Ricklin Brown, Esq.
PO Box 1386
Charleston, WV 25325-1386



ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE