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**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

215 PROFESSIONAL BUILDING  
1036 QUARRIER STREET  
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE: 304-348-2616

ARCH A. MOORE, JR.  
Governor

June 3, 1986

Mary Kay Buchmelter  
Assistant Attorney General  
1204 Kanawha Boulevard, E.  
Charleston, WV 25301

Fred Holroyd, Esq.  
209 W. Washington Street  
Charleston, WV 25302

RE: Gregory A. Starling V Heck's Inc.  
ER-482-85

Dear Ms. Buchmelter and Mr. Holroyd:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Gregory A. Starling V. Heck's Inc., ER-482-85.

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  
Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

GREGORY A. STARLING,

Complainant,

vs.

Docket No. ER-482-85

HECK'S INC.,

Respondent.

O R D E R

On the 7th day of May, 1986, the Commission reviewed the Findings of Fact and Conclusions of Law of Hearing Examiner John M. Richardson. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own, with the exceptions and amendments set forth below.

The Commission hereby amends the Recommended Decision of the Haring Examiner by adding to Section IV., Conclusions of Law the following:

"9. The complainant suffered substantial humiliation, embarrassment and mental anguish as a result of the acts of discrimination perpetrated against him by the respondent."

The Commission further amends the Recommended Decision in section VII., Proposed Order, paragraph 5., by deleting therefrom the figure "\$1,500.00." and substituting therefor the figure "\$5,000.00."

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, except as amended by this Order.

The respondent is hereby ORDERED to provide to the Commission proof of compliance with the Commission's Order within thirty-five (35) days of service of said Order by copies of cancelled checks, affidabit or other means calculated to provide such proof.

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 23 day of May, 1986.

Respectfully Submitted,



CHAIR/VICE-CHAIR  
WEST VIRGINIA HUMAN  
RIGHTS COMMISSION

BEFORE THE STATE OF WEST VIRGINIA  
HUMAN RIGHTS COMMISSION

RECEIVED

MAR 11 1986

W.V. HUMAN RIGHTS COMM.

GREGORY A. STARLING,

Complainant,

v.

CASE NO. ER-482-85

HECK'S, INC.,

Respondent.

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COMPLAINANT'S EXCEPTIONS TO THE RECOMMENDED  
DECISION OF THE HEARING EXAMINER

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The complainant, Gregory A. Starling, takes limited exception to the Hearing Examiner's Recommended Decision in that the Hearing Examiner did not award a sufficient amount of incidental damages for the humiliation and embarrassment suffered by complainant. In support, the complainant cites the following:

The Hearing Examiner in his Recommended Decision states that:

1. The complainant's testimony to the humiliation and embarrassment he suffered was corroborated by credible testimony and that he should be awarded compensation;

2. The complainant was subjected to racial remarks and overly scrutinized in the performance of his work in a racially charged atmosphere;

3. There was a lack of concern and an indifferent attitude on the part of the respondent toward the grievance of the complainant regarding violations of the Human Rights Act;

4. The respondent should be ashamed for its attitude in regard to complainant and that this attitude prevailed prior to, during and continuing after complainant filed his complaint.

Furthermore, the record reflects that the racial remarks and racially charged atmosphere that complainant was subjected to were most egregious;

5. When a customer asked complainant for directions, the manager told the customer "[d]on't ask that 'nigger.' He don't know where anything's at." Tr. Vol. I at 113;

6. Complainant was subjected to the racially derogatory term, "nigger" at other times. Tr. Vol. I at 14, 17, 114;

7. Complainant was told to climb on a ledge to place stock and expressed some fear about climbing. Whereupon, a manager said, "I thought all monkeys can climb." Tr. Vol. I at 43, 45, 59;

8. Complainant was made to perform degrading jobs that no white clerks were asked to do. Complainant was made to scrape the floor on his hands and knees with a putty knife and ammonia to remove gum and other debris while still being responsible for his other assigned duties. Tr. Vol. I at 64, 78, 79, 80, 81, 82;

9. A doctor's testimony substantiated that complainant suffered physical effects from the emotional trauma he was subjected to in the work place. Tr. Vol. I at 87, 88, 89, 90, 92, 93;

10. Complainant was at all times the only black employee at respondent's store which served to exacerbate the situation. Tr. Vol. I at 15, 39.

THEREFORE, the Commission should revise the Proposed Order of the Hearing Examiner to include a substantial increase in the amount of Incidental Damages awarded to complainant which would more accurately reflect the humiliation and embarrassment he has suffered.

WEST VIRGINIA HUMAN RIGHTS  
COMMISSION on behalf of  
GREGORY A. STARLING, Complainant

By counsel

CHARLES G. BROWN  
ATTORNEY GENERAL

*Mary Catherine Buchmelter*

MARY Q. BUCHMELTER  
ASSISTANT ATTORNEY GENERAL  
1204 Kanawha Boulevard, East  
Charleston, West Virginia 25301

CERTIFICATE OF SERVICE

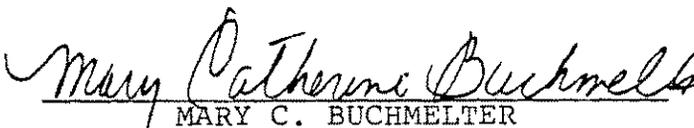
I, Mary C. Buchmelter, Assistant Attorney General for the State of West Virginia, do hereby certify that a true copy of the foregoing Complainant's Exceptions to the Recommended Decision of the Hearing Examiner was duly served on the following persons by depositing said copy in the United States mail with first-class postage prepaid, on the 7<sup>th</sup> day of March, 1986, addressed as follows:

TO: Fred F. Holroyd, Esquire  
Holroyd & Yost  
Attorneys at Law  
209 West Washington Street  
Charleston, West Virginia 25302

Nathaniel G. Jackson, Chairman  
135 South Randolph Street  
Elkins, West Virginia 26241

The original was sent this same day to:

John Richardson, Hearing Examiner  
West Virginia Human Rights Commission  
1036 Quarrier Street  
Charleston, West Virginia 25301

  
MARY C. BUCHMELTER

THE WEST VIRGINIA HUMAN RIGHTS COMMISSION  
OFFICE OF THE HEARING EXAMINER

GREGORY A. STARLING,  
Complainant,

V.

DOCKET NO. ER-482-85

HECK'S, INC.,

Respondent.

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RECOMMENDED DECISION

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I.

Preliminary Matters

On April 18, 1985, a formal complaint was filed by Gregory A. Starling, charging Heck's, Inc. with unlawful discrimination in that he was overly scrutinized in the performance of his work and subjected to racial remarks because he was black. Notice of a public hearing was issued on September 13, 1985, and the public hearing was held before John M. Richardson, Hearing Examiner on November 12 & 14, 1985, in the Mason County Courthouse Annex and in the conference room of the West Virginia Human Rights Commission. The complainant appeared in person, and by Assistant Attorney General, Mary K. Buchmelter. The respondent appeared by its Store Manager, Jim Lively, and by counsel Fred F. Holroyd. Thereafter, the parties, by counsel, filed proposed findings of fact and conclusions of law which have all 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 stated herein, they have been accepted, and to the extent that they are inconsistent 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 issues as presented. To the extent that the various witnesses' testimony is not in accord with the findings herein, it is not credited.

## II.

### Issue

Did the respondent subject Gregory A. Starling to racial remarks and overly scrutinize him in the performance of his work because of his race, in violation of WV Code 5-11-9(a).

## III.

### Findings of Fact

Based upon the evidence presented and the record in this matter, the Hearing Examiner makes the following findings of fact:

1. Complainant is a black male employed part-time by the respondent at its Point Pleasant #12 Heck's Store and has been so employed since 1979.

2. Respondent presently has 42 stores in West Virginia and employs between 2,500 and 2,600 employees.

3. The complainant is presently the only the black employee at respondent's #12 store.

4. Complainant is a "satisfactory" employee as rated by his supervisors.

5. Complainant is an "average to good worker" according to his fellow employees.

6. Complainant was scrutinized more closely than other employees.

7. Complainant was subjected to racial comments and remarks by his supervisors over the course of his employment which created an on-going and racially charged atmosphere at respondent's #12 store.

8. Respondent's investigation of complainant's grievances relating to racially oriented comments was inadequate.

9. Contrary to proffered testimony by respondent's store manager, the respondent has no written policy concerning discrimination which is available to all of its employees.

10. The complainant's attitude, work performance and well-being were adversely affected by the actions of respondent's supervisors in store #12.

#### IV.

#### Conclusions of Law

1. The West Virginia Human Rights Commission has jurisdiction of the matters alleged in the complaint.

2. The complainant has proven by a preponderance of the evidence a prima facie case.

3. As a result of the respondent's inadequate investigation into complainant's grievances containing allegations of racial harassment, the respondent allowed the creation of a racially charged work environment which existed prior to, at the time of, and, continuing after, the date of the filing of the complainant's complaint with the Human Rights Commission.

4. The respondent's one-sided investigation of the complainant's grievances combined with only general verbal recognition of Heck's unwritten policy directed to supervisory employees, was an insufficient and insincere attempt at halting the on-going harassment of complainant.

5. The respondent may not rely entirely on a labor-contract's grievance procedure, which does not function expeditiously, and thereby avoid its affirmative duty to rid the working place of racial harassment.

6. The respondent articulated a legitimate, non-discriminatory reason for overly scrutinizing complainant, by alleging that complainant was a poor work performer.

7. The complainant rebutted the respondent's legitimate, non-discriminatory reason by showing that fellow employees and the respondent's own supervisors rated and recognized the complainant as an average, satisfactory or good employee.

8. The Attorney General or members of that office, pursuant to WV Code 5-11-7 are not entitled to an award of attorney's fees for providing legal services to the West Virginia Human Rights Commission.

#### V.

#### Determination

The Complainant has proven, by a preponderance of the evidence, a prima facie case and has proven that respondent's non-discriminatory

reason for overly scrutinizing the complainant was pretextual. Therefore, the complainant is entitled to relief from the respondent.

## VI.

### Discussion

In fair employment, disparate treatment cases, the initial burden is upon the complainant to establish a prima facie case of discrimination. Shepherdstown Volunteer Fire Dept. v. The West Virginia Human Rights Commission, 309 S.E.2d 342 (WV 1983); McDonnell-Douglas Corp. v. Green, 411 U.S. 92 (1973). In order to prove a prima facie case, the complainant must by a preponderance of the evidence show: (a) that the complainant is a member of the protected class; and (b) that the complainant was subjected to verbal harassment and over scrutinization which resulted in his being discriminated against by the respondent. Thereafter, the respondent must articulate a legitimate, non-discriminatory reason for its actions. If the respondent is successful in articulating a legitimate, non-discriminatory reason for its actions, the complainant must prove that this legitimate, non-discriminatory reason offered by the respondent is in fact pretextual.

In the instant case, the complainant proved that he was a member of the protected class, i.e. that he was black. Complainant then further proved that he was treated differently (over scrutinized) from other co-workers who were similarly situated, at which time the respondent articulated the reason for overly scrutinizing the complainant was because he was a poor worker. The complainant then proved by credible witnesses that the complainant was an average or good worker and that the respondent's own supervisors rated him as a "satisfactory employee."

Throughout the hearing, the respondent relied on the handling of grievances, pursuant to its contract with the union, as an adequate response bolstered by the fact that it informed its supervisors of the company policy against discrimination. A closer look, at this situation, reveals that while the company declared it had a written policy, none was introduced into evidence and none was contained in respondent's "handbook" entered into evidence as Exhibits No. 4 and 45.

It is clear that the policy as set forth in WV Code 5-11-2, establishes an affirmative duty on the respondent to eliminate unlawful discrimination in the work place. That duty cannot be placed in the lap of another under the disguise of a labor contract grievance procedure which was proven to be ineffectual.

In the present case, the respondent failed to investigate the complainant's grievances alleging racial harassment, except to ask the alleged perpetrators if they were guilty. No effort was made to talk to non-supervisory employees nor was any effort made by senior management to look behind its store manager's actions. Such an investigation would have revealed employees who overheard racial remarks and observed the complainant's predicament.

While it is true that respondent has not discharged the complainant nor taken other severe disciplinary action against the complainant based upon the write-ups he has received, it is also true that the write-ups came as a result of over scrutiny in a racially charged atmosphere. For that reason, the write-ups contained in the complainant's personnel file should be expunged.

Inasmuch as the complainant has testified to the humiliation and embarrassment he has suffered and which was corroborated by credible

testimony, he should be awarded compensation. Needless to say, the respondent should be ashamed of its indifferent attitude towards this particular complainant and for its general lack of concern for grievances containing allegations of violations of the WV Human Rights Act.

The request for attorneys fee by Mary K. Buchmelter, Assistant Attorney General, on behalf of the Attorney General, Charlie Brown, is specifically denied. The Commission has consistently found that the Attorney General is not entitled to attorneys fees pursuant to WV Code 5-11-7 and the recent case of Allen et. al. v. State of West Virginia Human Rights Commission et. al. 324 SE2d 99 (WV 1984). The aforementioned statute and case clearly mandate that the Attorney General shall provide all legal services as required by the Commission without recompense. In the absence of clear statutory language to the contrary no fees should be awarded to the Attorney General.

## VII.

### Proposed Order

In view of the foregoing, the Hearing Examiner recommends that the Commission adopt the following order:

1. The respondent is guilty of racial discrimination at its Heck's #12 store, Point Pleasant, West Virginia.
2. The respondent shall prepare and submit to the Commission a written policy setting forth its affirmative position against all unlawful discrimination and thereafter and upon the approval by the Commission of such written policy that the respondent then submit a copy of the policy to all of its employees in the State of West Virginia.

3. The respondent shall expunge all "write-ups" from the complainant's personnel file up and until such time as respondent complies with the Commission's order.

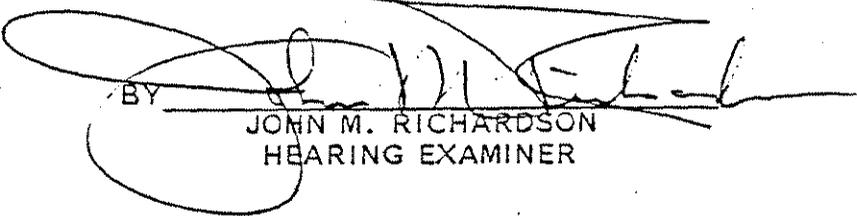
4. The respondent shall establish a written policy that provides for an independent investigation in addition to any union-contract grievance investigation, for complaints involving a violation of WV Code 5-11-1 et seq.

5. The respondent shall pay unto the complainant by way of incidental damages for embarrassment and humiliation the sum of \$1,500.00.

6. No attorney fee is awarded to the Attorney General for legal services rendered herein.

Entered this 21<sup>st</sup> day of February, 1986.

WV HUMAN RIGHTS COMMISSION

BY 

JOHN M. RICHARDSON  
HEARING EXAMINER

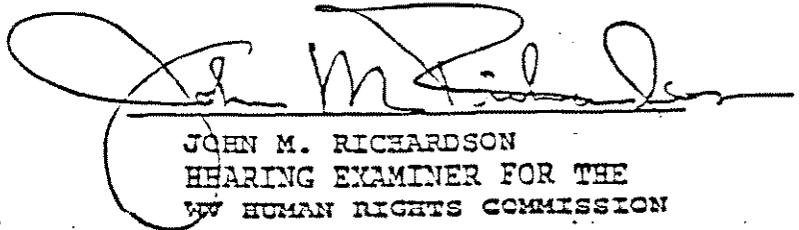
CERTIFICATE OF SERVICE

I, John M. Richardson, Hearing Examiner for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing \_\_\_\_\_

\_\_\_\_\_ RECOMMENDED DECISION \_\_\_\_\_ by depositing a true copy thereof in the U.S. Mail, Postage Prepaid, this \_\_\_\_\_ 21st \_\_\_\_\_ day of \_\_\_\_\_ February, 1986 \_\_\_\_\_, to:

Mary K. Buchmelter  
Assistant Attorney General  
1204 Kanawha Blvd.  
Charleston, WV 25301

Fred Holroyd, Esq.  
209 W. Washington St.  
Charleston, WV 25302

  
JOHN M. RICHARDSON  
HEARING EXAMINER FOR THE  
WV HUMAN RIGHTS COMMISSION