BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAMES STRAIN, JR.

Complainant,

v. Docket No. ER-167-76

VECELLIO & GROGAN, INC.

Respondent.

# FINDINGS OF FACT
# CONCLUSIONS OF LAW AND ORDER

## I
## PROCEEDINGS

This case came on for hearing in Princeton, West Virginia, on May 9, 1979, at 9:00 a.m., and was completed by 5:15 p.m. on the same day. The Complainant was represented by Carter Zerbe, an Assistant Attorney General with the West Virginia Human Rights Commission. The Respondent was represented by George Guthrie and Larry A. Winter, both of Charleston, West Virginia. There was no Human Rights Commissioner present and the Hearing Examiner, Deborah Lewis Rodecker, presided over the hearing.

The Complainant, James Strain, Jr., is a black resident of Princeton, West Virginia. The Respondent, Vecellio & Grogan, Inc., is a corporation with principal offices in Beckley, West Virginia, whose business is that of general contracting, primarily highway construction. This case arises from a complaint timely filed with the State of West Virginia Human Rights Commission on October 6, 1975, by James Strain, Jr., in which he charged the Respondent with discrimination on the

basis of race in violation of the West Virginia Human Rights Act, West Virginia Code, Chapter 5, Article 11, Section 9. The basis for Complainant's charge was that he is black, that on July 8, 1975, he applied for a position with Vecellio & Grogan and that he was not hired. In its verified answer, Respondent avers that the Complainant applied for a position with Vecellio & Grogan on July 11, 1975, and denies that Complainant was not hired because of his race or that Respondent discriminated against the Complainant for any reason.

To be considered in this case are 18 exhibits of the Complainant, 7 exhibits of the Respondent, and the testimony of 8 witnesses contained in 280 pages of transcript of the proceedings.

The West Virginia Human Rights Commission, after full consideration of the testimony of all witnesses, all exhibits presented, all motions, all argument of counsel, the recommendations of the Hearing Examiner, and exceptions thereto, makes the Findings of Fact and Conclusions of Law and Order as set forth herein.

## II
## ISSUES

Issues to be resolved in this matter were as follows:

1. Did the Respondent, Vecellio & Grogan, engage in racial discrimination in violation of West Virginia Code, 5-11-9 against the Complainant, James Strain, Jr., by not hiring him for a position in 1975 with Respondent's Mercer County Project?
2. If the Respondent is found to have engaged in illegal discrimination, what should the remedy be?

III

## SUMMARY OF TESTIMONY

Both the Complainant and the Respondent had full opportunity to call all witnesses and present all evidence, insofar as it was relevant to this complaint. Herein is a summary of the evidence.

FOR COMPLAINANT:

JAMES STRAIN, JR.

The Complainant, James Strain, Jr., testified that after serving four years in the United States Air Force as a communications specialist, he had been employed as a member of a carpentry training program for six to eight months. He testified that he then, in 1975, applied for a job with Vecellio & Grogan. He testified that at his interview, which he stated lasted for three to four minutes, he said he would be interested in any job, carpentry or otherwise, with Vecellio & Grogan. His testimony was that Carl Pierson, the project superintendent who interviewed him, said that he would get in contact with the Complainant, and the Complainant went back to the interview site for the next two months once or twice a week to inquire about a job. On one of these occasions, he stated that he found Carl Pierson at the site and Mr. Pierson stated that Respondent was not hiring. After two months of inquiring about a job with Respondent, the Complainant testified that he began to seek work elsewhere. The Complainant testified that in May of 1976, after a number of efforts with different companies, he eventually found employment with Acoustical Services, a surface and construction company, building a hospital. He testified that on that job he was

paid approximately $5.58 per hour, working eight hours a day, five days a week. He testified that when the work ceased, on completion of the hospital, he found work in January of 1977 at Pruitt Upholstering, as a refinisher of furniture. He stated that he has worked there for the past 2-1/2 years, starting out receiving $2.60 an hour, and now receiving $4.25 an hour for his services.

On cross-examination, Mr. Strain stated that prior to applying for the job at Vecellio & Grogan, he has also worked at the telephone company, and during the year preceding his application with Respondent, as a lathe operator in Virginia, with a company by the name of Electro Tec. He stated that on his application for employment with Vecellio & Grogan, he listed only the position with Electro Tec because only his most recent employment had been sought as a matter of inquiry. He testified that he met with a representative of OIC (Opportunities Industrialization Center) at the home of a friend after leaving Elector Tec. According to the Complainant, the OIC representative, Mr. Calhoun, gave the Complainant an application for a position with Vecellio & Grogan, telling him there was a chance of getting a job there because Respondent was hiring minorities for trainee positions. The Complainant stated that Mr. Calhoun went over the application for employment after Mr. Strain had filled his out, gave hints about interviewing, and was present at the Complainant's interview with Respondent.

On redirect examination, the Complainant testified that his application filed with Respondent had indicated that he had special skills and training in carpentry, and that he had applied for and been willing to accept any position, trainee or otherwise, with Respondent.

During the testimony, the Hearing Examiner withheld ruling on some objections to questions proferred by both the Complainant and the Respondent. The Hearing Examiner subsequently overruled Respondent's objections to questions pertaining to what the Complainant observed Mr. Pierson doing during the interview with the Complainant. (Tr. 29-30), and further overruled Complainant's objection to Respondent's inquiry about what Mr. Calhoun said at a meeting with Complainant. (Tr. 42-43) Finally, the Hearing Examiner overruled Complainant's objection to the question regarding the reason Mr. Strain believed he was not hired by Respondent. (Tr. 58-59)

DIANA HEDRICK

Mrs. Hedrick, a white female, testifed that her work experience prior to applying for a job with Respondent had consisted of office work such as bookkeeping, payroll accounts and ordering materials. She testified that she had had no prior experience in construction work other than plastering or dry wall. She testified that she had applied for a job with Vecellio & Grogan in 1975 and was interviewed for 20 to 30 minutes by Carl Pierson and hired as a "roller trainee". She testified that she was unmarried at that time. She testifed that it took her about one day to learn to operate the equipment.

On cross-examination, Mrs. Hedrick stated that she had applied for any employment that was open at Vecellio & Grogan. She testified that in October of 1975 she left work because of illness, though she was later recalled.

On redirect examination, Mrs.Hedrick stated that her four months' experience in dry wall construction had no relation to roller training.

TOM ALAN SLAMECKA

Mr. Slamecka, a white male, testified that he applied for and received a job with Respondent on the same day, at the beginning of August in 1975. His testimony was that his prior work experience had been working in a laboratory sifting sand, some shoveling, and some pipe laying. He stated that his work as a laborer for Respondent had involved "everything" - hauling lumber, lifting and laying steel, sweeping, cleaning, etc. His testimony was that he received approximately $5.56 per hour plus 3¢ apprentice pay. He testified about what he had observed of the general hiring practices of Respondent, stating that it was common for friends or relatives of those working on a project to be looked at first by the foreman.

On cross-examination, he testified that he was hired as part of the general work force of Vecellio & Grogan and that he had no knowledge of any special instructions Mr. Pierson might have received with respect to the training program.

During this testimony the Hearing Examiner withheld ruling on some objections by the Respondent to questions of the witness. Subsequent to the hearing the Hearing Examiner overruled the Respondent on three areas of inquiry of this witness, namely: 1) Respondent's objection to the questioning of this witness regarding his comprehension of Respondent's hiring process, (Tr. 80); 2) Respondent's objection to the admissability of the second application to Vecellio & Grogan of this witness, (Tr. 91); and 3) Respondent's objection to the entire testimony of the witness. (Tr. 91)

PAUL BURTON

Mr. Burton, a white male, testified that in November of 1975 he was hired as a mechanic's helper at Vecellio & Grogan. He testified that he approached the maintenance supervisor about the job after hearing there would be an opening from a friend. His testimony was that he was not interviewed nor did he make an application for the job. He stated that his prior work experience did not relate to mechanical work. He testified that he worked as a mechanic's helper for two months and was paid $5.88 an hour, was laid off, then re-employed as a laborer for a month, then changed to a pipe layer trainee. He stated that his salary as a laborer was less than that of a mechanic's helper, though he was paid approximately $5.80 per hour as a pipe layer trainee.

REGINALD HOWARD MILLNER

Mr. Millner, a black male, testified that he tried to get a job with Respondent in 1975. He stated that after going to the offices of Respondent on his own, with no success, he went with a group of other people who had been contacted and trained by OIC. He stated that he was briefly interviewed by Mr. Pierson, that he told Mr. Pierson that he had had previous training as a roller operator, and of his interest in that job, but also said he would take any job. He testified that he had worked on construction jobs in the summer while he was in college, putting up fences, doing everything from jackhammer to common labor, flagman, etc. His testimony was that Mr. Pierson said there were slots for minority trainees, and that he returned three times to see about any openings. His testimony was that on the last occasion, Mr. Pierson said that "he would probably only hire one more minority trainee and that it would probably be a woman." (Tr. 103-04)

On cross-examination, Mr. Millner testified that he and the Complainant had both participated in a program at a motel, which Mr. Calhoun of OIC had conducted in June of 1975, to help minorities with applications and interviews with Respondent. He testified that he understood when he went to interview for a position that the Respondent was looking not only for blacks, but for anybody who fell into a minority classification, such as females, economically disadvantaged, etc. He testified that Mr. Pierson told him at the interview that he had some slots open for minorities. ". . .and he would try to get the most qualified." (Tr. 166) His testimony was that he believed he was "given the runaround" in trying to obtain a job with Respondent.

On redirect examination, Mr. Millner affirmed that he would have accepted a job with Respondent whether or not in the training program.

During the testimony, the Hearing Examiner withheld ruling on some objections by the Complainant to questions of the witness. The Hearing Examiner thereafter overruled Complainant's objections to the Respondent's questioning of the witness about how Mr. Calhoun's programs were conducted at the motel and the purposes of those meetings. (Tr. 108-110) The Hearing Examiner subsequently overruled Complainant in his objection to inquiry of the witness regarding his opinion of the kind of consideration his friends received from Respondent. (Tr. 118)

FREDERICK LOUIS MILLNER

Mr. Millner, a black male, testified that he had worked for three to four months at Vecellio & Grogan in 1975, that he had been hired after going for an interview with the OIC group. His testimony was that he was interested in any job, particularly in one working with

heavy equipment, and he was hired as a carpentry trainee. Due to illness, he missed a number of days of work and lost his job. While employed, he testified that his rate of pay was about $5.90 per hour. He testified about a prior job as Youth Director for Mercer County Economic Opportunity Corporation and of his knowledge of population statistics as a result of that work.

On cross-examination, the witness testified that he had tried unsuccessfully to get a job with Respondent prior to meeting Mr. Calhoun with OIC, at which point he applied again because of the existence of the trainee program for minorities. He testified about the illness he contracted while working for the Respondent, and that he had excuses from his physician when he missed work. He testified that he did not know how many blacks had been hired in Respondent's training program.

During the testimony the Hearing Examiner withheld ruling on some objections by the Respondent to questions of the witness. The Hearing Examiner later overrule the objections of the Respondent to the statement of the witness that Respondent hired a couple of people without realizing they were black and to the line of questioning about how many blacks were employed by Respondent. (Tr. 129-30) The Hearing Examiner also overruled Respondent's objections to the testimony of the witness about the statistical makeup of Mercer County, (Tr. 132), as well as Respondent's objections to Complainant's exhibit consisting of names, positions, and dates of hire of employees of Vecellio & Grogan. (Tr. 167)

FOR RESPONDENT:

BARRY K. STANLEY

Mr. Stanley, a thirty-seven year old Personnel Manager with Vecellio & Grogan, testified that among other things, he has responsibility for the Affirmative Action Programs of Respondent. He testified about the procedures of Respondent in obtaining construction work, in assigning manpower to a project, what is involved in a highway construction project. He testified that during a typical construction project, the need for employees varies, and he explained the different classifications of workers and the fact that at different times of the year the need for workers varies also. His testimony was that the project superintendent makes the decisions about whether or not a person is going to be hired on a particular project. He testified that in hiring someone for a trainee position, which pays less than that of a skilled craftsman, a prospective trainee's outlook on the work is considered, as well as his dependability and finally, any previous experience. He testified that the training program which Respondent has been involved with since 1972 was developed pursuant to a provision in Respondent's highway contracts for the training of minorities, and that, generally 1000 hours of training are specified by the program before a trainee is upgraded. He testified that when Respondent got the contract for the Mercer County project, (APD-200(29), C-Z), in March of 1975, the West Virginia Department of Highways approved the training program proposed by the Respondent for the particular project, that eleven trainees were hired during the course of the project, six of whom were blacks, three of whom were women, two of whom were white males. He testified that 56 people in all were hired for new positions at

the project in question, six of whom are black males, six of whom were women. He testified that no other minorities were hired as new hirees. His testimony was that during peek construction of the project, in July of 1975, there were 94 employees working, seven of whom were black, two of whom were women.

On cross-examination, Mr. Stanley stated that one of the purposes of the training program provisions in Respondent's contracts is to facilitate employment of minorities, and explained that in 1975 Respondent also had implemented and was operating under an affirmative action program required by the West Virginia Department of Highways. He testified about the requirements of the program, about the publicity Respondent disseminated with respect to equal employment opportunities, and stated that Mr. Pierson, the superintendent of the Mercer County project, was made aware on an ongoing basis of his responsibilities under the program. He testified about the minimum qualifications required for different classifications of workers, explaining those that require some previous experience and those that do not. He testified that a total of approximately 175 people had worked on the Mercer County project. Other than those blacks in the training program, he stated four of the 175 people were black. He testified that he did not consider previous experience in special training schools as adequate in itself to qualify a prospective employee for a job in the general labor force, as opposed to the training program.

On redirect examination, the witness testified that Respondent was now assisting, free of charge, a black man in the area who is going into the construction business.

CARL ALAN PIERSON

Mr. Pierson, a thirty-five year old white former project superintendent for Respondent, testified about the responsibilities of the position, and stated that he and Mr. Stanley had reviewed the training program requirements prior to beginning work on the Mercer County project. He testified that around the beginning of June, 1975, Respondent was ready to hire for the project. He explained various phases of construction projects and how these related to the need for different types of skills in employees during the course of the project. His testimony was that all 10 trainee positions could not be filled at the same time due to the need at different times in the project for different skills. He stated that he "conducted all the interviews with the trainee people that applied in the training program as well as, you know we were working with OIC." (Tr. 244) He testified that he was responsible for hiring and firing on the project and that he looked to the attitude, dependability, desire and need for employment (i.e., marital status) in determining who to hire. His testimony was that he recalled the Complainant applying in 1975 for the training program and that he interviewed the Complainant and seriously considered his application, checking with his prior employer and receiving favorable information from him about the Complainant. His testimony was that the Complainant was one of three or four equally qualified people that he considered for the position of carpentry trainee and that he hired Mr. Millner for the job because he was married and had dependents.

On cross-examination, the witness stated that he made no inquiries as to whether the Complainant had dependents and that his application

did not show that he had any. He stated that he considered the Complainant for a trainee position, and not for any position in the general labor force, because he came with the OIC group. Finally, he testified at length about the application process and the criteria he used in considering prospective employees for hire.

## IV
## FINDINGS OF FACT

1. The Complainant, James Strain, Jr., is a lifelong black resident of Princeton, West Virginia, who applied for a job with Respondent on July 11, 1975.

2. Respondent, Vecellio & Grogan, is a West Virginia corporation engaged in general contracting and was awarded a contract for a construction project in 1975 in Mercer County involving the building of a four lane section of highway known as Project APD-200 (29), C-Z.

3. The project obligated Respondent through contract with the West Virginia Department of Highways to train ten people to become full journeymen, and the project got underway in May of 1975.

4. Though Complainant applied for "any job" with Respondent, he was only considered for a trainee position because of his race. The project stated that the Complainant was not considered for any job outside the trainee program because he came to interview with a group from OIC. (Tr. 254) This witness gave the clear impression that anyone interviewing for a job on this project who was referred by OIC was automatically relegated to consideration for a closed number of trainee positions, regardless of experience. (In this regard, it should be noted that in Respondent's policies,

Training Program to Comply with Training, Special Provisions of Federal Aid Contracts, General Provisions for Training. Part of Commission's Exhibit 7 and Respondent's Exhibit 2, the statement is made on page 3 that "Trainees will be selected from applicants who are classified minority, disadvantaged, and Vietnam Veterans of both minority and other groups, including trainees from existing programs.") It is unclear whether those in management supervising Mr. Pierson at Respondent company believed that this sentence meant that any black applicant was automatically to be considered only as a trainee applicant and thus communicated this to Mr. Pierson, or whether this was an understanding only acquired by Mr. Pierson. It is evident, in any event, that that is what happened, and it is evident that this was a twisted concept of what was intended by the quoted language and the intent of the training programs in the construction industry.

5. The Complainant met the minimum qualifications for any and all trainee positions Respondent was obliged to fill, and he was only considered for one of the trainee positions.

6. The testimony of the project superintendent for Respondent, the man actually responsible for hiring on the project, was that "this was the first project that had a great amount of training in it." (Tr. 236) His testimony concerning the criteria he employed when making a decision about hiring was somewhat confusing (Tr. 257-262) and inconsistent, particularly with regard to marital status. While he stated that married individuals with dependents were preferred over single people, (Tr. 246) he hired a single

woman as a trainee with no construction experience (and no dependents) and did not hire a man with dependents who had some training. Further, he did not know the Complainant had a dependent, a son, because according to his testimony the Complainant's application for employment did not show that he had dependents. (Tr. 253). In fact, on the Complainant's application, the number "2" is clearly written in response to "NO. DEPENDENTS INCLUDING YOURSELF:", indicating that he had a dependent. (Commission Exhibit No. 7 and Respondent Exhibit No 2)

7. While Respondent did hire some black persons as trainees on this project, Complainant was not hired, and subsequently, other white persons with similar or less qualifications were hired as trainees for the project and paid at different rates, approximately $5.75 per hour.

8. Different and subjective criteria was employed by the project superintendent, who had responsibility for hiring on this project, in judging white and black applicants. In reviewing the applications (Commission Exhibits 7, 9, and 10) the project superintendent did not follow the guidelines he maintained that he looked to. For example, the application of Hicks, who applied and was hired (after the Complainant applied for a job) and who was white, gives no information about why she left her prior employments (each of which lasted about six months) other than "job running out" and "moved". The Complainant's prior employer, on the other hand, stated that he was "dependable", just the characteristic the witness stated he sought in applicants. (The Complainant's prior

employer also stated that he would rehire him and that his performance and quality was above average.) The Complainant had worked for this employer for a year and the reason given for his leaving was "financial problems, resigned family reasons". In fact, based on all the above, it is difficult not to conclude that the project superintendent paid little or no attention to this application.

9. In the Commission's Exhibit No. 13, Special Provisions for On the Job Training, which establishes Respondent's obligation to train 10 people on the project, at page 2, it states, "This training commitment is not intended, and shall not be used, to discriminate against any applicant for training, whether a member of a minority group or not." The overall inpression of this witness was of a man who, despite heavy and no doubt time consuming responsibilities for hiring trainees on this 1975 project, was unable, for whatever reason, to fully understand and carry out the concept and obligations of equal employment opportunity and who was hiring minorities on a quota basis.

10. The treatment of Diana Hicks Hedrick, Tom Slamecka, and Paul Burton, who were all white and all hired by Respondent after expending little effort despite little or no experience, (and in at least one case with no interview) contrasted sharply with the treatment of Reginald Millner and the Complainant, both of whom were black, had experience and/or training in construction work, and were not hired despite repeatedly "checking back" with Respondent after their OIC arrange interview.

11. The testimony of Frederick Millner, a black man who was hired as a trainee, was that he was hired by Respondent after going for an interview with a group from OIC, whereas his previous efforts at securing a job with Respondent had been unsuccessful. This testimony, considered in light of Mr. Pierson's statement that "we were working with OIC" leaves the impression not only that those black persons who applied for jobs on this project, trainees or otherwise, were only considered for the training program but in addition, were only considered at all if they came under the aegis of OIC.

12. Mercer County has a Black labor force of seven and three-hundredths percent (7.03%). It has a Black unemployment rate of six and eight-tenths percent (6.8%), compared to a rate of five and two-tenths percent (5.2%) for whites. As of November of 1976, outside of three Black trainees, only one Black had been employed on the Project and he had apparently worked for the company before. The Black population in the county is concentrated in the Bluefield-Princeton area where the Project was located. With the estimated Black population of Bluefield at thrity percent (30%) and that of Princeton at twelve and one-half percent (12.5%), the fact that only three and one-half percent (3.5%) of the non-trainee positions were filled by Blacks is evidence of a striking disparity.

13. Those who were employed on this project worked approximately 10 hours a day, five days a week.

14. After several months of seeking employment, in May of 1976, Complainant found a construction job which paid him $5.58 per hour.

## V
## LEGAL DISCUSSION

Federal law under Title VII is by no means controlling in all cases under the West Virginia Human Rights Act. See, e.g., West Virginia Human Rights Commission v. United Transportation Union, Local 6551, 280 S.E.2d 653 (W.Va. 1981). Nevertheless, the West Virginia Supreme Court of Appeals has adopted the framework of McDonnell-Douglas Corp., v. Green, 411 U.S. 792 (1973) and its progeny for the procedure for the evaluation of evidence presented in employment discrimination cases wherein there is alleged disparate treatment of a member of a protected class. Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission, et al, 309 S.E.2d 342 (1983). Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Under the Shepherdstown analysis, the burden is upon the Complainant to prove by a preponderance of the evidence a prima facie case of discrimination which burden may be carried by showing (1) that the Complainant belongs to a protected group under the statute; (2) that he applied and was qualified for a position or positions for which there was an opening; (3) that he was rejected despite his qualifications; and (4) that after the rejection, the Respondent continued to accept the applications of similarly qualified persons and in fact hired persons similarly qualified. If the Complainant is successful in creating this rebuttable presumption of discrimination, the burden then shifts to the Respondent to offer some legitimate and non-discriminatory reason for the rejection. Should the Respondent succeed in rebutting the presumption of discrimination, then the Complainant has the opportunity to

prove by a preponderance of the evidence that the reasons offered by the Respondent were merely a pretext for the unlawful discrimination.

It should be noted that the burden of persuasion never shifts from the Complainant to the Respondent in these actions. "The defendant need not persuade the court that it was actually motivated by the proffered reasons." Burdine, 450 U.S. at 254. "It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Id. 450 U.S. at 254-55. If the Respondent meets this rebuttal burden, ut is incumbent upon the Commission to make the ultimate determination whether there was intentional discrimination on the part of the Respondent.

The Complainant, along with eight other Black applicants, was referred to Carl Pierson by a representative of an organization utilized by Respondent to find minority applicants for its training program; and that the very purpose of the training program was to enhance the employment opportunities of minorities. Indeed, it was because of the inability of Balcks to penetrate the virtually all-white workforce in the construction trades that such training programs became a requirement on all federally funded highway construction projects. It is also uncontroverted that approximately one month after they had applied, one of these Black applicants, Frederick Millner, was hired as a carpenter trainee; and that ultimately, over a two-year period, six Blacks were employed in the training program. Nevertheless, six Caucasians were also employed, and if Respondent preferred any of these applicants to Strain because of their race or sex, then it has engaged in an unlawful discriminatory practice.

In actual fact, there is no need to look beyond Diana Hicks who, along with Jerry Hagy, was the first one hired after the Complainant had submitted his application to detect the discrimination in Respondent's failure to hire the Complainant. Ms. Hicks, single and with no dependents, was hired July 14, 1975, the same day she applied and three days after the Complainant had submitted his application. Her previous experience consisted almost entirely of office work, and the work she had performed for a few months outside the office as a plasterer was unrelated to the trainee position into which she was hired. She had no military background of any kind. There was nothing on her application to indicate that her previous employers had been contacted; and since she was hired the same day she applied, they undoubtedly had not been. Why then was she preferred to Strain? He had applied first. He was the one who had been rated as "dependable" and "above average" in the quality of his work by his previous employer. Strain was obviously a superior candidate under the Respondent's own subjective criteria. Indeed, Pierson freely acknowledged that he knew nothing about Hicks that made her a superior candidate to Strain. Yet, not only was Strain not hired, he wasn't even considered for the job. According to Pierson's own admission, he wanted to fill that position with a woman. As a matter of fact, all three roller positions in Respondent's training program were filled by women--the only position into which women were hired.

It is freely acknowledged that the purpose of such training programs is to enhance the meployment opportunities of women as well as Blacks, and that Respondent may legitimately prefer women and Blacks

for such programs. It is nevertheless imperative that within such programs Respondent evaluate minority and female candidates on the basis of their qualifications and not on the basis of their sex or race. See Bakke vs. Regents of the University of California [17 EPD ¶8402 98 S. Ct. 2733. Thus, in a training program that is designed to open jobs in the construction industry to minorities, especially Blacks, the failure to consider Strain for the position of roller trainee because he was not a woman discriminated against Strain as a Black male. It was even a violation of Respondent's own contractual obligations. "The training commitment," the contract reads, "is not intended and shall not be used to discriminate against any applicant for training whether a member of a minority group or not." (Comm. Ex. 13) It is a sad day indeed, and a perversion of the intent and underlying purpose of the West Virginia Human Rights Act, if two traditionally deprived groups, Blacks and women, are placed in competition with each other on the basis of their race or sex and not on the basis of their relative merit and qualifications for the job in question.

James Strain has established a prima facie case of race discrimination. Respondent failed to rebut the prima facie case which the Complainant has established. Shepherdstown reiterates that when a prima facie case has been established, the burden shifts to the Respondent to articulate a "legitimate, non-discriminatory reason for the employee's rejection." Respondent argues that the position Complainant sought to fill was filled by another black man. It can be argued as proferred by Respondent that the elements of a prima facie case of race discrimination may not be established when the party receiving the

position sought is of the same race as the party alleging discrimination. Conty v. Olivarey, 452 F. Supp 762 However, Respondent has completely missed the point. The Complainant was applying for "any job" and in any event was qualified for any and all trainee positions. The fact that he may have been mentally pigeonholed as qualified for only one trainee position by the project superintendent and therefore in some sort of contest for that one position is not sufficient in any way to alleviate the Respondent of responsibility for discrimination. This fact must be remembered in light of Respondent's contention that Respondent has been placed in an impossible position by this case because the Complainant was rejected for a carpenter trainee position in favor of another black man. The simple fact is that if that position was the only one for which the Complainant was considered, that is because Respondent made the choice to do so.

Even the preference of Millner over Strain for the carpenter's position appears strange in light of Respondent's contention that dependability and desire for a career in the construction industry were primary employment considerations. A glance at Millner's application discloses that he had never spent more than a few months on any construction job he ever had. In fact, he held his last construction job for only a few weeks and his application is devoid of any indication why he had left. If Pierson had been looking for someone who would likely not stick around long then Millner would have been an ideal candidate. Note, moreover, that Pierson claimed that one of the reasons he preferred Millner to Strain was because Millner had dependents and Strain did not. Pierson admitted he didn't ask Strain if he had dependents

but observed that none were shown on his application. Strain's application shows two dependents. Finally, in light of the total subjectiveness of the hiring process, one can't help but wonder if Millner's light skin did not make him a more "desirable" candidate for the position than Strain.

Respondent's discriminatory treatment of the Complainant is not confined within the boundaries of the training program. The Complainant, as reflected in his application and his testimony at the hearing, was interested in a job. Like the other Black applicants with whom he applied, he was not simply applying for the training program, but for any position for which he was qualified. Respondent concedes, moreover, that during the course of the project the minority applicants were candidates for other positions besides training positions, but because of union obligations, or because they were less qualified than the ones who were hired, they were not employed. Since there were no union obligations in respect to new hires, presumably the Respondent's new employees were more "qualified" than the unsuccessful minority applicants. (TR 256, 257) The facts do not bear out such an assessment. From an objective standpoint, the applications of many of the minority applicants reflect qualifications and experience superior to a number of the whites who were subsequently hired. In respect to the Complainant, it must be noted, that in July, August, October, and November of 1975, and January of 1976, Caucasians who had applied after the Complainant had submitted his application were hired into positions which he was qualified to fill. For instance, in August of 1875, Tom Slamecka was hired as a laborer, and in November of that same year Paul Burton

was hired as a mechanic's helper. Their testimony and the qualifications reflected on their applications demonstrate that they were no more objectively qualified for these positions than Strain. Since Pierson failed to interview either one, he obviously did not assess their attitude and dependability. If some subordinate made such an assessment, it was purely visceral since both were hired the day they applied. It is also noteworthy to observe that another Caucasian, Robert Guard, who did not even designate a position for which he was applying, was hired as a mechanic's helper on October 2, 1975, the day after he had filed his application; that a white male, Samuel Goines, who also did not indicate for what job he was applying, and with no previous employment experience reflected on the application, was hired as a janitor on September 13, 1975; that Prema McBrayer, a white female, was hired as a flag person on the day she applied, only seven days after the Complainant had submitted his application. It is deemed significant to point out that three of the above hires were single, none had more than two dependents and none were veterans.

Under the circumstances, it is ludicrous to conclude that Pierson could have compared the qualifications of the minority applicants to these and the other hires and made a judgment as to the superior qualifications of the latter. Recall that Strain and eight other Blacks were given an assembly-line interview at the beginning of the Project. Pierson made no notation on the applications regarding the impressions he had formed of these candidates during the interview. Obviously he couldn't have remembered these Black applicants, let alone have evaluated them, when positions subsequently opened up months later. Pierson

certainly couldn't remember anything about these individuals at the hearing. The conclusion is inescapable that the minority applicants were never really considered for positions outside the training program. In short, Pierson was interested in the Black applicants only to the extent that their participation in the training program was necessary to fulfill the requirements of minority recruitment imposed on Respondent by the Department of Highways.

This conclusion can just as readily be drawn from an examination of Pierson's attitude and behavior towards these Black applicants. Despite repeated returns to the hiring office after they had filed their applications, Pierson never once gave them any encouragement, or informed them about the possibility of non-training positions becoming available, or instructed them to keep checking back as he had told Slamecka to do. He merely told Strain he wasn't hiring, and put off Reginald Millner by informing him that he was only hiring one more minority trainee who would probably be a woman. In the light of the above, it is not surprising that the Blacks eventually developed the consensus that they were "getting the runaround." Pierson's attitude is even more readily apparent in his statement to Frederick Millner, when the latter had sought reemployment after his layoff, that he (Pierson) had "all the minorities he <u>needed</u>." Pierson's behavior might not have been so significant if he had not been in complete and total charge of hiring as well as the Project's affirmative action officer.

It must also be noted that prior to the inauguration of the training program at least two of the Black applicants had made repeated trips to the hiring office to inquire about work. Not only were they not told

about the training program, but they were told the company was not hiring and they were unable to obtain applications. However, Commission Exhibit 16 reveals that between April 30, 1975, and June 30, 1975, ten individuals were employed in positions ranging from laborers, rodmen, and janitors to crane operators and carpenters. Pierson was simply not interested in employing Blacks in non-trainee positions.

Perhaps the most compelling evidence of discrimination has not even been touched upon. The absence of Blacks in non-trainee positions lays an irrefutable foundation of discrimination underlying and supporting the Complainant's individual charge. During the entire two-year period the project was in existence, out of fifty-six (56) new employees, only two Blacks were hired into non-trainee positions. One of these Blacks was not hired until April of 1976, almost a year after the Complainant had applied, and he was hired into the lowly position of "parts runner." The other Black who was hired as a carpenter in August of 1975 could pass as a white man: light skin, "almost blond hair and blue eyes." (TR 130) Indeed, it appears that at the time he was hired, the company was not even aware that he was Black. Nearly as significant is the fact that as of November of 1976, outside of three Black trainees, only one Black had been employed on the Project and he had apparently worked for the company before. These figures would perhaps not be so significant if the Project had not been located in an area that contained the highest concentration of Blacks in the State. Mercer County has a Black labor force of seven and three-hundrediths percent (7.03%). It has a Black unemployment rate of six and eight-tenths percent (6.8%), compared to a rate of five and two-tenths percent (5.2%) for whites.

The discrepancy between Blacks hired and the number of Blacks in the available labor pool is actually greater than these figures would seem to indicate. For the Black population in the county is concentrated in the Bluefield-Princeton area where the Project was located. Indeed, the hiring office was located on the outskirts of Bluefield. Thus, with the estimated Black population of Bluefield at thirty percent (30%) and that of Princeton at twelve and one-half percent (12.5%), the fact that only three and one-half percent (3.5%) of the non-trainee positions went to Blacks is evidence of a striking disparity. The importance of such statistics in proving discrimination had been established time and time again by a variety of courts in a variety of factual situations. McBride vs. Delta Air Lines, Inc., 551 F. 2d 113 (6th Cir. 1977; Corey vs. Greyhound Lines, Inc., 380 F. Supp. 467 (C.C. La.I 1972; International Brotherhood of Teamsters vs. U.S., 975 S. Ct. 1843 (1977); Parham vs. Southwestern Bell Telephone Company, 433 F. 2d 421 (8th Cir. 1970); Johnson vs. University of Pittsburgh, 5 FEP Cas. 1182 (W.D. Pa. 1973); McDonnell vs. Green, supra. Indeed Parham went so far as to hold, as a matter of law that, "statistics which revealed an extraordinarily small number of Black employees, except for the most part as menial laborers established a violation of Title VII." 433 F. 2d 426. The relationship of a pattern of discrimination to an indivudual charge was recently reiterated in a Six Circuit decision. ". . . a pervasive pattern of discriminatory effect may support an inference of intentional discrimination underlying the individual charge of discriminatory firing." McBride vs. Delta Air Lines, Inc., supra; citing, Village of Arlington Heights vs. Metropolitan Housing Development Corp., _____ U.S. _____ 50 L. Ed. 2d 450.

Respondent seeks to undercut the above evidence by pointing to the fact that six Blacks were hired into the training program during the course of the project. The short answer to this argument is that just because some Blacks were not the victims of discrimination does not relieve Respondent of the responsibility for the ones who were. Even if Respondent could have pointed to an equitable distribution of Blacks in its workforce, which it could not, the conclusion of discrimination would not be dispelled. "A racially balanced workforce cannot immunize an employer from liability for specific acts of discrimination." Fourco Construction Corp. vs. Waters, No. 77-369 (1978) LRR July 3, 1978. "It is not enough that some employment opportunities be available, there must be equal employment opportunities." Senter vs. General Motors Corporation, 532 F. 2d 511, 529 (6th Cir. 1976).

Furthermore, it must be stressed once again that the program was a requirement of both federal and State highway administrations pursuant to federal law and regulations, and the very reason for its existence was to provide employment opportunities in the construction industry for members of minority groups. If Respondent hadn't had a representative number of Blacks in its program, it faced the possibility of losing future highway contracts. Thus, in evaluating the Respondent's intent, the number of Blacks it hired outside the program is clearly the most reliable and probative evidence.

Even if evidence of intentional discrimination was absent from this case, the Complainant's charge would still be sustained on the basis of the fact that Respondent's hiring practices operated to the distinct disadvantage of Blacks including Strain. The principle that neutral

practices that operate as "built-in headwinds" to Black employment opportunities are unlawful was first recognized by the Supreme Court in Griggs vs. Duke Power Co., [3 FEP 175, 401 U.S. 424 (1971). In that case, the court invalidated job requirements of a high school education and a passing score on two intelligence tests on the basis that they excluded a higher precentage of Blacks than whites, and because the use of such requirements could not be justified by "business necessity". The court summarily dismissed Respondent's contention that it had no intention to discriminate by noting that, "congress directed the thrust of the Act to the consequences of employment practices not simply the motivation." 3 FEP at 178. (Emphasis in original)

Since Griggs, innumerable courts have followed the Supreme Court's lead and have found a variety of neutral employment practices discriminatory. See e.g. Bridges vs. City of North Chicago 402 F. Supp. 418 (N.D. Ill. 1975); Green vs. Missouri Pacific Railroad, 523 F. 2d 1290 (8th Cir. 1975); City of Schenectady vs. State Division of Human Rights 10 EPD ¶ 10,449 (N.Y. Ct. App. 1975); Shield Club vs. City of Cleveland 13 FEP 533 (N.D. Ohio 1974); Boston Chapter NAACP, Inc. vs. Beecher 504 F. 2d 1017 (1st Cir. 1974); Penn vs. Stumpf 308 F. Supp. 1238 (N.D. Cal 1970).

Several aspects of Respondent's hiring procedure adversely affected Black job opportunities on the Project. The method of communicating information about job openings was one. It is undisputed that job openings were not advertised. Those already employed on the Project would spread the word. Naturally, as Tom Slamecka verified, friends or relatives of those already hired had an inside tract to employment.

"The one who was there first gets the other one the job. That's just common practice." (TR 81) Or as Stanley put it, most applicants "just walk into the job." (TR 208) Of course it is more important for a prospective employee to have his or her connections with someone in a higher job classification. (TR 81)

Dispersing information about job openings through the "good-old-boy" network has long been a deterrent to Black employment in the construction industry and elsewhere. When, as is the case herein, the existing work force is already predominately white, Blacks are unlikely to hear about job openings. "Existing white employees tend to recommend their own relatives, friends, and neighbors, who would likely be of the same race." Parham! vs. Southwestern Bell Tel. Co., 443 F 2d 421, 427. (8th Cir 1970) Innumerable courts have found such practices discriminatory. See e.g. Rowe vs. General Motors Corp., 457 F 2d 348 (5th Cir. 1972), EEOC vs. Detroit Edison Co., 515 F. 2d 301 (6th Cir. 1975), Franks vs. Bowman Transportation Co., 495 F. 2d 398, 419-20. (5th Cir. 1974), Barnett vs. W.T. Grant Co., 518 F. 2d 543, 549, (4th Cir. 1975).

It is of little consequence that Strain acknowledged he knew two of Respondent's Black employees. Millner only worked for a few months and he testified that he had little contact with Strain anyway. The Record does not disclose how well Strain knew Lee, but Lee was not employed until almost a year after Strain had applied.

The discriminatory impact of Respondent's hiring procedure was not confined to word-of-mouth recruiting. Hiring decisions were based totally and completely on the subjective judgment of the Project's white

superintendent. And, it appears that this judgment was based on a modicum of knowledge about the prospective employee. For instance, a comparison of application dates and dates of hire discloses that at least twenty-five new hires were employed on the date they applied and at least four were employed before the date they filled out their applications. Indeed, the application process was a farce. A substantial number were only partially filled out absent such vital information as the job applied for and reasons for leaving previous employers. All were devoid of interview comments and, except for Strain's references from previous employers. The overwhelmingly weight of the evidence points to the superficiality and subjectiveness of Respondent's hiring process. When backed up by statistical data, the courts that have found such practices discriminatory are legion. Young vs. Edgcomb Steel Co., 363 F. Supp. 961, (M. D. H. C. 1973), Baxter vs. Savannah Sugar Refining Corp., 495 F. 2d 437, (15th Cir. 1974), cert. den., 419 U.S. 1033 (1974); Rowe vs. General Motors Corp., 457 F. 2d 348 (5th Cir. 1974); United States vs. Chesapeake and Ohio Railway Co., 471 F. 2d 582 (4th Cir. 1972), cert. denied, 411 U.S. 939 (1973). EEOC vs. Detroit Edison, supra; Brown vs. Gaston County Dyeing Machine Co., 457 F. 2d 1377 (4th Cir. 1972).

A case out of the Northern District of Illinois, Bridges vs. City of North Chicago, 10 EPD¶ 10,372 (N.D. Ill. 1975), invites comparison. In that case two Blacks, who were rejected for employment with the North Chicago Police Department, brought discrimination charges against that body. The court observed that despite the existence of a large number of Blacks in the labor force only two out of twenty-five police

officers were Black. It further noted that hiring decisions were made by a board of Fire and Police Commissioners utilizing the following procedure: (a) Filing of a completed application; (b) An agility test; (c) Written psychological examination; (d) Oral psychological examination; (e) Interview with the Board of Fire and Police Commissioners; (f) Medical examinations; and (g) Notification and posting of eligibility. Despite the existence of these set procedures and the absence of any evidence of intent to discriminate, the court nevertheless concluded that these "vague and subjective" standards had the effect of disqualifying a disproportionate number of minority applicants and were thus discriminatory.

The Court's observation in Rowe, supra, is also well worth repeating:

> "Where a considerable portion of the evaluation depends upon judgment of a vague and subjective nature as here, the entire procedure is permeated with susceptibility to bias, making it a ready mechanism for discrimination against Blacks." 457 F. 2d at 359

The hiring procedure operated to the detriment of Strain and the other Blacks in another way as well. The above procedure puts a premium on being out at the job site when the job becomes available. Vacancies occur and the person that is "Johnny on the spot" gets the job. (TR 208, 209, 228) Consequently, unless an individual has an in-house contact, he or she will have to make repeated trips to the job site to ensure being there at the opportune time. It requires little insight to realize that a hiring process which requires Black applicants to repeatedly return to a hiring office to importune a white hiring official about obtaining a job is a sure-fire method of discouraging and

frustrating Black applicants. In truth, this is exactly what happened in this case. After repeated trips to the hiring office, Strain and the others finally became discouraged and quit going out. Thus, even if they would have been considered had they presented themselves at the propitious time, this practice nevertheless operated as a deterrent to their employemnt chances.

In order to absolve itself from responsibility for the adverse effects of the above practices on minority applicants, Respondent must show that the practices have a "manifest relationship to the employment in question." Griggs, supra, 401 U.S. at 432. It has not done so.

It must be understood that Respondent's affirmative action efforts are not being subjected to attack. The fact that Blacks have been employed in Respondent's workforce over the years, albeit, virtually all in the lower job categories, points to at least a token effort to recruit and employ Blacks. Nevertheless, Respondent had the obligation to consider Strain as something other than just a minority body whose employment may or may not have been necessary to fulfill its affirmative action obligatons. And, within the training program itself, Strain had the right to be evaluated on the basis of his qualifications. Nothing more, nothing less. Finally, when the hiring process utilized by Respondent at its local construction projects, either intentionally or inadvertently discriminates against Blacks, such practices must be condemned, revised, or eliminated. As the Court points out in Rowe Supra,

> "Although we hold that GM has discriminated, we wish to make clear that this is not the case, typical of so many, in

which an employer has had a deliberate purpose to maintain or continue practices which discriminate in face under a facade of apparent neutrality and employment good will. Quite the opposite. . But the problem is not whether the employer has willingly--yea even enthusiastically--taken steps to eliminate. . . pre-Act segregation practices. Rather the question is whether on this record--and despite efforts toward conscientious fulfillment--the employer still has practices which violate the Act. In this sense, the question is whether the employer has done enough." 4 FEP 445, 449

## VI
## CONCLUSIONS OF LAW

In accordance with the foregoing findings of fact, issues presented and taking into consideration the arguments of counsel, the following conclusions of law are reached.

1. At all pertinent times, the Complainant was a citizen and resident of West Virginia within the meaning of West Virginia Code, Chapter 5, Article 11, Section 2.
2. At all pertinent times, the Respondent was an employer within the meaning of West Virginia Code, Chapter 5, Article 11, Section 3(d).
3. On October 6, 1975, the Complainant filed a verified complaint alleging that the Respondent had engaged in one or more unlawful discriminatory practices within the meaning of Chapter 5, Article 11, of the West Virginia Code.
4. Said Complaint was timely filed within 90 days of the alleged act of discrimination. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to 8, 9 and 10, Article 11, Chapter 5 of the Code of West Virginia.

5. Complainant made an initial prima facie showing that the Respondent discriminated against him on the basis of race.

6. The Respondent has failed to meet its rebuttal burden of articulating a legitimate non-discriminatory reason for its rejection of Complainant.

7. Complainant concurrently sustained its burden of proof to establish Respondent's hiring process as having disparate impact on blacks.

8. Evidence of a statistical nature as well as of a non statistical nature, namely the population workforce characteristics, the existence of specific exclusionary practices and Respondent's use of highly subjective practices in its selection process support this conclusion.

9. Respondent discriminated against Complainant within the meaning of West Virginia Code, Chapter 5, Article 11, Sections 9(a) and (d)(1) when he applied for a job in July of 1975 with Respondent's Mercer County project, and Complainant is entitled under the provisions of West Virginia Code, Chapter 5, Article 11, Section 10, to monetary relief in an effort to make him whole.

## VII
## ORDER

Therefore, pursuant to the above Findings of Fact and Conclusions of Law by the West Virginia Human Rights Commission, it is hereby ordered as follows:

1. The Respondent, Vecellio & Grogan and all persons in active concert or participation with them are hereby permanently ordered

to immediately CEASE AND DESIST from engaging in any conduct which denies full equal employment opportunity or otherwise discriminates against any individual on the basis of race with respect to hiring, tenure and terms and conditions of employment.

2. It is further ordered that Respondent will develop and disseminate a clear and direct policy to supervisory members and other persons within Respondent workforce forbidding discrimination against any individual with respect to hiring and other terms and conditions of employment as provided in Chapter 5, Article 11 of the West Virginia Code.

3. Respondent shall apply objective criteria on a consistent basis in evaluating all applications for position, trainee or othersise.

4. Because any amount of backpay which might possibly be awarded would be speculative, damages are awarded to the Complainant as follows: Within thirty (30) days of the effective date of this order, Respondent shall pay to Complainant the sum of $8,050 outright, which is approximately what Complainant would have earned working 10 hours a day, five days a week, had he been employed beginning in August of 1975 and worked through April, 1976, with eight weeks off in winter due to bad weather.

5. Respondent shall make a report to the Commission of its compliance with the terms of this order as soon as the order has been fully complied with and no later than sixty (60) days from the effective date of this order.

6. Finally, it is ordered that any State or federal funds received prospectively by Respondent directly or indirectly shall be contingent on Respondent's compliance with this order and subject to Respondent's adherence to a policy of non-discrimination under the West Virginia Human Rights Act, as amended.

May 10 1984
DATE

Enter:

Russell Van Cleve
Russell Van Cleve
Chairperson