

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

PERRY SUMNER,

COMPLAINANT,

V.

DOCKET NO. EA-9-84
EH-10-84

MCJUNKIN CORPORATION,

RESPONDENT.

ORDER

On the 15th day of July, 1985, the Commission reviewed Hearing Examiner James Gerl's Findings of Fact and Conclusions of Law and Respondent's Exceptions. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own.

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

1. The Respondent rehire the Complainant, Perry Sumner, at the rate of \$7.30 per hour.
2. The Respondent pay the Complainant wages in the amount of twenty-one thousand twenty-five dollars and eighty cents (\$21,025.80) which represents wages he would have earned from October 20, 1983 (The date a younger man was hired) at \$7.30 per hour less wages he earned in 1984 of five thousand and three hundred seventy-one dollars (\$5,371.00) plus interest at 10% per annum

3. The Respondent clear from its personnel records for Complainant all references to his filing of the instant complaint and the subsequent disposition thereof.
4. The Respondent cease and desist from discriminating against individuals on the basis of age.
5. The Respondent pay to Complainant's attorney, David E. Schumacher, his reasonable attorney's fees of three thousand eight hundred seventy dollars (\$3,870.00) and expenses of four hundred seventy-five dollars (\$475.00).
6. The Respondent report to the Commission within 45 days of the entry of this Order, the steps taken to comply with this Order.

By this Order, a copy of which to be sent by certified mail, 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 15th day of July, 1985.

RESPECTFULLY SUBMITTED,



RUSSELL VAN CLEVE
CHAIRMAN
WV HUMAN RIGHTS COMMISSION

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

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W.V. HUMAN RIGHTS COMM.
[Signature]

PERRY SUMNER,

COMPLAINANT,

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McJUNKIN CORPORATION,

RESPONDENT.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing was convened for this matter on January 14, 1985 in Bluefield, West Virginia. The complaint was filed on July 5, 1983. A status conference was held on November 15, 1984. Notice of hearing was served on November 26, 1984. Respondent's answer was filed on December 6, 1984.

All proposed findings, conclusions and supporting arguments submitted by the parties have been considered. To the extent that the proposed findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and views as stated herein, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues as presented. To the extent

that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

CONTENTIONS OF THE PARTIES

Complainant contends that respondent discriminated against him on the basis of his age ^{1/} by laying him off and by not hiring or recalling him. Respondent maintains that harsh economic conditions caused respondent to transfer the truck which complainant had driven to another location, thus rendering complainant's job, and, therefore, complainant not useful.

FINDINGS OF FACT

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

1. Complainant was laid off or terminated by respondent on May 6, 1983.

^{1/} Complainant had also filed a complainant alleging handicap discrimination. In complainant's post hearing brief, however, complainant does not make any argument regarding handicap discrimination and complainant explicitly waives his claim to the extent that it is based upon alleged handicap discrimination. Indeed, based upon the record evidence, complainant has not made out a prima facie case of handicap discrimination. There shall be no further discussion of the alleged handicap discrimination in this proposed decision.

2. Complainant was hired by respondent on August ^{2/} 21, 1978.

3. At the time of his layoff, complainant's rate of pay was \$11.17 per hour.

4. In 1979, complainant worked for respondent and earned \$22,603.91. In 1980, complainant worked for respondent and earned \$26,263.06. In 1981, complainant worked for respondent and earned \$28,268.19. In 1982, complainant worked for respondent and earned \$22,171.74. In 1983, complainant worked for respondent for a portion of the year and earned \$9757.85. In 1983, complainant also received unemployment compensation benefits of \$5,908.00. In 1984, complainant did not work for respondent, and he had earnings of \$5,371.00 from other employers. Complainant had no earnings from January 1, 1985 to the date of hearing herein.

5. In June of 1984, respondent offered reemployment to complainant at the rate of \$7.30 in exchange for his dropping his discrimination suit against respondent. Complainant did not accept such offer.

6. Complainant has driven each of the trucks at respondent's Princeton branch.

2/ Throughout his proposed findings of fact, complainant refers to respondent's responses to discovery requests in support of various proposed facts. Such discovery responses are not part of the record, and portions of such responses may contain inadmissible matter. Accordingly, only proposed findings which are supported by record evidence, that is, the transcript of hearing and admitted exhibits, have been considered.

7. Leeper has driven respondent's tractor trailer, truck #506.

8. Leeper was rehired by respondent at the rate of \$7.30 per hour.

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

9. Complainant was 47 years old at the time of hearing herein, and he was 45 years old at the time that respondent laid him off.

10. Respondent is an industrial supply company whose business is dependent upon sales of products to the coal, chemical and steel industries.

11. McClung was employed by respondent as an inside salesperson until he was laid off by respondent on or about May 6, 1983. At the time of his layoff, McClung requested and was granted a demotion to the lower paying job of warehouseperson.

12. Complainant was employed by respondent as a truck driver. He never requested and was never granted a demotion by respondent to a lower paying job rather than be laid off.

13. Complainant was qualified to drive all of the trucks at respondent's Princeton branch. Complainant was also qualified to perform the duties of warehouseperson.

14. Complainant's job performance during his tenure as an employee of respondent was good and his evaluations were favorable. Complainant did not have an attitude problem while employed by respondent. Complainant received regular wage increases while in respondent's employ.

15. Since the time of his layoff on May 6, 1983, complainant has not been rehired by respondent in any capacity.

16. Since the time of complainant's layoff on May 6, 1983, respondent has hired or rehired three individuals less than 30 years old, Leeper, Marshall and Thompson, to drive trucks.

17. As a result of the nationwide recession, respondent's business began to decline during 1982. In 1983, respondent suffered company-wide losses of six million dollars. In 1983, respondent's Princeton branch suffered losses of \$ 394,000.00.

18. In order to return to profitability, respondent took several steps in 1982 and 1983 to reduce expenses, including the following: a freeze on wages, reductions in wages and salaries, personnel layoffs, imposition of a four day work week, and cuts in telephone service, janitorial service, garbage collection, and security.

19. Respondent's employees were aware of respondent's poor economic condition in 1983.

20. Respondent did not consistently employ any uniform criteria with respect to its decisions to recall employees from layoff and to its decision not to recall

complainant from layoff.

21. Many of the criteria which respondent allegedly employed regarding its decisions to layoff and recall employees and to not recall complainant are subjective criteria.

CONCLUSIONS OF LAW

1. Perry Sumner is an individual claiming to be aggrieved by an alleged unlawful discriminatory practice and is a proper complainant for purposes of the Human Rights Act, West Virginia Code, Section 5-11-10.

2. McJunkin Corporation is an employer as defined in West Virginia Code, Section 5-11-3(d) and is subject to the provisions of the Human Rights Act.

3. Complainant has not made out a prima facie case that respondent discriminated against him on the basis of handicap.

4. Respondent did not discriminate against complainant on the basis of handicap by laying him off or by failing to recall him from layoff. West Virginia Code, Section 5-11-9(a).

5. Complainant has not made out a prima facie case of age discrimination with respect to respondent's decision to lay him off.

6. Respondent did not discriminate against complainant on the basis of age by laying him off. West Virginia Code, Section 5-11-9(a).

7. Complainant has made out a prima facie case that respondent discriminated against him on the basis of age by failing to recall him.

8. Complainant has demonstrated that the reasons articulated by respondent for failing to recall complainant are pretextual.

9. Respondent discriminated against complainant on the basis of his age in violation of West Virginia Code Section 5-11-9(a) by failing to recall complainant.

DETERMINATIONS

Insofar as the complaint alleges handicap discrimination and discriminatory layoff, it is not supported by a preponderance of the evidence. The preponderance of the evidence sustains the complaint insofar as it alleges discrimination on the basis of age with respect to respondent's failure to recall complainant.

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 Department v. West Virginia Human Rights Commission 309 S.E.2d 342, 352-353 (WVa 1983); McDonnell-Douglas Corporation v. Green 411 U.S. 792 (1973). If the complainant makes out a prima facie case, respondent is required to offer or articulate a legitimate

non-discriminatory reason for the action which it has taken with respect to complainant. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra. If respondent articulates such a reason, complainant must show that such reason is pretextual. Shepherdstown Volunteer Fire Dept., supra; McDonnell Douglas, supra.

A. Lay off

Complainant has not established a prima facie case of age discrimination with respect to respondent's decision to lay him off. The parties have stipulated that complainant was laid off on May 6, 1983. Complainant testified that he was 47 years old at the time of hearing, and, therefore, he was within the protected age group at the time of layoff.

Complainant argues that he has completed the prima facie case of discriminatory layoff by proving that a younger employee of respondent, McClung, was afforded the opportunity to transfer to another position rather than be laid off while complainant was not given this opportunity. The record evidence reveals, however, that complainant and McClung are not similarly situated. Firstly, complainant was a truck driver for respondent; whereas McClung was an inside salesperson before the layoffs and a warehouseperson after the layoffs. Thus, there is a dissimilarity of jobs. Secondly, McClung specifically requested that respondent demote him to a lower paying position when he

was informed that he would be laid off. Complainant did not request such a demotion. The facts proven by complainant do not constitute a prima facie case of discriminatory layoff because such facts do not give rise to an inference of discrimination unless otherwise explained. Texas Department of Community Affairs v. Burdine 450 U.S. 248, 49 U.S.L.W. 4214, 4216 (1981).

Even assuming, arguendo, that complainant has made out a prima facie case of discriminatory layoff, respondent has articulated a legitimate non-discriminatory reason for complainant's layoff, that is, substantial losses suffered by respondent's business in 1983. Complainant has not demonstrated that the economic basis for his layoff is pre-textual.

B. Failure to Recall

Complainant has demonstrated a prima facie case of discriminatory failure to recall. The parties have stipulated that complainant was laid off on May 6, 1983 and that complainant has driven all of the trucks at respondent's Princeton branch. Complainant testified that he was qualified to and did drive the trucks at respondent's Princeton branch as well as perform warehouse duties. Complainant's job performance evaluations were favorable and he received regular wage increases. Complainant testified that he was 47 years old at the time of hearing, and, therefore, was within the protected group at the time of any recalls. Complainant testified that he

was never recalled or rehired by respondent. Complainant and Leeper testified that three truck drivers for respondent under the age of 30, and all with less seniority than complainant, were recalled subsequent to complainant's layoff. Such facts are sufficient to make out a prima facie case of discrimination because, unless otherwise explained, they do raise an inference of discrimination. Texas Dept. of Community Affairs v. Burdine, supra.

Respondent has articulated a legitimate non-discriminatory reason for its failure to recall complainant. Respondent has proven that its business began to decline in 1982. Because it recorded substantial losses in 1983, it took several measures to return to profitability, including a decision to reassign the truck which complainant had driven most of the time. Respondent's witnesses stated that because of the reassignment of the truck, it no longer required the services of complainant. To the extent that complainant testified that he was unaware of the economic condition of respondent, such testimony is non-credible because of his evasive demeanor during cross examination on this point and because complainant's testimony was essentially contradicted by his own witness, Leeper, who noted that the deteriorating economic condition of respondent was apparent to the employees.

Complainant has demonstrated that the reasons

articulated by respondent for its failure to recall him are pretextual by proving that a discriminatory reason more likely motivated the employer and by showing that the employer's proffered explanation is unworthy of credence. Texas Dept. of Community Affairs v. Burdine, supra. The poor economic condition of respondent does not explain its decision to rehire other young employees and not to rehire complainant. The parties have stipulated that complainant had driven all of the trucks at respondent's Princeton branch. Complainant's job performance was good and his evaluations were favorable. Leeper testified that he and two other young employees were rehired or hired by respondent to do jobs which primarily entailed driving trucks. The only explanation given by respondent's witnesses for their failure to offer complainant another job was the assumption that he would not take such a job because it would involve a lower rate of pay. Such testimony evidences a paternalistic attitude and stereotypical thinking about older workers. Such assumption is in itself discriminatory and cannot shield respondent from liability for its actions.

Moreover, the testimony of respondent's witnesses regarding the criteria employed in deciding whom to recall is not credible because of the witnesses' demeanor during such testimony and because such testimony is laden with internal and external contradictions. Dobbins, respondent's Director

of Personnel, testified at first that there were no criteria for the decisions to layoff or recall. Later in his testimony, after being confronted with a prior inconsistent statement, he admitted that the criteria included productivity and versatility. In respondent's case, he added the factor of ability to do the job. Phillips, respondent's Regional Manager for the Princeton branch, testified that complainant's poor attitude was a factor in the decisions to layoff and not recall him even though complainant's employee rating sheets (evaluations) make no mention of an attitude problem and, indeed, describe him as having a very positive attitude. Later in his testimony, Phillips contradicted his prior testimony by stating that attitude was not a factor and that the decisions were based solely upon the reassignment of complainant's truck. In respondent's case, Phillips testified that there were actually four criteria that governed the decisions to layoff and not recall: pay, trainability, adaptability and attitude. Later in respondent's case, Phillips stated that these four criteria were not applied to complainant, but that the decisions regarding complainant were based solely upon the reassignment of complainant's truck. The testimony of Dobbins and Phillips regarding these points is not credible.

Even assuming, arguendo, that respondent did in fact apply the criteria listed by Dobbins and Phillips, such criteria are highly subjective. Subjective employment criteria and decisions are not in themselves violations of the fair employment

laws, but the use of subjective criteria does warrant special scrutiny and has been viewed with disfavor and skepticism. Rowe v. General Motors 475 F.2d 348, 359 (5th Cir. 1972). The reason for skepticism and special scrutiny of subjective employment criteria is illustrated by the manner in which respondent applied such criteria in the instant case. Despite complainant's above average evaluations, despite his good productivity and attitude ratings, and despite his ability to drive all the trucks at the Princeton branch as well as to perform warehouse duties, respondent rehired three young employees to drive trucks. Indeed, such subjective criteria as "adaptability," "flexibility," and "versatility" invite stereotypical thinking about older employees. Thus, to the extent that the criteria listed by respondent's witnesses were in fact applied, they constitute a pretext for discrimination.

Respondent argues in its brief that because it laid off and failed to recall truck drivers younger than complainant there can be no age discrimination. The gravamen of the civil rights statutes, however, is not to encourage a good bottom line on a tally sheet, but, rather, to protect against discrimination practiced against individuals. West Virginia Code, Section 5-11-9(a) In the instant case respondent has failed to give a non-pretextual reason for not recalling complainant.

C. Backpay

Because complainant has proven only a discriminatory failure to recall, and not a discriminatory layoff, the backpay calculation should begin at the date that respondent rehired

the first of the three truck drivers at the Princeton branch subsequent to complainant's layoff. For the same reason, the amount of backpay should be calculated at \$7.30 per hour, the amount that such truck drivers were rehired at, and not the higher wage earned by complainant prior to his layoff. Complainant's earnings since his layoff should, of course, be deducted from the amount of backpay due.

The parties have stipulated that complainant has refused an offer of reemployment at respondent at the rate of \$7.30 per hour. Respondent's offer was made as a part of a settlement package which would have required complainant to give up his discrimination complaint in return. Thus, the offer of reemployment was not an unconditional offer; it was conditioned upon complainant's dismissal of his discrimination claim. Accordingly, such offer should not toll respondent's backpay liability. Ford Motor Company v. EEOC ___U.S.___,
^{3/}
73 L.Ed.2d 721 (1982).

3/ The Hearing Examiner does not urge the Commission to adopt the Ford rule. The holding of Ford is bad law because it frustrates the statutory purpose of making victims of discrimination whole and because it discourages complainants from mitigating damages. It is not necessary, however, to decide whether to accept or reject Ford in the instant case because respondent's offer was conditional and, therefore, even under Ford complainant's backpay would not be tolled.

PROPOSED ORDER

In view of the foregoing, the Hearing Examiner recommends the following:

1. That the complaint of Perry Sumner, Docket No. EA-9-84, EH-10-84, be sustained insofar as it alleges unlawful age discrimination based upon failure to recall from layoff.

2. That respondent rehire complainant as a truck driver at the rate of \$7.30 per hour.

3. That respondent pay complainant a sum equal to the wages he would have earned but for respondent's unlawful failure to recall him from layoff. *\$7.30 as of 7-16-83 Oct 20, 1983*

4. That complainant be made whole as to all benefits that would have accrued to him but for respondent's unlawful failure to recall him from layoff. *(determine benefits which would have accrued)*

5. That respondent clear from its personnel records for complainant all references to his filing of the instant complaint and the subsequent disposition thereof.

6. That respondent be ordered to cease and desist from discriminating against individuals on the basis of age. *with regard to things*

7 That respondent pay to complainant his reasonable attorney's fees. And *see my draft*

8. That respondent report to the Commission within 45 days of the entry of its Order, the steps taken to comply with the Order.

HUMAN RIGHTS COMMISSION

Entered: 3/5/85
-15-

BY: James Gerl
JAMES GERL
HEARING EXAMINER

CERTIFICATE OF SERVICE

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

David E. Schumaker
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on this 5th day of March, 1985.

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JAMES GERL
HEARING EXAMINER