



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION

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12 June 1990

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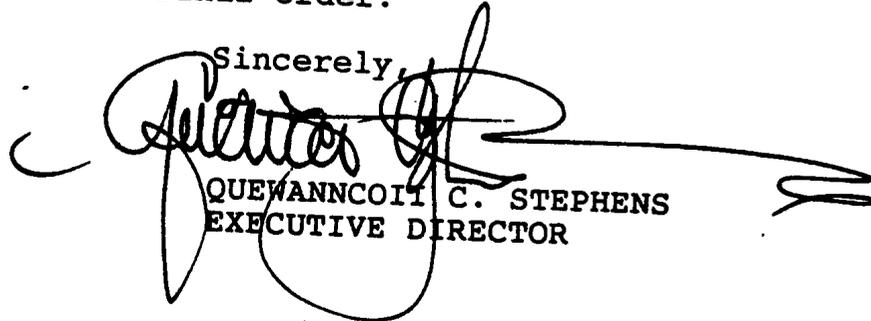
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Re: Shelton v. Dupont
ER-355-86

Dear Parties:

Herewith, please find the final order of the WV Human Rights Commission in the above-styled and numbered case. Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective July 1, 1989, any party adversely affected by this final order may file a petition for review with the Kanawha County Circuit Court within 30 days of receipt of this final order.

Sincerely,



QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR

QCS/amh

Enclosure

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed, is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code § 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RUSSELL J. SHELTON,

Complainant,

v.

DOCKET NO. ER-355-86

E. I. du PONT de NEMOURS
& COMPANY,

Respondent.

FINAL ORDER

AND

SUPPLEMENTAL ORDER ON RELIEF

On 4 January 1990 the West Virginia Human Rights Commission entered an Order holding that respondent E. I. du Pont de Nemours & Company (hereinafter referred to as DuPont) unlawfully discriminated against complainant, Russell J. Shelton, because of his race and in violation of the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq. Due to the inadequacy of the record, the Commission was unable to render a final order at that time and instructed its executive director to arrange for such further proceedings as was deemed necessary to determine the amount of back pay due Mr. Shelton and the amount of attorney's fees and costs that should be awarded.

On 30 April 1990 a hearing was held before hearing examiner pro tempore Mike Kelly regarding the issues of back pay, mitigation of damages and attorney's fees. The parties

having waived their right to file exceptions to the hearing examiner's recommendations, the hearing examiner presented his recommendations to the Commission at its regularly scheduled meeting of 9 May 1990.

After consideration of the hearing examiner's recommendations and thorough review of all evidence submitted by the parties in regard to the issues of recovery, the Commission decided to, and does hereby, enter its findings of fact and conclusions of law as set forth hereinbelow:

FINDINGS OF FACT

1. Complainant was discharged by respondent on 27 November 1985.
2. Mr. R. C. Hardman was at that time, and is still, an employee of respondent at its Belle, West Virginia plant. Mr. Hardman and complainant had similar positions and were earning identical wages at the time of Mr. Shelton's discharge. Respondent did not dispute that Mr. Shelton's earnings, had he not been fired, would have remained identical to Mr. Hardman's during the period December 1985 to the present. Similarly, respondent did not dispute the accuracy of the calculations of wages and benefits which complainant submitted into evidence.

3. Using Mr. Hardman's earnings as a marker, Mr. Shelton, as a result of DuPont's unlawful discriminatory act, suffered a loss in wages and benefits of \$128,398.00 during the period December 1985 through December 1989.

4. Since his discharge, the complainant has made a diligent effort to secure employment and has reasonably mitigated his damages.

5. During the period December 1985 and December 1989 the complainant had the following income:

1986	Unemployment compensation	\$2,925.
1988	January through March Alcohol Beverage Control Commission	2,038.
1988	Self-employed as auto repairman (nine months at approximately \$900 per month)	8,100.
1989	Various positions in State of Georgia	3,692.

6. Mr. Shelton's total earnings during the period December 1985 through December 1989 were \$16,755, all of which shall be taken into account, when formulating the final back pay award.

7. During the period January 1990 through April 1990 complainant suffered a loss of wages and benefits in the amount of \$2,658 per month, or a total of \$10,632.

8. Complainant continues to suffer a loss of wages and benefits due to his discharge.

9. The total back pay due complainant for the period December 1985 through 30 April 1990, minus interim earnings, is \$122,275.00.

10. Since his discharge, complainant has incurred out-of-pocket expenses in the amount of \$2,350.00 for medical treatment which would have been paid by his employer-provided health insurance had he not been terminated.

11. Complainant is entitled to prejudgment interest at the rate of ten (10%) percent per annum on his back pay award and his out-of-pocket losses, with interest to accrue quarterly on the total sum then due and owing.

12. Complainant's counsel have approximately 20 years and 8 years experience, respectively.

13. Given the rates requested by counsel, the amounts previously approved by the West Virginia Supreme Court of Appeals in civil rights cases, and the prevailing rate in this state, a reasonable hourly rate for Mr. McCuskey is \$125.00 and for Mr. Phalen \$110.00.

14. Mr. McCuskey reasonably expended 82.9 hours on this case.

15. Mr. Phalen reasonably expended 88.6 hours on this matter. (We have subtracted from Mr. Phalen's itemization of time nine hours of work spent in assisting the Commission on matters unrelated to this case. This time cannot be charged to this respondent).

16. Complainant reasonably expended \$1,160.00 for expert services associated with this matter. We subtract \$500.00 from the cost request submitted by complainant to reflect the approximate percentage of expert time spent on producing the figures submitted in support of claimant's theory on attorney's fees. Those calculations were not at all relevant to the formula for determining a reasonable attorney's fee in a civil rights case.

DISCUSSION ON PREJUDGMENT INTEREST
AND ATTORNEY'S FEES

Prejudgment Interest: An assessment of prejudgment interest, which reflects an appropriate exercise of the Commission's authority to fashion relief which makes the injured party whole, Pettway v. American Case Iron Pipe Company, 494 F.2d 211 (5th Cir. 1974); Parsons v. Kaiser Aluminum and Chemical Corporation, 727 F.2d 473 (5th Cir.

1973), was approved in Frank's Shoe Store v. Human Rights Commission, 365 S.E.2d 251, 261 (1986).

The purpose of prejudgment interest is to "fully compensate the injured party for his losses." Kirk v. Pineville Mobile Homes, Inc., 310 S.E.2d 210 (1983). "Where there is an ascertainable pecuniary loss," said the Court in Bond v. City of Huntington, 276 S.E.2d 539, 548 (1981), prejudgment interest will "fully compensate the injured party for the loss of the use of funds. . . ."

We award Mr. Shelton prejudgment interest at the rate of ten (10%) percent, Bell v. Inland Mutual Insurance Co., 332 S.E.2d 127 (1985), on his back wages and benefits and medical costs with the interest calculated to accrue quarterly. Walters v. City of Atlanta, 610 F. Supp., 715 (N.D. Ga. 1985) aff'd in part and rev'd in part on other grounds, 803 F.2d 1135 (11th Cir. 1986).

Fees and Costs: A prevailing complainant is entitled to a reasonable attorney's fee, plus costs. Bishop Coal Co. v. Salyers, 380 S.E.2d 238 (1989). In Salyers, the Court held that "When the relief sought in a human rights action is primarily equitable, 'reasonable attorney's fees' should be determined by (1) multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate -- the lodestar calculation -- and (2) allowing, if appropriate,

a contingency enhancement." Syl. pt. 3 of Salyers. The Salyers Court further advised that the general factors outlined in Aetna Casualty and Surety Company v. Petrolo, 342 S.E.2d 156 (1986) "should be considered to determine: (1) the reasonableness of both time expended and hourly rate charged; and, (2) the allowance and amount of a contingency enhancement." Ibid.

Here, we find that \$125 per hour for Mr. McCuskey and \$110 per hour for Mr. Phalen are reasonable rates given respective counsel's experience and reputation, the customary fee for civil rights cases in this state, and the time and labor this particular matter required. These rates favorably compare with the rates of \$130.00 and \$110.00 per hour approved in Casteel v. Consolidation Coal Company, 383 S.E.2d 305 (1989), and \$95 and \$110 an hour awarded in Salyers, 380 S.E.2d at 249.

We also believe that the hours expended by counsel were, for the most part, reasonably required. For reasons explained supra, however, we have subtracted nine (9) hours from Mr. Phalen's submitted itemization of hours.

Applying the formula approved in Salyers, the lodestar calculation for Mr. McCuskey (82.9 hours X \$125 per hour) is \$10,362.50 and for Mr. Phalen (88.6 hours X \$110 per hour) it is \$9,746. The total lodestar calculation awarded co-counsel,

therefore, is \$20,108.50.

Though the Commission declines to deviate from the Salyers fee formula as complainant's counsel appear to request, it should be noted that our ruling does not "impair . . . the right of lawyer and client to make a private fee arrangement" that is in keeping with normal ethical principals. Salyers, 380 S.E.2d at 249, n.10.

No fee enhancement having been requested, none is awarded.

We also award costs of \$1,160, which, for reasons explained supra, is \$500 less than the amount requested.

CONCLUSIONS OF LAW

Respondent is liable to complainant for back wages and benefits, out-of-pocket expenditures on medical care, prejudgment interest on his back wages and benefits and his out-of-pocket expenditures, plus attorneys' fees and costs.

RELIEF AND FINAL ORDER

In view of the foregoing, as well as the previous order entered herein, the West Virginia Human Rights Commission ADJUDGES, ORDERS AND DECREES and enters as its FINAL ORDER the following:

1. The complainant of Russell Shelton, Docket No. ER-355-86 is sustained.
2. Respondent shall reinstate complainant to a position and at a rate of pay comparable to where he would have been but for his discriminatory discharge.
3. For the period from December 1985 through 30 April 1990, respondent shall pay complainant back wages and benefits in the amount of \$122,275, plus prejudgment interest thereon in the amount of \$34,692.75.
4. For the period from 1 May 1990 until such time as Mr. Shelton is reinstated or this matter is otherwise resolved, respondent shall pay complainant the difference between what his wages and benefits would have been had he still been employed by DuPont and the amounts actually earned by complainant. Complainant shall continue to reasonably mitigate his damages.

5. Respondent shall reimburse complainant in the amount of \$2,350.00 for his out-of-pocket medical expenses, plus prejudgment interest thereon in the amount of \$1,077.56.

6. Respondent shall pay to complainant the sum of \$2,500.00 for incidental damages for humiliation, embarrassment, emotional and mental distress and loss of personal dignity suffered as a result of DuPont's unlawful discriminatory act.

7. Respondent shall pay to complainant and his counsel the sums of \$20,108.,50 for attorneys' fees and \$1,160 in costs.

8. Respondent shall cease and desist from discriminating against individuals on the basis of their race in making employment decisions.

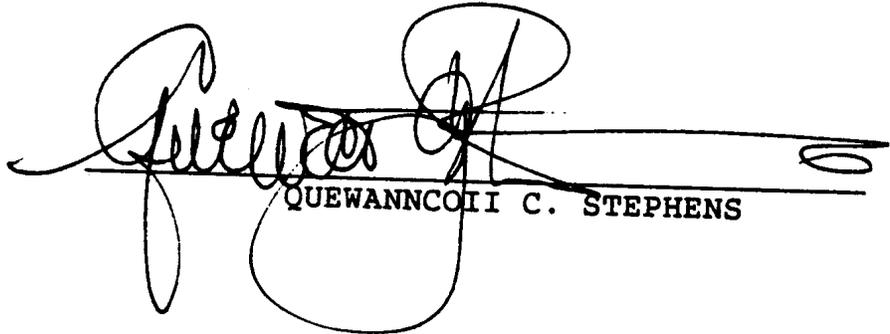
By this final order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they have ten (10) days to request that the Human rights Commission reconsider this final

order or they may seek judicial review as outlined in the
"Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia
Human Rights Commission this 13th day of June,
1990 in Charleston, Kanawha County, West Virginia.



QUEWANNCOLI C. STEPHENS