



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

TELEPHONE 304-348-2616

ARCH A. MOORE, JR.
Governor

October 22, 1987

Kathy Toothman
32 Breezy Acres
Wheeling, WV 26003

Paul Diss, Jr.
St. John's Home For Children
141 Key Ave.
Wheeling, WV 26003

Paul C. Camilletti, Esq.
Camilletti & Sacco
30 12th St.
Wheeling, WV 26003

Tom Hindes
Deputy Attorney General
812 Quarrier St.
Charleston, WV 25301

RE: Toothman v. St. John's Home For Children
ES-667-84A

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 April 1, 1987, any party adversely affected by this final order may file a petition for review with the supreme court of appeals within 30 days of receipt of this final order.

Sincerely,

A handwritten signature in cursive script that reads "Howard D. Kenney".

Howard D. Kenney
Executive Director

HDK/mst
Attachments

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

NOTICE
OF STATUTORY RIGHT TO JUDICIAL REVIEW
AMENDED AND EFFECTIVE
AS OF APRIL 1, 1937

Enr. H. B. 2638]

3

115 this article.

§5-11-11. Appeal and enforcement of commission orders.

1 (a) From any final order of the commission, an
2 application for review may be prosecuted by either
3 party to the supreme court of appeals within thirty days
4 from the receipt thereof by the filing of a petition
5 therefor to such court against the commission and the
6 adverse party as respondents, and the clerk of such
7 court shall notify each of the respondents and the
8 commission of the filing of such petition. The commis-
9 sion shall, within ten days after receipt of such notice,
10 file with the clerk of the court the record of the
11 proceedings had before it, including all the evidence.
12 The court or any judge thereof in vacation may
13 thereupon determine whether or not a review shall be
14 granted. And if granted to a nonresident of this state,
15 he shall be required to execute and file with the clerk
16 before such order or review shall become effective, a
17 bond, with security to be approved by the clerk,
18 conditioned to perform any judgment which may be
19 awarded against him thereon. The commission may
20 certify to the court and request its decision of any
21 question of law arising upon the record, and withhold
22 its further proceeding in the case, pending the decision
23 of court on the certified question, or until notice that the
24 court has declined to docket the same. If a review be
25 granted or the certified question be docketed for
26 hearing, the clerk shall notify the board and the parties
27 litigant or their attorneys and the commission of the fact
28 by mail. If a review be granted or the certified question
29 docketed, the case shall be heard by the court in the
30 manner provided for other cases.

31 The appeal procedure contained in this subsection
32 shall be the exclusive means of review, notwithstanding
33 the provisions of chapter twenty-nine-a of this code:
34 *Provided*, That such exclusive means of review shall not
35 apply to any case wherein an appeal or a petition for
36 enforcement of a cease and desist order has been filed
37 with a circuit court of this state prior to the first day
38 of April, one thousand nine hundred eighty-seven.

39 (b) In the event that any person shall fail to obey a
40 final order of the commission within thirty days after
41 receipt of the same, or, if applicable, within thirty days
42 after a final order of the supreme court of appeals, a
43 party or the commission may seek an order from the
44 circuit court for its enforcement. Such proceeding shall
45 be initiated by the filing of a petition in said court, and
46 served upon the respondent in the manner provided by
47 law for the service of summons in civil actions; a hearing
48 shall be held on such petition within sixty days of the
49 date of service. The court may grant appropriate
50 temporary relief, and shall make and enter upon the
51 pleadings, testimony and proceedings such order as is
52 necessary to enforce the order of the commission or
53 supreme court of appeals.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

KATHY TOOTHMAN,

Complainant,

v.

DOCKET NO.: ES-667-84A

ST. JOHN'S HOME FOR CHILDREN,

Respondent.

FINAL ORDER

On the 8th day of October, 1987, the West Virginia Human Rights Commission reviewed the recommended findings of fact and conclusions of law of Hearing Examiner, Theodore R. Dues, Jr., in the above-captioned matter. After consideration of the aforementioned and exceptions thereto, the commission does hereby adopt said recommended findings of fact and conclusions of law as its own, with the following modifications:

In the subsection titled Findings of Fact paragraph enumerated as 12 the word "total" is stricken.

In the subsection titled Conclusions of Law in the paragraph enumerated as 8, the figure "\$26,954.00" is stricken. Substituted, therefore, is the following: "\$31,204.00, representing lost wages due complainant from April 27, 1984 through September 18, 1987. Thereafter, complainant is entitled to lost wages in the amount of \$792.00 per month less any interim earnings, until the complainant is instated or rejects a bonafide offer of instatement."

Paragraph enumerated as 11 of said subsection is deleted.

It is hereby ORDERED that the Hearing Examiner's recommended findings of fact and conclusions of law be attached hereto and made a part of this final order except as amended by this final order.

Accordingly, it is further ORDERED as follows:

1. Respondent shall cease and desist from unlawfully discriminating against individuals on the basis of gender in making employment decisions.

2. Respondent shall unconditionally instate complainant to the position of child care worker within 30 days.

3. Respondent shall pay to the complainant as aggregate backpay through September 18, 1987, the amount of \$31,204.00. Thereafter, the respondent shall pay the complainant \$792.00 per month, less any interim earnings, until complainant is instated or rejects a bonafide offer of instatement.

4. Respondent shall pay the complainant statutory interest at the rate of 10% compounded annually on all monies due complainant.

5. Respondent shall pay the complainant incidental damages of \$5,000.00 for mental pain, suffering and damages to her personal dignity.

It is finally ORDERED that respondent provide to the commission proof of compliance with the commission's final order within 35 days of service of said final order by copies of cancelled checks, affidavits or other means calculated to provide such proof.

By this final order, a copy of which shall be sent by certified mail to the parties, the parties are hereby notified that they have ten days to request a reconsideration of this final order and that they may seek judicial review.

Entered this 16th day of October, 1987.

RESPECTFULLY SUBMITTED,

BY Betty A. Hamilton
CHAIR/VICE CHAIR
WV HUMAN RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

KATHY TOOTHMAN,

Complainant,

v.

Docket No. ES-667-84A

ST. JOHN'S HOME FOR
CHILDREN,

Respondent.

EXAMINER'S RECOMMENDED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This matter matured for public hearing on the 18th day of March, 1987. The hearing was held in the Council Chambers, Ohio County Courthouse, Wheeling, West Virginia. The hearing panel consisted of Theodore R. Dues, Jr., Hearing Examiner and Russell Van Cleve, Hearing Commissioner.

The Complainant appeared in person and by her counsel, Thomas L. Hindes, Deputy Attorney General. The Respondent appeared by its counsel, Paul C. Camilletti and by its representative, Paul E. Diss, Jr.

After a review of the record, any exhibits admitted in evidence, any stipulations entered into by the parties, any matters for which the Examiner took judicial notice during the proceedings, assessing the credibility of the witnesses and weighting the evidence in consideration of the same, the Examiner makes the following findings of fact and conclusions of law. To the extent that these findings and conclusions are generally consistent to any proposed findings of fact and conclusions of

law submitted by the parties, the same are adopted by the Examiner, and conversely, to the extent the same are inconsistent to the findings and conclusions, the same are rejected.

ISSUES

1. Did the Respondent discriminate against the Complainant on the basis of sex when it refused to interview or hire her for the childcare worker position for which she applied on March 27, 1984?

2. If so, did the Respondent act pursuant to a bona fide occupational qualification.

3. If not, to what relief is the Complainant entitled?

SUMMARY OF THE EVIDENCE

The Examiner issued a ruling pertaining to certain sanctions regarding the Respondent's continued failure to provide discovery pursuant to an initial request made by the Complainant and a subsequent Order by the Examiner to provide the same. The conclusion of the Examiner and the reasons therefore are a part of the record and will not be specifically reiterated herein. However, the same is specifically incorporated by reference for the purpose of this Order; it being sufficient at this time, to reflect that the Examiner precluded the Respondent from asserting a defense in relation to its contention that a bona fide qualification existed for its actions for the reason that it encompassed those matters which were unjustifiably and frequently denied the Complainant in discovery.

The evidence in this case was fairly straight forward. In early 1984, the Respondent advertised for the position of childcare worker. The advertisement was gender neutral. The Complainant applied for the position on or about March 27, 1984. At that time, she was employed by the Respondent as a childcare worker/cook. The rate of pay was \$4.00 per hour. The evidence is the case indicates that the Complainant was fully qualified for the position being sought, yet, she was not interviewed or given further consideration by the Respondent. It was not in contention, even prior to the public hearing, that the reason for the Respondent's actions, in not considering the Complainant, was due to her sex. The specific qualifications for the childcare position were defined and in force and effect, prior to the selection of the candidate, for the subject position.

On or about April 27, 1984, a male, without the basic qualification set forth in the job definition, was hired for the subject position. Again, it was undisputed by the Respondent that the reason for hiring this individual was the fact that he was a male. It also is uncontested, that the male that was hired was lacking in the basic background requirements for the position.

The salary for the position in question was \$1,500 per year. The Complainant worked as a childcare worker/cook on a half time basis from April 27, 1974 until June 8, 1984. The evidence indicated that the Complainant made \$616.00 less for this period of time than she would have had she been placed in the childcare worker position. Subsequent to June 8, 1984, the

Complainant has been continually unemployed. The evidence is uncontroverted that the Complainant diligently sought alternative employment without success.

The evidence was further uncontroverted, that the Complainant was extremely affected emotionally and her personal dignity was diminished by the Respondent's rejection of her for the childcare worker position.

I. Did the Complainant make a prima facie case of sex discrimination.

WVC § 5-11-9 prohibits sex discrimination in employment unless it is based on a bona fide occupational qualification. To condense the Respondent's characterization of its bona fide occupational qualification regarding the childcare position, would be to indicate that the Respondent's view was that a male is preferable for the job due to the liklihood of violent conduct from the persons typically referred to the St. John's Home for Children. That is, that the Respondent is in the business of serving as a custodial care facility for disturbed children; i.e., children with problems. The testimony in this case clearly reflects that the Complainant was qualified, both, educationally and by experience, to perform the job of childcare worker as was defined by the definitive qualifications listed by the Respondent for this position.

A potential problem exists at any time an employer attempts to pivot a hiring, promotional or other employment decision, upon a generic characteristic, the existence of which, places these persons as a member of a statuatorily protected

group. Accordingly, judicial review of such practices has been to limit very narrowly any exception which would recognize a decision based upon such generic characteristics as being lawful. Bothard v. Robinson, 433 U.S. 321 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 432, (1971). A misconception by an employer, on the merits of its bona fide occupational qualification policy, is of no consequence in the judicial scrutiny assessing whether it is in fact unlawful discrimination. In fact, the United States Supreme Court has determined that the presence, or absence of, good intent or discriminatory intent, is not a defense, if in fact, the implementation of the bona fide occupational qualification has the effect of unlawfully discriminating against members of a protected group. Griggs, supra.

Accordingly, it is the position of the Examiner that the Complainant has made a prima facie case in this matter for the reasons previously stated. In addition, it is specifically found by the Examiner that should the proffer made by the Respondent, of record in this matter, had been received and considered on the merits of this case, it would have been seriously deficient of that standard necessary to establish a bona fide job occupational qualification restricting the childcare worker position subject of this action to males only. The Complainant was entitled to be considered for the position on the merits of her education and job experience, and not in relation to her gender.

II. Relief

The Examiner having determined that the Complainant has

made a prima facie case, to which the Respondent has been precluded, in part, to introduce evidence in rebuttal of the same, does hereby determine to what extent the Complainant is legally entitled to relief. It has long been the position of the Commission, and in Title VII judicial decisions, that a prevailing Complainant is entitled to be made whole for injuries suffered on account of unlawful employment discrimination. Albemarle Paper Company v. Moody, 422 U.S. 405, 418, 95 S Ct. 2362 (1975).

The Complainant is entitled to backpay and incidental damages for humiliation, embarrassment, emotional and mental distress and loss of her personal dignity realized as a result of the Respondent's discriminatory conduct. State Human Rights Commission v. Pearlman Realty Agency, 161 W.Va 1, 239 S.E. 2d 145 (1977); State v. Logan-Mingo Mental Health Agency, W.Va. , 329 S.E. 2d 77 (1985).

FINDINGS OF FACT

1. The Complainant is a female.
2. The Respondent is a childcare facility specializing in custodial care placements for disturbed children.
3. The Complainant worked as a childcare worker/cook for the Respondent from August 15, 1983 until June 8, 1984, at which time she was terminated.
4. In March, 1984, Respondent advertised for applicants seeking employment as a childcare worker. The advertisement was gender neutral.

5. The aforementioned childcare worker position's job description was also gender neutral.

6. The Complainant applied for the aforementioned position, but, was neither interviewed nor hired.

7. On or about April 27, 1984, the Respondent hired a male for the aforementioned position.

8. At the time of hiring, the male did not possess the basic qualifications set forth as requirements for the position. Specifically, he did not possess the requisite educational or job experience.

9. The Complainant met and exceeded the job requirements, both, in the educational and job experience categories.

10. The Complainant was not hired because she was a female.

11. The Respondent failed to prove that the position in question was subject to a bona fide occupational qualification that legally restricted eligibility for the position to male employees only.

12. If the Complainant had received the aforementioned position on April 27, 1984, her earnings from that date would have been as follows:

DATES	BACKPAY
April 27, 1984 to June 8, 1984	\$ 616.00
June 8, 1984 to December, 1984	\$ 5,298.00
January 1985 to December 1985	\$ 9,500.00
January 1986 to December 1986	\$ 9,500.00
January 1987 to March 18, 1987	\$ 2,040.00
TOTAL BACKPAY	\$26,954.00

13. Complainant suffered humiliation and emotional distress as a result of the Respondent's failure to interview and hire her for the position.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the subject matter and parties herein. WVC § 5-11-1 et. seq.

2. At all times referred to herein, the Complainant is and has been a citizen and resident of West Virginia within the meaning of WVC section 5-11-2.

3. At all times referred to herein, the Respondent constituted an employer, as is more specifically defined in WVC Section 5-11-3(d).

4. The complaint in this matter was timely filed.

5. The Complainant made a prima facie case of sexual discrimination in this matter by establishing that she did not receive the position subject of this litigation based upon her sex.

6. The Respondent has failed to offer credible evidence that its restriction, of the position subject of this litigation, to males was a bona fide occupational qualification.

7. The Complainant reasonably mitigated her damages in this matter by dilligently seeking alternative employment.

8. The Complainant is entitled to backpay in the amount of \$26,954.00.

9. The Complainant is entitled to incidental damages for

mental pain, suffering and damage to her personal dignity in the amount of \$5,000.00.

10. The Complainant is entitled to prejudgment interest at the amount of 10% compounded annually for all monies unpaid.

11. The Complainant is entitled to front pay from the date of the hearing until her age of retirement.

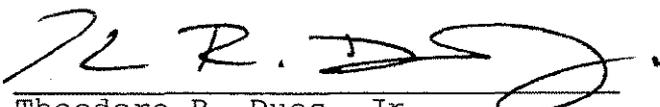
12. The Complainant is entitled to reinstatement to the position of childcare worker.

PROPOSED ORDER

Accordingly, the Examiner recommends to the Commission that it issue a final Order in this matter consistent to the reasons and in the amounts hereinbefore provided.

DATED: August 14, 1987

ENTER:


Theodore R. Dues, Jr.
Hearing Examiner

CERTIFICATE OF SERVICE

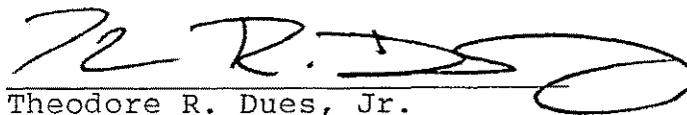
I, Theodore R. Dues, Jr., Hearing Examiner, hereby swear and say that I have served a true and exact copy of the foregoing EXAMINER'S RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW upon the following:

Thomas L. Hinds, Esq.
Deputy Attorney General
812 Quarrier Street
Fourth Floor, L & S Bldg.
Charleston, WV 25301

and

Paul C. Camilletti, Esq.
Camilletti & Sacco
30 12th Street
Wheeling, WV 26003

by mailing the same by United States Mail on this 13th day of August, 1987.


Theodore R. Dues, Jr.
Hearing Examiner