



COPY

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION
215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE, JR.
Governor

TELEPHONE: 304-348-2616

October 4, 1985

Mike Kelly, Esquire
1116-B Kanawha Boulevard, E.
Charleston, WV 25301

David P. Lambert, Esquire
Assistant Attorney General
Room E-26, State Capitol Bldg.
Charleston, WV 25305

RE: Deloris Wilder v. W. Va. Community Mental Service
Department/Docket No. ER-80-77

Dear Mr. Kelly and Mr. Lambert:

Herewith please find a copy of the Order of the WV Human Rights Commission in the above-styled and numbered case of Deloris Wilder v. W. Va. Community Mental Service Department/ER-80-77, Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,


Howard D. Kenney
Executive Director

HDK/kpv

Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

CC: Roxanne Rogers, Attorney
Anne Charnock, Hearing Examiner

CC: Roxanne Rogers, Attorney
Anne Charnock, Hearing Examiner

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

Deloris Wilder
Complainant,

v.

Docket No.: ER-80-77

W. Va. Community Mental Service
Department,
Respondent.

ORDER

On the 19th day of September, 1985, the Commission reviewed Hearing Examiner Anne Charnock's Findings of Fact and Conclusions of Law. 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.

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 4th day of October, 1985.

RESPECTFULLY SUBMITTED,



CHAIR / VICE CHAIR
WEST VIRGINIA HUMAN RIGHTS
COMMISSION

approved
Aug 14, 1985
SRH
RECEIVED

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

AUG 20 1985

DELORIS WILDER,
Complainant,

WEST VIRGINIA HUMAN RIGHTS COMM.
JG

Vs.

HRC CASE NO. ER 80-77

W. VA. COMMUNITY MENTAL
SERVICE DEPARTMENT,

Respondent.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND RECOMMENDATIONS

Pursuant to notice issued to the Respondent, this matter came on for hearing on the 28th day of May, 1985 in the Conference Room of the W. Va. Department of Health, Charleston, West Virginia. Sid Allen, Commissioner and Anne B. Charnock, hearing examiner, presided.

The Complainant, Deloris Wilder, appeared in person and by her counsel, Mike Kelly, Esquire, Special Assistant Attorney General, State of West Virginia, and the Respondent, W. Va. Community Mental Service Department, appeared in person by Randy Myers, who in 1976 was the assistant director of Respondent and by its counsel, David P. Lambert, Esquire, Assitant Attorney General, State of West Virginia.

~~It appearing to the panel that notice as required by law, setting forth the time and place of the hearing and the matters to be heard, had regularly been served upon the Respondent and that the same appeared by their representatives, the hearing was convened at the aforesaid time and place.~~

Upon due consideration of the pleading; the testimony,

demeanor and credibility of the witnesses; a review of the exhibits entered as evidence at the hearing and a review of the transcript of the hearing; the hearing examiner makes the following findings of fact, conclusions of law and recommendation;

FINDINGS OF FACT

1. The Complainant, Deloris Wilder, is a white female who was in 1976 and is presently married to Wayne Wilder a black male. Complainant was an employee of the Department of Vocational Rehabilitation in the speech and hearing division, and had been for two years. This was a state agency.

2. The Respondent, W. Va. Community Mental Service Department, was a state agency and a division of the West Virginia Department of Mental Health. Upon reorganization of state agencies this department became and is presently a division of the West Virginia Department of Health.

3. In early 1976 Respondent was seeking to fill a vacancy for a clerical position. This position had been vacant for some time and was a Civil Service position.

4. Vacancies in Civil Service positions were filled in a prescribed manner. Simplistically the system was thus: 1.) approval to fill the vacancy was granted. 2.) The Civil Service registers were "run". 3.) The eligible persons for the position were identified. 4.) Persons on the registers were contacted, interviewed, etc. 5.) Approval to hire was granted and 6.) The position was filled and

5. Historically this 'running the registers' was unproductive for a number of reasons. Oftentimes not one potential employee

could be found on a register. For this reason it was a common practice to run a number of similar registers simultaneously. The Civil Service system has over 500 separate registers.

6. On January 27, 1976 Respondent requested a register for one position - Clerk IV. This register produced twenty-nine names. Each of these persons was contacted by letter (Respondent's Exhibit 1)

7. Unsurprisingly, of these twenty-nine names not one person requested an interview.

8. In February 1976 Complainant became aware of the vacancy with Respondent and made an appointment to be interviewed. This interview occurred February 12, 1976.

9. Complainant was accompanied by her husband to the interview. While Complainant was being interviewed her husband waited in a waiting area where he could be seen by other employees.

10. Complainant met Robert Marshall who was then the Director of Respondent. She was interviewed by David Ingram who was Mr. Marshall's administrative assistant. Complainant was further interviewed by Ruth Anderson who was program coordinator of Respondent. If hired, Complainant would be a secretary for Ms. Anderson and Charles Maine.

11. Complainant made "a favorable impression". Ms. Anderson was "very much impressed" with complainant (transcript, 8-9, 89, 33).

No job was offered to Complainant at this time although Mr. Ingram said he would "be in touch" (transcript 9).

12. Approximately one week later Complainant contacted Mr. Ingram. Complainant testified that he told her that she had the job but paperwork needed to be processed. (Transcript 9).

13. One week later Complainant again contacted Mr. Ingram. Their conversation was of the same nature as the week before. Complainant initiated no further contact with Respondent.

14. On February 23, 1976 Respondent requested a second Civil Service register. On March 17, 1976, four additional Civil Service registers were requested. On April 7, 1976, another Civil Service Register was requested. On May 4, 1976, another Civil Service register was requested. On May 21, 1976, another Civil Service register was requested. (Respondent's Exhibits 2-9). Nine separate Civil Services registers were run in this process.

15. On March 1, 1976 Respondent sent a letter to the two persons Complainant listed as references to secure written references. A reference dated March 15, 1976 was received from Peter Americo. (Complainant's Exhibit 1).

16. Approximately March 24th Complainant interviewed for a job in another division of the Department of Vocational Rehabilitation. Complainant was offered the job on March 31, 1976 and began work April 16, 1976.

17. In mid-April 1976 Complainant was contacted by Ruth Anderson. Ms. Anderson asked if Complainant knew why she had not been hired by Respondent. At this point Respondent had made no contact with Complainant since the February 12th job interview. Ms. Anderson informed Complainant that she was not hired "because your husband is black" (Transcript, 12).

18. Approximately April 14, 1976, Ms. Anderson spoke to David Ingram concerning Complainant's hiring. Mr. Ingram informed her that Complainant was not hired because "her husband is black" (Transcript 35) Ms. Anderson also spoke to Mr. Marshall and Randy Myers.

about this matter.

19. Respondent offered two other reasons for the decision not to hire Complainant. One was that Mr. Maine had been given a negative, oral recommendation by Dr. Ivan Beatty, who was an employee of the Department of Vocational Rehabilitation. Another reason was that Complainant, being a transfer from another state agency, would join Respondent as a permanent employee. Had she not been a transfer Complainant would be a probationary employee (original appointment) and placed on a probation period before becoming a permanent employee.

20. Neither Mr. Marshall, nor Mr. Ingram, nor Mr. Myers contacted Dr. Beatty about his reference. Dr. Beatty's reference was never reduced to writing.

21. In the past Mr. Marshall had pursued additional information upon receiving a negative reference. In one instance Mr. Marshall personally contacted the supervisor of the applicant. Upon the Supervisor's positive recommendation the applicant was hired. (Transcript 113). This process was not followed for Complainant.

22. According to T. Glenn Roberts, personnel director for the Department of Mental Health in 1976, a transfer employee was not required to transfer to another state agency as a permanent employee. (Transcript 84 - 85). Furthermore of a staff of 15 - 20, 3 were transfers - one was in a secretarial position. (Transcript 102).

23. A series of conversations occurred and two memorandums circulated amongst Ms. Anderson, Mr. Myers, Mr. Marshall, and Mr. Gerson. Mr. Ingram concerning Complainant. (Complainant's Exhibit 2). Complainant. (C

24. Neither Mr. Myers, Mr. Marshall nor Mr. Ingram testified that Complainant was not hired because of her husband's race. However Mr. Myers indicated that the race of Mr. Wilder was a topic of conversation amongst the clerical staff. (Transcript 127) Mr. Marshall testified that Ms. Anderson was a credible person, would proffer credible testimony and had "no good reason" to lie about Mr. Myers or Mr Ingram. (Transcript 124). Ms. Anderson testified that her "relationship with Randy (Myers) and Bob Marshall and also Dave Ingram was good". (Transcript 62).

25. On May 10, 1976 Complainant contacted the Human Rights Commission concerning this matter.

26. On May 19, Mr. Ingram, at Mr. Marshall's direction, telephoned Complainant. Mr. Ingram informed her that the position was still available if she was interested in interviewing again. Mr. Marshall was aware that Complainant had contacted the Human Rights Commission. (Transcript 122). Furthermore Mr. Marshall acknowledged that he knew it was illegal to discriminate on the basis of race. (Transcript 121).

27. The person who eventually filled this position, Tina Hughes, was found on the eighth Civil Service register. (Respondent's Exhibit 8). She had been employed by Dr. Roberts for 8-11 months prior to obtaining this position, in a CETA position. CETA positions were not Civil Service positions. Dr. Roberts contacted Mr. Marshall and highly recommended Ms. Hughes. (Transcript 74). Ms. Anderson interviewed the applicant and felt she "less qualified" than Complainant. (Transcript. 42).

28. Ms. Hughes began working with Respondent on July 1, 1976.

29. Complainant was never officially notified by Respondent of being hired or rejected for the position. In fact Respondent contacted Complainant only one time following her interview - the May 19, 1976 phone call from Mr. Ingram.

30. Complainant was "very angry and then I just felt humiliated" about the action taken by Respondent (Transcript 14).

CONCLUSIONS OF LAW

1. The Complainant is a "person" within the meaning of the West Virginia Human Rights Act. W. Va. Code §5-11-3(a).

2. The Respondent is an "employer" within the meaning of the West Virginia Human Rights Act. W. Va. Code §5-11-3(d).

3. It is the public policy of the State of West Virginia to provide all of its citizens equal opportunity for employment. Equal opportunity in the areas of employment is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness or handicap. W. Va. Code §5-11-2.

4. On September 13, 1985, Complainant filed a formal complaint against Respondent (ER 80-77) alleging that Respondent had engaged in unlawful discriminatory practices prohibited by law. W. Va. Code §5-11-9(a).

5. Said Complaint was timely filed as within ninety days of the alleged act of discrimination. W. Va. Code §5-11-10.

6. Pursuant to the mandate issued by the court in Edith Allen, et al v. State of West Virginia Human Rights Commissioner, et al, 324 S. E. 2d 299 (W. Va. 1984) the public hearing was held.

7. Racial discrimination need not be proved by direct or circumstantial evidence. Rather a multi-point standard has been adopted in both federal and state courts. McDonnell-Douglas v. Green 411 U.S. 792 (1973), Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission 309 S.E. 2d 342 (W. Va. 1983). This scheme requires the Complainant to meet established criteria to establish a prima facie case. These requirements are: 1) that complainant was a member of a protected class, 2) that she applied and was qualified for the position 3) that she was rejected despite her qualifications 4) that following the rejection Respondent continued to accept the applications of similarly qualified persons.

8. Complainant has established a prima facie case. Although a white person is not a member of a protected racial group, a white person who is allegedly penalized for her association with black people falls within the protection of the (Civil Rights) Act. Whitney vs. Greater New York Corporation of Seventh Day Adventists, 401 F. Supp. 1363 (S.D.N.Y. 1975); Holiday v. Belle's Restuarant 409 F. Supp. 904 (W.D.Pa. 1976). Complainant did apply and was qualified for the position and although never formally notified Complainant was rejected for this position despite her qualifications. Respondent actively continued to seek similarly qualified persons for months after Complainant's interview.

9. ~~Once Complainant has established a prima facie case the~~
~~burden shifts to the Respondent "to articulate some legitimate, nondiscriminatory~~
~~reason for the employer's rejection"~~ McDonnell-Douglas, at 402. This is but a burden of producing evidence to rebut the prima facie case and not the burden of persuasion. Texas Dept. of

Community Affairs v. Burdine 450 U.S. 248 (1981). Respondent's reasons for not hiring Complainant: the negative recommendation of Dr. Beatty and the transfer employee problem clearly satisfy this burden.

10. Once Respondent has articulated a legitimate nondiscriminatory reason 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" Shephards-town at 352.

The negative recommendation from Dr. Beatty is troublesome. Neither Dr. Beatty nor Mr. Maine (the person Dr. Beatty discussed Complainant with) testified. The exact nature of the problem which resulted in this negative recommendation was never established. However it is clear that in a similar situation (the hiring of Mr. McCloud). Mr. Marshall initiated a call to verify a recommendation. This was not done for Complainant as no one contacted Dr. Beatty. Furthermore Mr. Marshall called Dr. Roberts to discuss Tina Hughes - the person hired for the position Complainant sought. Clearly different applicants were being treated disparately.

Secondly is the concern that Complainant, if hired, would become a permanent employee immediately. Three transfer employees were already working in a work force of 15-20. Dr. Roberts, the personnel director, testified that a transfer did not have to start as a permanent employee. Clearly, this excuse is but just that - an excuse. Thus the reasons espoused by Respondent are pretextual and have been shown to be pretexts by a preponderance of the evidence.

11. The West Virginia Human Rights Act shall be liberally

*affirmed
ARL
9/10/85*

construed to accomplish its objectives and purposes. W.Va. Code §5-11-15.

12. The West Virginia Human Rights Commission may award compensatory damages for humiliation, embarrassment, emotional and mental distress and loss of personal dignity, without proof of monetary loss. State of West Virginia Human Rights Commission v. Pearlman Realty Company, 239 S.E. 2d 145 (W.Va. 1977).

13. The West Virginia Human Rights Commission may award attorneys' fees against a respondent. §9.02(b)(1) Emergency Rules of the West Virginia Human Rights Commission.

Therefore, based on the foregoing, I make the following recommendations:

1. That Complainant be awarded incidental damages in the amount of \$2000.00, payable by Respondent, to compensate for the anger, embarrassment, humiliation, and emotional and mental distress, resulting from Respondent's actions.

2. That Counsel for Complainant be awarded attorney's fees payable by the Respondent as documented in Complainant's "Affidavit For Attorney's Fees And Costs", which is attached herein.

Respectfully submitted this 12th day of August, 1985.

Anne B. Charnock

ANNE B. CHARNOCK
Hearing Examiner

AFFIDAVIT FOR ATTORNEY FEES AND COSTSOK
PAC
9/10/85

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, to-wit:

I, Mike Kelly, counsel for the complainant in this action, hereby state under oath as follows:

1. The following is a true and actual summary of my time spent in litigating this action as compiled from my time records routinely kept throughout the duration of this matter:

<u>Date(s)</u>	<u>Activity</u>	<u>Hours</u>
April 11, 1985	Review file, interview client	1.0
April 27, 1985	Draft interrogatories	1.0
May 13, 1985	Pre-trial conference	0.5
May 22, 1985	Prepare for depositions	1.5
May 22, 1985	Depositions and preparation of client	4.0
May 23, 1985	Phone calls	0.7
May 26, 1985	Review depositions	2.0
May 27, 1985	Prepare for hearing	3.5
May 28, 1985	Meet with client and hearing	5.0
June 23 & 24, 1985	Read transcript	3.0
June 25, 1985	Research	7.0
June 26-July 1, 1985	Write brief	12.0
Total hours		41.2 hours
		x \$60 per hour
TOTAL		<u>\$ 2,472.00</u>

2. I have been a member of the Bar of the State of West Virginia for eight years and have been engaged in the practice of ~~civil rights law for a combined period of two years.~~

3. Given the time and labor required in this action, the difficulty of the questions involved, the results obtained, and the fee customarily charged in the Kanawha Valley area for similar

legal services by attorneys of similar experience, a fee of \$60 per hour in this action is reasonable.

4. The costs expended in this action on behalf of complainant amount to \$220.20, including the cost of the transcript (\$19.10) and depositions (\$201.10).

5. That the total amount due and owing to the Appalachian Research and Defense Fund for attorney fees and costs is:

Attorney fees (41.2 hours x \$60/hr.)	\$ 2,472.00
Costs	<u>220.20</u>
TOTAL AMOUNT DUE	<u><u>\$ 2,692.20</u></u>

Mike Kelly

 MIKE KELLY
 1116B Kanawha Blvd., East
 Charleston, WV 25301

Taken, sworn to, and subscribed before me this 1st day of July, 1985.

My commission expires January 25, 1993.

J. Sp Moss

 Notary Public