

STATE OF WEST VIRGINIA
HUMAN RIGHTS COMMISSION

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W.V. HUMAN RIGHTS COMM.
[Signature]

KEENE ROBERT WONG,

COMPLAINANT,

v.

DOCKET NO. EANC-113-84

HIGHLAND HOSPITAL,

RESPONDENT.

PROPOSED ORDER AND DECISION

PRELIMINARY MATTERS

A public hearing was convened for this matter on February 12, 1985 in Charleston, West Virginia. The complaint was filed on August 4, 1983. A Status Conference was held on November 15, 1984. Notice of hearing was served on November 26, 1984. At the hearing a Motion for Directed Finding at the close of complainant's case was granted. Subsequent to the hearing, respondent submitted proposed findings of fact and a post-hearing brief. Complainant and the Human Rights Commission were invited to file a Motion to Reconsider but have not done so.

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 ancestry, Chinese, by terminating him. Respondent maintains that complainant was terminated for improperly looking into a room while an enema was being administered to a female patient and for other impulsive and unprofessional behavior.

FINDINGS OF FACT

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

1. If complainant had remained in his employment with respondent, his salary from the date of his termination through January 31, 1985 would have been \$16,032.72. From the date of termination to the date of hearing, complainant earned \$6,563.45 from other employers.

2. Complainant was employed by respondent from July 1, 1981 to July 6, 1983.

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

3. Complainant is of Oriental/Asian ancestry. His father is Chinese.

4. Respondent is a non-profit institution devoted to the short term treatment of persons who are mentally and emotionally ill.

5. At the time that complainant was hired by respondent, he was informed by Clark, respondent's Director of Nursing, of the importance of behaving in a professional manner and that "horseplay" would not be permitted in the hospital.

6. At the time that complainant was hired by respondent, Clark advised complainant not to raise his voice or lose control because such actions could possibly produce a violent reaction from patients in the hospital.

7. On July 6, 1983, Clark terminated complainant from his employment with respondent.

8. Among the specific reasons given to complainant by Clark for his termination were the following:

- a. That he had improperly looked into a room while an enema was being administered to a female patient.
- b. That he had done cartwheels in the hospital hallway.

c. That he had made suggestive comments or engaged in suggestive behavior with regard to a female patient.

d. That he had improperly worn the smock portion of his uniform in a manner where the zipper was drawn too low on his body.

9. Complainant was informed by Clark at the time of his termination that complainant's history of impulsive and unprofessional behavior, for which he had been counseled but which he continued to exhibit, was a factor in the decision to terminate him.

10. Prior to his termination from employment with respondent, complainant had been counseled by Clark on at least three or four separate occasions and had received one written reprimand, all relating to his behavior in connection with his employment at respondent.

11. While employed at respondent, complainant was counseled by Clark on at least one occasion for wrestling with another employee in the hallway. In connection with such counselling complainant was advised that if such behavior were repeated, he would be terminated.

12. On one occasion, complainant was counseled by Clark or Cooper, a Charge Nurse at respondent, about controlling the volume of his voice at the hospital.

13. On one occasion, Clark counseled complainant about his impulsive behavior in threatening to walk off the unit on which he was working. Complainant was warned that impulsive behavior could result in his termination.

14. On one occasion, Clark counseled complainant regarding his impulsive behavior as manifested by his raising his voice with Moore, a nurse at respondent. Complainant received a written warning for such behavior and was informed that another episode of impulsive and disruptive behavior at the hospital could result in his termination.

15. At the time that complainant was hired by respondent, he was advised to obey the nurses.

16. At the time that complainant was hired by respondent, he was advised through the hospital Employee Manual that he could be terminated for several specific reasons as well as for causes which served to disrupt the ordinary operations of the hospital.

17. At the time of his termination, complainant was told by Clark that he had received prior counseling relating to his behavior and that he had failed to show improvement.

18. Respondent's policy with respect to the discharge of employees does not require prior written disciplinary warnings before an employee is terminated. Among the grounds for discharge specified in respondent's Employee Manual are the following: neglect of duty, incompetence, insubordination, and other causes which

disrupt the ordinary operations of respondent.

19. While employed at respondent, complainant was charged the amount of \$0.89 by respondent for personal calls made by him to his home using the hospital telephone. Respondent's Employee Manual explicitly provides that all hospital telephones are for business use only.

20. Approximately six months after complainant's termination, another attendant at respondent, Fleming, who is not of Asian or Chinese ancestry, was counseled by Clark regarding personal use of respondent's telephones and was required to pay respondent approximately \$1.00 for such personal calls.

21. During 1983, the year in which complainant was terminated by respondent, at least fifteen employees of respondent other than complainant, two of whom are black and the remainder of whom are caucasian, received oral or written reprimands or were terminated for their behavior at work or their job performance.

22. During 1983, Fleming, an attendant at respondent who is not of Asian or Chinese ancestry, was counseled and received written reprimands on at least two occasions and was threatened with termination for sleeping on the job.

23. On one occasion, complainant engaged in a very loud verbal exchange with Moore, a nurse at respondent, in the Constant Care area of the hospital, where sometimes violent patients are located.

24. Neither Clark, other management personnel, nor co-

employees at respondent made derogatory comments to complainant or called complainant derogatory names relating to his ancestry during complainant's employment at respondent.

25. During complainant's employment at respondent, he used the nickname "the Chink" and referred to himself by that name on a regular basis. He also permitted others to call him "the Chink" and he did not interpret the use of such name as a slur based upon ancestry or ethnicity.

CONCLUSIONS OF LAW

1. Keene Robert Wong 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. Highland Hospital 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 ancestry by terminating him.

4. Respondent did not discriminate against complainant on the basis of ancestry by terminating him. West Virginia Code, Section 5-11-9(a).

DETERMINATION

The complaint in this matter is not supported by a preponderance of the evidence.

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).

In the instant case, complainant has failed to establish a prima facie case of discrimination based upon ancestry with respect to his termination.

One way that a complainant may make out a prima facie case of discriminatory termination is by showing the following: 1) that he is a member of a class protected by the Act; 2) that he was qualified for the job that he was performing; 3) that he was satisfying the normal requirements of his work; 4) that he was discharged; and 5) that after his discharge, the employer assigned employees who are not members of complainant's protected class to perform the same work. Flowers v. Crouch-Walker Corp. 522 F.2d 1277 (7th Cir. 1977).

In the instant case, complainant established that he

is Asian (Chinese) and that he was discharged by respondent. He has not, however, established any of the other elements set forth above. There is no evidence in the record that non-Asian or non-Chinese employees were assigned complainant's work duties subsequent to his termination. Moreover, the record evidence indicates that while employed by respondent, complainant was not satisfying the normal requirements of his work. Complainant was counseled for infractions concerning impulsive and unprofessional work behavior on four separate occasions and was given a formal written warning on one occasion for such behavior. In addition, complainant misused the telephones of respondent.

The Flowers formula is not the only method for showing a prima facie case of discriminatory termination. Indeed, it is sufficient to establish a prima facie case where a complainant sets forth facts which, if otherwise unexplained, would raise an inference of discrimination. Furnco Construction Co. v. Waters 438 U.S. 567, 577 (1978); Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1978). In the instant case, complainant has established no such facts.

Complainant claims that his termination was discriminatory because he was not written up three times prior to discharge. Respondent's policy regarding termination of employees, however, does not require written warnings prior to discharge as claimed by complainant.

Complainant claimed that he, an Asian/Chinese employee, was disciplined more harshly than other employees. When asked to be more specific, complainant cited the following two examples: he was required to reimburse respondent for personal use of the telephone, and that he was written up for a verbal exchange with nurse Moore. The record evidence indicates, however, that Fleming, an attendant for respondent who is not of Asian or Chinese ancestry, was also required to reimburse respondent for personal use of the telephone. In any event, the amount which complainant was required to repay (\$0.89) is so small as to render the alleged discipline nonsignificant.

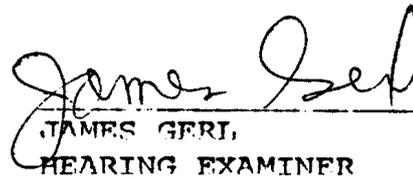
The record evidence also indicates that fifteen other employees, none of whom were of Asian or Chinese ancestry, were disciplined or terminated by respondent in 1983. Complainant's contention that he was singled out for discipline appears to be based upon rank hearsay. With regard to the incident involving Nurse Moore, complainant admits that he was shouting in the halls of a hospital that serves the mentally and emotionally ill.

Complainant argues that the allegations which led to his termination are false. Even if complainant is right, this is not evidence of discrimination. Complainant has shown no link between the allegedly untrue reasons for his discharge and his ancestry.

It is particularly significant that complainant admits that while he was employed by respondent there was no name calling based upon ancestry. If such ethnic slurs had been present, there could have been sufficient facts to raise an inference of discrimination unless otherwise explained. There were no such ancestral slurs in this case, and a prima facie case has not been established.

RECOMMENDED ORDER

In view of the foregoing, the Hearing Examiner recommends that the complaint in this matter be dismissed with prejudice.



JAMES GERI,
HEARING EXAMINER

ENTERED: April 8, 1985

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:

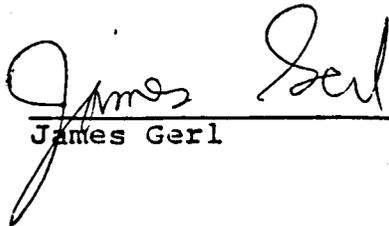
Keene Robert Wong
Rt. 1, Box 72
Gallagher, WV 25083

Cynthia Turco
Spilman Thomas, Battle & Klostermeyer
P. O. Box 273
Charleston, WV 25321

Roxanne Rogers
Human Rights Commission
215 Professional Building
1036 Quarrier Street
Charleston, WV 25301

John Boettner, Jr.
Boettner & Crane
1115 Charleston National Plaza
Charleston, WV 25301

on this 8th day of April, 1985.



James Gerl

COPY

May 24, 1985

Mr. Keene R. Wong
Route 1, Box 72
Gallagher, West Virginia 25083

Edwin L. Johnson, Administrator
Highland Hospital
P. O. Box 4359
Charleston, West Virginia 25304

Cynthia L. Turco, Esquire
Spilman, Thomas, Battle & Klostermeyer
P. O. Box 273
Charleston, West Virginia 25321

John Boettner, Jr.
Boettner & Crane
1115 Charleston National Plaza
Charleston, West Virginia 25301

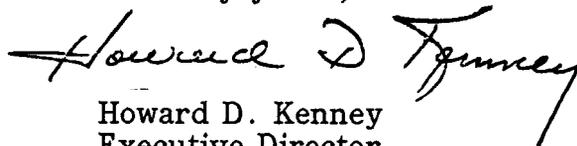
Re: Keene R. Wong v. Highland Hospital
Case No. EANC-113-84

Dear Mr. Wong, Mr. Johnson, Ms. Turco, and Mr. Boettner:

Herewith please find the Findings of Fact, Conclusions of Law and the Order of the WV Human Rights Commission in the case of Keene Robert Wong v. Highland Hospital.

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 thirty (30) days, the Order is deemed final.

Sincerely yours,



Howard D. Kenney
Executive Director

HDK/kpv
Enclosure CERTIFIED MAIL-RETURN RECEIPT REQUESTED

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

Keene Robert Wong,
Complainant,

v.

Docket No.: EANC-113-84

HIGHLAND HOSPITAL,
Respondent.

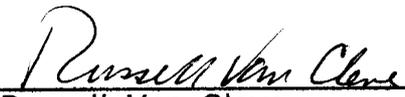
ORDER

On June 12, 1985, the Commission reviewed the Hearing Examiner's proposed Order and Decision. After consideration of the aforementioned Order and Decision the Commission does hereby adopt it as its own.

It is therefore ORDERED that the Hearing Examiner's Order be attached hereto and made a part of this Order. It is further ORDERED that Complainant be awarded no relief and that this case be closed.

By this Order, a copy of which is to be sent by certified mail, the parties are hereby NOTIFIED that they have ten days to request reconsideration of this Order and that they have the right to judicial review.

Entered this 17 day of June, 1985.



Russell Van Cleve
Chairman
West Virginia Human Rights
Commission