

closed
7/28/78

SCARBOROUGH V. ARNOLD
DECISION OF THE COMMISSION

Procedural Background

This case is before the Commission on remand from the State Supreme Court. The action was originally commenced by the complaint of Susan Scarborough filed with the Commission on March 17, 1975, alleging unlawful discriminatory hiring practices on the part of Robert B. Arnold, proprietor of a restaurant in Concord, New Hampshire. On June 12, 1975, Commissioner Bolden, who had previously been designated by the Commission Chairman, pursuant to RSA 354-A:5, to conduct an investigation of the complaint, issued his findings and his determination that there was probable cause for the complaint.

Thereafter, Commissioner Bolden offered Mr. Arnold a proposed conciliation agreement. Mr. Arnold did not accept the proposed agreement, nor did he offer a counter-proposal. The Commission held a factual hearing in the case on October 17, 1975; its Order and Findings -- holding that Mr. Arnold was guilty of discrimination -- were transmitted to Mr. Arnold on December 12, 1975. Mr. Arnold subsequently appealed the Commission's decision pursuant to RSA 354-A:10 to the Superior Court and from there to the Supreme Court. In Scarborough v. Arnold, ___ N.H. ___ (October 24, 1977), the Supreme Court held that the Commission's findings in deciding the case had not been sufficiently specific. In particular, the Court held that it was not clear from the findings whether the Commission, in holding that Mr. Arnold had violated RSA 354-A:8, I (Supp. 1977), had based its holding on a conclusion that there had

been a discriminatory refusal to hire Ms. Scarborough or rather on a conclusion that there had been a wrongful failure to fairly consider the applicant for a job opening because of her sex. Accordingly, the Court remanded the case to this Commission for further findings in accordance with the Court's opinion.

On remand the Commission has reviewed its December 12, 1975 decision and has given careful consideration to the entire record in the case in light of the Supreme Court's decision. After deliberation, the Commission makes the following specific findings and conclusions:

FINDINGS OF FACT

1. On March 6, 1975, in response to an advertisement in the Concord Monitor placed there by respondent for the purposes of recruiting a management trainee, complainant's husband, John Lawit, at the request of the complainant, Susan Scarborough, called the place of business of Robert B. Arnold, the respondent, at approximately 9:30 a.m.

2. The advertisement to which complainant, through her husband, responded to on March 6, 1975 did not contain any specification of qualifications required for the position of management trainee other than the general qualifications appearing in the following excerpt from the advertisement:

"Are you a self starter? Need applicant
who will work well with others. . . ."

Transcript of hearing on October 17, 1975 in Scarborough v. Weeks Ice Cream, Inc., No. ES-1240-222-126 (hereinafter "Transcript"),
p. 4.

3. Although he did not know who answered the telephone at respondent's place of business, the person to whom Lawit spoke on March 6, 1975 indicated, in response to an inquiry about the management trainee position, that "they are not going to take women applicants for this job." Transcript, p. 10.

4. Complainant Scarborough called respondent Arnold's place of business March 8, 1975; although she did not know who answered the telephone she too was told that women were not being considered for the position of management trainee. When she reminded the person who had answered that exclusion of women could possibly be sex discrimination, she was invited to come in for a personal interview. Transcript, p. 12.

5. Scarborough was interviewed by Arnold on March 10, 1975, at which time he was both polite and courteous but implied that "being a girl" she would not work out as a management trainee. During the interview Arnold stated that Scarborough would earn more money as a waitress. Transcript, pp. 14-16, 37-38, 49.

6. Although Arnold testified that the position would be "primarily -- a grill person," Transcript, p. 31, the Commission specifically notes that no such qualification was stated in the advertisement.

7. Arnold testified that during his interview with Scarborough, he stated " -- I did make reference to the fact that I wasn't looking for a girl. . . I told her she wouldn't be very happy in the job." Transcript, p. 37. Arnold also testified that "the other side of that grill is where the money is to be made for a woman." Transcript, p. 51. Arnold also testified that he had never suggested to any of

the male applicants that they would not be happy working at the job of management trainee. Transcript, pp. 53-54.

8. Donald Haywood, hired May 19, 1975 by Arnold as a management trainee, testified that although Arnold told him of all the bad aspects of the job during his interview, Transcript, p. 75, he was never told he would earn more money as a waiter or that he would not be happy with the job. Transcript, pp. 76-77.

9. Arnold testified that in all of his years in a hiring situation with both Friendly's and his own establishments, he had never hired a female as a management trainee.

CONCLUSIONS

A. It is the specific conclusion of the Commission, based on testimony, that Arnold was predisposed not to hire a female for the position of management trainee. His active dissuasion of Scarborough; his continued reference that she would earn more and be happier as a waitress, as set forth above; his comment, Transcript, p. 51, that "the other side of the grill is where the money is to be made for a woman"; his neglect to offer such advice to male applicants; and his history as a manager for Friendly's and as owner of his own establishments all shape the Commission's opinion that Arnold exhibited a discriminatory animus toward Scarborough, as a woman, in considering her for the position of management trainee and that because of this discriminatory animus, he failed to consider her, because of her sex, for the position of management trainee in violation of RSA 354-A:8, I (Supp. 1977).

B. The Commission considered Arnold's claim that Scarborough was not qualified for the position of management trainee which was

raised as an independent justification for the decision to hire another applicant. The Commission, however, rejects this contention for two distinct and independent reasons.

First, the Commission cannot find that there were any bona fide occupational qualifications for the position of management trainee. The evidence in the record is clear as to the following facts: that no statement of occupational qualifications was made by Arnold or his employees either in the advertisement placed in the Concord Monitor or in the responses to telephone inquiries by Scarborough and her husband in response to the advertisement. Moreover, there is no evidence that persons responding to the advertisement were presented with a written statement of job qualifications for the position of management trainee. The testimony of Arnold that such occupational qualifications existed is unconvincing in view of these uncontroverted facts.

Under circumstances such as these where there is no specification of job qualifications in advertisements of a position or in reply to preliminary inquiries in response to such advertisements and where there is no written job description which applies to the position, there is a substantial possibility that an employer will, as an afterthought, create an artificial barrier to bar an applicant from consideration in order to disguise a discriminatory motive. This is particularly true where the job qualification that is finally specified is not of a sort that can be readily measured in an objective manner. It is clear from the record that the assessment of the qualifications of applicants as grill persons as in this case was largely subjective and made by Arnold himself.

The Commission is convinced that Arnold's bias against hiring a woman for the position of management trainee infected the subjective evaluation of Scarborough's qualification for the job. The Commission therefore rejects Arnold's independent justification for hiring an applicant other than Scarborough for the position of management trainee.

Second, the Commission specifically holds that where, as here, the facts of a particular case clearly demonstrate that a discriminatory animus existed at the time a job application was filed, the applicant's qualifications for the position -- even where the existence of bona fide occupational qualifications is amply demonstrated by the record -- are immaterial.

C. The Commission has also considered the fact that Scarborough was not actually rejected as a job applicant prior to the point in time when she filed her complaint with the Commission. In view of the clear discriminatory animus demonstrated in this case, however, the Commission does not find this fact to be significant. Moreover, prior to the Commission hearing in this case another applicant was selected by Arnold for the position of management trainee and the Commission finds that acceptance of the other applicant was tantamount to rejection of Scarborough's application.

D. Having found, based on the evidence presented at the October 17, 1975 hearing before the Commission, that Arnold demonstrated a discriminatory animus toward women in considering Scarborough as an applicant for the job of management trainee, the Commission concludes that Arnold failed to consider Scarborough for

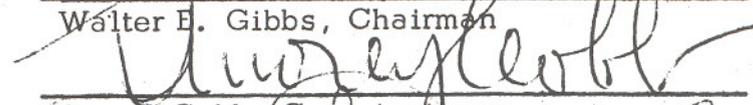
that position of management trainee solely because of her sex in violation of RSA 354-A:8, I, (Supp. 1977).

E. In addition, based on its finding of discriminatory animus, the Commission concludes that Arnold would not, under any circumstances, have hired Scarborough; that he failed to hire her under the facts of this case, and that his failure to hire her was based solely on her sex in violation of RSA 354-A:8, I (Supp. 1977).

F. The Commission finds that this is an appropriate case for an award of back pay and an order mandating affirmative action to correct past discriminatory practices. The Commission will schedule a further evidentiary hearing on the issue of back pay.



Walter E. Gibbs, Chairman



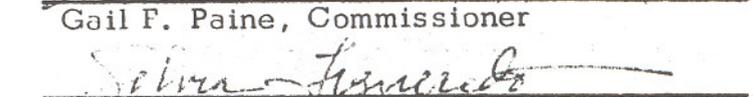
Ivorey Cobb, Commissioner



Romeo J. Rejimbai, Commissioner



Gail F. Paine, Commissioner



Sylvia Figueredo, Commissioner

26 May 1978

Susan Scarborough

v.

RTP Enterprises, Inc.
(Robert B. Arnold)

ORDER

The New Hampshire Commission for Human Rights hereby specifically finds as a fact each factual statement set forth in Plaintiff's Petition for Contempt, and further finds that Defendant's claim of lack of jurisdiction in the hearing in the above cause did not excuse his refusal to abide by the subpoena served on him, and Orders as follows:

1. Robert B. Arnold is found to be in contempt for failure to comply with a duly issued and properly executed subpoena, and is fined \$500.00 for said contempt, payable to Plaintiff, Susan Scarborough, for injuries and delays suffered as a result thereof.
2. Robert B. Arnold is ordered to appear before the Commission on August , 1978, and to bring with him all records previously subpoenaed by Plaintiff, to testify before the Commission regarding those records. Further, Robert B. Arnold is fined \$100.00 per day from August , 1978 if he fails to so appear, and is ordered to pay to the Plaintiff, Susan Scarborough, attorneys' fees at the rate of \$50.00 per hour to attend such hearing on August 1978, or any subsequent hearing.
3. The Commission specifically affirms its current award to Plaintiff in the amount of \$3321.91, which was awarded as a result of the July 28 hearing.
4. The Commission will grant to Plaintiff such higher amount as may appear to be due subsequent to the testimony of Robert B. Arnold taken pursuant to this Order, since the Commission's award is currently based on the minimum

amount established by the record.

So Ordered,

Walter E. Gibbs, Chairman
New Hampshire Commission for Human Rights

Romeo J. Rejimbai, Commissioner
New Hampshire Commission for Human Rights

Silvia Figueredo, Commissioner
New Hampshire Commission for Human Rights

Scarborough v. Arnold

Denial of Motion:

The New Hampshire Commission for Human Rights denies the Motion to refer Scarborough v. Arnold to the United States Equal Employment Opportunity Commission.

The Commission, pursuant to its statutory obligations RS354-A supp., cannot deny due process under state statute to complainants or respondents in charges of discrimination.

The current case, having been in litigation since October 1975, cannot be referred to the United States Equal Employment Opportunity Commission until all legal avenues have been exhausted at the State level.



Walter E. Gibbs, Chairman
N.H. Commission for Human Rights

August 1, 1978
Date

Docket Numbers
ES-1240-222-126
TBO5-1790 (E.E.O.C.)

closed 7/28/78

Susan Scarborough)
New Hampshire Commission for)
Human Rights)
)
vs.)
)
R.T.P. Enterprises, Inc.)
(Weeks Ice Cream, Inc.))
Robert B. Arnold, President)
)
)
)

ORDER

1. R.T.P. Enterprises, Inc., (Weeks Ice Cream, Inc.), and Mr. Robert B. Arnold, President, hereinafter known as the Respondent, shall cease and desist from all practices prohibited by NHRS354-A as amended and Title VII of the United States Civil Rights Act of 1964 as amended, and all lawful guidelines and promulgations therein.
2. Respondent shall not discriminate or retaliate in any manner against any person because of opposition to any practice declared unlawful under Title VII of the United States Civil Rights Act of 1964 as amended or NHRS354-A as amended or because of the filing of a charge; giving of testimony or assistance; or participation in any manner in any investigation, proceeding or hearing under Title VII of the United States Civil Rights Act of 1964 as amended or NHRS354-A as amended.
3. The New Hampshire Commission for Human Rights, hereinafter known as the Commission, may on its request or the request of the Complainant may review compliance with this Order. As a part of such review the Commission may require written reports concerning compliance, may inspect the premises, examine witnesses, and examine and copy documents.

4. Respondent shall include in all future advertising for help the line, "Equal Opportunity Employer, Male-Female."
5. Susan Scarborough, hereinafter known as the Complainant, hereby waives, releases and covenants not to sue the Respondent with respect to any matters which were or might have been alleged as charges filed with the Equal Employment Opportunity Commission of the New Hampshire Commission for Human Rights subject to performance by the Respondent of the promises and representations contained herein. The Commission shall determine whether the Respondent has complied with the terms of this Order.
6. Respondent shall pay to the Complainant the amount of Twenty-five hundred (\$2500.00) dollars.
7. Respondent shall return an executed copy of this Order plus the award stipulated in paragraph #6 payable to the Complainant, mailed to the New Hampshire Commission for Human Rights, 66 South Street, Concord, New Hampshire, within thirty (30) days of receipt of this order.

Date

Susan Scarborough

Date

For the Respondent

Date

Gail F. Paine
For the Commission

Scarborough v. Arnold

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Walter E. Gibbs, Chairman
N.H. Commission for Human Rights

December 1, 1978
Date

New Hampshire Commission for Human Rights

COMMISSIONERS

WALTER E. GIBBS, CHAIRMAN
GAIL F. PAINE
IVOREY COBB
ROMEO J. REJIMBAI
SYLVIA FIGUEROA



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CONCORD, NEW HAMPSHIRE 03301
TEL. (603) 271-2767
EXECUTIVE DIRECTOR
BEREL FIRESTONE

14 August 1978

re: Scarborough v. Arnold

Robert E. Bowers, Jr., Esquire
Main Street
New London, NH 03257

Dear Mr. Bowers:

By telephone this date, 14 August 1978, Chairman Walter E. Gibbs has authorized me to make the following comments:

1. The Commission denies the Motion for Contempt filed 9 August 1978.
2. The Commission has no statutory authority under law or its Rules of Practice and Procedure to find any party in contempt and/or to institute fines.
3. The request for affirmation of the Commission's award of damages resulting from the Hearing 28 July 1978, is both unnecessary and superfluous.

The Order of the Commission issued 28 July 1978 is final, pursuant to the requirements in the Remand from the New Hampshire Supreme Court, and any further litigation to that Order must be instituted within thirty (30) days of receipt. Failure to obey the Order, and absent any appeal, will cause the Commission under RS354-A:12 to appeal in Superior Court for a contempt citation.

Very truly yours,



Berel Firestone
Executive Director

BF:jw

Cc Attorneys Greenhalge and Sargent, Chairman Gibbs