BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

Docket No. 31854

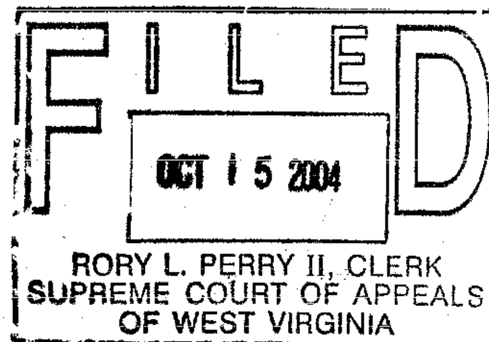
WEST VIRGINIA HUMAN RIGHTS COMMISSION; and BEVERLY L. WATTIE, on behalf of KRYSTAL WATTIE, a minor,

Complainant-Respondents,

v.

BARBARA COBB,

Petitioner.



BRIEF OF PETITIONER

I. STATEMENT OF THE CASE

On January 30, 2004, the State of West Virginia Human Rights Commission ("HRC"), pursuant to West Virginia Code §5-11-11, entered the Decision appealed from. The Decision affirmed, without any explanation, that Petitioner Barbara Cobb ("Teacher"), who was a respondent before the Commission in a case brought on behalf of an African-American student at Riverside High School, had discriminated against the student ("KW" or "Student") but, on account of a Student's behavior, reduced the award against the teacher to $500.00. This Court granted review.

II. STATEMENT OF FACTS

This case involves certain interreactions between an assertive senior high school African-American student and a white teacher at Riverside High, the Petitioner, during two or three of the four years the Student attended Riverside High School in Kanawha County.

The Student alleges that the Petitioner-Teacher engaged in a pattern of racial discrimination against her during a three-year period which began in the school year of the ninth grade year[1] when the Student was in the Teacher's second semester English classroom, the only class the Student attended taught by the Petitioner and during portions of the following two school years when the Student was a tenth grader and a junior. Although the ALJ, as affirmed by the HRC and the Circuit Court, generally found for the Student and against the Teacher, he excoriated the Student for her verbal behavior and disrespect toward the Teacher. The ALJ found:

> ... as a matter of fact, the [Student] ... was chronically tardy to the respondent ... [Teacher's] class; and, that she and her group of African-American friends, were frequently very loud and disruptive in the hallways of Riverside High School during her ninth grade year. It is further found that the [Student] complainant was combative and confrontational with the [Teacher] respondent, and that she took advantage of the situation concerning the administration's suggestion to [the Teacher] that she refrain from contact with the [Student], to goad [the Teacher] .... KW [the Student] would block the hall when [the Teacher] ... tried to pass. KW muttered things like "just let her say something." She would generally run her mouth about [the Teacher] ... to her peers so that [the Teacher] would know she was being talked about by KW and her friends. [citations omitted]

Factfinding 22, Final Decision at 10. The ALJ further found:

> There is no dispute that KW was chronically tardy for class and that she and

[1]In the interest of clarity and convenience, the three or four school years relevant herein will be referred to by the grade the Student was in at the time:

Grade	Year	Class
9	'99-'00	Ninth
10	'00-'01	Tenth
11	'01-'02	Junior
12	'02-'03	Senior

> her African-American friends were loud and disruptive in the hallways during Jump Start and class changes. The undersigned finds that discipline imposed for such instances during KW's first year were to some extent appropriate. ...

Final Decision at p. 15. Although similar to quotes above, the following summarizes the HRC findings of Student's open antagonism toward the Teacher during the Student's tenth grade year.

> This case is very disturbing because of the escalation of hostility between the parties particularly during the 10th Grade year for KW. It is further complicated by the fact that regardless of any racial bias by [the Teacher] ..., KW herself engaged in inexcusable antagonistic behavior toward [the Teacher] ... that year as well. KW would block the hall when respondent tried to pass. KW muttered things like "just let her say something." She would generally run her mouth about respondent to her peers so that the respondent would know she was being talked about by KW and her friends. KW would not back down when confronted by respondent and would yell, rant and rave back in respondent's face.

Decision at p. 16. In awarding only $500 damages against the Teacher, the ALJ noted:

> This is so, not only due to the relative misconduct of the complainant, KW, but also because it is clear that the relative misconduct of complainant KW in her confrontations with respondent, Mrs. Cobb. ...

Decision, p. 18. Hereinafter, the foregoing findings will be referred to as the "rant and rave findings." The Commission did not alter them.

III. ASSIGNMENTS OF ERROR

1. The refusal of the ALJ to recognize that the "loud ... disruptive ... combative and confrontational ..." behavior of the Student caused the situation underlying the discipline, completely undermines the ALJ's intentional discrimination findings. Further, the findings of intentional discrimination by the Teacher are contradicted by the rant and rave findings and fail to take into account the effect of the legal status of a teacher,

especially when maintaining order in and around the classroom. Thus, the findings are arbitrary and capricious, clearly wrong in view of the reliable, probative and substantial evidence on the whole record and are affected by other error of law, within the meaning of West Virginia Code §29A-5-4(g)(4), (5) and (6).

> Westmoreland Coal Co. v. West Virginia Human Rights Commission, 181 W.Va. 368, 382 S.E.2d 562 (1989); Gino's Pizza of West Hamlin, Inc. v. West Virginia Human Rights Commission, 187 W.Va. 312, 418 S.E.2d 758 (1992).

2. The HRC and the Court below failed to recognize the legal status of the Teacher and her authority, her duty administer discipline and the accompanying qualified immunity. Further, the HRC ignored the well-established public policy of leaving all but the most serious forms of student discipline to the educators and keeping them away from the legal system. Thus, the findings of intentional discrimination are "affected by other errors of law" and arbitrary and capricious within the meaning of West Virginia Code §29A-5-4(g)(4) and (6).

> West Virginia Code §18A-5-1(c); Keith D. v. Ball, 177 W.Va. 93, 350 S.E.2d 758 (1986)

IV. POINTS AND AUTHORITIES RELIED UPON

Cases:

Adams v. City of Dothan, 45 So.2d 761, 759 Ala. Civ. App. (1986)

Bethel School District v. Fraser, 478 U.S. 675 (1986)

Bryant v. Independent School District No. I-38 of Garvin County, Oklahoma, 334 F.3d 928, 930 (10th Cir. 2003)

Davis v. Ann Arbor Public Schools, 313 F.Supp. 217 (E.D.Mi. 1970)

Dickens v. Johnson County BOE, 661 F.Supp. 157 (E.D. Tn. 1987)

Gino's Pizza of West Hamlin, Inc. v. West Virginia Human Rights Commission, 187 W.Va. 312, 418 S.E.2d 758 (1992)

Keith D. v. Ball, 177 W.Va. 93, 350 S.E.2d 72 (1986)

Loveland v. Martin, 355 F.3d 776 (4th Cir. 2004), dissent

New Jersey v. T.L.O., 469 U.S. 325 (1985) (Powell, J. concurring)

Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989)

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 526 (1969), dissent

Westmoreland Coal Co. v. West Virginia Human Rights Commission, 181 W.Va. 368, 382 S.E.2d 562 (1989)

Statutes:

West Virginia Code §18A-5-1(b)

West Virginia Code §18A-5-1(c)

West Virginia Code §29A-5-4(g)(4)(6)

West Virginia Code § 61-2-5

Other Sources:

Prosser, Law of Torts, §120 (1971)

Restatement (Second) Torts, §153(b)

Safe School Act

V. ARGUMENT

THE EVIDENCE OF INTENTIONAL DISCRIMINATION IS INSUFFICIENT, PARTICULARLY IN LIGHT OF THE "RANT AND RAVE FINDINGS".

A. THE FINDINGS OF INTENTIONAL DISCRIMINATION ARE CONTRADICTED BY THE RANT AND RAVE FINDINGS AND FAIL TO TAKE INTO ACCOUNT THE EFFECT OF THE LEGAL STATUS OF THE TEACHER.

1. Since no other students engaged in the behavior summarized in the rant and rave findings, there is no case of discrimination.

The ALJ found:

> "the [Student] ... was chronically tardy to the ... [Teacher's] class; and, that she and her group of African-American friends were frequently very loud and disruptive in the hallways of the Riverside School during her ninth grade year. It is further found that the [Student] ... was combative and confrontational with the Teacher ..."

No other students of any race or color exhibited anything like that behavior. Common sense tells us that the rant and rave findings recognize a clear basis and, indeed, a crying need, for disciplinary action. Therefore, the disciplinary actions to control her classroom and the school environment are not discrimination.

The Decision's findings about the treatment of other African-American students in the ninth grade second semester class (the only semester the Student was in the Teacher's class) is based on the faulty premise that the Teacher did not discipline or send other students to the office. Although the ALJ tried to ignore it, the record is clear that at least one white student was sent to the front office at least five times for acts similar to those performed by the Student. The Teacher testified without contradiction that a certain white student, C.E., had been sent to the front office five times for acts similar to those performed

by the Student (T Vol. II, 226) and that other white students, A.B., had been disciplined by her.

However, this case really is about the relationship between the Student and the Teacher as described in the rant and rave findings and throughout the Decision. The following specific findings about that relationship are themselves contradicted by the rant and rave findings.

2. <u>The factfindings of discrimination are contradicted by rant and rave findings concerning student's behavior.</u>

Although he found against the Teacher, the ALJ found that the Student basically had performed most of the behavior which the Teacher and her colleagues had found unacceptable. However, when the specific factfindings which the judge made to support a finding of racial discrimination against the Teacher are analyzed against the "rant and rave findings" and the entire record, the rant and rave findings actually contradict and undermine the specific findings. While we appreciate the effort of the judge to be fair about the Student's conduct, it is inherently unfair and, to be specific, an abuse of discretion, to make rant and rave findings as to totally unacceptable behavior and then ignore the "rant and rave" context in which the assertedly discriminatory behavior of the Student occurred.

Factfinding 15 deals with an incident which occurred during the tenth grade year. The Judge found that the Teacher "claimed"[2] that the Student[3] was "obstructing the hallway

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[2]The ALJ never discredits the "claim" nor makes any findings of fact to the contrary; but, he did find that the Student "would block the hall when [the Teacher] ... tried to pass." The Student "... would not back down when confronted by [the Teacher] ... and would

she [the Teacher] was attempting to go down, and a heated verbal exchange occurred." The Student was in the hallway, supposedly upset about what the Teacher had said about her, when the Teacher and the Student met. The Student said that "Mrs. Cobb asked me when I was passing her what was wrong." (T I, 46) The Teacher testified that the Student approached her "in a weak little voice" and the Teacher asked what was wrong. The Student replied that she didn't appreciate what the Teacher was saying about her. (T II, 197-8) The Teacher then testified that the Student got in her face and repeatedly screamed "I'm talking to you." The Teacher repeated several times that she did not want to have a discussion with the Student. Student cornered the Teacher and was continuing her verbal attack when another teacher, Mrs. Hopkins, came up and took the Student "by the arm" and said, "[KW], come here."[4] Mrs. Hopkins withdrew the Student and after a pause the

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yell, rant and rave back in the [Teacher's] face." Decision 16.

[3]The ALJ's finding that the Student was with "her friend" (Factfinding 15) at the time is clearly erroneous. The only two persons to the confrontation, the Teacher and the Student, testified that the confrontation involved was one-on-one with no witnesses.

[4]Mrs. Hopkins related that she observed the two having a conversation with their faces about twenty to twenty-five inches apart. "I could tell that they were both upset and I knew that there had been some problems .... I went over and just asked [the Student] to come with me and she did." Mrs. Hopkins then admonished the Student, that if she needed to talk to Mrs. Cobb to "do it in front of an administrator, don't do it in the hallway." (T II, 8-10) Later that day, Mrs. Hopkins sent an e-mail message to the Teacher stating:

> I'm sorry you are having it difficult[y] with this situation. ... I ... thought I could at least try to get her away and talk to her. What I have told her and told her today was that since there is a problem, no matter who did what or said what or whose fault it is, that she should not say anything back to you. If there is a problem, it is better for her <u>not to confront you</u>, especially in the hallway. ... Anyway, I hope this situation is somehow resolved and I know it

Teacher followed and told the Student that "it was a good thing" that Mrs. Hopkins had intervened. The ALJ then completes the factfinding by noting the "it's a good thing ..." statement, thus turning the incident against the Teacher, and at page 17 characterizes the incident as an example of Teacher's inability to "leave well enough alone ...". The student did not take the stand in rebuttal to deny the Teacher's full account that the Student initiated the confrontation, which the Student had with supporting detail to contradict the Teacher's testimony inn her testimony in chief. T __.

The Judge believed that the insubordination in the above situation occurred as testified to by the Teacher. The finding that the Student would "block the hall when [the Teacher] ... tried to pass. ... [The Student] would not back down when confronted by [the Teacher] and would yell, rant and rave back in the [Teacher's] face," fits the facts of this incident exactly as described by the Teacher. (T __) However, the Judge avoids the obvious conflict in the evidence by failing to connect the outrageous behavior of the Student to any specific incident or even relating those findings to the reasons for many of the Teacher's actions.

a. The Student "... was chronically tardy to the ... [Teacher's] class ...".

We now discuss how the above-quoted finding conflicts with other findings made by the Commission. The factfindings we now discuss are examples of

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has been stressful for you. Good luck to you and hope you are okay.

RX 12. The foregoing account of the event and surrounding opinions are strong proof of the absence of discriminatory motive on the part of the Teacher, especially keeping in mind the "rant and rave" finding which specifically applies to that factual situation.

how the above rant and rave behavior conflicts with the Decision. Factfinding 8 deals with the alleged discrimination against the Student. The Student claimed, and the ALJ found (Decision 14), that being kicked out of class and sent to the office for being tardy was an act of discrimination. The Teacher (as credited by the ALJ) testified that the Student was not only tardy but was disruptive to the teaching activities going on in the classroom when the Student entered.[5] The Student disrupted the class by demanding to be briefed on what she had missed. Race was not a factor in this episode. The classroom incidents occurred during the second semester of the ninth grade year, well after the group of unruly African-American ninth graders had been identified as being "disruptive in the hallways during Jump Start [homeroom] and class changes" (Decision 15) and disruptive in class. Cobb, T Vol. II, 113; Harper, T Vol. II, 238, 240; Cavendar-McNeil, T Vol. II, 21-23. The failure of the ALJ to consider the legal duties and obligations of the Teacher (see pp. 25-27 below) to maintain order before ruling on intention of discrimination was error.

Well into the second semester, during the first of two meetings between the mother of the Student, the principal and the Student, requested by the mother, the Student admitted, when asked by the principal, that race was not an issue. (T Vol. I, 71) The Teacher had other classes with African-American students who had not been disciplined (see RX 15, Answer No. 6). Further, two particular white students were specifically identified as having been the subject of discipline. See p. 7 above.

A person engaged in intentional racial discrimination, especially in as open a setting

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[5]This testimony, apparently credited by the ALJ, in light of his findings quoted above at p. 3.

as a public school, is unlikely to repeatedly take the problem of the behavior of the Student to her superiors, including both the school and County Superintendent (T Vol. II, 190, 191; RX 20-21) ; nor is she likely to keep detailed records of each transaction, as the Teacher did. See, for example, RX 8-12. Those are the acts of a person seeking definition of her duties and protection. The Student's testimony as credited by the ALJ that the Teacher kept confusing her with another student hardly jives with the ALJ's findings as to the misbehavior of the Student. It is doubtful that a student who has misbehaved so much could be confused with another student who misbehaved much less, if at all. The crediting of the Student's testimony that African-American students were singled out for harsher treatment (supposedly not being provided with a "post-it" note and other minor infractions) is not supported by any details nor any showing that what white students who performed similar acts were not disciplined or were not identified for harsher treatment as being denied a post-it note. Such minutia should not be the subject of an HRC or court proceeding.

After repeated tardiness and disruption of the class by the student's tardy arrival, the Teacher experimented by briefly "locking out" the Student from her classroom (Factfinding 9). The other student who had been directly instructed by the Teacher to not unlock the door (so the Student could enter later), flagrantly violated the directive and did unlock the door. The Teacher further experimented with calling the mother of the second student concerning that student's direct disobedience. Neither experiment had the desired effect and the Teacher did not repeat either.

The Teacher's remark following the phone call that, in effect, the parent of the

second student was just as disrespectful as the second student is not evidence of racial discrimination; because, the student in question had, as the ALJ recognized, engaged in the misconduct of being repeatedly tardy to class, by remaining in the hallway when they should have been in class. Since there is no showing in the record that non African-American students were repeatedly tardy to class and then disruptive when they did arrive, there was no need to try any innovative approaches to try to make them conform to basic normals of group behavior.

Inasmuch as the ALJ has already found on a very clear record that the Student "and her African-American friends were loud and disruptive in the hallways during Jump Start[6] and class changes" and since students were supposed to be present in Jump Start, just like any other class, the truth of the comment of the Teacher that it was their "nature to be loud," which was found to be a violation (factfinding 21), is established by the findings of the ALJ that the African-Americans "were frequently loud and disruptive ..." (FoF 10).[7] The practice of allowing students who were not late to class and were known as "good students" to arrive late, but to exclude students who were chronically late to class, is hardly racial discrimination. Keep in mind that the Teacher testified that tardiness of the Student was frequently intentional, as was seen in the fact that she would repeatedly hang around her locker when told to go to Jump Start by the Teacher and other teachers. The question

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[6]"Jump Start" is the initial class of the day and is essentially a combination of home room and a brief study hall and/or opportunity for individual tutoring.

[7]It is clear from the ALJ's findings and the record that the noise levels and activities of the African-American group of the Student's friends was much louder and more noticeable than the normally noisy and rough actions of teenagers.

at hand concerns how a Teacher reacts to one or more students who are continually and deliberately late to class as compared to students who are not. Therefore, the circumstance that the unruly group are members of a protected class does not immunize them from the efforts of the Teacher to maintain order.

Assistant Principal Paula Potter's testimony does not, as Factfinding 6 implies, indicate that the Student was disciplined because she was "part of a group of African-American students who were too loud and disruptive in the hallways," but rather that the group was disciplined because they were "loud and disruptive." A fair reading of the testimony does not even suggest that Mrs. Potter was testifying that the Teacher was a racist. (T 163, Vol. I) The fact that Mrs. Potter and the Teacher had several (T 162-3) ongoing conversations concerning a noise and tardiness problem recognized by the ALJ as well as the administrators and groups of teachers, likewise, is not indicative of a racist attitude. Indeed, the Rant and Rave Finding establishes, consistent with the complaints of the Teacher made to the Vice-Principal (T 166) that the African-American students were "loud and unruly." (T 165, line 3)

The concluding sentence of Factfinding 6 suggests that, although the Teacher had good reason for sending the Student to the front office, the Teacher was racist; because, other teachers simply warned the Student and other students concerning the noise levels in the hallway instead of sending them to the office. Note that the Student never claims that she was not engaged in conduct for which she could properly be sent to the office or that the Teacher had caught her engaging in such conduct. The Teacher was not the only one who had problems with the Student. Teachers McNeil and Crist testified to highly

disrespectful treatment by the Student. When questioned by teacher Crist as to the use of a cell phone in school, which was prohibited, the Student responded to Mrs. Crist, "Well, you're just out of it, Mrs. Crist, if you think you're going to take my cell phone. Don't you speak to me, Mrs. Crist, don't you ever speak to me again." (T III, 112-3) When teacher McNeil ordered the Student, while she was in the hall during class time, to move on to Jump Start, Student responded to the teacher that the Student would do so, "when she got ready and to stop yelling at her." McNeil (RX-9)

> b. "It is further found that the [Student] ... was combative and confrontational with the [Teacher] ..., and that she [the Student] took advantage of the situation concerning the Administration's suggestion to [the Teacher] that she refrain from contact with the [Student], to goad [the Teacher] ...."

Factfinding 10 implies that the Teacher acted unreasonably in denying the Student a syllabus (or "rubric") concerning an assignment which somehow justified the ninth grade Student from stomping out of the library, where the class was being conducted, and disobeying the Teacher's instructions to remain. The undisputed record is that the class was meeting in the library and the students were to hand in their notebooks which, if kept in accordance with the Teacher's prior instructions (called a "rubric"), would result in each student who so conformed obtaining "extra credit."

Most of the students had already turned in their notebooks by the time Student and the friend, P.B., arrived late and without her notebook in the proper form so that it could not be handed in for extra credit. The Student demanded, and eventually obtained, a copy of a rubric which told her what she already should have done. She became agitated and stomped out of the classroom <u>contrary to the Teacher's express instructions that she</u>

remain. (T I, 22-4, 204-7 213-15; T III, 18) The Student's witness P.B. admitted that the Student left the library without permission of the Teacher. Thus, the suggestion in Finding No. 10 that the Student was somehow denied the opportunity for extra credit and the further inference that the denial was discriminatory and caused the Student emotional distress is also clearly erroneous. Specifically, the Student was given a related rubric, but instead of using it, became agitated and stomped out of the room in direct controversion of the directive of the Teacher.

In addition to being combative and confrontational, the Judge also found that during her tenth grade year, the Student "engaged in inexcusable antagonistic behavior toward [the Teacher]. ... [The Student] ... would not back down when confronted by [the Teacher] and would yell, rant and rave back in [the Teacher's] face."

Although general in nature, the foregoing findings by the Judge contradict any inference of discrimination in Factfinding 12. The Student "was not in [the Teacher's] class at that point and thereafter, however, problems between the two escalated that [tenth grade] year." On one occasion when the Student refused the direct order (made during class time) of the Teacher to close her locker and go to class. When the Student refused, the Teacher took the Student to the office. While doing so, they passed the classroom where the Student's mother was conducting an Upward Bound meeting and the Teacher complained to the mother, "are you going to let your daughter talk like this to me" to the mother in front of the Upward Bound Students. After having been directly disobeyed by the Student, one might understand that the Teacher, especially following the behaviors previously described, was upset.

The Conclusion at 15, that the mother was "humiliated" is not supported by the record, nor by any factfinding. The mother never mentioned being humiliated and volunteered that "I was not upset that day." She did not like the event and, after her session was finished, went to the office and talked to the principal. She did not complain that she had been humiliated or upset in any way. Rather, she complained that the Teacher would not call her (the mother) concerning whatever complaint the Teacher had concerning the student. (T I, p. 107)

Strangely, the Decision makes much of this incident, but fails to mention in any depth, the "visit" that the mother and daughter made to Teacher's ongoing class that day. If anybody was "humiliated" that day, it was the Teacher. During class, the Teacher was interrupted by the mother and the Student demanding to schedule a conference and insulting and berating Ms. Cobb in front of her class. (T Vol. 2, 165-168; RX 18). Mrs. Wattie reportedly stated, "Ms. Cobb's acting like a student." (RX 18). Ms. Wattie responded, "yes, she is acting like a two-year-old, she always does that." (T Vol. I, 76; RX 18). Both statements were made in front of the entire class. Ms. Cobb alerted the office of the situation, and told her students to write down what they had witnessed, to which the Student responded to the class, over the directive of the Teacher: "you all go on and write, write whatever you want to." (T Vol. 2, 175). The mother was subsequently instructed by Principal Clendenin that she could not enter a teacher's classroom unannounced and disrupt the educational process. (Clendenin, T Vol. II, 79; Mrs. Wattie, T Vol. I, 122-123).

The mother's reaction to the original incident is also important because the Decision at page 17 finds that the remarks of the Teacher made to the mother "reek of

retaliation" for the filing of the complaint herein.[8] Again, it was the Student who started the chain of events by refusing to go to class. The mother was not upset by the remark made to her by the Teacher. Her professed concern was to establish some communications between she and the Teacher concerning the Teacher's complaints about the student. Thus, the conclusion that the statement made by the Teacher and the mother, while the mother was conducting her Upward Bound activity, was not humiliating and does not "reek of retaliation." There was no showing that the Teacher even knew of the charges or that it had been filed.

The final incident occurred in the spring of the Student's tenth grade year at a school play that was being held at night. See Factfinding 14. The Teacher claimed that she had been in the bathroom alone (undisputed) and that the Student had come in and waited for the Teacher to leave her stall and then had cornered and confronted the Teacher. The Student claimed that she came in to the bathroom and was confronted by the Teacher. This disputed testimony was not resolved by the ALJ except to the extent that he found, consistent with the Student's testimony, the Student "shouldered" the Teacher.

Apparently, the ALJ ascribes no racial motivation to that point but he does find extreme fault on the Teacher's part because she placed a call to law enforcement claiming that she had been assaulted and battered by the Student. Within hours the Student's mother had likewise done the same thing. Treating the circumstance that the Teacher

[8]There is no record as to when the Teacher became aware of the charge being filed; thus any retaliation, which was never mentioned in the hearing, is a figment of the ALJ's imagination.

called law enforcement as outrageous, the ALJ somehow finds discrimination in that act. Decision, p. 16. This conclusion is, as a matter of law, erroneous because a citizen always has the right to call law enforcement.[9] A single call to the police after an emotional confrontation which did involve a touching can hardly amount to an act of discrimination.

3. Remaining Erroneous Factfindings

(a). The teacher's physical fear of the student was real, factfinding 19.

This factfinding attempts to portray the Teacher's stated fear of the Student as being incredible. Instead, the fear was supported by several circumstances, none of which are denied. The Teacher was in poor health, having recently been weakened by a bout with cancer. As the ALJ himself recognized, again at the expense of repeating, the Student was "combative and confrontational" with the Teacher, would block the Teacher in the hall," and admitted to "shouldering" the Teacher in the bathroom. The open hostility, obscene words and gestures used towards teachers and physical assaults of teachers is an established phenomenon of national concern. The West Virginia Legislature found it necessary when adopting the "safe schools" law[10] to reaffirm the right of the teachers to control the class. Although the judge tried to downplay the reports that the Student had in

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[9]The only claim that can arise is one for malicious prosecution and that can only be filed if the criminal proceeding is not invoked or completed. The Judge cites no authority for his proposition and all we could find was in Prosser, Law of Torts §120 (1971).

[10]West Virginia Code §18A-5-1(c) empowers and directs teachers to maintain discipline in their classes and to "exclude" students "who in any manner interferes with an orderly educational process; who threatens, abuses or otherwise intimidates or attempts to intimidate a school employee or a pupil; or who willfully disobeys a school employee."

fact made physical threats to beat up the Teacher and expose her wig, because they were hearsay, the Student never took the stand to even deny having made such threats. Further, those types of threats are consistent with the rant and rave findings. Further, the Student had "gotten in the Teacher's face" several times, had the gaul to accuse the Teacher of acting "like a second grader" in front of a classroom of students.

> The National Center for Education reported the following statistics of teachers it surveyed in 1993: nineteen percent had been "verbally abused" by students in the last four weeks prior to the survey, eight percent had been "threatened with injury" in the last twelve months, and two percent had been "physically attacked" in the last twelve months. Teachers and administrators on the frontline of public schools in 1997 must deal regularly with anything from pupils' willful defiance to kids with weapons. They are in the best position to evaluate the impact a student's defiant statement has on the learning environment.
>
> Thus, violence in the schools provides an additional reason for why discretion should rest with teachers and administrators in handling student infractions.[11]

But even if the Teacher's fears were unfounded or irrational, the effort of the Decision to palm off those fears as "racial stereotyping" is, in light of the foregoing factors, clearly erroneous on this record.

(b). Escort of the student, Factfinding 16.

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[11]Education Week, Apr. 7, 1993, at 7. See also Pepperdine University, National School Safety Center, School Crime and Violence Statistical Review 5-6 (Aug. 1993) (citing U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Survey (1991) (reporting that 16 percent of teachers it surveyed had been attacked or threatened with attack in the six months prior to the survey) and Illinois Criminal Justice Information Authority, Trends and Issues 91 (1991) (reporting that one in eleven of the 1300 teachers in Illinois public high schools it surveyed had been threatened by a student during the prior month; that 52.9 percent had a student direct an obscenity at them; and that 32.4 percent had a student make an obscene gesture at them)).

After the bathroom incident, the principal assigned a staff member to walk with the Student whenever she was on the Teacher's wing of the school building. The ALJ infers that the principal took that action to protect the Student from further discipline by the Teacher and treats it as evidence supporting his findings of discrimination. This is clearly erroneous for several reasons. First, the principal never said <u>why</u> he set up the arrangement,[12] only that he had discussed the matter with the County Superintendent and it was implemented. The Student was admittedly instructed to avoid any interaction with the Teacher under the threat of suspension by the principal; but, the Teacher was simply freed of hallway and bus duties and was not (despite hearsay reports to the contrary) told to avoid the Student. The Commission, as the one who carried the burden of proof, did not ask why the principal established the practice and the record is uninformative on that issue. Following the bathroom incident, the Teacher was given no instruction or discipline or, for that matter, comment. The fact is that the Student was required to be accompanied by an escort and the circumstance that the Teacher was uninstructed following the incident.[13] As the preceding paragraph documents, the Teacher was physically afraid of the Student, whereas the same was obviously not true of the Student who "shouldered" the Teacher and, to repeat, "was combative and confrontational with the ..." Teacher, "goad[ed]" the Teacher to engaged in contact with the Student when the Student knew that

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[12]The mother testified that she asked the principal to provide such protection. T __.

[13]The Teacher was not instructed not to avoid other parts of the building, she simply was freed of any responsibilities which would mandatorily take her there. No first-hand testimony in the record says that she was forbidden to go to other parts of the school.

the Teacher had been advised to refrain from such contact, and ran "her mouth about [the Teacher] ...." Since all of the facts of record which possibly bear on that issue support the opposite inference, that the escort is designed to protect the Teacher from the Student, Finding 16 is "clearly wrong."

(c). Factfinding 17 is particularly hard to understand in light of the findings of the judge concerning the chronic, confrontational and provocative misbehavior of the student toward the teacher.

In this factfinding, the Judge attempts to suggest that because only one other Teacher, Mrs. Cavendar-McNeil, sent the Student to the office, that the Teacher was out of line in doing so. That sort of finding can only encourage the misbehavior the Judge seems to condemn.

There is absolutely no evidence in the record to support the finding that the Teacher "constantly harangues everyone and anyone concerning ..." the Student. In both incidents which the ALJ relies upon, the Teacher was not attempting to diminish the reputation of the Student. The episode did not itself result in any adverse action to the Student and was not an effort to remove her from the College Summit program. Rather, that incident sprung from the complaint by Mrs. Cobb that she and other teachers had been excluded from the process of at least commenting on the students who were to be included in the program. The teachers had been told that they would be allowed to participate but in fact were not. Based on the rant and rave findings of the egregious behavior of the student, the Teacher was expressing a legitimate concern. It was only the manner in which those concerns were expressed that caused the Teacher to be disciplined. See T __.

Whatever else can be said about the confrontation with Mrs. Quasi, the Student was mentioned only in a very limited manner. The Teacher was basically complaining about another student, who Ms. Quasi had apparently excused from the Teacher's class. Mrs. Quasi felt that she had been misled by the particular student, who was an African-American student active in the HSTA program. The vice-principal who was present at the meeting, Mrs. Michaels, proposed that the other be expelled from HSTA for her misconduct. The Teacher opposed that expulsion as being excessive and unnecessary. It was only in that context that the Teacher pointed out that the Student remained in the program despite a serious disciplinary history and that the other student proposed for expulsion from HSTA should not be removed from the program for a single tardiness while the Student remained in the program, despite her egregious behavior – as confirmed in the "rant and rave" findings. T __.

B. THE HRC FAILED TO RECOGNIZED THAT THE LEGAL STATUS OF THE TEACHER AND HER AUTHORITY TO DISCIPLINE RAISED QUESTIONS ABOUT INTENTIONAL DISCRIMINATION WHICH NEEDED TO BE RESOLVED BEFORE A DECISION ON THE ISSUE OF INTENT COULD BE MADE.

This is a "public accommodation" case.[14] See the Decision, p. __. The public accommodation is apparently how the Teacher dealt with a the Student who the HRC

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[14]The only authority even remotely close was a Title VI case (federal funding) where some black students were dismissed for fighting and claimed that white students who did the same thing had not been dismissed. It was found that there was no fight among white students and the discrimination claim of the black students was therefore denied. This case involves the equality of discipline, not the way in which it is imposed. Bryant v. Independent School District No. I-38 of Garvin County, Oklahoma, 334 F.3d 928, 930 (10th Cir. 2003).

found to be recalcitrant. There is no claim that the Student was denied access to an education, to the school building, the curriculum, counseling or guidance/college planning. In short, although the Commission may quibble concerning one or two incidents including the alleged efforts of the Teacher to embarrass the Student into abandoning her repeatedly tardy and disruptive entry to the classroom, this is not a case, unlike virtually all other "public accommodation" education cases, which involve denial of meaningful educational benefits to an African-American.

Instead, this is the case about how a teacher reacted to "inexcusabl[y] antagonistic behavior toward ..." her by the Student and the general behavior of the Student being "combative and confrontational with the ..." Teacher. The Student "... would not back down when confronted by [the Teacher] and would yell, rant and rave back in [the Teacher's] ... face." While admitting in the most graphic terms possible and at length that the Students egregious], the Commission made the far-fetched findings that the Teacher in responding to the behavior of the student engaged in intentional racial discrimination. The commission committed seriously ill error in two general areas. First, the commission ignores the legal status of the teacher as a public official bound to maintain and enforce order in the classroom and in the school generally and the protections reinforcing that status. Instead, the Commission finds that actions of the teacher in responding to the foregoing verbal harassment to be evidence of overt, intentional acts of racial discrimination under the Human Rights Act.

Second, the finding of egregious conduct on the part of the complaining witness including the "rant and rave" and other forms of verbal harassment of the Teacher and an

unconsented to "elbowing" of the Teacher by the Student in the bathroom incident render whatever facts in the record might otherwise provide a basis for inferring discrimination beside the point, at least until the legal question surrounding the Teacher's execution of her duties have been resolved. Given these circumstances, the evidence of intentional discrimination is simply insufficient.

In short, the HRC has in effect created a paradoxical "tale of two cities" -- a student who is "combative and confrontational" with a teacher, was "inexcusabl[y] antagonistic toward [the Teacher]" and who "would not back down when confronted by [the Teacher] and would yell, rant and rave back in [the Teacher's] face on the one hand. On the other hand, the Teacher was found to be intentionally discriminating against her without examining the teacher-pupil relationship between them and the legal attributes of that relationship – in particular, the responsibility of the Teacher to respond to student misconduct. The failure to resolve this paradox completely undermines the findings of intentional misconduct.

First, the Safe Schools Act recognizes that the teacher stands "in the place of the parents, ... in exercising authority over the school and shall have control of all pupils enrolled in the school."[15] The Act authorizes the teacher to:

> exclude from ... her classroom ... any pupil who is guilty the other disorderly conduct; who in any manner interferes with an orderly educational process; who threatens, abuses or otherwise intimidates or attempts to intimidate a school employee ...; or who willfully disobeys a school employee ..."[16]

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[15] 18A-5-1(b)

[16] 18A-5-1(c)

When creating that role for the teacher, the Legislature established a separate assault crime, West Virginia code §61-2-5, specifically criminalizing assault on a school employee. Likewise, the common law, Restatement (Second) of Torts, §153 (1965), recognizes that "one who is in charge of the education ... of a child as a public officer is privileged to inflict such reasonable punishments as are necessary for the child's proper education ...". As found by the ALJ and affirmed by the Commission, the student engaged in conduct violative of the Safe School Act. The Commission found, and it is not disputed, that the Student engaged in "disorderly conduct" in the hallways during her ninth grade year, she "interfere[d] with the orderly educational process" when she repeatedly entered class late and otherwise made scenes in class, including the almost unbelievable disrespect displayed toward the Teacher when the Student and her mother entered the Teacher's classroom with the class in session and the Student openly mocked the Teacher by echoing the instructions the Teacher gave to the class. See p. __. The Student "willfully disobey[ed] a school employee" when she refused, when told by the Teacher and by Mrs. McNeil to leave her locker and go to the class she was supposed to be in which was in session.

As a matter of sound public policy, the court, and the Human Rights Commission, consistent with well-established principles, avoid second-guessing problems at school, especially minor ones such as in this case. It is well-recognized that the courts, and we submit administrative agencies such as the HRC, defer to more disciplinary decisions and avoid second-guessing school authorities as to discipline and other classroom issues, typically absent an assertion of a strong constitutional deficit. The "courts," and we submit

that the same standard should apply to administrative agencies such as the Human Rights Commission, "should not interfere with the decisions of school board officials in disciplinary matters except in extreme cases." Keith D. v. Ball, 177 W.Va. 93, 95, 350 S.E.2d 720, 722 (1986) Although the behavior in Keith D was more serious misconduct, the making of repeated faults bomb threats, the holding concerning the conduct of students applies with equal force to all conduct by a student, including the student herein, whether in class or not.

> Conduct by a student, whether in class or out, whether it stems from the time, place, or type of behavior, which materially disrupts class work or involves substantial disorder or invasion of the rights of others, is not constitutionally immunized ... in such a fashion that it deprives others of their lawful rights may result in a forfeiture of those rights. ... If an individual chooses to exercise his rights to education in such a fashion as to disrupt schools and deny that right to others, then he may forfeit the right to attend.

177 W.Va. at 95, 350 S.E.2d at 723. This Court again emphasized that:

> [c]ourts should not interfere with the decisions of school officials in disciplinary matters except in extreme cases. See Adams v. City of Dothan , 485 So.2d 761, 759 (Ala. Civ. App. 1986) .

Dothan held, "It is well established that school boards and officials have comprehensive authority within constitutional bounds to maintain good order and discipline in school."

The courts, such as this court did in Brian D, speak increasingly of the need to four our society to regain control of classrooms. Speaking in the constitutional due process setting, Dickens v. Johnson County BOE, 661 F.Supp 157 (E.D.Tn. 1987), held "... teachers should be free to impose minor forms of classroom discipline, such as admonishing students, requiring special assignments, restricting activities, and denying certain privileges, without being subjected to the strictures is of due process scrutiny." Also

referring to the due process rights of students in a case in which the teacher had come close to, if not interfered with, the free speech rights of a student in the school setting, the Sixth Circuit in Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989), recognized, "it also remains true, however, that the federal Constitution does not compel "teachers, parents, and elected school officials to surrender control of the American public school system to public school students," citing Bethel School District v. Fraser, 478 U.S. 675, 683 , 686 (1986), which attributed the above quote to Justice Black.[17]

In the thirty-five years intervening since Justice Black expressed his concern that control not be "surrendered" to students, the focus has unfortunately turned to regaining control. For example, Judge Wilkinson of the Fourth Circuit, in Love Lane v. Martin, 355 F.3d 776, 790-02 (2004, dissent[18]):

> Keeping order in our nation's schools is among our most pressing educational concerns. See, e.g. New Jersey v. T.L.O., 469 U S. 325, 339 (1985) (maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crimes ... have become major problems..") ... Sadly, almost half of America's teachers report that they spend more time trying to keep order in their classroom than actually teaching students. ...
>
> Of course, a breakdown in order and discipline leaves teachers to educate and students unable to learn. See, e.g., T.L.O., 469 U.S. at 350 (Powell, J., concurring) ("Without first establishing discipline and maintaining order,

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[17]Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 526 (1969) (dissent).

[18]The Judge Wilkinson was dissenting from a majority opinion which held that school administrators did enjoy qualified immunity in a situation involving discipline of a high-ranking school official allegedly on racial grounds. We do not quote it for the holding on the merits but rather for Judge Wilkinson's summary of the underlying societal dilemma.

teachers cannot begin to educate their students."). And yet the consequences stretch far beyond missed opportunities for learning, because the more severe a school's disciplinary problems are, the more likely it is that the school's students will be victims of violent ... encounters. It is not difficult to understand, then, why an overwhelming number of Americans believe that the lack of student discipline is a serious problem in their local schools.

Referring to the merits of the case, [Judge Wilkerson continues] We have never accorded so little deference to the views of public school administrators or such short shrift to well-establish principles of qualified immunity . Under the majority's regime, courts, not schools themselves, will have the final word on questions of school discipline. And with lawsuits waiting in the wings, principals and superintendents will be reluctant to do their part in resolving disciplinary problems or in reconstituting dysfunctional administrative teams..

But nowhere will the effects of this litigation be felt more severely than on the ability of educators to set expectations for their students. Only by establishing such expectations can schools bring out the best in children and give them every chance of success. But to saying expectations require his order in public school systems and strong working relationships between public school officials. It requires that school authorities be able to set reasonable goals for their local administrators, who in turn set standards for the students they are charged with educating. In short, expectations for an orderly environment go hand-in-and would expectations for a creative and productive learning experience. To have litigation at every turn is the surest way to undercut the standards that challenge students and the expectations that form the essence of education itself.

Id.

The HRC fills a crucial role in our community and society. Without diminishing that role, we respectfully submit that the Commission has mistakenly ventured into the area of minor school discipline. Further, the Commission never attempted to reconcile its own findings of the outlandish behavior of the Student with intentional racial discrimination. The rant and rave findings make it clear that the Student was the irritant and that the Teacher was only, or primarily, responding to the combativeness "antagonistic

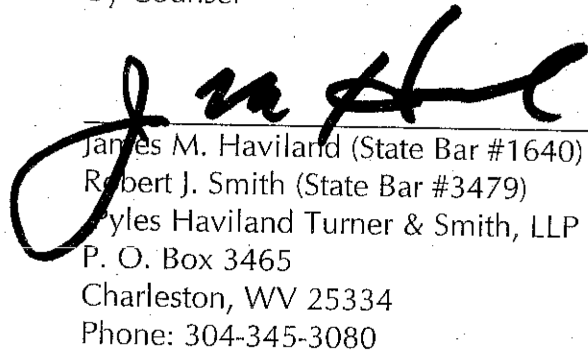
behavior," refusal to "back down when confronted" and "yell[ing], rant[ing] and rav[ing] back in [the Teacher's] face." Accordingly, if one agrees with Judge Wilkerson's assessment of the necessity of regaining control of the classrooms, a ruling reporting the reality that no claim was proven in this case, may discourage similar cases and the student behavior involved here, and vindicate the actions of the Teacher in carrying out her role of enforcing discipline and maintaining a positive environment in our school systems.

VI. CONCLUSION

The Decision of the Commission should be vacated and the complaint and the determination against the Teacher, Barbara Cobb, dismissed.

Respectfully submitted,

BARBARA COBB,
By Counsel



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CERTIFICATE OF SERVICE

I, James M. Haviland, hereby certify that a copy of the foregoing BRIEF OF PETITIONER was served on opposing counsel by first-class mail, postage prepaid, to:

Paul Sheridan
Office of the Attorney General
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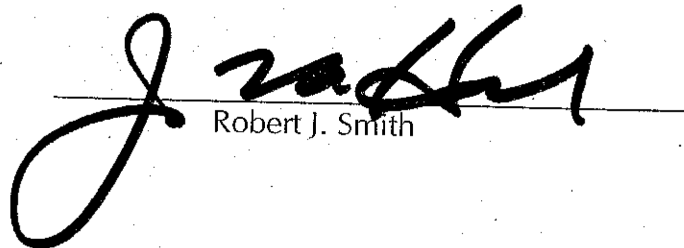
this 15th day of October, 2004.



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