

No. 31854

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

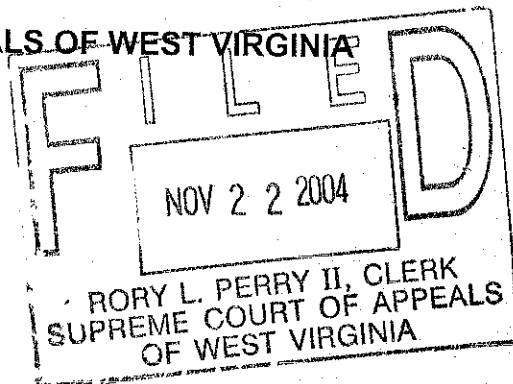
BARBARA COBB,

Appellant/Respondent Below,

v.

WEST VIRGINIA HUMAN RIGHTS  
COMMISSION; and BEVERLY WATTIE,  
on behalf of KRYSTAL WATTIE,

Appellees/Complainants Below.



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FROM THE FINAL ORDER  
OF THE  
WEST VIRGINIA HUMAN RIGHTS COMMISSION  
DOCKET NO. PAR-282-01

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BRIEF OF APPELLEE  
WEST VIRGINIA HUMAN RIGHTS COMMISSION

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**INTRODUCTION**

This case is on appeal from the Final Oder of the West Virginia Human Rights Commission, which upheld an administrative hearing decision in favor of the Complainant, Krystal Wattie. The Human Rights Commission found that a teacher, Barbara Cobb, the Appellant herein, had violated the West Virginia Human Rights Act by engaging in racial harassment and discrimination against a student, and awarded the student \$500.

**I. HISTORY OF PROCEEDINGS**

On or about April 2, 2001, the Complainant, Beverly Wattie, mother and next friend of her daughter,<sup>1</sup> K.W., filed a Complaint with the West Virginia Human Rights Commission [hereinafter Commission or Human Rights Commission] against the Kanawha County Board of Education [hereinafter Board or Board of Education], teacher Barbara Cobb and teacher Jennifer Cavender-McNeal, alleging that Krystal Wattie had been discriminated against and harassed, based upon her race, all in violation of the West Virginia Human Rights Act, W. Va. Code § 5-11-9. Following an investigation, the Commission issued a Letter of Determination finding probable cause to believe that the West Virginia Human Rights Act [hereinafter Act or Human Rights Act] had been violated by the Respondents,

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<sup>1</sup>When this case was filed, Krystal Wattie was a minor suing by her mother as "next friend." She has since reached 18 years of age.

and this matter was then set for public hearing. Prior to the commencement of the hearing, the Complainants and the Commission reached a Settlement Agreement with all of the Respondents except Barbara Cobb [hereinafter Petitioner or Appellant].

The case against Barbara Cobb came on for public hearing before Administrative Law Judge Robert B. Wilson [hereinafter ALJ] on January 14, 15 and 25, 2003. On August 25, 2003, ALJ Wilson issued a Final Decision, finding that Ms. Cobb had engaged in unlawful discrimination based on race against Krystal Wattie and ordering Ms. Cobb to pay \$500.00 in damages. Upon Respondent Cobb's Petition, the Commission conducted an administrative appeal, and on January 30, 2004, the Commission issued its Final Order upholding the ALJ's Final Decision.<sup>2</sup>

It is from this Final Order of the West Virginia Human Rights Commission which Ms. Cobb now appeals.

## **II. SUMMARY OF THE CLAIM**

Krystal Wattie, who is African American, started as a freshman at Riverside High School in the fall of 1999, the year the new school opened. She attended school there for four years. She was a "top notch" student in the eyes of the school administration and most of the faculty. She did well academically. (ALJ's Final Decision, pp. 3-4). She participated in a variety of academic and extra-curricular activities. (Tr. I, pp. 173-174, 188; Tr. II, pp. 14, 99). According to the Assistant Principal Paula Potter,<sup>3</sup> Krystal Wattie's behavior in school, although not "perfect" was typical of students, and not worse than other teenagers. (ALJ's Final Decision, pp. 3-4; Tr. I, pp. 173-174, 188; Tr. II, p.14). The evidence in the record reflects that, in general, she was well thought of by teachers and administrators at Riverside. Krystal graduated in the spring of 2003, shortly after the completion of the hearing of this matter.

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<sup>2</sup>To the extent this Brief refers to the ALJ's Final Decision or the ALJ's findings, it is for ease of reference. Such findings and conclusions have been incorporated by reference into the Final Order of the West Virginia Human Rights Commission.

<sup>3</sup>Paula Potter is currently serving as Principal of Riverside High School.

Barbara Cobb was an English teacher at Riverside High School. For the first half of the spring semester of the 1999-2000 academic year (a period of only a few months), Krystal was a student in Ms. Cobb's class. Because Ms Cobb took a leave of medical absence during that semester, and because Krystal never again enrolled in one of Ms. Cobb's classes, this period of several months during her ninth grade year was the only time Ms. Cobb was Krystal's classroom teacher. Everything that happened after that brief period, which includes most of the events related to this case, happened while Ms. Cobb was one among many teachers at Riverside High School and Krystal was one among many students.<sup>4</sup>

During the very brief period that Krystal was in Ms. Cobb's class, Ms. Cobb exhibited a tendency to single out Krystal Wattie, along with other African American students, for discipline, complaints and mistreatment. Barbara Cobb repeatedly sent Krystal to the office for questionable or minor infractions. (Tr. I, pp. 18-19). Fellow student P.B., whose testimony the ALJ credited (ALJ's Final Decision, p. 3, Finding of Fact No. 4), could not recall white students being sent to the office by Ms. Cobb. (Tr. I, pp. 18-19, 206-208). Ms. Cobb locked Krystal out of class and refused to provide her with make-up assignments when Krystal was absent. (ALJ's Final Decision, p. 3, Finding of Fact No. 4; Tr. I, pp. 13-15, 17-18, 203-205). If Krystal raised her hand in class, Ms. Cobb refused to acknowledge her. (ALJ's Final Decision, p. 3, Finding of Fact No. 4; Tr. I, pp. 15-17).

A.W., P.B., and R.T., all African American students in Ms. Cobb's class, were also treated in a similar manner by Barbara Cobb. (Tr. I, p 17). P.B. recalled an incident where she went to Barbara Cobb and requested a post-it-note to put on her locker. Ms. Cobb took out a pad of post-it-notes and set it on her desk, and then told P.B., "You can go get some from someone else." (Tr. I, p. 209).

Principal Richard Clendenin testified that other African American students besides Krystal Wattie had trouble with Barbara Cobb. In those cases, the problem was solved by

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<sup>4</sup>This is a very important point. Appellant would have the Court perceive Ms Cobb's conduct toward Krystal as being essentially related to the role of classroom teacher; when in fact, she had no more reason to be interacting with Krystal than dozens of other teachers, none of whom felt the need to treat Krystal as Ms. Cobb did.

moving the students to another English class. According to Principal Clendenin, these students did fine once they were moved away from Ms. Cobb. (ALJ's Final Decision, p.3; Finding of Fact No. 5; Tr. II, pp. 96-97).

Principal Clendenin suggested moving Krystal Wattie out of Barbara Cobb's class as a way of addressing the initial problems experienced by Krystal (ALJ's Final Decision, p. 3; Finding of Fact No. 5 ), but Krystal's mother, Beverly Wattie, objected to making her daughter alter her situation to fix a problem created by Ms. Cobb. According to Principal Clendenin, Beverly Wattie "felt very strongly that it was the school's responsibility to provide equal and nondiscriminatory education and she didn't want her daughter moved." (Tr. I, pp. 100-103; Tr. II, p. 95).

On one occasion when Barbara Cobb had locked Krystal Wattie out of class (ALJ's Final Decision, p. 5; Finding of Fact No. 9), A.W. got up and let Krystal in. Ms. Cobb called A.W.'s mother, right then, from the classroom. Ms. Cobb acknowledged that her telephone conversation with A.W.'s mother took place in front of the whole class. (Tr. III, pp. 8-10). Ms. Cobb testified that it was the students' idea for her to call A.W.'s mother, and she claimed that it was not a disciplinary act, but it is clear that it was an act designed to punish A.W. A.W.'s mother was apparently unsupportive of Ms. Cobb, or perhaps perceived the inappropriateness of Ms. Cobb's call under those circumstances, and expressed her displeasure. After talking to A.W.'s mother, Barbara Cobb said to A.W. and Krystal again, in front of the entire class, "I don't need this disrespect," and "no wonder that you're the way that you are." (Tr. I, pp. 26-28).

Ms. Cobb left school on a medical leave of absence during the spring of 2000, and Krystal finished ninth grade English with a substitute. Krystal Wattie did academically very well in Barbara Cobb's class; however, Ms. Cobb only gave Krystal a "B" grade, and falsely accused Krystal of not turning in her summer reading. (ALJ's Final Decision, p.14; Tr. I, pp. 21, 23, 29-30, 204-205). After Barbara Cobb left on medical leave and the class was being taught by a substitute, Krystal Wattie's academic achievement was recognized and she received an "A" for the class as a whole. (ALJ's Final Decision, p. 4, Finding of Fact No. 7; Tr. I, pp. 21, 30).

Ms. Cobb returned in the fall. Krystal Wattie did not have Barbara Cobb as a teacher after ninth grade; however, in the remaining years of high school, Ms. Cobb regularly confronted Krystal Wattie in the hallways of Riverside High School. (Tr. I, p. 30). Barbara Cobb continued to complain regularly about Krystal Wattie, and with only limited exception, she was the only teacher to do so. (ALJ's Final Decision, p. 8, Finding of Fact No. 17; Tr. II, p. 98). Barbara Cobb acknowledged that the administration had a different view of what discipline was appropriate for Krystal, and acknowledged that notwithstanding this, she felt it was necessary and appropriate for her to continue taking the matter of disciplining Krystal "into her own hands." (Tr. II, pp. 91, 92-93).

Ms. Cobb acknowledged in her testimony that Krystal was not the only student who could be found in the hallway after the bell had rung, but explained her efforts to reprimand Krystal and not the others by saying that the other students were "good students." (ALJ's Final Decision, pp. 9-10, Finding of Fact No. 21; Tr. II, pp. 299-300). Ironically, it is clearly established in this proceeding that by any measure except Ms. Cobb's judgment, Krystal Wattie was a very accomplished student. (Tr. I, pp. 173-174, 188; Tr. II, p. 99).

For the remaining years of her high school career, until Ms. Cobb was suspended for disrupting a faculty meeting, Krystal had to constantly look over her shoulder for Ms. Cobb. Ms. Cobb singled Krystal out for scrutiny bordering on obsession, and for especially harsh discipline for any real or imagined offense. Despite an explicit request from the principal and the Superintendent to avoid Krystal (Tr. II, pp. 83-84, 89-90), the Principal observed that Ms. Cobb continued to confront Krystal. (Tr. II, p. 92). Ms. Cobb went out of her way to confront Krystal if she was at her Hall locker. (Tr. I, p. 30; Tr. II, p. 92).

It was clear that Ms. Cobb's treatment of Krystal Wattie was motivated by racial bias. Not only was it Krystal, and to a lesser extent other African American students who received most of Ms. Cobb's negative attentions, Ms. Cobb would mimic and ridicule Krystal in ways that clearly reflected racial prejudice. Ms. Cobb engaged in stereotyping about African American students. (ALJ's Final Decision, p. 4, Finding of Fact No. 8). She told Krystal that it was her understanding that African Americans were loud by nature. (ALJ's Final Decision, p. 5, Finding of Fact No. 9; Tr. I, p. 29). After talking to the mother of another African American student about her daughter, Ms. Cobb commented to Krystal

and this other student, in front of a classroom of students, that it was no wonder Krystal "was the way she was." (ALJ's Final Decision, p. 5, Finding of Fact No. 9; Tr. I, pp. 26-28). And Ms. Cobb started making many detailed (although not necessarily accurate) notes of encounters with Krystal Wattie, many of them including alleged quotes, demeaningly set out in attempted dialect. For example, in one account, Ms. Cobb quoted Krystal as saying, "SHE WASN'T EVEN TALKIN' TO YOU. GWAN TO YORE CLASSROOM." (Commission's Exhibit No. 9; Tr. III, pp. 19-23; Commission's Exhibits Nos. 13, 14, 15, 16, 17, 18 and 19). Ms. Cobb refused to meet with Krystal's mother, Beverly Wattie, to discuss her problems with Krystal.

Barbara Cobb kept extensive notes of alleged grievances against Krystal Wattie. Although Barbara Cobb appears to have documented every alleged instance of Krystal Wattie's misconduct, it does very little to support Ms. Cobb's claim that Krystal deserved the disciplinary attention which she focused upon her. For instance, Ms. Cobb's documentation asserts (in capital letters for emphasis) that SHE LIED. (Tr. III, p. 14). The alleged "lie" was Krystal Wattie's complaint that Barbara Cobb was talking about her (Krystal) in class to other students. (Tr. III, pp. 15-16). Ms. Cobb admitted that she might have mentioned Krystal Wattie to her students in a class. (Tr. III, pp. 19-20).

Maria Lynn Hopkins was a teacher at Riverside High School whose class was three rooms down the Hall from Ms. Cobb's and was also close to Krystal Wattie's locker. (Tr. II, pp. 8-9). She recalled an incident where Barbara Cobb and Krystal Wattie were having a "conversation" and both were upset. Ms. Hopkins intervened and moved Krystal away from Ms. Cobb. Knowing the history of the situation, Ms. Hopkins told Krystal Wattie that if she needed to talk to Barbara Cobb, she should do it in the presence of an administrator. (Tr. II, p. 10). Ms. Hopkins testified that

after I had got Krystal away, Ms. Cobb came back over and got in my – was close to my face and Krystal's face and when she come over she pointed her finger at Krystal and at me and she said it's a good thing this lady intervined when she did because I don't know what would have happened, and she walked away. And I told Krystal just don't say anything, just stand here. She didn't, and that was the end of it, of that.

(Tr. II, p. 10; see ALJ's Final Decision, pp. 7-8, Finding of Fact No. 15).

Ms. Hopkins testified that on many occasions, out of fear of Ms. Cobb, Krystal Wattie requested that Ms. Hopkins walk her to class, and she did. (Tr. II, pp. 12-13). Eventually Principal Clendenin assigned an aide to accompany Krystal between classes. (ALJ's Final Decision, p. 8, Finding of Fact No. 16; Tr. II, pp. 83-84, 89-90).<sup>5</sup>

Parween Qazi has been a math teacher at Riverside High School since it opened. She was born in Pakistan but has lived in the United States since 1971. She has been a U.S. citizen since 1979. (Tr. I, pp. 183-185). Among other things, Ms. Qazi directs the school's HSTA (Health Science Technology Academy) Program, which provides mentoring and assistance to disadvantaged students. Krystal Wattie was in the program. On one occasion, Barbara Cobb approached Ms. Qazi and told her that Krystal Wattie had "attacked" or "assaulted" her. Ms. Cobb went on to express to Ms. Qazi her view that Krystal Wattie should not be in HSTA. (ALJ's Final Decision, p. 9, Finding of Fact No. 20; Tr. I, pp. 189-190). Ms. Qazi also testified to another encounter with Ms. Cobb regarding another African American student who was in the HSTA Program. On this occasion, after Ms. Qazi had made it clear that it was not up to her to limit participation in the HSTA Program, Ms. Cobb resorted to demeaning comments about Ms. Qazi's education and her English proficiency. (ALJ's Final Decision, p. 9, Finding of Fact No. 20; Tr. I, pp. 195-198).

As the Appellant points out, there was evidence that Krystal was disrespectful and disobedient on occasion and that she resisted the mistreatment by Ms. Cobb in a confrontational manner; and the ALJ made findings regarding this in his Final Decision. However, this did not excuse or justify the extent or manner of Ms. Cobb's conduct. Ms. Cobb was guilty of "profiling" Krystal Wattie and of continuously treating Krystal, not in a fair and equal manner but, rather, in accordance with her own stereotypes and prejudices. Ms. Cobb abused her authority as a teacher. Ms. Cobb's conduct created a racially hostile educational environment for Krystal, and this clearly affected Krystal's ability to feel safe and comfortable in school.

Ironically, while the school authorities failed to act decisively to protect Krystal Wattie from mistreatment by Barbara Cobb, when Ms. Cobb eventually abused her colleagues for

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<sup>5</sup>Contrary to Appellant's assertion (Brief of Petitioner, p. 20) the Principal did testify that this was to protect Krystal as well as Ms. Cobb. (Tr. II, p.90).

refusing to support her in her campaign of harassment against Krystal, the Board of Education finally responded. On April 19, 2002, at a faculty meeting, Barbara Cobb became upset upon learning that Krystal Wattie had been recommended for "college summit." Following the incident, Ms. Cobb was accused of making derogatory comments toward a colleague and disrupting the staff meeting, and she was subsequently suspended from her teaching position. (Tr. III, pp. 35-39).

### **III. SUMMARY OF THE COMMISSION'S FINAL ORDER**

The Final Order of the West Virginia Human Rights Commission affirmed and upheld, without modification, the Final Decision issued by ALJ Wilson. In the Final Decision, the ALJ found that Barbara Cobb's racially motivated conduct toward Krystal Wattie had the effect of denying "certain advantages, privileges and services" to Krystal and "created a racially hostile environment." (ALJ's Final Decision, p. 14).

In her Petition for Appeal, Barbara Cobb notes that the ALJ made findings regarding the misconduct of the student, Krystal Wattie, and Petitioner quoted these findings at length. However, Petitioner makes little mention of the ALJ's central findings, which were: that Ms. Cobb treated this student, and other African American students in her class, in a discriminatory fashion (ALJ's Final Decision pp. 3-5); and that the Principal's approach to resolving this racial conflict was to offer African American students the option of transferring to another teacher. (ALJ's Final Decision, p. 3, Finding of Fact No. 5).

It was very clear from the findings and discussion in the Final Decision, and from the record itself, that the ALJ had ample evidence upon which to base his conclusion of discrimination. The ALJ referred to the "disproportionate imposition of discipline by the Respondent teacher, Barbara Cobb, both while KW was a student in her class and thereafter." Ms. Cobb also "denied credit for work turned in by KW and gave her a grade of B over the first nine weeks, when her assignments graded out at A level work[.]" (ALJ's Final Decision, p. 14). The ALJ concluded that "Respondent's consistent refusal to provide KW with make up assignments and her failure to accurately record and grade KW's work is indicative of racial bias. The Respondent's refusal to give PB [a fellow African American

student] a post it note for locker checks is impossible to explain except as racial hostility.” (ALJ’s Final Decision, p. 15).

The ALJ placed significant emphasis on the evidence that Ms. Cobb singled out the African American students for especially harsh discipline (ALJ’s Final Decision, pp. 4-5, Finding of Fact No. 8; ALJ’s Final Decision, pp. 9-10, Finding of Fact No. 21; ALJ’s Final Decision, pp. 15, 17) and singled out Krystal among other students in the halls. (ALJ’s Final Decision, p. 6, Finding of Fact No. 12; ALJ’s Final Decision, pp. 7-8, Findings of Fact Nos. 15-18). The ALJ also emphasized the “racially stereotypical comments [Respondent made to her] class regarding the propensity for African Americans to be loud.” (ALJ’s Final Decision, p. 15; see also ALJ’s Final Decision, pp. 4-5, Findings of Fact Nos. 8 and 9; ALJ’s Final Decision pp. 9-10, Findings of Fact Nos. 20 and 21).

The ALJ did find that Krystal Wattie’s behavior warranted some discipline, in particular that she was often tardy and that she was loud in the halls. (ALJ’s Final Decision, p. 10, Finding of Fact No. 22). He also found that Krystal was not a passive victim of the discrimination, that she “stood up for herself and confronted her situation[,]” and in the process that she “went overboard.” (ALJ’s Final Decision, p. 18). However, the ALJ and the Commission properly refused to allow a child’s misconduct to justify the demeaning and discriminatory actions of an adult teacher, who the law must hold to a higher standard.

#### **IV. APPELLANT’S ASSIGNMENTS OF ERROR**

Appellant asserts two assignments of error in her Brief.<sup>6</sup> The first assignment asserts that Krystal Wattie’s conduct “caused” Barbara Cobb to take the action she did, and that the ALJ’s recognition of Krystal Wattie’s occasional misconduct undermines the ALJ’s finding of discrimination.

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<sup>6</sup>The assignments set forth in the Brief are not identical to those set out in the Petition.

The second assignment of error asserts that the ALJ failed to recognize the teacher's legal status and her duties to discipline, and that when recognized, these factors undermine the ALJ's finding of discrimination.<sup>7</sup>

#### V. SCOPE OF REVIEW

The State Administrative Procedures Act, W. Va. Code § 29A-5-4, sets out the parameters for the review of a final order of the Human Rights Commission.

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

(1) In violation of constitutional or statutory provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon lawful procedures; or

(4) Affected by other error of law; or

(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4(g) (1998).

The scope of review for factual determinations is particularly limited. Where there is conflicting evidence, or conflicting inferences which may be drawn from the evidence, deference is given to the resolution arrived at by the fact finder. Brammer v. West Virginia Human Rights Commission, 183 W. Va. 108, 394 S.E.2d 340, 343 (1990). Where there is sufficient evidence to support the findings, the findings of fact should be affirmed

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<sup>7</sup>The Appellant has apparently abandoned the claim, which was asserted in her Petition, that Ms. Cobb's conduct did not constitute an adverse action. (See Petition for Appeal, Assignment of Error No. 2.) Accordingly, the matter is not argued here. The Commission's position on this point was set forth in the Commission's Response to Petition for Appeal.

"regardless of whether the [reviewer] would have reached a different conclusion on the same facts." Gino's Pizza of West Hamlin v. West Virginia Human Rights Commission, 187 W. Va. 312, 418 S.E.2d 758 (1992); Bloss & Dillard v. West Virginia Human Rights Commission, 183 W. Va. 702, 398 S.E.2d 528, 531 (1990); Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986).

Findings of fact made by the trier of fact should be sustained where the findings are supported by substantial evidence and not clearly wrong. Holbrook v. Poole Associates, Inc., Syl. pt. 1, 184 W. Va. 428, 400 S.E.2d 863 (1990); Bloss & Dillard v. West Virginia Human Rights Commission, 183 W. Va. 702, 398 S.E.2d 528 (1990); West Virginia Human Rights Commission v. United Transportation Union, Local 655, Syl. pt. 1, 167 W. Va. 655, 282 S.E.2d 653 (1981). "Substantial evidence" is such relevant evidence, on the whole record, as a reasonable mind might accept as adequate to support a finding; it must be enough to justify a refusal to direct a verdict, if the factual matter were tried to a jury. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

Brammer, 181 W. Va. at 111, 394 S.E.2d at 343; see also West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W. Va. 525, 532-33, 383 S.E.2d 490, 497-98 (1989) (citations omitted); Wheeling Pittsburgh Steel Corp. v. Rowing, 205 W. Va. 286, 517 S.E.2d 763 (1999); Fairmont Specialty Services v. West Virginia Human Rights Commission, 206 W. Va. 86, 522 S.E.2d 180 (1999); Tom's Convenient Food Mart, Inc. v. West Virginia Human Rights Commission, 206 W. Va. 611, 527 S.E.2d 155 (1999).

This limited scope of review regarding factual issues serves a dual purpose: protection of the integrity and autonomy of the administrative process and deference to an agency's expertise and experience. Consolo v. Federal Maritime Commission, 383 U.S. 607, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966). As noted by Alfred S. Neely, IV in his treatise, Administrative Law in West Virginia, at 438 (1982), much of the justification for administrative adjudication would be lost if courts were allowed to routinely substitute their judgment for that of the agency. Cited in Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986). The substantial evidence rule is especially pertinent in cases before the Commission where the Rules of Evidence apply, parties are represented by counsel and the Administrative Law Judges are well versed in the area of discrimination law. The issues are fully litigated and the parties submit post-

hearing findings of fact and conclusions of law and memoranda of law, and the findings of the judge are explained in writing.

On the other hand, less deference is given to a lower tribunal's interpretation of the law or the application of the law. Where the issue on appeal is a question of law or involves the interpretation of a statute, a *de novo* standard of review is to be applied. Maikotter v. University of West Virginia Board of Trustees, 206 W. Va. 691, 527 S.E.2d 802 (1999); Wheeling Pittsburgh Steel Corp. v. Rowing, 205 W. Va. 286, 517 S.E.2d 763 (1999); State ex rel. Miller v. Reed, Syl. pt. 5, 203 W. Va. 673, 510 S.E.2d 507 (1998); Province v. Province, 196 W. Va. 473, 481, 478 S.E.2d 894, 902 (1996); Appalachian Power Co. v. State Tax Dep't of West Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995); Crystal R.M. v. Charlie A.L., Syl. pt. 1, 194 W. Va. 138, 459 S.E.2d 415 (1995). Aspects of the decision which deviate from the laws of the state are to be corrected by the Court in its review.

When the Commission's Final Order is reviewed in light of the appropriate standards of review, it is apparent that the Final Order should be affirmed.

## VI. ARGUMENT

### A. **THE ALJ'S FINDINGS THAT MS. COBB'S HARASSMENT AND DISCRIMINATORY TREATMENT OF KRYSTAL WATTIE WAS RACIALLY MOTIVATED ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.**

1. **The ALJ's findings, to the effect that both parties behaved badly at times, are not inconsistent with his finding of racial discrimination and harassment by Ms. Cobb.**

Appellant attempts to make Krystal Wattie's conduct, not Ms. Cobb's conduct, the focus of this appeal. In doing so, the Appellant exaggerates the misbehavior of Krystal and fails to justify or excuse the obsessive, selective and racially motivated conduct of Ms. Cobb toward Krystal.

Appellant makes much of what she refers to in her Brief as the ALJ's "*rant and rave*" findings. (See Brief of Petitioner, pp. 2-3). These parts of the Final Decision make reference to "antagonistic behavior" by Krystal Wattie, refusing to back down when confronted and "running her mouth" to her peers regarding Ms. Cobb. (ALJ's Final

Decision, p. 10, Finding of Fact No. 22; ALJ's Final Decision, p. 16). Appellant quotes and cites these parts of the Final Decision throughout her Brief.

If Krystal Wattie's behavior was as objectively bad as Appellant suggests, it is remarkable that she was such a successful student and had the respect of the school's administrators and other teachers. Indeed, if Krystal's behavior was really so bad, we would expect to find that she had been suspended or expelled.<sup>8</sup> What the record reflects is that with very few exceptions, Barbara Cobb is the only teacher who found that Krystal's conduct warranted a disciplinary response. And based upon Ms. Cobb's disciplinary referrals and her other documents, she found Krystal in almost constant need of disciplinary attention. Clearly Ms. Cobb's assessment was not objectively valid, and the ALJ recognized this.

However, the ALJ also recognized that Krystal was not without fault. In judging the evidence, the ALJ did not refrain from evaluating the conduct of the student as well as the teacher, and he did not refrain from commenting upon what he believed was inappropriate or overly reactive conduct on the part of the student. The ALJ factored this into his decision. However, the ALJ properly made the focus of decision the conduct of the teacher, and properly rejected the assertion that Ms. Cobb's conduct toward Krystal was justified.

Appellant claims that "[w]hile 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." (Brief of Petitioner, p. 7). But in truth, the ALJ did not ignore this context. The ALJ weighed the factors together, refusing to ignore the inequitable conduct by Krystal, and refusing to overlook the discriminatory conduct of Ms. Cobb. The Court is bound to give the ALJ deference unless his findings are clearly wrong. Appellant would have this Court withhold this deference and reverse the ALJ's decision because of his honesty and balance.

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<sup>8</sup>Instead, it is Ms. Cobb who has the record of being suspended.

The Appellant completely ignores Ms. Cobb's own "ranting and raving" and the ALJ's findings that reflect them. For example, the ALJ found that "Respondent constantly harangues everyone and anyone concerning Complainant KW, and bristles at any honors she receives." (ALJ's Final Decision, p. 9, Finding of Fact No. 20; see also Commission's Exhibit Nos. 2-19). The ALJ notes that "Respondent has gone completely out of reason with her actions toward Complainant, KW," and that "Respondent has a propensity to get in peoples faces during such confrontations, as she was on this occasion and many others, and with Ms. Qazi on another occasion." (ALJ's Final Decision p. 16-17). The ALJ found: "Respondent couldn't leave well enough alone on another occasion when she came back after KW when Ms. Hopper had separated them, to say 'it's a good thing she came along when she did or I don't know what would have happened.'" (ALJ's Final Decision p. 17). And the ALJ found that "Respondent's constant attacks on KW and others whenever KW was honored or recognized for her achievements is simply inexcusable . . ." (ALJ's Final Decision p. 17).

These "rant and rave" findings regarding Ms. Cobb are well supported by the evidence in the record, and the conduct they describe is in no way justified by anything which Krystal Wattie did. The ALJ aptly notes the irony of the situation in the Final Decision where he says:

What is so aggravating about this case, is that both Respondent and Complainant want and demand respect from the other but are unwilling to reciprocate that respect.

(ALJ's Final Decision p. 17).

But the ALJ does not lose sight of the fact that Ms. Cobb is an adult professional with certain duties, including nondiscrimination. A teacher's racial discrimination and harassment is not excused by a student's lack of respect.

**2. The ALJ's finding that Barbara Cobb's harassment of Krystal Wattie was based on race is supported by substantial evidence.**

In her first assignment of error and first argument, Appellant also asserts that Ms. Cobb's conduct cannot be discrimination because the disciplinary actions to control her

classroom and the school environment are not discrimination. However, the record is replete with evidence supporting the ALJ's judgment that Barbara Cobb treated Krystal Wattie as she did because of her race.

Appellant asserts in her appeal that the record does not support the conclusion that African American students were singled out (Petition for Appeal, pp. 6-7), simply ignores the credible evidence on the point, including the testimony of Krystal Wattie, student A.W., Principal Richard Clendenin and Assistant Principals Paula Potter and Jacquie Switzer. The credible evidence is quite clear that Krystal and her African American friends were singled out. It is even clearer that race was a significant factor in Ms. Cobb's subsequent obsession with "disciplining" Krystal long after Krystal ceased to be her student and after both the Principal and the Superintendent had asked Ms. Cobb to refrain from contact with Krystal.

The pattern of discrimination began while Krystal was a student in Ms. Cobb's class.<sup>9</sup> If Krystal Wattie was absent from Barbara Cobb's class, Ms. Cobb would not provide her with the homework assignment unless Krystal involved an administrator. (Tr. I, pp. 13-15, 203-205). If Krystal would raise her hand in class, Barbara Cobb would refuse to acknowledge her. (Tr. I, pp. 15-17). Barbara Cobb locked Krystal out of the classroom. (Tr. I, pp. 17-18). Ms. Cobb never locked other students out of class. (Tr. III, p. 5). On one occasion when Krystal requested a syllabus from Barbara Cobb regarding a particular assignment, Ms. Cobb abandoned any composure and turned the incident into a confrontation, treating the request as misbehavior worthy of public humiliation. (Tr. I, pp. 22-23, 205-206). When Barbara Cobb was anywhere nearby, even in the hallway or at a sporting event, Krystal risked disciplinary action for something as innocent as speaking to a fellow student.

Students A.W., P.B. and R.T., who are all African American, were also treated badly by Barbara Cobb. (Tr. I, p. 17). P.B. recalled an incident when she went to Barbara Cobb and requested a post-it note to put on her locker. Ms. Cobb took out a pad of post-it-notes,

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<sup>9</sup>But this period was relatively short, lasting only a few months in the early spring of 2000.

but then set it on her desk and told P.B., "You can go get some from someone else." (Tr. I, p. 209).

Principal Richard Clendenin testified that other African American students besides Krystal Wattie also were having trouble with Barbara Cobb. In those cases, the problem was solved by moving the students to other English classes. These students did fine once they were moved. (Tr. II, pp. 96-97). Mr. Clendenin and Ms. Potter testified that Barbara Cobb focused her disciplinary attention on the African American students at Riverside High School. (Clendenin: Tr. II, p. 88; Potter: Tr. I, pp. 163-164; Tr. I, pp. 206-208).

While Ms. Cobb singled out Krystal Wattie above all, it was clear that African American students were far more likely to receive her discipline than white students. (Tr. I, pp. 17, 163-164, 206-208; Tr. II, pp. 88, 97). Whether or not Ms. Cobb was fully conscious of this pattern in her conduct, it was clear to her administrators, and it is clear evidence of discriminatory bias.

Barbara Cobb acknowledged that Krystal was not the only student who sometimes remained at her locker in the hallway after the beginning of the period known as "jump start." She focused her "disciplinary" efforts on Krystal rather than other students, and asked to explain this, Ms. Cobb testified that these other students were "good students not in need of going for tutoring or make up." (ALJ's Final Decision, pp. 9-10, Finding of Fact 21; Tr. II, pp. 299-300). Ironically, Krystal Wattie was a very good student and earned various academic honors during her high school career. Ms. Cobb knew this to be the case, and she expressed resentment toward Krystal for her achievements.. Krystal earned an "A" for the semester during which she had Barbara Cobb as a teacher.

The way in which Ms. Cobb documented her encounters with Krystal Wattie, writing out quotes in dialect, also indicates a bias. (Tr. III, pp. 19-23; Commission's Exhibit Nos. 2-19). Ms. Cobb tried to explain this in terms of her status as an English teacher and an effort to be accurate. However, this accuracy is notably absent in other ways, and Ms. Cobb herself made clear that her vernacular quotes were meant to convey Krystal's attitude while speaking, which is part of what Ms. Cobb obviously found so offensive.

Krystal Wattie was a bright, capable and confident African American youth, and this may well have been why she was singled out among other African American students.

Assistant Principal Paula Potter commented on Krystal's willingness to speak up, and this may have been part of what annoyed Ms. Cobb. (Tr. I, pp. 173-174).

It is very clear from the record that part of what angered Ms. Cobb was Krystal Wattie's success as a student. Ms. Cobb was upset that Krystal had the respect and good will of other teachers and administrators, she was upset that Krystal had opportunities like HSTA, and Ms. Cobb was upset that Krystal received recognition for her achievements.

**3 A teacher's acts of harassment and discrimination are not excused or justified by any conduct on the part of a student.**

In the second part of Appellant's first assignment of error, it is suggested that Krystal Wattie caused Barbara Cobb's complained of conduct. This is an attempt to obscure the fact that Ms. Cobb is under a duty of nondiscrimination, even when responding to a student. Petitioner is arguing, in essence, that student Krystal deserved the treatment she received from teacher Barbara Cobb. Ms. Cobb refers repeatedly to the ALJ's acknowledgment that Krystal was on occasion loud or late or defensive, and argues that this explained and justified everything Ms. Cobb did to Krystal.<sup>10</sup> However, two wrongs do not make a right, and as between the two, the law has higher standards for the conduct of a teacher.<sup>11</sup> Racially motivated overreaction is wrong, even when the reaction itself was provoked by misbehavior. For example, Rodney King was the victim of civil rights violations, notwithstanding the fact that he had committed serious traffic offenses warranting a police response.

The racially biased reactions of this particular teacher were extreme. The ALJ noted one hallway incident involving Ms. Cobb and Krystal Wattie in which another teacher, Mrs.

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<sup>10</sup>Ms. Cobb seriously overstates Krystal Wattie's behavior. The ALJ made one finding in this regard. (ALJ's Final Decision, p. 10, Finding of Fact No. 22). A review of the ALJ's Final Decision and of the record does not support the contention that Krystal's behavior was worse than the norm. Indeed, this was established by the testimony of Assistant Principal Paula Potter, who was the primary person in the school responsible for student discipline. (Tr. I, pp. 163-164, 206-208).

<sup>11</sup>The ALJ observed that both Barbara Cobb and Krystal Wattie "want and demand respect from the other but are unwilling to reciprocate that respect." (ALJ's Final Decision, p. 17).

Hopkins, intervened and separated them. There was testimony from each of the three persons about this incident (Tr. II, pp 8-10; Tr. I, p. 46), and there was a dispute of testimony as to how the incident, which was not observed by Mrs. Hopkins, had started. But it was clear from the evidence that as of the time Mrs. Hopkins intervened, it was Ms. Cobb's overreaction which was the problem. Even as Mrs. Hopkins led Krystal compliantly away from the scene, Ms. Cobb chased Krystal stuck her finger in Krystal's face and sought to re-ignite the confrontation. (Tr. II, p.10; Tr. I pp. 46-47). As the ALJ observed, Ms. Cobb "couldn't leave well enough alone." (ALJ's Final Decision p. 17). This particular teacher testified that on many occasions, out of fear of Ms. Cobb, Krystal requested that this teacher walk her to class, which she did. (Tr. II, pp. 12-13).

On another occasion, where a different teacher refused to participate in Ms. Cobb's cruelty toward Krystal Wattie and other African American students, Ms. Cobb turned her cruelty on the teacher, who happened to be Pakistani-born, and made critical remarks about the teacher's accent. (Tr. I, pp. 183-188, 195-198).

It does not save Ms. Cobb from liability merely because some of her conduct was in response to Krystal. If there was a mixture of motives for her actions, Ms. Cobb can avoid liability only if she carries the burden of proving that she would have taken the same adverse action even if race had not been given any consideration. See Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152, 162164 (1995); Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989); Desert Palace, Inc. v Costa, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84, 91 Fair Empl. Prac. Cas. 1569 (2003).

Even assuming that Barbara Cobb had justification, on occasion, for criticizing or punishing Krystal Wattie, it is very clear from the record that her extraordinary pattern of conduct toward Krystal was motivated, at least in part, by race. These circumstances are covered by the Price Waterhouse mixed motive analysis, first recognized by this Court in West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W. Va. 525, 531 383 S.E.2d 490, 496-497 n.11 (1989), and later in Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 479 S.E.2d 561 (1996). The evidence makes it very clear that Ms. Cobb went after Krystal Wattie with the persistence she did and "disciplined" her with the

severity she did because of Krystal's race. But for her race, Krystal would not have been in need of protection from Ms. Cobb, and this establishes a violation of the West Virginia Human Rights Act.

In this case, the ALJ reasonably found, and the Commission appropriate affirmed the ALJ's finding, that Barbara Cobb failed to adequately explain her actions. This is true both because the credible evidence fails to show that Krystal Wattie was the outrageous behavior problem that Ms. Cobb makes her out to be, and, more importantly, because most of Ms. Cobb's conduct toward Krystal would not be a responsible teacher's response, even if Krystal were misbehaving.

Ms. Cobb's obsessive conduct toward Krystal Wattie cannot be adequately explained or justified in terms of Krystal's behavior. While there is no dispute that Krystal's behavior may have warranted correction on occasion, it was no worse than other high school students, and in no way warranted the response she received from Ms. Cobb. This is clear from various aspects of the record. First, the credible evidence established that Krystal Wattie was not a significant behavior problem. Administrators and teachers who dealt with her on a regular basis attested to this. (Tr. I, pp. 173-174, 198; Tr. II, p. 14). This alone is enough to refute any claim that Ms. Cobb's conduct toward Krystal was justified.

Second, Ms. Cobb's conduct toward Krystal Wattie was not consistent with appropriate methods of addressing student misbehavior. Locking her out of class and refusing to give her make-up assignments are not legitimate forms of discipline. While Krystal Wattie was her student, Barbara Cobb passed up, and then refused, opportunities to meet with Krystal's mother, where her behavior might have been discussed and constructive solutions sought. And after Krystal was no longer her student, Ms. Cobb was even less interested in efforts to address the problem, and instead actively inflamed the situation. Ms. Cobb went out of her way to confront Krystal over every perceived breach of propriety, even after she had been explicitly instructed by the administration to avoid Krystal.

Third, there is the remarkable extent to which Barbara Cobb singled out Krystal Wattie, and to a lesser extent, other African American students. The record convincingly

establishes that whatever principle of order or discipline Ms. Cobb thought she was upholding when she went after Krystal, she was actually engaging in serious “profiling” and stereotyping. This is attested to not only by Krystal and other students, but by the school’s administrators, who were well aware of the pattern. (Tr. II, pp. 92, 96-97). This bias, and not Krystal Wattie’s behavior, is what “explains” Ms. Cobb’s treatment of Krystal.

**4. The ALJ did not find, and the record does not establish, that Krystal ever shoved Barbara Cobb.**

Regarding the “bathroom incident” that occurred in March 2001, Appellant asserts that the 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.” (Brief of Petitioner, p. 17). Appellant’s assertion is inaccurate in several respects: The ALJ did not find that Krystal shouldered Ms. Cobb, and if he had, it would not have been consistent with the testimony of the student. In addition, such a finding would not have been consistent with the independent testimony of the Assistant Principal.

The ALJ described the incident as a “heated verbal exchange which drew several people to the scene including one of the administrators.” Regarding physical contact between the parties, the ALJ reflected his lack of certainty by saying that “[d]uring the course of the confrontation, Complainant, KW evidently shouldered Respondent.” (ALJ’s Final Decision, p. 7, Finding of Fact No. 14) (emphasis supplied).<sup>12</sup>

Furthermore, the claim by Ms. Cobb that Krystal shoved her is not consistent with Krystal’s detailed testimony regarding the event. (Tr. I, pp. 40-43). Nor is it consistent with the testimony of Assistant Principal Jacquie Switzer, who was an independent observer to at least part of the altercation. Ms. Cobb insisted that she was “shoved” by Krystal after Ms. Switzer arrived on the scene, and that Ms. Switzer saw the shove and told Ms. Cobb she saw it. (Tr. II, pp. 215-217; Tr. III, pp. 65-66). However, Ms. Switzer’s written report

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<sup>12</sup>This use of the term “shouldered” is confusing, in that it could connote anything from “brushing past” to a “body block.” However, the ALJ’s use of the word again (ALJ’s Final Decision, p.16) clearly suggests he used it to mean a non-serious event.

of the event did not describe Krystal shoving Ms. Cobb (Commission Exhibit No. 1), and Ms. Switzer's testimony was that she did not observe any physical contact. (Tr. II, p. 55).<sup>13</sup>

**B. MS. COBB'S STATUS AS A TEACHER DOES NOT EXEMPT HER FROM A DUTY OF NONDISCRIMINATION.**

In her second argument, Appellant claims that Ms. Cobb's legal status as a teacher, her authority to discipline students and the alleged provocation by Krystal Wattie excuse Ms. Cobb from liability for discrimination.<sup>14</sup> To adopt such a proposition would be to seriously undermine the guarantees of the Human Rights Act, which are as vital in the context of education as they are anywhere.

**1. Racial harassment by a teacher in a school is a violation of the public accommodations discrimination provisions of the Human Rights Act.**

Appellant suggests that this case does not involve the "denial of meaningful educational benefits to an African-American," (Brief of Petitioner, p. 23), and therefore does not constitute a cognizable claim of discrimination under the Human Rights Act. However, if we are to truly protect equal opportunity in education, this argument must be rejected.

Violation of the "privilege of non-persecution" is sometimes referred to as harassment. It is now well recognized that when racially or sexually motivated harassment is sufficiently severe to affect the "terms and conditions of employment," it constitutes an adverse employment action. The same is true for places of public accommodations, particularly schools, which are captive environments for the students who attend them. *See West Virginia State Board of Education's Legislative Rules Regarding Racial, Sexual, Religious/Ethnic Harassment and Violence Policy (2421)*, W. Va. C.S.R. § 126-18-1 (1997).

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<sup>13</sup>In her Brief, Appellant does not address Ms. Switzer's testimony, which clearly reflects that Ms. Cobb was behaving very irrationally and was out of control. (Tr. II, pp. 52-58). In her own testimony regarding the event, Ms. Cobb reflected some of that irrationality (Tr. II, pp. 206-218, Tr. III, pp. 64-72); and regarding Ms. Switzer's written report of the event, Ms. Cobb said "these are lies." (Commission's Exhibit No. 15).

<sup>14</sup>In her Brief, Appellant no longer presents this argument as a claim of privilege, which is how it was framed in the Petition for Appeal. Accordingly, the claim of qualified privilege is not directly addressed here.

The West Virginia Human Rights Commission has regulations which describe the test for analyzing claims of sexual harassment. Although these rules speak most specifically to sexual harassment in the context of employment, by their own terms they also apply to places of public accommodations. See West Virginia Human Rights Commission's Legislative Rules Regarding Sexual Harassment, 6 W. Va. C.S.R. § 77-4-4 *et seq.* (1994). It has also been held that the standards for establishing a claim of racial harassment are parallel to those of a claim of sexual harassment. Fairmont Specialty Services v. West Virginia Human Rights Commission, 206 W. Va. 86, 522 S.E.2d 180 (1999). Under the Commission's legislative rules, conduct constitutes actionable harassment if it "has the purpose or effect of unreasonably interfering with an individual's [work] performance or creating an intimidating, hostile or offensive [working] environment[.]" 6 W. Va. C.S.R. § 77-4-2.2.3.

In addition, it would seriously undermine the intent of the Human Rights Act if "profiling" were not also considered a form of harassment, especially where it leads to substantial disruption of the accommodations, advantages, privileges and services.

Courts have recognized the parallels between harassment in the workplace and harassment in schools. "There is no meaningful distinction between the work environment and school environment which would forbid such discrimination in the former context and tolerate it in the latter." Doe v. Taylor Independent School District, 975 F.2d 137, 149 (5th Cir. 1992) (applying Title VII analysis to sexual harassment in a school context). Indeed, because high school students are in a developmental stage of their lives, because they are compelled to be in school and because teachers have a duty to foster healthy development, nondiscrimination in the school context is even more important than in the employment context. Patricia H. v. Berkeley Unified School District, 830 F. Supp. 1288 (N.D. Cal. 1993).

The importance and function of the environment is different academically than in the workplace . . . . A nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives.

Patricia H., at 1292-1293, *citing* Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 Tex. L. Rev. 525, 551 (1987) (footnote omitted).

Other courts have spoken more specifically about a "hostile educational environment." It has been said that a hostile educational environment exists where a complainant can show (1) that she suffered intentional discrimination because of her protected status; (2) that the discrimination was pervasive and regular; (3) that the discrimination detrimentally affected the complainant; and (4) that the discrimination would detrimentally affect a reasonable student of the same protected in her position. Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990).

Clearly the evidence establishes that Barbara Cobb created a hostile educational environment for Krystal Wattie. During the spring of 2000, the only semester in which Barbara Cobb had Krystal Wattie as a student, she referred her to the office on multiple occasions, locked Krystal out of her classroom, refused to give her make-up assignments, criticized her, confronted her and otherwise made her feel targeted and burdened. Perhaps most telling of all, the Principal recognized that African American students were transferring out of Ms. Cobb's class because of her treatment, and even suggested to Krystal's mother that this might be the best way for Krystal to address the problem.

In the subsequent years, although no longer her student, Ms. Cobb continued to focus her disciplinary attention on Krystal Wattie, so much so that teachers and administrators recognized the need to protect Krystal from Barbara Cobb by helping her to avoid Ms. Cobb, intervening to rescue her when she was confronted, accompanying her in the halls and assigning her an aide. In addition, Ms. Cobb attempted to have Krystal removed from the HSTA program, and Ms. Cobb became upset and abusive upon learning that Krystal received a recommendation to a college summit.

This conduct by Ms. Cobb continued throughout Krystal Wattie's sophomore and junior year, constituting a continuing violation, right up to the time Ms. Cobb was suspended in the spring of 2002. Clearly it was pervasive, detrimentally affected Krystal and would have detrimentally affected anyone in her position. There can be no doubt that this pattern of conduct constituted discriminatory action. It undermined Krystal Wattie's right to equal opportunity as a student.

It is fundamental and long-standing public policy in the state of West Virginia that no person be denied equal opportunity because of race, especially in education. The West

Virginia Human Rights Act explicitly declares the right of equal opportunity to be a "human right," and notes the denial of this right based upon race (and the other prohibited motives) "is destructive of a free and democratic society." W. Va. Code § 5-11-2. Because this right is so fundamental, this Court has said that unlawful discrimination "is akin to an act of treason, undermining the very foundations of our democracy." Allen v. State Human Rights Commission, 174 W. Va. 139, 148, 324 S.E. 2d 99, 108 (1984). As far back as 1898, even in the context of "separate but equal" education, this Court recognized that "discrimination against the colored people, because of color alone, as to privileges, immunities, and equal legal protection, is contrary to public policy and the law of the land." Williams v. Board of Education of Fairfax District 45 W. Va. 199 (1898). It is vital that the Court not retreat from its insistence on racial equality in education.

**2. A teacher's authority to discipline is not license to discriminate or harass minority students.**

Appellant asserts that in finding Ms. Cobb guilty of discrimination the Commission has ignored her legal status as a teacher and her authority to administer discipline. However, a careful reading of the record makes it clear that Ms. Cobb exceeded and acted apart from her legitimate authority. Her status as a teacher was not ignored in arriving at the conclusion that she engaged in unlawful discrimination.

Appellant notes that long-standing doctrines recognize teacher as possessing authority to "inflict such reasonable punishments as are necessary for the child's proper education..." (Brief of Petitioner, p. 25, citing Restatement of Torts). But there can be no serious argument that "reasonable punishments" do not include conduct such as referring to all of the African American students in the class collectively (ALJ's Final Decision p. 4, Finding of Fact No. 8), locking a student out of class (ALJ's Final Decision p. 5, Finding of Fact No. 9), saying to an African American student in front of her classmates, "it is just in your nature to be loud," (ALJ's Final Decision p. 5, Finding of Fact No. 9), conducting a parent teacher conference regarding a misbehaving student in front of the student's classmates (ALJ's Final Decision p. 5, Finding of Fact No. 9), or shaking a finger in the face

of a frightened student and saying, "It's a good thing she came along when she did or I don't know what would have happened." (ALJ's Final Decision p. 17).

Appellant points out that the West Virginia Safe Schools Act specifically authorizes a teacher to "exclude from. . .her classroom. . .any pupil who is guilty of disorderly conduct." W. Va. Code § 18A-5-1(c). Appellant fails to note that the same statute goes on to say that "any pupil excluded shall be placed under the control of the principal of the school or a designee[,]" and shall be readmitted to the classroom. . .only when the principal, or a designee, provides written certification to the teacher. . . ." (emphasis supplied). This code section does not authorize a teacher to "experiment. . .by briefly [and unilaterally] 'locking out' a student from her classroom," (Brief of Petitioner, p. 11), as Ms. Cobb did in this case. In addition, it only speaks to exclusion.

In this case, Ms. Cobb was Krystal's classroom teacher for only a brief period in the early spring of 2000. After that, Krystal never again had Ms. Cobb as a classroom teacher, and so this code provision was inapplicable. Whatever authority W. Va. Code § 18A-5-1(c) bestowed on Ms. Cobb to exclude Krystal from class during the spring of 2000 did not apply to her efforts to "discipline" her during the two years that followed.

In addition, W. Va. Code § 18A-5-1(c) specifically provides that a teacher's authority is to refer a disobedient student to the principal or designee, who administers the appropriate discipline. It does not bestow on the teacher authority to discipline in contravention of the will of the administration. The evidence in this record clearly reflects that Ms. Cobb was dissatisfied because the Principal, both Assistant Principals and the Superintendent would not assist or support her in her campaign of harassment. She was specifically told to avoid Krystal and to refrain from attempts to discipline, which directives Ms. Cobb declined to follow. And ultimately acting beyond the will of administration (Tr. III, pp. 92-93), Ms. Cobb resolved to persist in taking the discipline of Krystal Wattie into her own hands. (Tr. III, p. 91, lines 8-16).

Appellant has cited several cases in which the courts have spoken to the importance of some deference to school authority in matters of maintaining discipline. (Brief of Petitioner, pp. 26-27). It is significant that in all but one of the cited cases the applicable "authority" was the school administration. Even where the issue involved conduct by a

teacher, the teacher was backed by the board of education. None of these cases upholds the disciplinary action of a teacher against a student taken without the support and backing of the school administration.

This Court, in Keith D. v. Ball, 177 W. Va. 93, 350 S.E.2d 720 (1986), at Syl. pt. 1, held that "Courts should not interfere with the decisions of school board officials in disciplinary matters except in extreme cases." (emphasis supplied). The Court reasoned that very serious misconduct (repeated bomb threats that disrupted the education for all other students and also resulted in the death of a student) could warrant a temporary forfeiture of the perpetrator's right to an education. However, there is no hint in that decision that even such serious misconduct would justify a forfeiture of the perpetrator's right to be punished equitably, notwithstanding his race.

In Dickens v. Johnson County Board of Education, 661 F. Supp. 155 (E.D. Tenn. 1987), the court upheld the authority of a classroom teacher to "impose minor forms of classroom discipline, such as admonishing students, requiring special assignments, restricting activities and denying certain privileges, without being subject to the structures of due process scrutiny." 661 F. Supp. at 157. But this case involved a substantive due process claim, not a discrimination claim. The federal court which decided it explicitly declined to retain pendent jurisdiction over and rule upon the plaintiff's state claims, 661 F. Supp. at 159, which might have entailed a different level of deference. In addition, there is no suggestion in the Dickens decision that the teacher involved was imposing discipline disapproved of by the school administration.

Appellant cites Judge Wilkinson's dissent in Love-Lane v. Martin, 335 F.3d 776, 800-801 (4th Cir. 2004), for the proposition that "keeping order in our nation's schools is among our most pressing educational concerns." (Brief of Petitioner, p. 27). However, this is an attempt to pose a false dilemma. It is absurd to suggest that some amount of race discrimination or harassment must be tolerated in order to preserve order.<sup>15</sup> Ironically,

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<sup>15</sup>Judge Wilkinson reports that "Sadly, almost half of America's teachers report that they spend more time trying to keep order in their classroom than actually teaching students. . . ." Love-Lane, 335 F.3d at 800 (citation omitted). If this is so, it strongly suggests there are teachers who are using very ineffective and perhaps counterproductive approaches to discipline. (This is pointed out by the majority in that decision.) A careful

Love-Lane involved a race case, and the majority opinion appropriately recognized that ensuring nondiscrimination within a school setting is important to preserving proper order and discipline.<sup>16</sup> A disciplinary system which does not ensure fairness and nondiscrimination loses its legitimacy and is bound to fail.

**3. Ms. Cobb abused and exceeded her authority by exercising authority in a discriminatory fashion.**

Appellant asserts that by seeking to discipline a student, Ms. Cobb was not engaging in a "facially indefensible act," that is, acting within her authority. But this does not render the conduct legal. Adverse actions in discrimination cases are almost never "facially indefensible acts." It becomes essential to look beneath the surface.

Adverse actions are rarely unlawful acts, in and of themselves, except insofar as they are done for discriminatory reasons or done in discriminatory ways. In employment cases, for instance (under the Human Rights Act and Title VII), adverse actions typically consist of terminations, failures to hire or failures to promote. In virtually every one of these cases the employer has an explanation which, if believed, is a defense to the discrimination charge. In addition, absent a discriminatory motive, an employer is free to hire and fire largely "at will." Thus, their decisions, even if very *adverse* to an employee, are "facially defensible," that is, within the scope of the employer's authority. Notwithstanding this, the termination of a job is an adverse action in any event, and is unlawful when it is shown to be discriminatory.

In the employment context, discriminatory discipline has been recognized by this Court as a cognizable adverse action. See Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152 (1995). But the employer does not violate the law merely by imposing discipline. That is to say, the discipline does not become unlawful merely because it is

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reading of the record in the case at bar, and in particular Commission's Exhibit Nos. 2-19, will lend some credence to this hypothesis.

<sup>16</sup>Contrary to the representation of the Appellant (Brief of Petitioner, p. 27 n.18), the majority opinion did not hold that the defendant school administrator had qualified immunity 355 F.3d at 784-785.

adverse. The violation of law occurs when the adverse action is done with discriminatory motive or discriminatory result.

Appellant asserts that discipline is "an appropriate and necessary exertion of academic or governmental authority." (Petition for Appeal, p. 18). This is not disputed. Nor is it different in the employment context, where it is well recognized that hiring and firing is an appropriate and necessary exertion of employer authority. In either context, there is no violation of the law, except where discriminatory motive can be shown. But it is this exception which is important in this case.

Appellant asserts that Bryant v. Independent School District No. 1-38 of Garvin County, Oklahoma, 334 F.3d 928 (10th Cir. 2003), is the only authority "even remotely close" to the case at bar. In Bryant, the student's claim failed not for a lack of adverse action, or because of some "privilege" on the part of the school official, but because the evidence did not support the plaintiff's claim that he had been treated *differently because of race*. This case is factually distinguishable from the instant case. Bryant involved a claim of race discrimination by a student who had been suspended after his second fight. The court upheld a summary judgment on behalf of the school because the evidence clearly showed that the school had consistently suspended all students, white and black, for their second offense of fighting. In the case at bar, the evidence clearly established that Ms. Cobb treated Krystal Wattie differently. (See e.g., ALJ's Final Decision, pp. 9-10, Finding of Fact No. 21). This is what distinguishes it from Bryant.

On the other hand, the case of Bow v. Willow Run Community School, 2001 WL 889137 (Mich. App.), is at least as close in facts and issues. That case involved a substitute teacher who made two racially derogatory statements to a fifth grade class during a home-room period. Tried under a state civil rights act on a claim of racial harassment, a jury returned a verdict of \$38,904.52. The appeals court later reversed, finding that the teacher's isolated comment, while offensive, was not of a "type, severity, or duration to have created an objectively hostile [educational] environment." Bow, 2001 WL 889137, at \*2 (footnote omitted). In contrast, the case at bar involved several racially derogatory comments, and many racially motivated confrontations and incidents, over a period of years. The bias of Ms. Cobb, expressed through her conduct toward Krystal and

through her writings, clearly evidences a racially hostile environment and not just an isolated incident.

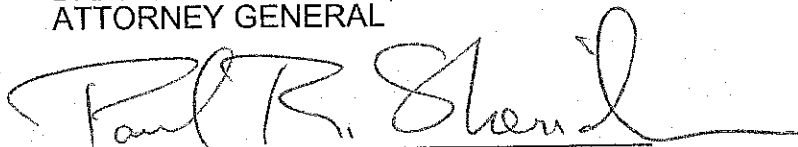
**CONCLUSION**

The Final Decision of the Administrative Law Judge, which was upheld by the West Virginia Human Rights Commission, is supported by the evidence in the record. It is a fair and balanced treatment of that record and contains findings which favor both sides and findings which critique both sides. The conclusions properly apply the law to the most salient facts, and the decision should be affirmed by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Paul R. Sheridan, Deputy Attorney General of the State of West Virginia, do hereby certify that a true copy of the foregoing Brief of Appellee West Virginia Human Rights Commission was served upon the following, by hand delivering a true copy thereof, on the 20th day of November 2004, addressed as follows:

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