

NOS. 34739 and 34740

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

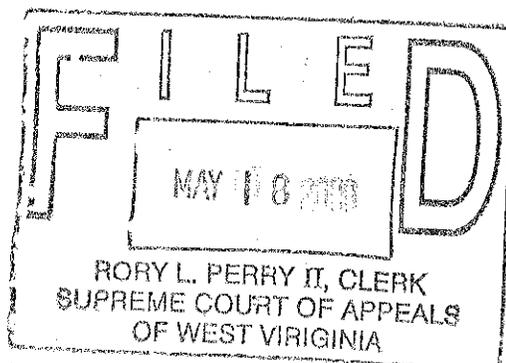
CHARLESTON TOWN CENTER COMPANY, LP,

Appellant/Respondent Below,

v.

STEVEN and CYNTHIA BUMPUS, on
behalf of STEVEN M. BUMPUS, a minor;
AUGUSTA ROBINSON, on behalf of
Kevin Streets, a minor; and the WEST
VIRGINIA HUMAN RIGHTS COMMISSION,

Appellees/Complainants Below.



FROM THE FINAL ORDERS OF THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION
DOCKET NOS. PAR-81-07 AND PAR-140-07

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

INTRODUCTION

The appeals filed by the Charleston Town Center Company, LP, seeking a reversal of the Final Orders of the West Virginia Human Rights Commission in Bumpus v. Charleston Town Center Company, LP, Docket No. PAR-81-07, and Robinson/Streets v. Charleston Town Center Company, LP, Docket No. PAR-140-07, were accepted by this Court and consolidated for purposes of briefing, argument and consideration.

The West Virginia Human Rights Commission, on behalf of Appellees Steven M. Bumpus, Jr. and Kevin Streets, submits that both of these matters have been properly decided by the Commission, applying the appropriate law to the facts in the record, and respectfully requests that the Final Orders of the West Virginia Human Rights Commission be affirmed. The Commission provides the following Brief in support of its position.

I. SUMMARY OF PROCEEDINGS BELOW

On or about September 26, 2006, and October 11, 2006, respectively, Steven and Cynthia Bumpus, on behalf of their minor son, Steven M. Bumpus, and Augusta Robinson, on behalf of her minor grandson, Kevin Streets, filed separate administrative complaints with the West Virginia Human Rights Commission. These complaints alleged that the Charleston Town Center Company, LP, the entity which operates the retail establishment known as the Charleston Town Center Mall [hereinafter sometimes referred to as CTCM or Mall], had discriminated against these young men on the basis of race, by denying them the accommodations, advantages, facilities, privileges and services of the CTCM as a place of public accommodations. Both young men are African American. Steven Bumpus and Kevin Streets [hereinafter sometimes referred to as Complainants] claimed that the security guards employed by the Mall surveilled and followed the young men in the Mall, evicted them from the food court, interfered with their window shopping, and later escorted them out of the Mall. Complainants further claimed that while Steven and Kevin waited on the sidewalk to be picked up by Mrs. Bumpus after eating at Chili's, the Mall security guards attempted to have them ejected from the sidewalk, and then had them arrested for trespassing.¹ The Complainants contended that this mistreatment by mall guards was unwarranted and that white patrons, including other youth, were not treated in such a hostile manner, were not told to leave the food court or the Mall, and were not arrested for standing on the sidewalk.

After an investigation and a finding of probable cause, these matters were set for public hearing in compliance with W. Va. Code § 5-11-10. The cases were heard by Administrative Law Judge Robert B. Wilson on December 12-14, 2007. Although originating as separate Human Rights Act complaints filed by the families of each of the juvenile Complainants involved, the two cases were heard and considered together by the Human Rights Commission without objection from any party.

¹Charges against the Complainants were later dropped without any further proceedings.

On May 23, 2008, ALJ Wilson issued a Final Decision in each case, finding that the Charleston Town Center Mall had discriminated against each Complainant in violation of the West Virginia Human Rights Act, and awarding each Complainant relief.

On July 28, 2008, the Charleston Town Center Mall filed a petition for administrative appeal in each of these cases. The Human Rights Commissioners conducted an administrative review, and on November 26, 2008, the West Virginia Human Rights Commission issued a Final Order in each case "adopt[ing] said Administrative Law Judge's Final Decision, as its own, without modification or amendment." (*Final Order of the West Virginia Human Rights Commission*, p. 1).

The Charleston Town Center Company, LP then filed with this Court a *Petition for Appeal on Behalf of Charleston Town Center Company, LP* of the Final Order of the West Virginia Human Rights Commission in *Bumpus v. Charleston Town Center Company, LP*, Docket No. PAR-81-07, and a *Petition for Appeal on Behalf of Charleston Town Center Company, LP* of the Final Order of the West Virginia Human Rights Commission in *Robinson v. Charleston Town Center Company, LP*, Docket No. PAR-140-07. The Court has docketed both appeals, and upon the Motion of the Appellees has consolidated the appeals for consideration.

II. SUMMARY OF THE RULINGS BELOW

This is an appeal of the ALJ's Final Decision in each of the two cases, and from the HRC's Final Orders upholding and adopting the Final Decisions.

The ALJ issued a 36-page Final Decision in each of the two cases. The Final Decision in each case is essentially identical to the other.² Each Final Decision summarizes the evidence, identifies the factual disputes and resolves them by weighing various factors related to credibility. Each Final Decision identifies and applies the applicable law and finds discrimination. In these Final Decisions, the Administrative Law Judge awarded both Complainants equitable relief and incidental monetary relief.

²While there was a separate Final Decision issued in both cases, the citation references given herein can be found in either. Accordingly, the uniform designation "Final Decision" is used.

In the Final Decisions, the ALJ concluded that the Charleston Town Center Mall was covered as a place of public accommodations by the Human Rights Act. The Administrative Law Judge considered and rejected³ CTCM's contentions that the Complainants had never attempted to avail themselves of the privileges and benefits of this place of public accommodation, and its contention that they had never been denied the privileges and benefits of the CTCM. For instance, the Administrative Law Judge found that "to use [the sidewalk] as an exit from a public restaurant and to wait to be picked up by a parent, is an attempt to avail oneself of a public accommodation," (Final Decision, p. 22), and to be denied "the use of the public sidewalk" outside the Town Center Mall was to be denied one of the benefits of this particular place of public accommodation.⁴

Regarding the arrest of the Complainants, the ALJ concluded that they would not have been arrested for trespassing but for the fact that Lt. Karl Hager of CTCM security required that the Complainants leave or be removed. Regarding the role of Charleston Police Officers in this, the Appellant's Brief misstates the nature of the Administrative Law Judge's ruling. Contrary to Appellant's assertion, the ALJ did not "base his finding on his determination that the police officers acted as the Appellant's agents" in making the arrests. (Appellant's Brief, p. 14, *citing* ALJ's Final Decision, p. 29). The ALJ based his ruling on a determination that it was the Mall, through its security guard Lt. Hager, that evicted the Complainants.

The Complainants were not breaking any laws by standing where they were standing, other than and until [the Mall], by its agent, Lt. Hager, specifically identified Complainants and Mr. Martin as trespassers upon their private property to be removed therefrom by the police.

Final Decision, p. 29.

³Final Decision, pp. 27-29.

⁴In its Summary of Proceedings, the Appellant mischaracterizes the nature of the complaints. In its description of the Final Decision, Appellant refers to the cases as involving "racial profiling" (Appellant's Brief, p. 2) and "undue attention." (Appellant's Brief, p. 3). While this is true as far as it goes, these Complainants were not *merely* judged or watched because of their race. As the ALJ noted in his Final Decision, they were three times *compelled* to leave various parts of the Mall.

The ALJ noted that CTCM attempted to explain and justify its treatment of the Complainants by alleging that they were disruptive and violated the rules. While the ALJ also noted that this offered explanation was "plausible" (Final Decision, p. 30; Appellant's Brief, p. 3), the ALJ found that in light of the evidence in the record it was not credible as an explanation.

The ALJ found that the testimony of Lt. Hager, the principal witness for the Charleston Town Center Mall, generally was not credible. The ALJ noted that Lt. Hager's testimony was internally inconsistent on several important points, and significantly inconsistent with some of his own written records, both those records allegedly made the day of the incident and those admittedly made after the discrimination complaint had been filed. (Final Decision, pp. 10, 11, 12-13, 16-17, 22, 31-32). It is significant that Lt. Karl Hager, the chief Mall security guard, was the only witness who provided first-hand testimony on CTCM's assertions. The testimony of the Complainants, on the other hand, was supported by other evidence in the record, including testimony by some of the Charleston Police Officers and some of the Charleston Town Center Mall's records, in addition to the cell phone records and police dispatch records.

Among other things, the Administrative Law Judge also noted that by Lt. Hager's own testimony he treated the Complainants differently than he usually treated teens (Final Decision, p. 22), and that he focused on race as a defining difference. (Final Decision, pp. 11, 17, 22). The ALJ noted the compelling evidence that the security guards focused on the Complainants from the time they first entered the Mall (Final Decision, p. 31; Commission's Exhibit 22), and prevented them from window shopping, which was a violation of no rules. (Final Decision, p. 31). And the ALJ noted the evidence from other sources, including witnesses called by Appellant, that the Mall exhibited a propensity to evict African American patrons.

Police Officer Coleman indicated that when he receives calls to escort from the Mall they are commonly African Americans. Police Officer Brown testified credibly that it was 100% of the

time minorities or blacks being evicted or escorted from the Mall on the calls he participated in over the years. Vol II, pages 62, 63, 69, 70, 130 and 131.

Final Decision, pp. 23-24.⁵

The ALJ ruled that it was as a result of race discrimination that the Complainants were denied the advantages and privileges of the Charleston Town Center Mall's place of public accommodation, and this ruling was based on the evidence in the record.

III. SUMMARY OF THE FACTS

The Appellees herein/Complainants below, Steven M. Bumpus, Jr. and Kevin Streets, are both African American males. On April 22, 2006, when the events of this case occurred, they were sixteen and seventeen years old, respectively.

The Charleston Town Center Company, LP is the operator of the Charleston Town Center Mall, which is a commercial mall within the City of Charleston. It is a "place of public accommodations" within the meaning of the West Virginia Human Rights Act, W. Va. Code § 5-11-3(j).⁶

On Saturday, April 22, 2006, at approximately 7:00 p.m., the Complainants went to the Charleston Town Center Mall. After meeting up with another friend, who is also African American, the Complainants strolled through the Mall, eventually arriving at the third floor food court, where they joined some highschool classmates, also African American, who were there.

The Complainants noticed that they were being watched and followed almost as soon as they entered the Mall. (Final Decision, p. 9, Finding of Fact No. 4; Transcript Vol. I, pp. 22-24, 28, 29, 105, 106, 231; Transcript Vol. II, p. 47). The Charleston Town Center

⁵Contrary to Appellant's assertion that police officer testimony was ignored (Appellant's Brief, pp. 18-21), the ALJ gave weight to their testimony.

⁶The Appellant initially disputed this point. In CTCM's initial response to the HRC complaints, Charleston Town Center Mall denied that it was a place of public accommodation. (Commission's Exhibit 6, p. 3). Later, however, CTCM acknowledged that it was a place of public accommodation (Commission's Exhibit 8, p. 3), and this point apparently is no longer in dispute.

Mall denied that it paid special attention to the African American Complainants; however, the credible evidence supported the Complainants' claim and contradicted the CTCM. Steven Bumpus testified that he was uncomfortable being watched by the guards and called his mother for advice. The cell phone records and his mother's testimony corroborate this. CTCM security guard Nearhoof testified that the guards followed prescribed patrolling patterns, and used a system which could verify exactly when each officer was at any given position (Transcript Vol. II, pp. 195-196; Appellant's Brief, p. 4); however, Appellant never presented any evidence from this system to show the positions or patrolling patterns of the guards on that evening. The written records made by the Mall security guards that very evening reflect that at about 7:30 p.m. at least one guard "kept a group of BM [Black males] moving." (Commission's Exhibit 22). The ALJ appropriately credited the Complainants' version of these facts.

Complainants went to the food court of the Mall. While the Complainants were in the food court, they were confronted by Lt. Hager of Mall security, who ordered the Complainants and the other African American youth to leave the food court, and then solicited the help of two Charleston Police Officers to assist in evicting the Complainants from the food court. (Final Decision, pp. 9-10, Findings of Fact Nos. 5, 6, 7 and 8; Transcript Vol. I, pp. 109-110).⁷ The Complainants saw white youth at the food court who were not being so treated, and they perceived that they were being treated unfairly. (Transcript Vol. I, pp. 33, 155-157). One of their companions, who had purchased food and was eating, was particularly annoyed, and the Complainants had to urge him to comply with the orders and not to be reactive. (Final Decision, pp. 9-10, Finding of Fact No. 6; Transcript Vol. I, pp. 31, 108-110). The two Complainants then left the food court, and with two other friends browsed through other parts of the Mall. (Final Decision, pp. 9-11, Findings of Fact Nos. 6 and 8; Transcript Vol. I, pp. 34-36, 111-112). At one point, the

⁷Lieutenant Hager told inconsistent stories about how he came upon the Complainants, and he admitted that he did not give the Complainants any opportunity to obtain food or to regroup into smaller groups before ejecting them. (Final Decision, p. 10; Commission's Proposed Findings of Fact and Conclusions of Law, p. 24). CTCM made no effort to obtain the testimony of the Police Officers regarding what happened on that occasion. Based on this, the ALJ acted appropriately to accept the Complainants' version of events, which matched other objective evidence, such as the cellular telephone records.

Complainants were confronted by a security guard who prohibited them from window shopping and told them that they must "constantly keep moving." (Final Decision, pp. 10-11, Finding of Fact No. 8; Transcript Vol. I, pp. 36, 112).

Just before 9:00 p.m., as closing time approached, Mall security guards confronted the Complainants again, this time insisting that they leave the Town Center Mall. (Final Decision, p. 11, Finding of Fact No. 9; Transcript Vol. I, pp. 37, 81, 113). The Complainants were not being disruptive (Final Decision, p. 12, Finding of Fact No. 12; Transcript Vol. I, pp. 141; Commission's Exhibit 17), and the stores in the Mall were not yet closed. (Final Decision, pp. 13-14, Finding of Fact No. 16; Commission's Proposed Findings of Fact and Conclusions of Law, pp. 8-9). However, the Town Center Mall security called in the police and had the Complainants escorted out of the Mall.⁸ The Complainants were compliant and left as they were directed. (Final Decision, p. 12, Finding of Fact No. 12; Transcript Vol. I, p. 141). They walked to a local cinema for a short while, and later returned to the Mall area, where they had a meal at Chili's, which is part of the Mall structure, but is accessed from the outside through a separate entrance.⁹ (Final Decision, p. 15, Finding of Fact No. 22).

Shortly before 11:00 p.m., after eating at Chili's, Complainants exited the restaurant. Just outside of Chili's, Steven Bumpus telephoned his mother to seek a ride, and the boys waited there on the sidewalk for Mrs. Bumpus to arrive. (Final Decision, p. 11, Finding of Fact No. 23; Transcript Vol. I, pp. 40, 44, 117, 236; Commission's Exhibits 30 and 31).

⁸The Charleston Town Center Mall claims that the Complainants were escorted out of the Mall after 9:00 p.m., when the stores in the Mall were already closed. CTCM also claims that Lt. Hager talked with Cynthia Bumpus on the phone during these events. The Complainants dispute these claims, and the cellular phone records and other independently established facts support the ALJ's rejection of the Charleston Town Center Mall's claims. (See Final Decision, pp. 12-14; see also Commission's Proposed Findings of Fact and Conclusions of Law, pp. 8-9).

⁹It is important to point out that while the Complainants had been escorted out of the Mall, they had not been told to stay away or otherwise prohibited from eating at Chili's.

At 10:45:50 p.m.,¹⁰ the Town Center Mall security personnel called the Charleston Police Department regarding a large group (fifteen to twenty) of African American youth who were creating a disturbance at the Court Street end of the Town Center Mall. (Final Decision, pp. 16-17, Findings of Fact Nos. 26 and 27; Commission's Exhibit 34; Commission's Exhibit 17, p. 4; Transcript Vol. III, pp. 110-111). Charleston Police Officers were dispatched, and arrived in several police cars and a prisoner transport wagon, just as Steven Bumpus was exiting Chili's and calling his mother for a ride.¹¹ (Final Decision, p. 17, Finding of Fact No. 28; Commission's Exhibits 30, 31 and 34). As the police arrived,¹² the group who had been causing the disturbance fled, ending the need for further action to remedy the disturbance by either the Town Center Mall security or the police. (Final Decision, p. 18, Finding of Fact No. 32; Transcript Vol. I, pp. 118-119). But Lt. Hager, the Mall security officer in charge, turned his attention to the Complainants, the only African American youth left on the scene, who were merely standing on the sidewalk by the street, waiting for Mrs. Bumpus. (Final Decision, pp. 16-17, 18, 21-23, Findings of Fact Nos. 26, 33, 49 and 50).¹³

When Charleston Police arrived, they were asked by Mall security to assist in the removal of the Complainants. (Final Decision, p. 29). Police Officer Shawn Midkiff testified that he had been told by Mall security that the Complainants had been "harassing customers" throughout the day (Transcript Vol. II, p. 12), which is undeniably a false

¹⁰The dispatch records establish this time. (Commission's Exhibit 34). This had to be at least a few minutes after Lt. Hager had received the call from the vendor which prompted the call to the police. But it was before Steven Bumpus exited Chili's and called his mother.

¹¹The cell phone records establish that this call was made at 10:55 p.m. (Commission's Exhibits 30 and 31). Cynthia Bumpus recalled receiving this call, the content of which was only Steven's request for a ride home. (Transcript Vol. I, p. 236).

¹²The dispatch records reflect that a total of six Charleston Police Officers arrived on scene between 10:55 and 11:01 p.m. (Commission's Exhibit 34).

¹³There were no witnesses who claimed to have seen or heard Steven Bumpus or Kevin Streets do anything inappropriate, other than to later refuse the order to leave the sidewalk. Lieutenant Hager testified that he was called a "rent-a-cop" but could not say whether Bumpus or Streets said anything. (Transcript Vol. III, p. 117). He acknowledged that he considered them "guilty by association." (Transcript Vol. III, p. 128).

accusation.¹⁴ While the boys were waiting for a ride along the curb outside of Chili's, they were confronted by the Mall security personnel, and then by two Charleston Police Officers, who ordered them to leave immediately. Other Charleston Police Officers arrived and watched. When Steven and Kevin explained that they were merely waiting for a ride,¹⁵ and questioned why they had been singled out for this treatment, they were arrested by the police for trespassing. (Final Decision, pp. 18-19, Findings of Fact Nos. 33, 34, 36 and 42; Transcript Vol. I, pp. 11-12, 23-24). Police Officer R.H. Coleman testified that other than standing somewhere that Mall security did not want them to be (that is, on the sidewalk in front of Chili's) he did not see the Complainants violate any laws. (Final Decision, p. 21, Finding of Fact No. 46; Transcript Vol. II, pp. 115-119; see also Transcript Vol. II, pp. 23-24). Although the Complainants were taken away by the police that night, charges against them were later dropped.

As a result of being singled out and discriminated against because of their race, each Complainant not only was deprived of access to the accommodations, advantages, facilities, privileges and services of the Charleston Town Center Mall, but each suffered the embarrassment and humiliation of being treated as a second class citizen.¹⁶

¹⁴It is undisputed that the Complainants spent barely two hours inside the Mall that day, all of it after 7:00 p.m., and there was never an allegation by the Mall, or any evidence, that they ever harassed a customer.

¹⁵The evidence in the record is very clear that the boys attempted to explain that they were merely there waiting on a ride which was only minutes away, and that it was others who had caused the disturbance. It is significant that Police Officer Coleman (Transcript Vol. III, pp. 113, 115), and security guard Nearhoof (Transcript Vol. III, pp. 210, 217-218), both had a recollection of Bumpus and Streets attempting to *explain* these circumstances and complain about the injustice of the situation. They heard no insults or threats. Lieutenant Hager, the senior representative of the CTCM on the scene with the authority to have the boys removed, was not listening. According to his testimony, he heard nothing but insults and threats. (Transcript Vol. III, pp. 116-117, 133-134).

¹⁶The evidence supporting this claim of racial profiling and discrimination is so compelling that the Appellant has attempted to build its appeal primarily on the claim that its conduct does not fall within the purview of the Human Rights Act.

IV. ALLEGED ERRORS

The Charleston Town Center Mall lists three Assignments of Error; however, the first articulated Assignment of Error addresses four distinct substantive issues.

In its first assignment, CTCM initially asserts that the ALJ should have found the Complainants ineligible to make this claim of discrimination “because they did not attempt to avail themselves of public accommodations.” (Appellant’s Brief, p. 7, ¶ 1). The Appellant’s primary basis for seeking a reversal is the remarkable contention that the protections of the Human Rights Act and its guarantees of equal treatment only extend to those Mall patrons who actually shop. (Appellant’s Brief, pp. 7, 11).

Charleston Town Center Mall next asserts that even if Complainants’ use of the Mall does count as an “attempt to avail themselves” of a public accommodation, the *prima facie* case still fails because “no accommodations were denied or withheld from the Complainants[.]” (Appellant’s Brief, p. 7, ¶ 1). In other words, CTCM is arguing that, regardless of whether or not it acted with racial bias, it did nothing which counts as an “adverse action” subject to the jurisdiction of the Human Rights Act.¹⁷ In connection with this second issue regarding whether Complainants suffered a denial of accommodations, Appellant asserts “that the actions that the Charleston Police Department took cannot be imputed to the Charleston Town Center.” (Appellant’s Brief, p. 7, ¶ 1, pp. 11-16).

As its third issue in its first assignment, CTCM asserts that the ALJ erred by failing to conclude that “any denial of access to public accommodations that might have occurred was based solely on a legitimate, non-discriminatory motive,” that is, the alleged uniform enforcement of the Mall Code of Conduct. (Appellant’s Brief, p. 7, ¶ 1, pp. 13, 16-18).

As its fourth issue in its first assignment, the Appellant asserts that the ALJ’s Final Decision “impermissibly restricts the role of police officers and security guards to promote public safety.” (Appellant’s Brief, p. 7, ¶ 1). But CTCM’s dispute here is not with any “restrictions” imposed by the ALJ. Rather, CTCM essentially argues that because security guards and police officers are “entrusted with ensuring a safe public

¹⁷CTCM mentions the “undue attention” but does not mention being evicted from the food court, and then the Mall, and then the sidewalk outside the Mall. (Appellant’s Brief, p. 7, ¶ 1).

environment,"(Appellant's Brief, p. 21), the Human Rights Commission should have especially limited authority to doubt their testimony or the motives behind their conduct. (Appellant's Brief, pp. 18-21).¹⁸

The last two Assignments of Error are more generic. CTCM's second assignment asserts that the ALJ's "findings were arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion, in that they ignored credible evidence." As its third assignment, CTCM asserts that the ALJ's findings "were not supported by the evidence" and "were clearly wrong." (Charleston Town Center Mall's Petition for Appeal, p. 7, ¶¶s 2 and 3). Neither of these assignments are specifically addressed in Appellant's Brief.

V. ISSUES PRESENTED

1. Whether the prima facie requirement "that complainant attempted to avail himself of the 'accommodations, advantages, facilities, privileges or services' of a place of public accommodations" is met in this case by the fact that the Complainants went to the Town Center Mall to spend a Saturday evening, notwithstanding that they did not do so with the explicit intention to shop.

2. Whether the prima facie requirement "that the 'accommodations, advantages, facilities, privileges or services' were withheld, denied, or refused to a complainant" is met in this case by the fact that the Complainants were forcibly removed from the food court, from the Mall itself, and then from the sidewalk outside of the Mall.

3. Whether there is substantial evidence in the record which supports the ALJ's determination that race was a factor in motivating the CTCM's efforts to evict the Complainants from the food court, from the Mall itself, and from the sidewalk outside the Mall.

¹⁸Ironically, given this record, even a rule which gives enhanced weight to the testimony of police officers and security guards would not save CTCM from liability in this case, because it was a Charleston Police Officer who testified that when he has been called to the Mall to evict patrons, it has always turned out to be a minority person. (Final Decision, pp. 23-24; Transcript Vol. II, pp. 69-70).

4. Whether a factual finding of discrimination by Mall Security, based upon substantial evidence in the record, impermissibly restricts the role of police and security guards to promote public safety.

VI. STANDARD 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); see also Muscatell v. Cline, 196 W. Va. 588, 474 S.E.2d 518 (1996); Smith v. West Virginia Human Rights Commission, 216 W. Va. 2, 6, 602 S.E.2d 445, 449 (2004).

The scope of review for factual determinations is limited.

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 Human Rights Commission v. United Transp. Union, Local No. 655, Syl. pt. 1, 167 W. Va. 282, 280 S.E.2d 653 (1981); West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W. Va. 525, 532-533, 383 S.E.2d 490, 497-498 (1989); 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); Smith v. West Virginia Human Rights Commission, Syl. pt. 2, 216 W. Va. 2, 502 S.E.2d 445 (2004).

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 "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).

Less deference is given by reviewing courts to a lower tribunal's interpretation of the law or the application of the law. 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). Review of legal determinations is *de novo*. If there are aspects of the HRC decision which deviate from the laws of the state, they are to be corrected by the Court in its review.

When the ALJ's Final Decisions and the HRC's Final Orders are reviewed in light of the appropriate standard of review, it is apparent that they must be affirmed.

VII. ARGUMENT

A. THE ALJ AND THE WEST VIRGINIA HUMAN RIGHTS COMMISSION CORRECTLY CONCLUDED THAT THE COMMISSION ESTABLISHED A PRIMA FACIE CASE.

Appellant's first two issues are aimed at the Commission's prima facie case. The prima facie case serves two important purposes. Because motive is usually the most critical issue on which a discrimination case turns, the prima facie case is most often recognized as part of a proof formula which facilitates the evaluation of circumstantial evidence.¹⁹ The other purpose of a prima facie case is to establish standing and adverse action. Without these, there is no cognizable harm. Improper motive without harm does not give rise to a discrimination claim.

The prima facie elements for a public accommodation case were set out by this Court in K-Mart Corp. v. West Virginia Human Rights Commission, Syl. pts. 1, 2 & 3, 181 W. Va. 473, 383 S.E.2d 277 (1989):

In order to make a prima facie case of discrimination in a place of public accommodation, the complainant must prove the following elements: (a) that the complainant is a member of a protect class; (b) that the complainant attempted to avail himself of the "accommodations, advantages, privileges or services" of a place of public accommodation; and (c) that the "accommodations, advantages, privileges or services" were withheld, denied or refused to the complainant.

All three elements are required to meet the prima facie burden, so that the case analysis can move forward to consideration of motive. See Barefoot, 193 W. Va. at 485, 457 S.E.2d at 162.

Unless the Complainants "attempted to avail" themselves of the public accommodation, and unless some aspect of the public accommodation was "withheld, denied or refused" to them, then the issue of motive is not important. No matter how strong

¹⁹In Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission, 172 W. Va. 627, 309 S.E.2d 342 (1983), this Court first adopted the three-step proof formula set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). While the McDonnell-Douglas test was created in an employment context, it is significant that Shepherdstown VFD applied it in a public accommodations context. For a detailed treatment of the formula, see Barefoot v. Sundale Nursing Home, 193 W. Va. 475, 457 S.E.2d 152 (1995), and Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 479 S.E.2d 561 (1996).

the evidence of bias, if the Charleston Town Center Mall did not actually disadvantage the Complainants in a legally meaningful way, then there is no Human Rights Act violation.

Normally, the elements of a prima facie case are no longer in serious dispute by the time a case goes to hearing. See United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715, 103 S. Ct. 1478, 1482 (1983); Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 663-664 (6th Cir. 2000); Skaggs, 198 W. Va. at 73, 479 S.E.2d at 583 n.25. The prima facie case is only a "threshold burden." Barefoot, 193 W. Va. at 484, 457 S.E.2d at 161. Often these facts can be stipulated, and the dispute becomes immediately focused on the issue of why a complainant was turned away. However, here, the Charleston Town Center Mall has made the prima facie case challenge a major part of its appeal. (Appellant's Brief, pp. 10-16).

This approach attempts to avoid the question of racial motive. These arguments seek to defeat the Commission's case without ever getting to the issue of racial bias, by disputing that the Complainants had standing to bring these complaints (failure to avail) and by disputing that the Complainants had suffered some cognizable adverse action (no denial). If either of these arguments were to succeed, then the complaints would have to be dismissed even though the Complainants were mistreated because of their race. Indeed, the case would necessarily fail even if the CTCM had been explicit in its discriminatory motive, or had even confessed to it.

Both of these initial issues turn upon the question of what are the "accommodations, advantages, facilities, privileges, and services" of the CTCM. In answering this question, it becomes clear that the Complainants did seek and were denied the very accommodations, advantages, facilities, privileges, and services which the CTCM offers and makes available to the general public. Accordingly, it is clear that the Commission did make its prima facie case.

1. **The ALJ and the WVHRC appropriately concluded that the Complainants *attempted to avail themselves* of the facilities, advantages, services, accommodations and privileges of the CTCM.**

In its Brief, the Charleston Town Center Mall first argues that the Complainants failed to make out a prima facie case of discrimination because they did not attempt to avail themselves of public accommodations. According to Appellant, “[b]ecause the Complainants did not enter the mall area with the intent to make purchases from the retail businesses inside, it cannot be said that they attempted to avail themselves of the accommodations provided by the Charleston Town Center.” (Appellant’s Brief, p. 11). CTCM argues that regardless of what was done to the Complainants and regardless of why, the Complainants’ case fails because they were not shopping.

In the Charleston Town Center Mall’s imagination, its obligation to refrain from discrimination extends only to those who make purchases from its tenants. The CTCM would have this Court rule that the Human Rights Act extends no protection to persons who enter the Mall for purposes other than shopping. This absurd argument fails for several reasons.

This argument attempts to ignore both the legal definition of a “place of public accommodations” and the business reality of the CTCM. There is nothing in the definition of a “place of public accommodations” which limits the scope of discrimination claims to the “purchase of goods and services.” The West Virginia Human Rights Act defines a “place of public accommodations” as “any establishment . . . which offers its services, goods, facilities or accommodations to the general public. . . .” W. Va. Code § 5-11-3(j) (emphasis supplied). While “goods and services” are not to be discriminatorily withheld, denied or refused, W. Va. Code § 5-11-9(6)(A), neither are “facilities or accommodations.” In this case, it is clear that what is offered to the general public by the CTCM goes well beyond the goods and services sold by the Mall’s client stores and restaurants. Furthermore, the record reflects that the “business” of the CTCM is to create a context for marketing and to bring the public in; albeit so that its client stores can make sales. But most of what CTCM itself offers to the general public has nothing directly to do with the purchase of goods or services. A review of the CTCM’s marketing performance reports

reveals that efforts to increase "traffic" are a significant focus of CTCM marketing. (See Commission's Exhibits 49A and 49B).

Media events, fashion shows, free flu shots, teen board tryouts, and visits by the Care Bears and other children's characters bring people to the CTCM, many of whom come without any intent to purchase goods or services. Obviously, CTCM hopes and expects that many of those who come, even those who come with no intent to purchase goods or services, will nevertheless do so. However, no effort is made by the Mall to screen those attracted to its events to be sure that attendees come with money and are ready to spend it. All who come are accepting the "offer" extended by the Mall, and seek to avail themselves of the CTCM's facilities, regardless of whether they buy anything on a particular occasion.²⁰

Much of the efforts of the Mall to attract "traffic" are not event oriented, and CTCM also offers its facilities to members of the public who come to the Mall for the environment itself. The broad walkways, the foliage, and the fountain are all facilities designed to make the CTCM an attractive place for people, including teenagers, to gather.²¹ The Mall reaches out to people who come to Charleston to a sporting event or a conference with an invitation to *spend time* at the Mall. These are the facilities offered by the CTCM to the general public. These "offered" facilities include the sidewalks outside the Mall, which are filled everyday and every evening with many people, only some of whom make purchases from the shops in the Mall.

Among those who the Town Center Mall actively seeks, because they tend to spend money on purchases when they spend time there, are youth. The record contains compelling evidence on this point. Charleston Town Center Mall's Manager Thomas Bird testified that the CTCM actively promotes itself as a gathering place for people, including

²⁰Surely any child who goes to the CTCM to see the "Care Bears" or Santa Claus has "sought to avail" herself sufficiently to be protected from discriminatory exclusion, whether or not she or her parents buy anything, or intend to buy anything. And while the CTCM might wish otherwise, children are no less entitled to the HRA protections against race discrimination when they grow to be teenagers.

²¹Even Sgt. Nearhoof, who works for Mall security, acknowledged that on his own time he goes to the Mall on occasion to hang out. (Transcript Vol. II, p. 232).

teenagers, and hosts a variety of activities to bring them to the Mall. (Transcript Vol. I, p. 322). This is further supported by CTCM's marketing reports. (Commission's Exhibits 49A and 49B).

It is absurd to suggest, as Appellant does, that if the Complainants' conscious purposes did not include making purchases, they were not seeking to avail themselves of the facilities and accommodations of the CTCM. The Complainants were responding to the CTCM's offer of its facilities to the general public, to stroll, to view merchandise on display, and hang out. The irony of Appellant's argument is compounded by the explicit evidence that the Complainants engaged in window shopping while in the Mall (Transcript Vol. I, pp. 35-36), which is surely one of the most common and welcomed activities at the CTCM, and that they eventually purchased a meal at Chili's, a tenant of Charleston Town Center Mall.

CTCM made its absurd argument below, but the ALJ appropriately saw it for what it is and rejected it. As the ALJ notes, the "Charleston Town Center Mall is engaged in the business of owning and operating a commons area for the use of the public to facilitate shopping and other activities[.]" (Final Decision, p. 27). Charleston Town Center Mall's business is not primarily retail sales but, rather, the operation of public space where retail sales can occur. As the ALJ noted, "The public is implicitly invited to this commons area as the public's presence facilitates the impulse of such attendees to make purchases from the Mall's tenants[.]" (Final Decision, p. 27). The ALJ went on to conclude: "[W]hen Complainants exited a public restaurant [at the Mall] and attempted to wait for their transportation. . . Complainants have a right to [the sidewalk] under the same terms as. . . white patrons." (Final Decision, p. 28). Public space is the very nature of the public accommodation of the Mall, and it is access to that public space itself, and fair treatment within that space, which constitutes the privileges and advantages offered by the Mall.

The ALJ's conclusion in this regard is in accordance with the law and the undisputed facts. Steven Bumpus and Kevin Streets were attempting to avail themselves of the "accommodations, advantages, facilities, privileges and services" of the Charleston Town Center Mall. These included the facilities designed for strolling, window shopping and visiting; the services of the food court, and of Chili's Restaurant; and all the advantages

and privileges afforded to others, such as access to the space and the ability to wait for a ride on the sidewalk.

2. **The ALJ and the WVHRC appropriately concluded that the Charleston Town Center Mall *denied to and withheld from the Complainants the facilities, accommodations, advantages, services and privileges of the CTCM.***

Charleston Town Center Mall next argues that even if the Complainants attempted to avail themselves of the advantages of the Mall, their prima facie case still fails because CTCM did not deny or withhold any privileges of the public accommodation. (Appellant's Brief, pp. 11-16). This argument ultimately fails, but it has several overlapping parts which must be addressed separately.

- a. **Evicting the Complainants from the food court, from the Mall, and from the sidewalk outside the Mall separately and collectively constituted a denial of privileges.**

The Human Rights Act makes it an unlawful discriminatory practice to "[refuse, withhold from or deny to any individual because of his or her race, . . . either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of the place of public accommodations." W. Va. Code § 5-11-9(6)(A). The first part of Charleston Town Center Mall's argument is that "undue attention" and "simply observing" the Complainants alone is not a denial of privileges sufficient to support a finding of unlawful discrimination. (Appellant's Brief, p. 12). While this may be a valid statement of the law, it does not describe the facts of this case. The uncontested evidence is that the CTCM repeatedly interfered with the Complainants, evicting them from the food court, the Mall and then the sidewalk. Each of these evictions surely constitutes a "refusal" and "denial" sufficient to meet the terms of the statute.

The Appellant's argument attempts to rely upon K-Mart Corp. v. West Virginia Human Rights Commission, 181 W. Va. 473, 383 S.E.2d 277 (1989). The complainants in K-Mart, a Syrian family named Baram, went to a K-Mart store with the intent of buying gifts to take back to relatives in Syria. Upon seeing them entering the store, K-Mart

personnel called the local police "as a precautionary measure," believing that the family "might be a group of shoplifters the store had been warned were victimizing the area." K-Mart, 181 W. Va. at 474, 383 S.E.2d at 278. The family was followed and watched while in the store, but while shopping they were never confronted by store personnel or the police. Mr. Baram eventually asked a store manager why they were being watched and was told that all customers are observed. The manager apologized for any embarrassment, but when the family left, a police officer who had been summoned by K-Mart followed the family. When Mr. Baram became angry and asked why he was being followed, the police officer called for back up.

At the HRC hearing in K-Mart, there was evidence that the county sheriff had issued a warning a week or so before the incident. K-Mart also claimed that years before it had been victimized by a "similar group of shoplifters." K-Mart, 181 W. Va. at 474, 383 S.E.2d at 278. The Human Rights Commission found discrimination, but this Court in K-Mart reversed the Commission.

The Court majority in K-Mart concluded that the third part of the prima facie test had not been met on those facts; however, the facts in K-Mart which led the majority to its conclusion regarding the prima facie case burden are easily distinguishable from those in the case at bar. The K-Mart Court wrote:

[N]owhere in the record do we find that the appellant and his family were actually denied, refused, or withheld any services or amenities as required by W. Va. Code § 5-11-9 (1987) and the last element of our test. The complainant, who entered the store and shopped without hindrance, left without attempting to buy any items offered by K-Mart. No one approached the Barams while shopping nor asked them to leave.

K-Mart, 181 W. Va. at 478, 383 S.E.2d at 282 (emphasis supplied)..

In stark contrast, Bumpus and Streets had been approached not once but three times. They were not just *asked* but were *compelled* to leave in each of the separate incidents: from the food court, from the Mall, and then from the sidewalk in front of the Mall. Bumpus and Streets were approached not only by Mall Security Officer Karl Hager, but at his direction also by the Charleston City Police, whom Hager used to effectuate his demand that the Complainants leave the premises. Like the Baram family, Bumpus and Streets

were made to feel unwelcome, but the actions of the CTCM directly affected their access as well as their feelings.

It is undisputed that the Complainants were chased out of the food court, that they were denied access to these particular facilities which are generally offered to the public, and that Steven Bumpus and Kevin Streets were the only persons evicted.²² The Complainants were compelled to leave the food court, under threat of action by the Charleston Police Department. Clearly, this was a denial to the Complainants of a facility offered generally to the public.

Similarly, when the Complainants were escorted from the Mall just before 9:00 that evening, they were again denied access to facilities and accommodations available generally to the public. Only the African American Complainants were shown to the door, while others were allowed to choose their exits and do so on their own time. It matters not that it was near closing time for the stores in the Mall. It is totally absurd to assert, as does the Charleston Town Center Mall, that "there is nothing exclusionary" (Charleston Town Center Mall's Post-Hearing Memorandum of Law, p. 9) about having the Complainants escorted out by the police.²³

Finally, there was the third incident at the end of the evening, where Lt. Hager ordered the Complainants to leave the sidewalk outside of the Mall, and then had them arrested for trespassing when they refused.²⁴ The Complainants were denied the

²²Despite Lt. Hager's claim that the problem was that these boys were in the food court and not eating (Transcript Vol. I, p. 31; Transcript Vol. III, p. 17), he admits that he did not give the boys the option of getting something to eat. (Transcript Vol. III, p. 60). In contrast to what Lt. Hager testified was his usual practice with juveniles, he did not explain to this group of African American youth that they need only break into smaller groups to comply with the rules. (Transcript Vol. III, pp. 79-80).

²³As a matter of fact, Lt. Hager's action to exclude the Complainants from the Mall clearly occurred before 9:00 p.m., when the stores in the Mall were still open. The credible evidence on which the ALJ relied establishes that Lt. Hager began his efforts to evict Complainants before 9:00 p.m. Even if it were the case that the facilities and accommodations of the Mall became unavailable to the general public at 9:00 p.m., which is not what the evidence reveals, to attempt to exclude the Complainants before 9:00 p.m. would still satisfy the third prong of the prima facie test.

²⁴The Charleston Town Center Mall asserts that it had nothing to do with the arrest of the Complainants, as if this occurred as an independent event at the behest of the Charleston Police Department alone. But since the Complainants were arrested for

opportunity to stand on the sidewalk and wait for a ride from Steven Bumpus's mother. At this time, the stores in the Mall were closed but the restaurants were not. The evidence in the record clearly reflects that white members of the public were still welcomed by the CTCM to use the sidewalks outside the Mall, and were even welcomed to enter the Mall if Lt. Hager believed they were retrieving a car in the garage.

The Complainants were three times forcibly removed from parts of the CTCM, and each of these occasions independently constituted a "refusal" or "denial" sufficient to meet the requirements of the Human Rights Act. It could not be clearer that the Complainants were denied privileges and accommodations which were offered and permitted to other members of the general public.

i) Complete and total withholding of advantages, facilities, or services is not necessary to constitute a violation of the Human Rights Act.

The fact that there was not a *complete and total* withholding of "accommodations, advantages, facilities, privileges and services" from the Complainants does not destroy the prima facie case. The Complainants were permitted to enter the Town Center Mall, and although they were followed and harassed and not permitted to make the same use of the food court as others were, they were not physically evicted from the Mall for almost two hours. Theoretically, they could have been treated worse. In addition, they were later allowed to eat a meal at Chili's.²⁵ In addition, while there is evidence that other Blacks were targeted from CTCM security and evicted from the Mall with a higher frequency than whites (Final Decision, pp. 23-24), neither the Complainants nor the HRC claim that Blacks are always treated badly at the Mall.

trespassing, they could not have been subject to arrest except at the direction of the CTCM. See Argument 2(c), *infra*, p. 28.

²⁵One has to wonder whether the Complainants would have been permitted to eat unmolested at Chili's, if Lt. Hager had known they were there.

The purpose of the Human Rights Act is to ensure that all persons be given equal access to places of public accommodation;²⁶ restricted access is not sufficient. Even under Jim Crow, Blacks were allowed some limited “privileges and services.” Rosa Parks was not denied access to bus service until she insisted on sitting at the front of the bus. The West Virginia Human Rights Act, and contemporary American notions of equal treatment, require much more.

The Complainants clearly suffered a denial of accommodations, advantages, facilities, privileges and services. Although initially admitted, they were three times physically ejected from facilities where others, including all of the white patrons, were permitted to remain. This meets the prima facie test.

ii) **Physical exclusion from the premises is not necessary to constitute a violation of the Human Rights Act.**

In addition to physically evicting the Complainants, the agents of the CTCM “harassed and intimidated [the complainants] throughout the evening,” (Final Decision, p. 30), engaging in “racial profiling and stereotyping” in a manner which also constituted “a denial of the advantages and privileges of a public accommodation.” (Final Decision, p. 29). The ALJ suggests that apart from the evictions, this harassing conduct itself, because it was racially motivated and because it deprived the Complainants of *equal* opportunity, violated the Human Rights Act.

Appellant claims that under K-Mart, “undue attention,” “racial profiling,” and any harassing conduct short of physical exclusion²⁷ is not enough to create a violation of the Human Rights Act. But the Human Rights Act is broad enough to encompass this form of discrimination.

The public policy of the State of West Virginia is that all persons should have “equal access to places of public accommodations” without regard to race. W. Va. Code § 5-11-2. The Human Rights Act states that “[e]qual opportunity in the areas of employment and

²⁶W. Va. Code § 5-11-2.

²⁷In its description of the facts of this case, Appellant focuses on the “harassment” and entirely ignores the uncontested facts of the Complainants’ evictions.

public accommodations is hereby declared to be a human right or civil right. . . ." W. Va. Code § 5-11-2. Denial of these rights "is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society," W. Va. Code § 5-11-2, and is therefore "akin to treason." Allen v. West Virginia Human Rights Commission, 174 W. Va. 139, 143, 324 S.E.2d 99, 108 (1984).

The Human Rights Act makes it an unlawful discriminatory practice to "[r]efuse, withhold from or deny to any individual because of his or her race. . . either directly or indirectly, any of the accommodations, advantages, facilities, privileges, or services of the place of public accommodations." W. Va. Code § 5-11-9(6)(A). This language covers overt and covert conduct and should be construed to give full meaning to the phrase.²⁸ While the term "refuse" implies an overt, exclusionary act, use of the terms "deny" and "either directly or indirectly" suggests legislative intent to cover more subtle or surreptitious conduct, and conduct which has an exclusionary effect. In light of this language, and in light of the clear public policy in favor of "equal access," this Court should take care that the terms "refuse, withhold from or deny to" are construed to ensure the full range of equal opportunity to people of all races.

While passively watching may fall short of the threshold, repeated demands to keep moving should be viewed as a cognizable "adverse action." Similarly, rudeness which crosses the line into hostility should be recognized as a denial of equal access, particularly if the hostility is overtly racial.

In K-Mart, this Court did not require physical exclusion to establish a prima facie case. However, while leaving open the question of what short of physical exclusion constitutes "denial," the majority opinion creates the impression that racially motivated hostility by an agent of a place of public accommodations might not be a violation of the West Virginia Human Rights Act. The K-Mart decision states, "Standing alone, we do not believe rudeness is sufficient to prove a prima facie case of discrimination." K-Mart, 181

²⁸The Human Rights Act "shall be liberally construed to accomplish its objectives and purposes." W. Va. Code § 5-11-15; Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 257 (1986); Paxton v. Crabtree, 184 W. Va. 237, 400 S.E.2d 245 (1990).

W. Va. at 478, 383 S.E.2d at 282.²⁹ At least one court has recognized racial hostility short of physical exclusion to be “denial” of a place of public accommodations. See Totem Taxi, Inc. v. New York State Human Rights Appeal Board, 98 A.D.2d 923-924, 471 N.Y.S.2d 358 (1983),

The Court should take this opportunity to clarify that in West Virginia racial harassment by the proprietors and security guards at a place of public accommodations, just as by employers in workplaces, will not be treated as mere rudeness, and it will not be tolerated.

b. Claims of legitimate motives, even “plausible” ones, cannot undermine a prima facie case.

The Charleston Town Center Mall next attempts to address the obvious difference between this case and K-Mart by arguing that each time it interfered with the Complainants or ran them out of an area of the Mall, it did so with a legitimate reason. The Appellant acknowledges that here (in contrast to the K-Mart case) the security personnel “did interact with the Complainants.” (Appellant’s Brief, p. 13). CTCM says that each time these “interactions” occurred, which would be more appropriately described as “evictions,” they were *justified* by a legitimate motive. (Appellant’s Brief, p. 13).

However, justifications and motives are not part of the prima facie case. If the Charleston Town Center Mall denied the Complainants the privileges and advantages of a place of public accommodations, then the Complainants met their prima facie burden. Whether or not the Appellant can articulate a legitimate reason is important to the ultimate determination of discrimination, but it is not a factor in the prima facie case.³⁰ By resorting here to an argument related to motive, Appellant in effect concedes the establishment of

²⁹If one cannot establish a prima facie case by demonstrating this hostility, one never gets to the question of motive for the rudeness, even if the racial motive is clearly evident.

³⁰This consideration occurs after establishment of the prima facie case. Articulation of a legitimate motive is the second step of the McDonnell-Douglas formula. The whole point of the third step of the proof formula is for the credibility of the offered reason be tested against the evidence. The ALJ ultimately determined from the evidence that CTCM’s actual motives were not all legitimate and nondiscriminatory, which is the subject of Argument B, beginning on page 30 herein.

the prima facie case, and moves to the next level of the analysis, that is, motive. The holding in K-Mart, which involves the failure of the plaintiff to establish a prima facie case, does not apply here.

There should be no serious dispute that the accommodations, advantages, facilities, privileges and services were "withheld, denied or refused" to the Complainants. The undisputed evidence alone establishes this. While the Charleston Town Center Mall denies that it watched or followed the Complainants in the Mall, CTCM does not deny that the Complainants were chased from the food court where they were sitting with their friends. Similarly, there is no dispute that they were escorted out of the Town Center Mall while other patrons were still ending their evenings on their own time and by leaving through doorways of their own choosing. Finally, there is also no dispute that after Lt. Hager banished them from the sidewalk in front of Chili's, the Complainants were deemed trespassers and arrested.³¹

The treatment suffered by the Complainants on April 22, 2006, clearly meets the third part of the prima facie test, and the inquiry properly moves on to the next stage, that is, examination of the offered explanations for the adverse actions to see if race actually played a part in Appellant's conduct.³²

³¹In each of these instances, the denial of "accommodations, facilities, advantages, and privileges" was accomplished with the *assistance* of the Charleston Police Department, (Commission's Exhibit 48). But it was the Town Center Mall which caused the deprivation of accommodations. While CTCM argues that the Complainants violated its rules, there is no claim that the Complainants broke any laws, except, arguably, trespassing by refusing a directive given by the Town Center Mall to the Complainants to leave the Mall's sidewalk. The police lack authority to make independent decisions to enforce CTCM rules.

³²For a detailed discussions of CTCM's articulated "legitimate and nondiscriminatory" justification of its conduct and why it cannot be accepted, see Part B, supra.

- c. **It was the discriminatory acts of the Mall security agent which caused the Complainants' arrest for trespassing on Mall property, since absent the directive of CTCM security to remove the Complainants from CTCM property, the Charleston Police had no authority to arrest the Complainants for trespass.**

As a third part of this argument, the Appellant asserts that it cannot be held liable for any acts of the Charleston Police. (Appellant's Brief, pp. 14-16). The Charleston Town Center Mall argues that it did nothing which denied or withheld privileges or advantages to the Complainants; at least nothing for which it can be held to account under the Human Rights Act. CTCM completely misunderstands the ALJ's conclusions regarding the relationship between the arrests and the "denial and withholding" of advantages and privileges. As a result, the Charleston Town Center Mall's argument about *agency* and the performance of *official duties* completely misses the point.

The Appellant inaccurately asserts that "Judge Wilson based his finding on his determination that the police officers acted as [the Town Center's] agents." (Appellant's Brief, p. 14, *citing* ALJ's Final Decision, p. 29). A careful reading of the Final Decision reveals that the ALJ never states or suggests that the police officers acted as agents of CTCM. Twice the ALJ does refer to agent(s) (Final Decision, p. 29): once at the top of the page, where he refers to the security officers as "the Mall's agents," and once at the bottom of the page, where he refers to Lt. Hager as Charleston Town Center Mall's "agent." The ALJ's Final Decision accepts the proposition that the police officers were *not* agents of the Mall but, rather, acted in their official capacity. (Final Decision, p. 29). The important point is that the Complainants could only be arrested for trespass by a police officer acting in his official capacity *because the Mall had acted to have Complainants excluded from the premises.*

Criminal trespass is the act of entering or remaining on private property without permission or authority to do so.³³ The Complainants entered CTCM property with clearly implied authority to do so, but CTCM withdrew authority for the Complainants to be there on the sidewalk by ordering them to leave. CTCM withdrew from the Complainants this privilege, which they extend to every other member of the public. It is this act of withdrawing authority for the Complainants to be on the sidewalk which is the adverse action that deprived the Complainants of access. Without this act on the part of the Charleston Town Center Mall, the Complainants could have remained on the sidewalk, just as the white patrons who were there on that same sidewalk at that very moment were allowed to do. CTCM, acting through Lt. Hager, gave the Complainants "notice against entering or remaining," and only then did their presence on the sidewalk become trespassing. Only then could the police officers, acting in their official capacity, arrest them.³⁴

This point was appropriately noted by the ALJ in the Final Decision:

The Complainants were not breaking any laws by standing where they were standing, other than and until Charleston Town Center Mall, by its agent, Lt. Hager, specifically identified Complainants and Mr. Martin as trespassers upon their private property to be removed therefrom by the police.

Final Decision, p. 29.

CTCM security guard Lt. Hager identified Steven Bumpus and Kevin Streets as trespassers to be removed from Mall property.

In support of its misdirected argument about police officer *agency*, Appellant cites State v. Phillips, 205 W. Va. 673, 520 S.E.2d 670 (1999). In Phillips, the off-duty police

³³West Virginia Code § 61-3B-3(a) [criminal trespass] states: "Any person who knowingly and without being authorized, licensed or invited, enters or remains on any property. . .as to which notice against entering or remaining is either given by actual communication to such person or by posting, fencing or cultivation, shall be guilty of a misdemeanor. . . ."

³⁴Charleston Police Officer Shawn Midkiff testified that the Complainants were arrested because they had been asked to leave by Mall security and refused. (Transcript Vol. II, pp. 23-24). Officer Robbie Brown confirmed that as a police officer if Mall management or security requests that someone be removed, he does it. (Transcript Vol. II, pp. 61-62).

officer was working for Wal-Mart, was being paid by Wal-Mart, and except for his arrest of Ms. Phillips, acted as an agent of Wal-Mart. However, this Court held that the off-duty police officer retained his "official police officer status" even when off duty and even when in private employment. When he perceived a public disturbance being committed in his presence, and he exercised his independent judgment to make an arrest, he was acting lawfully and within his official capacity.³⁵

In this case, the record is clear that Steven Bumpus and Kevin Streets did not cause a public disturbance. Bystander Ken Brooks testified that the boys did nothing to prompt their arrest. (Transcript Vol. I, p. 180). Police Officer Midkiff testified that the Complainants were not creating any type of disruption when he arrived on the scene. (Transcript Vol. II, p. 26). Police Officer Coleman testified that when he arrived, the situation was "in hand" and "under control." (Transcript Vol. II, pp. 104, 112). Even CTCM's Lt. Hager did not testify that Bumpus or Streets were responsible for any disturbance there on the sidewalk. (Transcript Vol. III, p. 117). Other than being in a place that Mall Security had forbid them to stay, the Complainants did not violate any laws or give cause to be arrested. (Transcript Vol. II, pp. 115-116). Lieutenant Hager's act of banishing them is what caused Complainants to be subject to arrest.

B. THE CHARLESTON TOWN CENTER MALL'S REPEATED EFFORTS TO EXCLUDE THE COMPLAINANTS WERE NOT LEGITIMATE AND WERE DISCRIMINATORY.

The Appellant next argues that if its previous arguments fail because the Complainants were actually denied access or withheld privileges or advantages, CTCM should still win. CTCM claims that Complainants were treated as they were "solely due to the actions of the Complainants in violating the uniformly-applied mall Code of Conduct."

³⁵ALJ Wilson did not discuss the extent to which the CPD Officers involved in this matter made independent judgments. Actually, all of their decisions and actions *should have been* based on independent judgments made pursuant to their official capacity, since unlike the officer in *Phillips*, all of the police officers involved in this matter were on duty for the Charleston Police Department. None of the police officers were in the private employ of the CTCM at the time of these events. While there were some instances where the police officers at the Mall on that day acted very much like private security guards for the Mall, enforcing CTCM rules instead of laws, this fact is not important to the ALJ's Final Decision, which assumes they always acted independently and in their official capacity.

(Appellant's Brief, p. 17). CTCM asserts that race had nothing to do with it. This is a "plausible" explanation,³⁶ as noted by the ALJ (Final Decision, p. 30; Appellant's Brief, p. 3), but not, as it turns out, a credible one. The ALJ subjected the explanation to scrutiny, as he is directed by the law to do.³⁷ The ALJ found that the record contained "too many troubling pieces of evidence," some of which established racial bias (Final Decision, p. 30), and that CTCM's "alternative explanations for its actions have been proven by the preponderance of the evidence to be pretext for racial discrimination." (Final Decision, p. 34). Upon a review of the evidence in the record, it is clear that the ALJ had a sound basis for determining that CTCM did not uniformly enforce its rules and that the Complainants were treated as they were because of their race.

Actually, CTCM's claim that its rules were uniformly enforced was nothing more than a bald "claim," made by Lt. Hager and supported by no other evidence. In addition, there was much evidence in the record which contradicted Lt. Hager's claim.

Lieutenant Hager's own testimony established that his treatment of the Complainants was inconsistent with his treatment of others. Hager testified that his usual

³⁶Indeed, the explanation must be plausible to meet the Appellant's burden of production at stage two of the McDonnell-Douglas analysis. Moore v. King County Fire Protection District, No. C05-442JLR, 2005 WL 2898065, at *7 (W.D. Wash. 2005); Mertes v. Wynne, No. CIV.S-06-1742 LKK/GGH, 2009 WL 3203004, at *7 (E.D. Cal. 2007

³⁷ "In evaluating the proposed justifications, the district court must carefully scrutinize suggested reasons that are not objective in nature. In cases in which discriminatory intent could be inferred from the sequence of events, the courts have generally viewed subjective explanations with considerable skepticism. The wisdom in such skepticism is obvious.' Any defendant can respond to a discriminatory effect with a claim of some subjective preference or prerogative**286 *482 and, if such assertions are accepted, prevail in virtually every case.' Comment, *Applying the Title VII Prima Facie Case to Title VIII Litigation*, 11 Harv.C.R.-C.L.L.Rev. 128, 182 (1976) (emphasis in original)."

Cited by the Dissent in K-Mart Corp. v. West Virginia Human Rights Commission, 181 W. Va. 473, 481-482, 383 S.E.2d 277, 285-286 (1989); see also Barefoot, 193 W. Va. at 485, 457 S.E.2d at 162, Robinson v. 12 Loft Realty, Inc., 610 F.2d 1032, 1040 (2d Cir. 1979); Beirne v. Fieldrest Cannon, Inc. No. 92 Civ.3282 (JFK), 1997 WL 187340, at *6 (S.D.N.Y. 1997); Williams v. Best Buy Stores, L.P., No. 3:07-0294, 2008 WL 752639, at *10 (M.D. Tenn. 2008); and NLRB v. Leading Edge Aviation Services, Inc., 212 Fed.Appx. 193, No. 06-1204, 2007 WL 57544, at *6 (4th Cir. 2007).

practice with large groups of youth was to explain to them how to achieve technical compliance with the rule in a way that need not impede their activity.³⁸ Yet it is undisputed that Lt. Hager never acted toward the Complainants in this manner, and never offered them advice or assistance. (Transcript Vol. III, p. 80). The record is clear that the “kinder, gentler” Lt. Hager, who may have been available to white youth who hang out in the Mall, was not available to the Complainants.³⁹ The ALJ took note of this in his Final Decision. (Final Decision, pp. 10, 31).

Lieutenant Hager, the chief enforcer of the Mall’s rules, also could not even explain the rules consistently or accurately, seriously undermining his claim to consistent enforcement. CTCM had a published rule indicating that, “Juvenile groups of four (4) or more will be dispersed,” (Commission’s Exhibit 9), but Hager was clearly confused about whether four youth together constitutes a violation of the established rules or whether it needed to be *more than four*. (Transcript Vol. III, pp. 24, 29, 79). And he gave varied answers to the question of whether groups of youth were routinely dispersed merely for exceeding the requisite size limit. (Transcript Vol. III, pp. 77-79, 82).

In rejecting CTCM’s claim that race had nothing to do with the treatment of the Complainants, the ALJ also focused on the fact that the Complainants were watched from the beginning of their evening at the Mall (Final Decision, p. 30), during a period when they are not even alleged to have been in a large group or to have been causing any type of disturbance.⁴⁰ Whether or not this profiling and surveillance conduct toward the

³⁸Lieutenant Hager claimed that “about every time” he’s talked to juveniles, he’s explained to them that if they are in groups of more than four, they need only break up into smaller groups and stay “two or three feet apart from each other.” (Transcript Vol. III, pp. 79-80).

³⁹Appellant attempts to make much of the fact that the Complainants had been to the CTCM before, apparently without incident. The fact that both Complainants had been in the Mall on previous occasions without being harassed may be evidence that racial discrimination at the Mall is not the universal and constant norm, but it does very little to undermine the evidence that it was racial discrimination which occurred on this occasion. It may have been that on previous occasions the Complainants were fortunate enough not to encounter Lt. Hager.

⁴⁰Security guard David Cook reported in writing that at 7:30 that evening he “kept group of BM [Black males] moving.” (Commission’s Exhibit 22).

Complainants alone would constitute a "refusal, withholding or denial" within the meaning of W. Va. Code § 5-11-9(6)(A), it certainly indicates that race was a factor in how the Complainants were perceived, and supports the conclusion that later actions by CTCM security was not a response "solely due to the actions of the Complainants in violating the uniformly-applied mall Code of Conduct." (Appellant's Brief, p. 17). The ALJ also notes that there was no claim by CTCM that there was a rule against window shopping, yet there was credible evidence, both from the Complainants' testimony and from the security reports of the guards, that the guards interfered with Complainants doing this. (Commission's Exhibit 22).

The Charleston Town Center Mall had several and varied explanations for why it evicted the Complainants from the food court, and it is the lack of consistency, among other things, which undermines its credibility. For example, there are serious discrepancies in CTCM's explanation as to what prompted Lt. Hager to confront the Complainants and their companions. CTCM initially claimed that Lt. Hager acted in response to a complaint and request for help from a food vendor in the food court. (Commission's Exhibit 8, p. 4, ¶ 7). This offered explanation was apparently abandoned by CTCM or forgotten. At hearing, Lt. Hager claimed that he came out of a restroom and heard a disturbance and responded. No evidence was ever produced to corroborate either version as to what precipitated the confrontation.

Then there are discrepancies as to exactly what the Complainants and their companions were doing to warrant being evicted from the food court. Hager's Daily Activity Report, the only contemporaneous documentation, offers no explanation as to why the youth were asked to leave, although the use of the term "large group of kids" suggests that it was related to the policy involving four or more juveniles. (Commission's Exhibit 17, p. 1). But then the statement Hager wrote five months later after the HRC complaints were filed refers to "a large group of black males that were playing around and yelling." (Commission's Exhibit 17, p. 3). This account adds in a reason, an alleged disturbance, but only after the need to have legitimate and documented reasons has become manifest by the filing of the HRC complaints.

Courts have been appropriately skeptical of alleged reasons which are not asserted until the latter stages of a discrimination dispute. Gallo v. John Powell Chevrolet, Inc., 765 F. Supp. 198, 210, 61 Fair Empl. Prac. Cas. 1120, 1129 (M.D. Pa. 1991) (the fact that employer's alleged reasons were not asserted until the hearing "casts doubt on their authenticity and suggests that they were fabricated after the fact to justify a decision made on other grounds"); Foster v. Simon, 467 F. Supp. 533, 537, 19 Fair Empl. Prac. Cas. 1648 (W.D. N.C. 1979) (alleged reason asserted for first time at trial held to be pretext for discrimination).

There is also a complete lack of corroboration for Lt. Hager's version of events, notwithstanding that security guard David Gandee was there at the food court, at least for the end of the incident (Commission's Exhibit 19), and Charleston Police Department Officers Midkiff and Ross were integrally involved in the eviction. The Charleston Town Center Mall chose not to call Gandee and Ross to testify. And Midkiff, who was called as a witness by the Commission, could not corroborate Hager's version of events. (Transcript Vol. II, p. 29). There was no testimonial or written evidence of a disturbance provided from the manager of Best of Crete, who allegedly complained about a disturbance. The evidence in the record establishes that it is more likely that any disturbance which occurred in the food court that day was caused by Hager's confrontation rather than vice versa.

The Appellant's own records, rather than supporting its claim of "uniform enforcement," reflect a security force focused on race as a factor and sloppy in its approach to exerting authority. Even with a virtual monopoly on the recorded substantive information about what occurred that evening at the Mall, and despite internal procedures which require CTCM's agents to accurately document events (Transcript Vol. III, p. 157; Transcript Vol. II, p. 227), the documents produced by the Charleston Town Center Mall contain significant inconsistencies, and overall serve to support the Commission's theory that the Complainants were targeted and that they were targeted because of race. For example, the Appellant asserts that the group approached on the first level of the Mall at or near 9:00 p.m. "was the same group Lt. Hager encountered in the Food Court." (Charleston Town Center Mall's Proposed Findings of Fact, pp. 8-9, ¶ 26). But CTCM's

own records reflect that it was "another" group. (Commission's Exhibit 17). It is clear from all the evidence that in Lt. Hager's mind what connected the groups was the racial factor.

Race turns up repeatedly as a factor in documentation prepared by CTCM security guards, and it is always Blacks whose race must be distinguished. (See Commission's Exhibit 17, p. 1, line 19; Commission's Exhibit 17, p. 3, line 2; Commission's Exhibit 17, p. 3, line 10; Commission's Exhibit 17, p. 4, line 3; and Commission's Exhibit 17, p. 4, line 9). It was a group of "black males" who a security guard felt the need to "keep moving." (Commission's Exhibit 22). The Charleston Town Center Mall asserts in its Proposed Findings that the phone call from Chili's to Lt. Hager advised him "that there was a large group of black males located outside of the restaurant entrance." (Charleston Town Center Mall's Proposed Findings of Fact, pp. 9-10, ¶ 31). This is also what Lt. Hager's written record reflects. However, Lt. Hager testified at hearing, with complete if unconvincing confidence, that the caller did not describe the race of the individuals. (Transcript Vol. III, pp. 110-111).

The ALJ also credited the testimony of Charleston Police Officers, who confirmed that in their experience evictions from the Mall seemed to be focused on African Americans. (Final Decision, p. 23, Finding No. 52; Transcript Vol. II, pp. 69-70, 71-72, 130). Officer Robbie Brown testified that he had responded to thousands of calls at the Mall over thirteen years and that all of the individuals he had assisted the CTCM in evicting were African American. (Transcript Vol. II, pp. 69-70). Officer R.H. Coleman, who was called as a witness in this case by the Charleston Town Center Mall, testified on cross examination that it was not unusual for him to be called to the Mall to evict people "for different things." (Transcript Vol. II, p. 129). Officer Coleman testified that when he responded to calls at the Town Center Mall, he found that the individuals he was being asked to evict were commonly African Americans. (Transcript Vol. II, p. 130).

According to Officer Brown, most of the time in these instances where he has been called on to evict an African American person from the Town Center Mall, he has not personally observed any disturbance, and the problem when he arrived was "just the fact that the kids are still walking around on the . . . premises." (Transcript Vol. II, p. 71). In some of these situations, the kids who were being evicted indicated to Officer Brown their

perception that the security guard was discriminating against them. (Transcript Vol. II, p. 71). "Kids will make some type of comment to the effect of, to the security officer, 'Say what you said now that the police is here.'" (Transcript Vol. II, p. 72). Officer Brown testified that he advises people in these circumstances to come back the next day and complain to the manager. (Transcript Vol. II, p. 72). Corporal Keith Peoples of the Charleston Police Department also testified that he had heard complaints from citizens about being ejected from the Mall because of race. (Transcript Vol. II, pp. 65-66).

Curiously, the management of the CTCM claimed to have never heard any complaints of this kind. Indeed, the record reflects that the Charleston Town Center Mall summarily ignored all allegations of race discrimination which were made or brought to its attention, declining to even refer them up the chain of command, until they were made to the Human Rights Commission. (Transcript Vol. I, pp. 333-335, 336-338; Transcript Vol. II, pp. 37, 38-41, 65-66, 71-72; Commission's Exhibit 8, pp. 9-10).

Carol Johnson Cyrus testified that she had personally spoken to a Mall security guard about racial profiling and that she had personally gone to CTCM Manager Thomas Bird and complained about several incidents of racial profiling and discrimination. (Transcript Vol. II, pp. 34-40). In discovery, when asked about race claims, whether formal or informal, CTCM referred only to employment discrimination claims filed at the HRC by Black employees of the Town Center Mall. (Commission's Exhibit 8, pp. 9-10, ¶ 19). CTCM acknowledged no other formal or informal complaints of race discrimination; in other words, no complaints regarding the discriminatory treatment of patrons. Mr. Bird testified that he did not recall a complaint from Ms. Johnson Cyrus, or from anyone, complaining about racial profiling. (Transcript Vol. I, pp. 336-337; see Final Decision, pp 32-33).

The only "evidence" which the Appellant cites to support its assertion that it enforces its rules "regardless of national origin" (Appellant's Brief, p. 17), is a claim by CTCM Manager Thomas Bird that "a group of about ten Caucasian females was asked to disperse[.]" (Appellant's Brief, p. 17). This incident was recalled by Mr. Bird in response to a question about complaints he had received regarding Lt. Hager. (Transcript Vol. I, pp. 99, 333-339). There was no documentation offered by CTCM regarding this alleged event, despite the fact that CTCM's own policies required that guards make a written record of

incidents. (Commission's Exhibit 11; Commission's Exhibit 13). There was no corroborating evidence of any kind, and nothing to suggest that if the event occurred, it was not a rare example of whites being subjected to the policy.

When there is conflicting testimony, it is within the purview of the Administrative Law Judge to make a determination of credibility. Westmoreland Coal Co. v. West Virginia Human Rights Commission, 181 W. Va. 368, 373, 382 S.E.2d 562, 567 (1989). In assessing and weighing the credibility of testimony, courts look to: (1) whether the testimony is internally consistent, (2) the demeanor of the individuals while testifying, and (3) whose testimony is better supported by the record. Maturo v. National Graphics, Inc., 722 F. Supp. 916 (D. Conn. 1989). This is precisely what the ALJ did in this case, and his factual findings are supported by the evidence.

Clearly, there is substantial evidence in the record which supports the ALJ's conclusion that Charleston Town Center Mall's enforcement of its rules was not uniform; and that on the occasion in question race was a motivating factor in the Complainants being denied the privileges and advantages which were allowed to others.

C. THE ALJ'S FINAL DECISION HAS DONE NOTHING TO IMPEDE THE ABILITY OF POLICE OFFICERS OR SECURITY GUARDS TO PROMOTE PUBLIC SAFETY.

Charleston Town Center Mall's final argument on appeal is an attempt to obtain special status for Mall security guards, so that their motives and their testimony cannot be doubted and questioned. The Appellant asserts in its final argument heading that the ALJ's scrutiny "impermissibly restrict[s] the important role of police officers and security guards to promote public safety." (Appellant's Brief, p. 18).⁴¹ However, the Mall security guards are not above the law, and the Human Rights Act applies to them in the same way it applies to others. The ALJ, by making his factual findings on the issues of credibility and discrimination, did precisely what the Human Rights Act requires of him. Because his

⁴¹It is important to note that there is nothing in the ALJ's Final Decision which imposes by order any actual restriction on police officers or security guards. The "impermissible restriction" of which CTCM complains is the ALJ's findings that Lt. Hager's testimony lacked credibility and that his conduct toward the Complainants was discriminatory.

findings are well supported by the evidence in the record and properly apply the law, they should be affirmed.

Appellant repeatedly asserts that the ALJ “consistently discounts the testimony of Charleston Town Center security officers and Charleston Police officers.” (Appellant’s Brief, p. 18; see also Charleston Town Center Mall’s Petition for Appeal, p. 21, where CTCM accuses the ALJ of “findings that wholly discount the testimony of security and police officers.”). These accusations are simply not true; indeed, they are gross misrepresentations of the ALJ’s decision. In reality, the only witness whose credibility the ALJ doubted was Lt. Hager, and the ALJ’s basis for doing this was articulated in the decision, and very reasonable given the evidence. The ALJ did not discount the testimony of the other witnesses, and indeed paid close attention to the testimony of the police officers. Other than Lt. Hager, the testimony of the police and security officers was consistent with the claims of the Complainants.

Regarding the eviction of the Complainants from the food court, the Charleston Town Center Mall did not offer testimony from any police officers or security guards besides Lt. Hager.⁴² Similarly with regard to Complainants’ eviction from the Mall at 9:00 p.m., CTCM offered the testimony of no witnesses other than Lt. Hager. CTCM did call witnesses other than Lt. Hager regarding the events around 11:00 p.m., including Police Officer R.H. Coleman, Police Officer J.A. Hunt and security guard Nearhoof; however, in general, their testimony was consistent with the Complainants’ claims. For instance, Officer Coleman verified that the Complainants were not disruptive, and recalled them complaining about the unfairness of how they were being treated. (Transcript Vol. II, pp. 103, 112-114). Officer Coleman verified that other than being where Lt. Hager did not want them to be, there was no other cause for arresting them. (Transcript Vol. II, pp. 116, 120). The

⁴²Security guard Gandee’s written records reflect that he was there in the food court (Commission’s Exhibit 19), but CTCM did not call him as a witness. Likewise, CTCM called neither of the two police officers who were allegedly part of the food court incident. When the Commission called Patrolman Midkiff for testimony on other matters, it was established through questioning by CTCM’s counsel that Midkiff could not corroborate Lt. Hager’s account of events in the food court. (Transcript Vol. II, p. 24).

testimony of Midkiff and Nearhoof on these points was similar.⁴³ Regarding who initiated the arrests and why, Officers Coleman and Midkiff also contradicted CTCM's claims.⁴⁴

Police Officer Hunt added very little to the evidence regarding the event, other than to verify that he was one of six police officers to respond to the call and to say that he did not see the Complainants cause any disturbance. (Transcript Vol. II, p. 135). Given how little probative information Officer Hunt could offer at the hearing, it appears he was called to provide information about the reputation of one of the Complainants. (Transcript Vol. II, pp. 133-134). It turned out that this information was entirely false, and Officer Hunt later specifically retracted his testimony by sworn Affidavit. (Affidavit of Officer J.A. Hunt, dated

⁴³See Transcript Vol. II, pp. 26, 218.

⁴⁴In contrast to CTCM's repeated attempts to cast African American Officer Coleman as the primary actor on the scene (see Charleston Town Center Mall's Proposed Findings of Fact and Conclusions of Law, April 7, 2008, p. 12, ¶ 37; Commission's Exhibit 17, pp. 3-4; Commission's Exhibit 8, p. 5), Officer Coleman testified that he did not take the lead in responding to the incident, nor did he make the decision to arrest the Complainants. (Transcript Vol. II, pp. 104, 111). Officer Midkiff, who did make the decision to arrest the Complainants, did so because he had been deceived by Hager into believing they had caused trouble at the Mall all day and because they had refused the directive to leave the Mall's private property. (Transcript Vol. II, pp. 12, 16-17, 23). Officer Midkiff acknowledged that the Complainants did not resist arrest. (Transcript Vol. II, p. 11).

January 23, 2008).⁴⁵ Among other things, Officer Hunt provides a compelling reason why the testimony of police officers should not be granted special weight.

Security guard Nearhoof was also called by Charleston Town Center Mall to offer testimony regarding this event, but his testimony did not conflict with the Complainants'. Using his recorded notes (Transcript Vol. II, pp. 198-200), Nearhoof testified that there was

⁴⁵Charleston Police Department Patrolman James A. Hunt, who was called as a witness by the CTCM, testified that he responded to a call to the Town Center Mall on April 22, 2006. He recalled that upon arriving, he observed "a large crowd on the . . . Court Street side [of the Mall] . . . and a couple other officers out there with the crowd." (Transcript Vol. II, p. 133). He testified that he was the sixth officer on the scene. (Transcript Vol. II, p.133).

Officer Hunt admitted "my recollection, I guess, is pretty foggy," (Transcript Vol. II, 140), and this is clear in part because police records reflect that he was the last car to arrive, at 11:01 p.m., six minutes after the first car. (Commission's Exhibit 34, Transcript Vol. II, pp. 141-143; Commission's Exhibit 34, p. 3). By this time, the "large crowd" has dispersed according to the other police witnesses (Transcript Vol. I, p. 198; Transcript Vol. II, pp. 104, 112-113, 198) and except for a few other patrons, it was only the Complainants who were there waiting for Steven Bumpus's mother to pick them up. On cross examination, it became clear that while the dispatcher had called him "to respond to a large crowd," by the time Hunt got there, "everything appeared to be under control." (Transcript Vol. II, p. 140).

Patrolman James Hunt further testified on direct that he recognized Steven Bumpus, because previously in the year he "had attacked a fellow police officer" at a domestic disturbance on Park Avenue." He also testified that he had stopped Complainant Steven Bumpus, when he was driving with "his brother, Les," and that neither of them had a license. (Transcript Vol. II, pp. 134-136).

There was an objection to the relevancy of this evidence, but it was allowed into the record, and regardless of the evidentiary ruling, it is hard to imagine it not causing a fact finder, even a judge, to imagine such a youth being disruptive in the Mall. However, this testimony of Officer Hunt was completely false. The testimony was disputed by Steven Bumpus, and Officer Hunt later signed an Affidavit acknowledging his error.

In his written statement, Officer Hunt said, "I now realize and hereby state that neither of the men I pointed out at the hearing were the individuals I thought they were. I now realize and hereby state that neither of the men who I pointed out at counsel table at the hearing were at the domestic disturbance at 1001 Park Avenue, Charleston, West Virginia, which I referred to from the witness stand, and neither of them had anything to do with that incident, as far as I know." Officer Hunt further stated: "I now realize and hereby state that I never stopped Steven Bumpus when he was driving without his license. I do not know if he has a brother named Les, and as far as I know, he may never have been in a car with anyone named Les." (Affidavit of Officer J.A. Hunt, dated January 23, 2008).

While Officer Hunt was not an agent of the Mall, and his astonishing carelessness is not directly attributable to the Mall, his remarkable testimony serves as an illustration of how profiling occurs and how insidious its effects can be. It also serves as an example of why the testimony of police officers and security guards, like all other witnesses, should be subject to careful scrutiny.

a group of juveniles, and Lt. Hager was "trying to get them to go." (Transcript Vol. II, p. 200). Nearhoof recalled that "one individual, he refused" and the others "just stayed." (Transcript Vol. II, p. 200). Nearhoof explained his notation "disrespectful toward security" by saying, "He basically, you know, refused the LT in not leaving." (Transcript Vol. II, p. 201). The Complainants have never disputed that they refused the request to leave the sidewalk. Nearhoof apparently left the scene before the police arrived and did not observe the arrests. (Transcript Vol. II, p. 202).

In some instances, the evidence which came, directly or indirectly, from security officers corroborated the Complainants' testimony. For example, regarding the racial profiling of the Complainants from the time they arrived, it was the written record of security guard Cook which reflects that at 7:30 p.m. he "kept group of BM [Black males] moving." (Commission's Exhibit 20).

The ALJ also gave weight to some of the police officer testimony which CTCM probably wishes the ALJ had ignored or discounted. For example, the ALJ noted:

Police Officer Coleman indicated that when he receives calls to escort from the Mall they are commonly African Americans. Police Officer Brown testified credibly that it was 100% of the time minorities or blacks being evicted or escorted from the Mall on the calls he participated in over the years. Vol II, pages 62, 63, 69, 70, 130 and 131.

Final Decision, pp. 23-24, Finding of Fact No. 52.

While the ALJ did discount the testimony of Lt. Hager as lacking credibility, there were many very good reasons to do so. There was varied and conflicting evidence from the Charleston Town Center Mall regarding how Lt. Hager came to confront the Complainants in the food court. Lieutenant Hager testified at hearing that he came out of the restroom on the third level, at approximately 7:30 p.m., heard loud noises coming from the other side of the Mall, and went to investigate. (Transcript Vol. III, p. 17). In contrast to Hager's testimonial explanation, Charleston Town Center Mall's Interrogatory Answers reflected that it was "one of the food vendors, Best of Crete, [who] notified security officer Lt. Karl Hager that the youths were a disturbance and requested help." (Commission's Exhibit 8, p. 4, ¶ 7) (emphasis supplied). When this contrast was pointed out to Lt. Hager, he attempted to explain this discrepancy by saying a vendor told him after the incident that

"he was going to call me." (Transcript Vol. III, p. 163). However, this is inconsistent with the clear written representation that it was a vendor who notified Hager of the alleged problem, and the representation that the vendor requested help. One does not request help regarding an incident that has already been resolved.

Lieutenant Hager testified that he later encountered the Complainants, and that on this occasion "they were in a group of about seven." (Transcript Vol. III, p. 29) (emphasis supplied). Later in his testimony, he was confident that there were seven of them. He claimed to have counted them, but acknowledged that he never made any record of the number. Hager explained "the only time we write numbers is if it is a significant amount." (Transcript Vol. III, pp. 84-86). Ironically, less than an hour later, three girls were apparently a significantly large group to get numbered in his report. (Commission's Exhibit 17, p. 1). Lieutenant Hager also testified that this alleged group of seven people was the "same group" he had encountered in the food court (Transcript Vol. III, p. 86), but his Daily Activity Report kept on that date refers to this group as "another large group of kids." (Commission's Exhibit 17) (emphasis supplied).

Lieutenant Hager wrote in a statement, five months after the incident, that "at 21:35 pm received a call from one of the boy's mother asking why I was harassing her two boys. I told her they were yelling and playing around in mall. And the mall was closed at this time. And they was refusing to leave." (Commission's Exhibit 17, p. 3). Lieutenant Hager stood by his written account, and swore that the mother had been Cynthia Bumpus, claiming that she had identified herself to him. (Transcript Vol. II, p. 89). However, it was clearly established that the events could not have occurred as Lt. Hager claimed. Both Steven Bumpus and Cynthia Bumpus testified credibly that this conversation between Cynthia Bumpus and Lt. Hager never occurred, and their cell phone records establish that there were no calls at or near 9:35 p.m. (Commission's Exhibits 30 and 31).

Lieutenant Hager's record keeping created reason to doubt his candor. He testified that he recorded events in his Daily Activity Report in the sequence in which they occurred; but it is clear from his written record of April 22, 2006, that his reference to the food court incident is made out of sequence, as an after-thought. (Commission's Exhibit 17). In addition, he gave varied and conflicting explanations regarding when and why he created

pages 3 and 4 of Commission's Exhibit 17, which was a detailed description of the events of April 22, 2006, made long after the fact. (Transcript Vol. III, pp. 91-92, 96, 97, 98-99, 100).

Lieutenant Hager testified that on the evening of April 22, 2006, he received a telephone call from Chili's "saying there was a large group outside of their establishment . . . deterring customers from coming in." (Transcript Vol. III, p. 33). He testified that the caller from Chili's did not describe the race of the individuals (Transcript Vol. III, pp. 110-111), and his notes made on April 22, 2006, contain no reference to such information. (Commission's Exhibit 17, p. 2). However, in his written statement made after the HRC complaint was filed, Hager records that the caller identified the group as a "large group of black males." (Commission's Exhibit 17, p. 4).

Lieutenant Hager testified that when he responded, he found a large group of fifteen or twenty, standing in front of Chili's. (Transcript Vol. III, pp. 33, 114). His testimony was that all fifteen to twenty were male. He testified he was not sure if they were all Black (Transcript Vol. III, p. 114); however, his written report (Commission's Exhibit 17) reflects that there were "15-20 black mall (sic)," which he acknowledges was intended to be "black males." (Transcript Vol. III, p. 115). Lieutenant Hager testified that he recognized the Complainants Bumpus and Streets, but did not recognize and could not describe any of the others. (Transcript Vol. III, pp. 116-117).

Lieutenant Hager testified that when the police arrived, it was Officer Coleman, who is African American, who came up to him, and to whom he described the situation. (Transcript Vol. III, p. 23). Lieutenant Hager claims he told Officer Coleman, "I need them to leave Mall property." (Transcript Vol. III, p. 124). Lieutenant Hager testified that it was Officer Coleman who handled the situation, engaged the Complainants and initiated the arrests. (Transcript Vol. III, pp. 43, 120, 139). Lieutenant Hager testified that none of the other police officers participated in the events prior to the arrests. (Transcript Vol. III, p. 139). This is all disputed by the other witnesses, including Officer Coleman. (Transcript Vol. II, pp. 102, 104, 111, 112). The dispatch records (Commission's Exhibit 34) reflect that Officers Ross and Midkiff had been on the scene for five minutes before Coleman arrived, and the cell phone records reflect that within two minutes of Coleman's arrival, the arrests

had proceeded to the point where Steven Bumpus's cell phone was being answered by an arresting officer. CTCM's attempted description regarding the involvement of the only African American officer on the scene is a transparent effort to bend the facts to cover the racial profiling.

The Appellant's assertions to the contrary, a comparison of the Final Decision to the record reflects that the ALJ actually paid close attention to the record, including the testimony of police officers and security guards. The record established good reason for the ALJ to be distrustful of the testimony of Lt. Hager, both on its own terms and because it was virtually uncorroborated on every important disputed matter. Ironically, CTCM's witnesses corroborated many of the claims of the Complainants, and offered some independent evidence that the discrimination experienced by the Complainants was not an isolated incident. Surely there is no legitimate public safety objective which is promoted by overturning the ALJ's sound and well supported Final Decision.

CONCLUSION

For the reasons set forth herein, the undersigned counsel for the Commission respectfully requests that the Court affirm the West Virginia Human Rights Commission's Final Orders, and in so doing, adopt the dissent in K-Mart.

WEST VIRGINIA HUMAN RIGHTS
COMMISSION, on behalf of
Steven M. Bumpus, Jr.
and Kevin Streets,
Appellees,
By Counsel.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON TOWN CENTER COMPANY, LP,

Appellant/Respondent Below,

v.

STEVEN and CYNTHIA BUMPUS, on
behalf of STEVEN M. BUMPUS, a minor;
AUGUSTA ROBINSON, on behalf of
KEVIN STREETS, a minor; and the WEST
VIRGINIA HUMAN RIGHTS COMMISSION,

Appellees/Complainants Below.

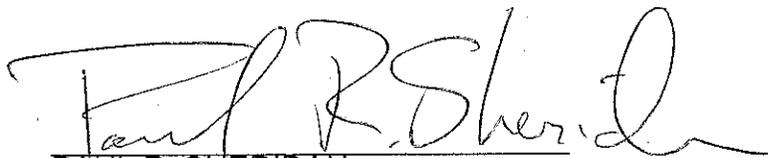
CERTIFICATE OF SERVICE

I, Paul R. Sheridan, Deputy Attorney General of the State of West Virginia, do hereby certify that the foregoing *Brief of Appellees* was served upon the following, by depositing a true copy thereof in the United States Mail, first class postage prepaid, on the 18th day of May 2009, addressed as follows:

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The original and nine copies were hand delivered this date to:

The Honorable Rory L. Perry II, Clerk
West Virginia Supreme Court of Appeals
State Capitol, Room E-317
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Charleston, West Virginia 25305


PAUL R. SHERIDAN