

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

CHARLESTON TOWN CENTER
COMPANY, LP,

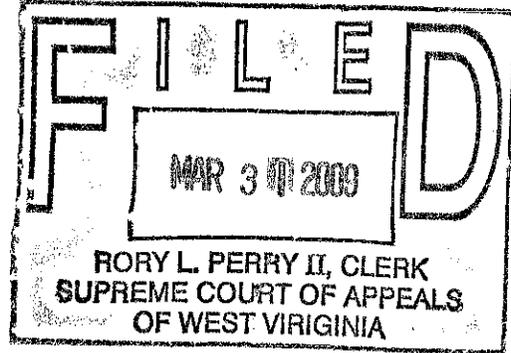
Appellant,

v.

No. 34740

THE WEST VIRGINIA HUMAN
RIGHTS COMMISSION and AUGUSTA ROBINSON,
on behalf of KEVIN STREETS, a minor,

Appellees.



APPELLANT'S BRIEF

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March 31, 2009

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**SUMMARY OF PROCEEDING AND
NATURE OF RULING IN THE LOWER TRIBUNAL**

Augusta Robinson, the complainant below and Appellee herein, initiated this administrative action against the Charleston Town Center Company, LP (the “Charleston Town Center” or the “Appellant”), the respondent below and Appellant herein, before the West Virginia Human Rights Commission. Ms. Robinson alleged that her grandchild, Kevin Streets, and Steven M. Bumpus, (collectively, the “Complainants”¹) both African-American males who were in their teens at the time of the events in question, had been subjected to racial profiling when they were arrested by the Charleston Police Department on May 22, 2006 outside the Charleston Town Center mall in downtown Charleston, West Virginia.

The West Virginia Human Rights Commission (the “Human Rights Commission”) convened a public hearing on December 12-14, 2007 before the Honorable Robert B. Wilson, Administrative Law Judge. (Final Decision at 1.) At the close of the public hearing in this matter, Judge Wilson found that the Complainants had attempted to avail themselves of a place of public accommodation because the Charleston Town Center is “engaged in the business of owning and operating a commons area to facilitate shopping” rather than “making retail sales.” (*Id.* at 27.) Judge Wilson made his determination notwithstanding the fact that the Complainants made no purchases in the main mall area on the date of the event giving rise to this matter. (Transcript of Record Vol. I at 69, *Bumpus v. Charleston Town Center, LP*, No. PAR-81-07 [hereinafter Record].)

Judge Wilson further found that the Charleston Town Center had denied access to the

¹ The Complaints on behalf of Steven M. Bumpus and Kevin Streets were consolidated for public hearing before the West Virginia Human Rights Commission. Although separate appellant’s briefs are being filed, the individual briefs refer to Steven M. Bumpus and Kevin Streets, collectively, as the “Complainants” for the sake of simplicity and because the relevant facts apply to both parties.

privileges of a place of public accommodation because “undue attention” paid to the individuals in question amounted to “harassment.” (Final Decision at 28-29.) Additionally, Judge Wilson found that the Complainants were denied access as a result of the Charleston Police Department arresting the individuals in question for trespass on mall property. (*Id.* at 29.) Judge Wilson based his finding partly on his determination that the mall “utilized” the Charleston Police Department to intimidate the Complainants and “others of their race.” (*Id.* at 30.) Although Judge Wilson found that the Charleston Town Center’s reason for any adverse treatment of the Complainants – their own violation of the Code of Conduct – was “plausible,” he decided that this reason was only a pretext for discriminatory treatment. (*Id.* at 30.)

In response to Judge Wilson’s Final Decision, the Charleston Town Center filed a petition in support of appeal with the West Virginia Human Rights Commission. By Final Order entered November 26, 2008, the Commissioners of the West Virginia Human Rights Commission upheld the lower Final Decision. Subsequently, on December 23, 2008, the Charleston Town Center filed petitions for appeal in this case and its companion case involving Steven M. Bumpus, to which the Human Rights Commission responded on January 22, 2009. This Honorable Court granted both petitions for appeal by orders entered on February 26, 2009 and received by counsel for the Appellant on March 4, 2009.

STATEMENT OF FACTS

At approximately 7:00 p.m. on April 22, 2006, the Complainants entered the Charleston Town Center mall (Record Vol. I at 24, 28), and alleged that they were followed by mall security guards from the time of their entrance into the mall (*id.* at 22). At the public hearing, the Charleston Town Center presented evidence that its security officers follow prescribed patrol patterns that are verifiable through the use of “strike points,” which record the time each security officer is stationed in a particular position. (*Id.* Vol. II at 195-96.)

The first interaction between mall security officers and the Complainants occurred sometime after the Complainants entered the mall food court and joined another group of acquaintances. (*Id.* Vol. I at 23.) The group at issue consisted of eight individual youths (*id.* at 73-74), in violation of the Town Center Code of Conduct (*id.* Exhibit 9, Code of Conduct [hereinafter Code of Conduct]). This first interaction occurred at least forty-five minutes after the Complainants entered the mall. (*See id.* Vol. I at 30.) Mall security officers explained to the Complainants that they were not allowed to loiter in the food court without food or drink. (*Id.* at 31.) The Complainants did not have any food or drink with them at this time. (*Id.* at 109.) When some members of the group disputed the security officers’ request that they disperse, security officers notified two Charleston Police officers who were eating in the mall food court at the time of a possible disturbance. (*Id.* Vol. III at 63.) The Complainants subsequently left the food court as directed. (*See id.* Vol. I at 34-35.) Some time later, the Complainants and some friends in a group were instructed not to loiter in a walking area of the mall. (*Id.* at 35-36.) At this time, there were four members in the group, which was a violation of the Charleston Town Center Code of Conduct. (*Id.* at 34-35, 39; Code of Conduct.)

The next encounter between the Complainants and mall security officers occurred between

9:00 and 10:00 p.m. (Record Vol. I at 83, 112-13; *id.* Vol. III at 31.) At this time, the Complainants were advised that the mall was closing and that they should exit the mall. (*Id.* Vol. I at 113.) At the public hearing, the Complainants and the Charleston Town Center presented conflicting testimony about the time that this event occurred. However, the Complainants admit that it was at or around the time that the mall was closing. (*Id.* Vol. I at 83, 112-13; *Id.* Vol. III at 31.) The Complainants and their group resisted the security officers' request and the security officers again contacted Charleston Police officers for assistance with a disturbance. (*Id.* Vol. III at 30.) At this time, Charleston Police Department officers – not mall security officers – escorted the Complainants and their group out of the mall. (*Id.* Vol. I at 81-83.)

The Complainants later returned to the mall area to eat at Chili's restaurant. (*Id.* at 38-39.) Upon exiting Chili's, the Complainants and two other individuals waited outside the mall area for a ride. (*Id.* at 39-40.) At this time, a large group of people was assembled in the same area, creating a disturbance. (*Id.* at 40, 43-44, 48; *id.* Vol. III at 33.) An independent observer indicated that there appeared to him to be one large group of youths. (*See id.* Vol. I. at 187-88, 194-96.) A member of the Chili's restaurant staff called mall security because the group was deterring customers from entering the restaurant. (*Id.* Vol. III at 32-33.) Mall security officers arrived and observed a large group of 15 to 20 individuals standing in front of Chili's. (*Id.* at 33.) Mall security then asked the group to disperse, informing them that they were deterring customers from entering the restaurant. (*Id.* at 36.) However, the group refused to disperse and, instead responded with threats and allegations that the security officers were racist "rent-a-cops," which prompted mall security to call the Charleston Police Department for assistance. (*Id.* Vol. III at 36-37.)

Subsequently, officers from the Charleston Police Department arrived, at which time, many

of those individuals did disperse, either upon seeing the arriving police car or after being so instructed by the responding officers. (*Id.* Vol. III at 40.) However, by their own admissions, the Complainants refused this request by the Charleston Police officers. (*Id.* Vol. I at 51-52, 121-122.) The Charleston Police officers then made the decision, without any direction from the Appellant or its security officers, to arrest the Complainants for criminal trespass and obstruction of an officer. (*Id.* at 318-20.) This decision was consistent with regular Charleston Police Department practice that officers only request that individuals leave property if they determine that the individuals should be removed. (*See id.* Vol. II at 62-63.)

ASSIGNMENTS OF ERROR

The Charleston Town Center respectfully submits the following assignments of error as its grounds for review:

1. The Commissioners of the West Virginia Human Rights Commission erred in refusing to reverse the Final Decision of the Administrative Law Judge when the Complainants failed to prove every required element of their discrimination claims by a preponderance of the evidence. More specifically, the Complainants did not attempt to avail themselves of public accommodations. Moreover, no accommodations were denied or withheld from the Complainants in that the undue attention that they allegedly received did not equate to a denial of public accommodations and the actions that the Charleston Police Department took cannot be imputed to the Charleston Town Center. Additionally, any denial of access to public accommodations that might have occurred was based solely on a legitimate, non-discriminatory motive. Finally, the Administrative Law Judge's decision impermissibly restricts the role of police officers and security guards to promote public safety.

2. The lower Administrative Law Judge'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 presented at the public hearing to establish facts in this matter, as well as the non-discriminatory policies and procedures employed by both the Charleston Town Center and the Charleston Police Department both in this matter and generally.

3. The lower Administrative Law Judge's findings were not supported by the evidence in the record in this matter, as a whole, and were clearly wrong in view of the reliable, probative, and substantial evidence.

TABLE OF AUTHORITIES

WEST VIRGINIA CASES

Cobb v. W. Va. Human Rights Comm'n, 619 S.E. 2d 274 (W. Va. 2005) 9, 10, 17, 19, 20

Colgan Air, Inc. v. W. Va. Human Rights Comm'n, 656 S.E.2d 33 (W. Va. 2007) 9

K-Mart Corp. v. W. Va. Human Rights Comm'n, 383 S.E.2d 277 (W. Va. 1989) 10, 12, 17, 18

Skaggs v. Elk Run Coal Co., 479 S.E.2d 561 (W. Va. 1996) 10, 11, 17

State v. Phillips, 520 S.E.2d 670 (W. Va. 1999) 14, 20

WEST VIRGINIA STATUTES

W. Va. Code § 8-14-3 15, 20

DISCUSSION OF LAW

I. STANDARD OF REVIEW

In *Colgan Air, Inc. v. W. Va. Human Rights Comm'n*, 656 S.E.2d 33 (W. Va. 2007), this Court set forth the following standard of review concerning appeals from orders issued by the West Virginia Human Rights Commission:

Where an appeal from an order issued by the West Virginia Human Rights Commission is brought directly to the West Virginia Supreme Court of Appeals, pursuant to W. Va. Code § 5-11-11 (1989), this Court will apply the same standard of review that is applied to Human Rights Commission orders appealed to a circuit court.

Syl. pt. 1, *Cobb v. West Virginia Human Rights Comm'n*, 217 W. Va. 761, 619 S.E.2d 274 (2005). In reviewing cases appealed to a circuit court from the Human Rights Commission, we have held that

“West Virginia Human Rights Commission’s findings of fact should be sustained by reviewing courts if they are supported by substantial evidence or are unchallenged by the parties.” Syllabus Point 1, *West Virginia Human Rights Comm'n v. United Transp. Union, Local No. 655*, 167 W. Va. 282, 280 S.E.2d 653 (1981).

Syl. pt. 2, *Smith v. West Virginia Human Rights Comm'n*, 216 W. Va. 2, 602 S.E.2d 445 (2004). Further,

“[o]n appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W. Va. Code § 29A-5-4(a) and reviews questions of law presented *de novo*; findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.” Syllabus Point 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996).

Syl. pt. 1, *Smith*, 216 W. Va. 2, 602 S.E.2d 445. Thus, we apply a *de novo* standard of review to questions of law, and we will not disturb the findings of fact unless they are clearly wrong.

Colgan Air, Inc. v. W. Va. Human Rights Comm'n, 656 S.E.2d 33, 40 (W. Va. 2007). Moreover, “an administrative law judge’s application of law to the facts is reviewed *de novo*.” *Cobb v. W. Va. Human Rights Comm'n*, 619 S.E. 2d 274, 282 (W. Va. 2005) (citing *Martin v. Randolph County Bd. of Educ.*, 465 S.E.2d 399, 406 (W. Va. 1995)).

This Court has also stated that it

shall reverse, vacate or modify the order or decision of the [HRC] if the substantial rights of the [Appellant] have been prejudiced because the administrative findings, inferences, conclusions, decisions, or order are: “. . . (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) *Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.*”

Cobb v. W. Va. Human Rights Comm'n, 619 S.E.2d 274, 284 (W. Va. 2005) (citing Syl. Pt. 2, *Shepherdstown Volunteer Fire Dep't v. State ex rel. W. Va.*, 309 S.E.2d 342 (W. Va. 1983)) (alterations in original).

II. CHARLESTON TOWN CENTER WAS ENTITLED TO A JUDGMENT IN ITS FAVOR OR A REVERSAL OF THE FINAL DECISION BECAUSE THE COMPLAINANTS FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION.

In order to establish a prima facie case of discrimination in a place of public accommodation, a complainant must prove the following: 1) that he or she is a member of a protected class; 2) that the complainant attempted to avail himself or herself of the “accommodations, advantages, privileges or services” of a place of public accommodation; and 3) that the “accommodations, advantages, privileges or services” were withheld, denied or refused to the complainant. Syllabus Point 1, *K-Mart Corp. v. W. Va. Rights Comm'n*, 383 S.E.2d 277 (W. Va. 1989). Where the complainant establishes a prima facie case, the respondent can rebut a presumption of discrimination by offering a legitimate reason for the actions it took with respect to the complainant. *Id.* at 281; *Skaggs v. Elk Run Coal Co.*, 479 S.E.2d 561, 582 (W. Va. 1996). In order to prevail on a discrimination claim, the complainant then must show that the respondent’s proffered reason is a mere pretext for discriminatory action. *K-Mart*, 383 S.E.2d at 281; *Skaggs*, 479 S.E.2d at 582. More specifically, the complainant must show that the respondent’s explanation “was not the reason

that actually motivated the action taken against the [complainant].” *Skaggs*, 479 S.E.2d at 584. The burden of proof remains on the complainant to show that the respondent intended to discriminate. *Id.* at 582.

A. The Complainants Cannot Establish a Prima Facie Case of Discrimination Because They Did Not Attempt to Avail Themselves of Public Accommodations.

The Charleston Town Center is engaged in the business of operating a commercial property for the purpose of making retail sales. All accommodations offered by the Charleston Town Center are provided to allow customers to make retail purchases at the mall and its tenant businesses. The purpose of the mall is not to facilitate social interaction, which – although it is an important societal objective – is promoted not by private business entities but rather by public facilities such as parks. Instead, the Charleston Town Center offers accommodations to customers to facilitate purchases of items from diverse retail businesses in a single commercial setting.

During the public hearing, the Complainants admitted that they did not make any retail purchases while at the Charleston Town Center facilities on the date at issue. (Record Vol. I. at 69.) Because 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. Therefore, the Complainants failed to make a prima facie case of discrimination against the Appellant based upon a preponderance of the evidence and the Commissioners of the Human Rights Commission should have reversed the lower Final Decision based upon the record before them.

B. The Complainants Cannot Make a Prima Facie Case of Discrimination Because No Accommodations Were Denied or Withheld From Them.

Without waiving the discussion set forth in section II.A., above, and arguing strictly

arguendo, even if the Complainants did attempt to avail themselves of the privileges of a place of public accommodation, the Complainants were unable to establish their prima facie claims of discrimination because the Appellant did not deny them such privileges or accommodations. In his Final Decision, Judge Wilson set forth his determination that the Appellant had denied the Complainants public accommodation because of undue attention paid to them by security officers and because of their removal from mall property by Charleston Police officers. (Final Decision at 28-29.) However, under the applicable law, neither of these situations equates to a denial of public accommodations to the Complainants by the Charleston Town Center.

i. Undue Attention Does Not Deny Individuals the Privileges of Public Accommodations.

As noted above, Judge Wilson's finding that the Complainants were denied the privileges of public accommodations is based in part on the Complainants' allegations that mall security officers followed them through the mall. While the Appellant denies these allegations, even assuming their veracity for purposes of argument only, those allegations do not support a finding of denial of public accommodation. Indeed, this Court has made clear that simply observing entrants to a commercial property – or, indeed, even summoning the police in anticipation of a problem with the entrants – does not amount to a denial of the privileges of public accommodations. *See K-Mart Corp. v. W. Va. Rights Comm'n*, 383 S.E.2d 277, 281-82 (W. Va. 1989).

In *K-Mart*, the defendant business observed the plaintiffs – a family of Syrian descent – approaching the store and called the police in anticipation that the plaintiffs were a band of shoplifters about which the store had been warned. *Id.* at 278. Store employees and one police officer observed the plaintiffs as they shopped in the store. *Id.* The Court found that “no services were denied or refused” by this conduct and thus the Human Rights Commission’s finding of

discrimination was properly set aside by the circuit court. *Id.* at 281-82. Similarly, in this matter, to the extent that Judge Wilson's Final Decision was based upon the mall security officers' observations of the Complainants or upon those officers' calls to the Charleston Police Department, the finding of discrimination does not conform to the applicable West Virginia law and, therefore, should have been set aside by the Human Rights Commission.

While the Appellant recognizes that mall security officers did interact with the Complainants in this matter, each of those interactions resulted from the Complainants' clear violation of the Charleston Town Center Code of Conduct. (Code of Conduct.) Indeed, as described in the Statement of Facts, above, while in the food court, the Complainants were seated without eating food and were congregated in a group larger than four. (Record Vol. I at 23, 109.) Similarly, when confronted later, the Complainants were in a group of four and were blocking a walkway of the mall. (*Id.* at 34-36, 39.) These were all instances of conduct that is clearly proscribed by the Code of Conduct. (Code of Conduct.)

Finally, the Complainants were advised to leave the mall when it was closing. (Record Vol. I at 112-13.) Logically, the Charleston Town Center is not required to allow patrons to remain in the mall after closing time. Judge Wilson based his finding that undue attention and harassment occurred on the conduct of the mall security officers, specifically their alleged observation of the Complainants. As illustrated by the relevant case law cited above, this provided neither Judge Wilson nor the Human Rights Commission with a sufficient basis for a finding that services or privileges of public accommodations of a commercial establishment were denied.

ii. The Actions of the Charleston Police Are Not Those of the Town Center and Cannot Provide the Basis for a Finding of Denial of Privileges.

In his Final Decision, Judge Wilson also found that the Charleston Town Center denied the Complainants the privileges of public accommodations because officers of the Charleston Police Department ordered the Complainants to leave mall property and subsequently arrested them when they refused. (Final Decision at 29.) Judge Wilson based his finding on his determination that the police officers acted as the Appellant's agents. (*Id.*) However, as this Court has determined previously, when a police officer acts within the scope of his official duties-- i.e., making an arrest -- he acts in his official capacity and not as a private employee. Syllabus Points 4-6, *State v. Phillips*, 520 S.E.2d 670 (W. Va. 1999).

In *Phillips*, an off-duty police officer was working as a security guard at a retail business. *Id.* at 674. When a cashier encountered a disruptive customer at the register, she summoned the police officer. *Id.* The customer and the police officer then got into an altercation, which ultimately resulted in the customer's arrest for disorderly conduct, obstructing an officer, and assault on a police officer. *Id.* On appeal, the customer argued, among other things, that she should have been acquitted because the officer "was not acting in his lawful, official capacity at the time of the alleged offenses, but was instead employed privately as a security guard acting under the direction of a private entity." *Id.* at 675.

The Court found that the officer in that case had acted in his official capacity, holding that "an off-duty municipal police officer employed by a private entity as a security guard retains his or her official police officer status even in the private employment, unless it is clear from the nature of the officer's activities that he or she is acting in an exclusively private capacity or engaging in his or her private business." *Id.* at 684. In determining that the officer was not acting in an exclusively private capacity, the Court specifically noted that he was wearing his police uniform at the time of

his action and was enforcing the criminal laws of the state. *Id.* at 683.

In the instant matter, the police officers who directed the Complainants to leave the mall area and subsequently arrested them when they refused were acting exclusively in their official capacity. As *Phillips* illustrates, the mere fact that mall security officers summoned the police does not make the police department or those individual officers agents of the Charleston Town Center, a private entity. The police arrived, wearing their official uniforms, to assist with a public disturbance outside of Chili's. They acted pursuant to their statutorily-mandated duty to "aid in the enforcement of the criminal laws of the state." W. Va. Code § 8-14-3. Even more critically, the record in this matter establishes that the police officers who responded in this matter were not off-duty officers employed by the Charleston Town Center. Rather, they were on-duty officers performing their official duties and exercising their discretion in placing the Complainants under arrest. (*See* Record Vol. II. at 61-63.)

Moreover, there is absolutely no evidence in the record that the police officers arrested the Complainants at the direction of the Charleston Town Center. Rather, through their own evidence, the Complainants established quite the opposite. At the public hearing in this matter, the Human Rights Commission called Corporal Keith Peoples, an officer with the Charleston Police Department who, during his tenure with the police department,² had responded to incidents at the Charleston Town Center. (*Id.* at 58-60.) Not only did Officer Peoples, an African-American man himself, testify that he could not recall any incidents in which he was aware of mall security officers referring to African-American youth by derogatory terms or harassing or mistreating African-American youth (*id.* at 60-61), but more critically, he established that, when responding to a summons from mall

² Officer Peoples also testified that he was also employed privately by the Charleston Town Center. However, that

security, police officers exercise their own judgment in determining whether to evict an individual (*id.* at 62). Indeed, on this point, Officer People provided the following testimony:

Q No, I'm sorry, my question wasn't clear. If you, if you're responding to a call from the mall security, okay, and you arrive and they, they ask you to see that somebody is evicted, you evict, you make sure that person leaves, is that correct?

A After we find out exactly what took place. Then if, if security is correct then, yeah, we ask them to go ahead and leave. If not, then we normally give them the name of Dennis Lewis, who's the director of security, and advise them to go talk to him.

* * *

Q Okay. So you don't actually, personally, evict somebody from the mall unless it's pretty clear that there's good cause for it.

A Yes, sir, that's correct.

(Record Vol. II at 62-63.)

Thus, because the Charleston Police officers were not acting at the direction of the Town Center, the Town Center cannot be held responsible for their actions. Therefore, to the extent that Judge Wilson's finding that the Appellant denied the Complainants access to public accommodations is based upon the actions of the Charleston Police officers, it does not conform to the law of West Virginia and should have been set aside by the Human Rights Commission.

C. ANY DENIAL OF ACCESS TO PUBLIC ACCOMMODATIONS THAT MIGHT HAVE OCCURRED WAS BASED SOLELY ON A LEGITIMATE NON-DISCRIMINATORY MOTIVE.

While the Appellant disputes that the Complainants were denied access to a place of public accommodation, the record in this matter demonstrated that any such denial of access occurred solely due to the actions of the Complainants in violating the uniformly applied mall Code of

private employment is not relevant to the events at issue in this matter.

Conduct. Indeed, in his Final Decision, Judge Wilson determined that the Charleston Town Center had articulated a legitimate non-discriminatory purpose for its actions, namely enforcing the Code of Conduct. (Final Decision at 30.) Thus, the burden shifted to the Complainants to show by a preponderance of the evidence that enforcement of the Code of Conduct was not the true reason for the Town Center's action. *K-Mart*, 383 S.E.2d at 281; *Skaggs*, 479 S.E.2d at 584.

At the public hearing in this matter, the Appellant presented evidence that it enforces the Code of Conduct with respect to all entrants regardless of national origin. (Record Vol. I at 315-16. *See id.* Vol. II at 40-41.) More specifically, the evidence in this matter established that in the days leading up to the incident at issue in this matter, a group of about ten Caucasian females was asked to disperse for violating the policy prohibiting groups of four or more juveniles. (*See id.* Vol. I at 334.) When that group refused to disperse, they were asked to leave the mall and subsequently did so. (*Id.* at 334.) In fact, the Complainants cannot dispute that they were in violation of the Code of Conduct on the date of this incident. Instead, they have alleged that the Code of Conduct was enforced against them only due to their race.

Other instances of the Appellant's enforcement of the Code of Conduct weigh further against the Complainants' contention. Indeed, as this Court has recognized recently, "[d]iscipline imposed on a minority [] does not alone equate to racial discrimination unless there is a preponderance of evidence that the discipline was imposed in a discriminatory manner or for a discriminatory purpose." *Cobb v. West Virginia Human Rights Comm'n*, 619 S.E.2d 274, 289 (W. Va. 2005.) Furthermore, the Complainants' own admissions that they were regular guests at the Charleston Town Center – visiting the mall “hundreds of times if not thousands of times,” apparently without a prior, similar incident – in and of itself illustrates that the Complainants were not targeted because of

their race. (*See* Record Vol. I at 67-68, 103.) In fact, this Court has spoken previously on this very point, recognizing that a claim of denial of access to public accommodations is significantly weakened by a complainant's admission that he or she had frequented the business at issue previously without incident. *K-Mart*, 383 S.E. 2d at 282 ("Most influential in our decision . . . is the fact that the [complainants] admitted to peaceably shopping at the St. Albans K-Mart at least once a week for a full year prior to [the incident].")

Given these facts, the Appellant respectfully asserts that Judge Wilson's finding that enforcement of the Code of Conduct was a mere pretext for a discriminatory motive was not supported by substantial evidence in the record and did not conform with applicable state law. Accordingly, the Human Rights Commission should have set aside the Administrative Law Judge's Final Decision.

III. THE FACTUAL FINDINGS IN THE FINAL DECISION, ULTIMATELY UPHELD IN THE FINAL ORDER, IMPERMISSIBLY RESTRICT THE IMPORTANT ROLE OF POLICE OFFICERS AND SECURITY GUARDS TO PROMOTE PUBLIC SAFETY.

The Final Decision, and by extension, the Final Order, consistently discounts the testimony of Charleston Town Center security officers and Charleston Police officers who were duty-bound to exercise their discretion to promote safety and the enjoyment of the mall facilities at the time the events at issue occurred. More specifically, Judge Wilson found that "testimony of [the Appellant]'s witnesses that [the Complainants were not followed by mall security] is simply not credible," although the Town Center presented evidence that security officers' patrols are standardized and monitored. (Final Decision at 5; Record Vol. II at 195-96.)

Similarly, Judge Wilson found that "[m]all security guards clearly directed the actions of the police when responding to [m]all calls, and use them to enforce [m]all Code of Conduct violations,

with the threat of trespass criminal violations upon the say so of the [m]all security guards.” (Final Decision at 7.) However, as discussed above, this is in direct contradiction to testimony presented at trial that illustrated that the police enforce the laws in their own discretion and that the Appellant has no authority to direct their actions. (Record Vol. II at 62-63. *See id.* Vol. I at 319.)

Similarly, Judge Wilson further found that the testimony of the Charleston Town Center’s head of security is “not credited” and that he appeared to have “racial animus” because he “instructed police to remove” the entire group of African-American individuals from the food court. (Final Decision at 10.) However, the security officer did not instruct the police to remove the group and, in fact, the Complainants left the food court on their own, according to their own testimony. (Record Vol. I at 35.) Judge Wilson also found that mall security officers “associate[d] the Complainants with other African American teens in a group” because of the individuals’ physical proximity and determined that this association was based on race. (Final Decision at 23.) However, even an independent observer testified that he observed one group of youths outside the Chili’s restaurant at the relevant time. (Record Vol. I. at 187-88, 194-96.)

Judge Wilson’s findings simply ignore the testimony of security and police officers who were attempting to, respectively, enforce a Code of Conduct implemented to ensure public enjoyment of facilities and to enforce the laws of the state to preserve public safety. Where a public official is both authorized and required to impose appropriate discipline for the maintenance of an appropriate environment, he should not be discouraged in the performance of his official duty. *Cobb*, 619 S.E.2d at 289. In *Cobb*, this Court set aside a Human Rights Commission decision that found that a teacher had denied a student access to public accommodation by disciplining the student. *Id.* at 284. The Court noted that simply disciplining a minority student for violation of a

code of conduct did not amount to discriminatory action. *Id.* at 278. In fact, the *Cobb* Court noted that where a public official such as a teacher is authorized or required to impose discipline to maintain a safe environment, that official *must be permitted to exercise her discretion* to perform that duty. *Id.* at 289 (emphasis added).

The instant matter presents an even stronger case for allowing public officials to perform their duties without impermissibly limiting their discretion by discounting their observance of developing events. Police officers are required to “preserve the public peace and protect the public in general.” Syllabus Point 5, *Phillips*, 520 S.E.2d 670; W. Va. Code § 8-14-3. In order to perform this duty, police officers must be permitted some degree of discretion to neutralize threats to the public peace, as they see fit. By wholly discounting the testimony of such officers, the Human Rights Commission has impermissibly restricted such officers’ ability to perform their required duties to protect the public. Although mall security officers – at least insofar as they are not also police officers – do not possess the same statutorily-mandated duty to protect the public peace, their enforcement of the mall’s Code of Conduct serves the same function, namely to ensure enjoyment of public accommodations by all members of the public in a safe, secure environment. If the testimony of officers who must respond to threats to public safety is given no weight, then their ability to protect the public will be significantly eroded by the fear of reprisal for simply performing their jobs.

The Charleston Town Center recognizes the importance of both the West Virginia Human Rights Act and the Human Rights Commission. Of course, individuals should not be singled out on the basis of their skin color, gender, age, or any other improper consideration. However, as this Court recognized in *Cobb*,

[T]here must be proof sufficient to meet the standards [] articulated by this Court that unlawful discrimination actually [has] occurred before liability may be imposed.

Otherwise, the legitimacy of the HRC will be brought into question, putting at risk the vital and important role served by the HRC. The HRC must ensure that its decisions are made in a fair and even-handed manner, and, unlike here, based on the *actual* evidence introduced on the record before it.”

Cobb, 619 S.E.2d at 290.

Under the relevant case law, it is clear that the evidence presented at the public hearing does not support Judge Wilson’s findings, so as to inhibit those entrusted with ensuring a safe public environment from performing their duties, absent a substantial showing that they performed such duties in a discriminatory manner. Therefore, the Appellant respectfully argues that Judge Wilson’s findings that wholly discount the testimony of security and police officers constitute an unwarranted exercise of discretion and that his Final Decision and, ultimately, the Final Order of the Human Rights Commission, should be reversed.

CONCLUSION

For the foregoing reasons, the Administrative Law Judge’s Final Decision and the subsequent Final Order of the Human Rights Commission should be reversed because the Complainants failed to make a prima facie case of discrimination in a place of public accommodation. The Complainants did not attempt to avail themselves of the services and privileges provided by the Charleston Town Center. Furthermore, the applicable case law shows that the actions of the Charleston Town Center did not deny the Complainants any such access or privileges and that the actions of Charleston Police officers cannot be attributed to the Charleston Town Center.

Alternatively, any such denial of access or privileges that may have occurred was the result of a legitimate non-discriminatory purpose – i.e., the uniform enforcement of a racially neutral code of conduct – and the Complainants cannot prove by a preponderance of the evidence that this was not the true reason for the alleged denial of public accommodations. Accordingly, the Charleston

Town Center Company respectfully asserts that the West Virginia Human Rights Commission should have set aside the Administrative Law Judge's Final Decision.

PRAYER FOR RELIEF

WHEREFORE, Your Appellant prays that this Honorable Court reverse the Final Order of the West Virginia Human Rights Commission of November 26, 2008 and award judgment to the Appellant as a matter of law, or, in the alternative, remand this matter such that the Appellant be granted a new public hearing on any issues that this Honorable Court deems not to be disposable as a matter of law.

Dated: March 31, 2009

Respectfully submitted,

CHARLESTON TOWN CENTER
COMPANY, LP,

by Counsel,



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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

CHARLESTON TOWN CENTER
COMPANY, LP,

Appellant,

v.

No. 34740

THE WEST VIRGINIA HUMAN
RIGHTS COMMISSION and AUGUSTA ROBINSON,
on behalf of KEVIN STREETS, a minor,

Appellees.

CERTIFICATE OF SERVICE

I, L. Kevin Levine, counsel for the Petitioner, Charleston Town Center Company, LP, hereby certify that on March 31, 2009, I served a true copy of the attached *Appellant's Brief* upon counsel and parties of record, as indicated below, by mailing true copies thereof via the United States mail, in postage paid envelopes:

Paul R. Sheridan
Deputy Attorney General
Civil Rights Division
P.O. Box 1789
Charleston, WV 25326-1789

Augusta Robinson
on behalf of Kevin Streets
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Additionally, the original and nine copies of the brief 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 35305


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