



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Cecil H. Underwood
Governor

Ivin B. Lee
Executive Director

February 25, 2000

Roy Higginbotham, Jr.
Post Office Box 763
Moundsville, WV 26041

Yellow Cab Co.
1006 4th St.
Moundsville, WV 26041

Janie O'Neal Peyton
Assistant. Attorney General
Civil Rights Division
Post Office Box 1789
Charleston, WV 25326-1789

William J. Ihlenfeld, Esq.
78 1/2 14th St.
Wheeling, WV 26003

Re: Higginbotham v. Yellow Cab Co.
Docket No. PAR-328-98

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled case. Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 1989, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for review of this Final Order.

Sincerely,

IVIN B. LEE
EXECUTIVE DIRECTOR

IBL/bw
Enclosures
Certified Mail/Return
Receipt Requested

cc: The Honorable Ken Hechler
Secretary of State

Mary Catherine Buchmelter
Deputy Attorney General
Civil Rights Division

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this Order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this Order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the Clerk of the West Virginia Supreme Court naming the West Virginia Human Rights Commission and the adverse party as respondents. The employer or the person or entity against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, person or entity against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the Clerk of the Supreme Court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the Commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the Commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this Order.

For a more complete description of the appeal process see West Virginia Code § 5-11-11 and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ROY A. HIGGINBOTHAM, JR.,

Complainant,

v.

DOCKET NO. PAR-328-98

YELLOW CAB COMPANY,

Respondent.

FINAL ORDER

On February 17, 2000, the West Virginia Human Rights Commission reviewed the Administrative Law Judge's Final Decision in the above-styled action issued by Administrative Law Judge Robert B. Wilson. After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer filed in response to the Administrative Law Judge's Final Decision, the Commission decided to, and does hereby, adopt said Administrative Law Judge's Final Decision as its own, without modification or amendment.

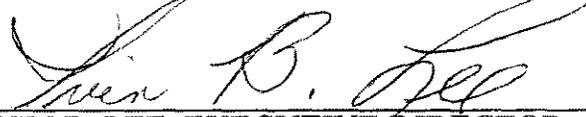
It is, therefore, the order of the Commission that the Administrative Law Judge's Final Decision be attached hereto and made a part of this Final Order.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this
25 day of February 2000, in Charleston, Kanawha County, West Virginia.



IVIN B. LEE, EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ROY A. HIGGINBOTHAM, JR.,

Complainant,

v.

Docket Number: PAR-328-98

YELLOW CAB COMPANY,

Respondent.

ADMINISTRATIVE LAW JUDGES

FINAL DECISION

A public hearing in the above captioned-matter was convened on July 27, 1999 at the Moundsville City Council Chambers, 800 6th Street, Moundsville, West Virginia, in Marshall County, West Virginia. Post hearing briefs were received through September 20, 1999.

The complainant, Roy A. Higginbotham, Jr. , appeared in person and his case was presented by Janie O'Neal Peyton, Assistant Attorney General, Civil Rights Division, Counsel for the West Virginia Human Rights Commission. The respondent, Yellow Cab Company, appeared by its representative, Michael Sobata, Jr., its owner and manager, and was represented by its counsel, William J. Ihlenfeld with the firm of Ihlenfeld Law Offices.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the

aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings, conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the administrative law judge and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

A.

Findings of Fact

1. The complainant, Roy A. Higginbotham, Jr., is a resident of West Virginia and is an African American male. Carol Higginbotham, who is white, is the complainant's wife. The complainant and his wife currently reside at Route 2, Moundsville, West Virginia. At the time of the incident at issue, they resided at 1006 Fourth Street Moundsville, West Virginia, but were in the process of moving. Tr. Page 6.

2. The respondent, Yellow Cab Company, is a taxi service located in Wheeling and Moundsville, West Virginia, and is a "place of public accommodations" within the meaning of the West Virginia Human Rights Act. Tr. Page 101, and W.Va. Code § 5-11-3(j).

3. This complaint arises from the events which led to the refusal of service to the complainant and his wife by cab driver Harold L. Woodburn, "Woody". The events of that

day were recounted essentially the same by both the complainant and Mrs. Higginbotham, his wife, whose versions of events of that day were determined by the undersigned to be more credible than that of Mr. Woodburn. Complainant's wife called the cab so they could go out to eat and get some groceries. When the cab arrived, complainant's wife got in the front seat and complainant started toward the cab but stopped to talk to the reverend from whom they were going to rent. They were in the process of moving on the date in question. Complainant's wife states that complainant was taking approximately four to five minutes talking to the reverend during which time Mr. Woodburn became quite angry and began complaining why did they call the cab if they were not ready to go. When complainant got in the car his wife informed him that Mr. Woodburn was upset about waiting on him, at which point complainant offered to pay extra for having to wait on him. Mr. Woodburn replied, "I don't have all God Damn day." "I'm not putting up with this." Mr. Woodburn jerked the car to a stop and got out and snatched open complainant's door. Mr. Woodburn said something to the effect of, "I'm not putting up with this God Damned Shit. Get out, I don't like God Damned Niggers anyway. Get out of my cab right now." Tr. Pages 6-10, and 30-35.

4. Both complainant and his wife stated that although Mr. Woodburn had not refused to give them rides in the past, he was nevertheless unfriendly toward them in his demeanor in contrast to that of the other cab drivers with whom they had ridden. Mrs. Higginbotham stated, "He was very nasty at times he came to get us. He was very arrogant.

He seems to always have an attitude when we got in the cab before.” Complainant recalled that, “I had ridden with him before, and he wasn’t like most of the other drivers are, that I’m affiliated with, we have a good time. But he was moody when I first rode with him. There was times he’d look like he’d be upset about something.” Tr. Pages 16, 17, 24 and 44.

5. Mr. Woodburn’s version of events differs quite markedly from that of complainant and his wife. He believes he waited for eight minutes while complainant talked with the reverend and that he did not speak with Mrs. Higginbotham or make any comments about the wait. He states that there was another couple in the cab, a man and a woman who were sitting in the back of the cab when complainant approached to get in the front seat with him. He thinks one of the other passengers was later identified to him as Mrs. Higginbotham’s son. His version includes a claim that complainant was cursing about he was going to pay and that he was going to get in the cab and that when he told complainant that he would have to stop cursing or he could not ride in the cab, Mrs. Higginbotham then said O.K. then we will all get out. Tr. Pages 78-82.

6. The testimony of Mr. Woodburn was deemed by the undersigned to be less credible. Besides the opportunity to observe the demeanor of the respective witnesses, I would note that it seems not credible that Mr. Woodburn would patiently wait for eight minutes without any comment or conversation with the people seated in his cab. Further, Mr. Michael Parnicza, a former driver with the respondent, who was familiar with complainant and his wife testified credibly, that they were congenial and not a problem.

That they were never verbally abusive and that they never cursed. Mr. Woodburn testified that Mrs. Higginbotham's son, may have been one of the "other" passengers he alleges were in the cab that day. Yet, he is quite detailed in his memories of Mrs. Higginbotham's son when relating an earlier incident involving his refusal to take Mrs. Higginbotham's son because he states he was too inebriated. Tr. Pages 64, 65, 92, 97 and 98.

7. Mrs. Higginbotham called the respondent's owner, Mr. Sobota, and related their complaints about the refusal of service to him either the next day or two days later. She discussed the matter with him and he indicated that he would talk to Mr. Woodburn and call her back. He did not call her back, however. Mr. Michael Sobata, Jr. owns the respondent cab company in Moundsville as well as one in Wheeling, West Virginia. He talked to Mrs. Higginbotham and then with Mr. Woodburn. He tried to call Mrs. Higginbotham back but could not reach her. Later that afternoon he had a long conversation with the president of the Wheeling NAACP, Mr. Galloway; and the upshot was that he thought Mr. Galloway would talk to the complainant and get back in touch with him. When he did not Mr. Sobata assumed everything was O.K. Tr. Page 11, and 103-104.

8. Mr. Sobata testified about other incidents when he had received complaints about Mr. Woodburn. In one instance, Mr. Woodburn had asked that a young lady leave his cab when she used foul language in the presence of he and a young couple with their infant. In that instance, Mr. Sobata interviewed everyone concerned and concluded after talking to the young couple that, Mr. Woodburn had acted appropriately and that they had appreciated

his handling of the situation as they had been offended. In another instance, Mr. Sobata had to talk to a young women in a wheel chair and her parents, after she became upset, when Mr. Woodburn followed her into the hospital and asked to borrow their disinfectant/deodorant because his cab stank. Mr. Sobata was satisfied that Mr. Woodburn had done nothing wrong when the girl admitted that Mr. Woodburn did not state that she stank, but rather only that his cab stank. The undersigned finds that Mr. Sobata did not investigate the complaints of the complainant in the same manner, and that he never spoke directly with the complainant about what he alleged occurred. At no time had the Higginbothams ever told Mr. Sobata that Mr. Galloway was representing them in the matter. Even though this may have been inadvertent due to Mr. Galloway's involvement, it was a departure from the normal fashion in which he had handled similar complaints about Mr. Woodburn, and the mere fact that he had not heard back from Mr. Galloway, does not explain why he would not have been curious enough about the matter to call either the complainant or Mr. Galloway when he did not hear back. Tr. Pages 107-109, 112 and 113.

9. Mr. Sobata testified credibly that he has several African American drivers working for his Wheeling cab company, and that he would fire any driver who refused to carry a passenger because they were African American. Tr. Pages 102 and 110.

10. Complainant was upset and angry about what had occurred. He went to eat and told his wife, "We have to deal with this. Well, we will never ride in a cab again, that's all there is to it." Complainant stated, "Basically this hurt me. This hurt me because I'm a man

just like he is. Don't talk to me that way. I'm paying hard earned money to receive service."

Tr. Pages 36 and 60.

B.

Discussion

To prove a prima facie case of discrimination in places of public accommodation, the complainant must prove the following elements:

1. that the complainant is a member of a protected class;
2. that the complainant attempted to avail himself 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. K-Mart Corp. V. Human Rights Commission, 383 S.E.2d 277, at 281 (W.Va. 1989).

Once the complainant has established a prima facie case of discrimination, the burden shifts to the defending place of public accommodation to demonstrate a legitimate and non discriminatory reason for their action sufficient to overcome the inference of discriminatory intent. If the respondent is successful in rebutting the prima facie case of discrimination, the complainant then has the opportunity to show that the reason given by the respondent was merely a pretext for a discriminatory motive. K-Mart Corp., Supra, Id.

Respondent cites the Paxton v. Crabtree, 400 S.E.2d 245, syllabus point 8 (W.Va. 1990) for the proposition that "an employer will not be liable for the discriminatory acts of

its employees unless he knew or reasonably should have known of the discriminatory acts and did nothing to correct them or expressly or impliedly authorized or ratified them.” In Paxton, the Court cited with approval the holding of Totem Taxi v. N.Y. State Human rights A. Bd., 480 N.E.2d 1075, at pages 1077 and 1078 (N.Y. 1985) that “the employer cannot be held liable for an employee’s discriminatory act unless the employer became a party to it by encouraging, condoning or approving it...it cannot be rationally concluded under the present statute that an employer has been guilty of discrimination whenever any employee at any level commits, out of personal pique, a disapproved and unanticipated discriminatory act.” While the undersigned does not believe such a holding is appropriate in the context of the public accommodation case as it would render the West Virginia Human Rights Act toothless under such circumstances, nevertheless, even applying this standard, the undersigned believes there are sufficient acts of condonation by Mr. Sobata in light of the fact that it would be reasonable of Mr. Sobata to have concluded that Mr. Woodburn did in fact engage in discriminatory outrageous behavior toward the complainant, and that he failed to ever even speak to both the complainant and Mrs. Higginbotham face to face about this incident, thus in essence condoning it by his denial that it was a problem. Mr. Sobata displayed a pattern of condoning Mr. Woodburn’s action in an earlier incident with the girl in a wheelchair, and should have been on alert to the potential for Mr. Woodburn to be offensive. Simply because the girl stated that Mr. Woodburn did not say she stunk up the cab, does not explain away her inference that Mr. Woodburn was accusing her of stinking

up his cab. Furthermore, it would appear that Mr. Sobata was more interested in sticking up for his driver and smoothing ruffled feathers than investigating the validity of the complaints. His readiness to accept any explanation Mr. Woodburn puts forth without ever talking to the complainant about his allegations, seems to be condonation of those acts. Accepting Mr. Sobata's rationale, whenever anyone were to complain of Mr. Woodburn's discriminatory and outrageous behavior, there is simply no way for him to verify that it is true because it will be his word against that of the complainant. How will Mr. Sobata ever get to the point where his policy will be implemented, and any cab driver who refused to give service on the basis of race be fired, if he is so willing to simply accept Mr. Woodburn's version of events whenever someone complains of his behavior.

The undersigned concluded that the weight of the evidence establishes that Mr. Woodburn denied service to the complainant and his wife because of the race of the complainant. His prior behavior toward the complainant and his wife evidenced an innate hostility toward them that the undersigned believes to be based upon the fact that there is an interracial marriage between complainant and his wife. The fact that his anger on this particular day was fueled by some trivial incident requiring him to wait for Mr. Higginbotham to speak with his preacher, is simply not relevant to the fact that race seems to be the motivating factor that caused his predisposition to hostility toward the complainant. When Mr. Sobata neglected to speak face to face with complainant about this incident, whether because he was too busy or forgot or thought the matter was resolved, he ratified

and condoned the behavior of his driver. Mr. Sobata was never informed that the NAACP spoke for complainant, and thus the reliance on Mr. Galloway for resolution of the matter was racially discriminatory to the extent he varied from his own standard policy of personally speaking to customers who made complaints in the past. There simply is no excuse for not having followed up with Mr. Galloway or complainant when he did not hear back.

Clearly the complainant was humiliated by the experience and was upset to the point that he even considered adopting a policy of not riding in taxis in the future. The undersigned finds that complainant is entitled to an award of incidental damages in the amount of \$3,277.45, for humiliation, embarrassment and emotional and mental distress and loss of personal dignity. Pearlman Real Estate Agency v. West Virginia Human Rights Commission, 161 W. Va. 1, 239 S.E.2d 145 (1977). A cap on incidental awards for a non jury trial is set at \$3,277.45 in cases before the Human Rights Commission as adjusted to conform to the consumer price index pursuant to the West Virginia Supreme Court's decision in Bishop Coal Company v. Salvers, 181 W. Va. 71, 380 S.E.2d 238 (1989).

C.

Conclusions of Law

1. Complainant, Roy A. Higginbotham, Jr., is an individual claiming to be aggrieved by an unlawful discriminatory practice and is a proper complainant for the purposes of the West Virginia Human Rights Act, WV Code § 5-11-10.

2. Respondent, Yellow Cab Company, is and was at all times relevant hereto, a “place of public accommodation” defined by the West Virginia Human Rights Act, WV Code §§ 5-11-3(j).

3. The complaint in this matter was timely filed pursuant to WV Code § 5-11-10.

4. The West Virginia Human Rights Commission has jurisdiction over the parties and the subject matter of the complaint.

5. The complainant has established a prima facie case of race discrimination in that he has shown that he is a member of a protected class; that he attempted to avail himself of the “accommodations, advantages, privileges or services” of a place of public accommodation; and, that the “accommodations, advantages, privileges or services” were withheld, denied or refused to the complainant.

6. The respondent has articulated a legitimate non discriminatory reason for the refusal to provide services; which the complainant has proven by a preponderance of the evidence to be pretext for unlawful race discrimination by the respondent.

7. The complainant has suffered humiliation, embarrassment, emotional distress and loss of personal dignity as a result of respondent’s unlawful discrimination.

D.

Relief and Order

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** that:

1. The respondent named hereinabove shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of the receipt of the undersigned's order, the respondent shall pay the reasonable costs incurred in the prosecution of this matter, in the amount of \$339.25 to the West Virginia Human Rights Commission for hearing transcript costs and \$299.67 in travel expenses to the Civil Rights Division of the Attorney General's Office.

3. Within 31 days of receipt of the undersigned's order, the respondent shall pay the complainant incidental damages in the amount of \$3,277.45 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination, plus statutory interest of ten percent.

6. In the event of failure of the respondent to perform any of the obligations hereinbefore set forth, complainant is directed to immediately so advise the West Virginia Human Rights Commission, Norman Lindell, Deputy Director, 1321 Plaza East, Room 108-A, Charleston, West Virginia 25301-1400, Telephone: (304) 558-2616.

It is so Ordered.

Entered this 22nd day of October, 1999.

WV HUMAN RIGHTS COMMISSION

BY RBW
ROBERT B. WILSON
ADMINISTRATIVE LAW JUDGE