COPY

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
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Quewanncoii C. Stephens
Executive Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

November 13, 1990

Mary L. Gray
126 Rhodes St.
Beckley, WV 25801

Beckley's Nite Spot
2106 S. Fayette St.
Beckley, WV 25801

Johanna Spade
200 Hunt Ave.
Beckley, WV 25801

Mary C. Buchmelter
Asst. Attorney General
L & S Bldg. - 5th Floor
812 Quarrier St.
Charleston, WV 25301

Re: Gray v. Beckley Nite Spot
PAR-72-87

Dear Parties:

Enclosed, please find the final decision of the undersigned hearing examiner in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the hearing examiner's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all

matters alleged to have been erroneously decided by the examiner, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the hearing examiner shall not operate as a stay of the decision of the hearing examiner unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the hearing examiner, or an order remanding the matter for further proceedings before a hearing examiner, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a hearing examiner, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the examiner on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the hearing examiner's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a hearing examiner's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the examiner's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,

Gail Ferguson
Hearing Examiner

GF/mst

Enclosure

cc: Quewanncoii C. Stephens, Executive Director
Glenda S. Gooden, Legal Unit Manager
[redacted]

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

MARY L. GRAY,

Complainant,

v. DOCKET NUMBER(S): PAR-72-87

BECKLEY NITE SPOT AND
JOHANNA SPADE,

Respondent.

HEARING EXAMINER'S FINAL DECISION

A public hearing, in the above-captioned matter, was convened on March 22, 1990, in Raleigh County, at the West Virginia Health and Human Resource Center, Beckley, West Virginia, before Gail Ferguson, Hearing Examiner.

The complainant, Mary L. Gray, appeared in person and by counsel, Kim Farha, Assistant Attorney General. The respondent, Beckley Nite Spot, appeared by its manager, Johanna Spade.

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 the 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 hearing examiner and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findin

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.

FINDINGS OF FACT

1. The complainant, Mary L. Gray, is a black female.

2. The respondent, Beckley Nite Spot, was a night club establishment located at South Fayette St., Beckley, West Virginia.

3. The respondent, Johanna Spade, was the co-manager of the Beckley Nite Spot.

4. The complainant, on Mother's Day, May, 1986, accompanied by her friends Hollis Watts, Teresa Radford and Perry Price, patronized the respondent's business establishment.

5. Hollis Watts is a black male. Teresa Radford and Perry Price are both white.

6. The complainant was not a club member of the Beckley Nite Spot.

7. Hollis Watts, Teresa Radford, and Perry Price were not members of the Beckley Nite Spot.

8. Mother's Day, 1986, was the first time complainant had ever been in respondent's establishment.

9. The respondent did not collect a cover charge and only required complainant and her three friends to sign the guest book.

10. The complainant and her boyfriend, Hollis Watts, were the only blacks in the Beckley Nite Spot on this occasion.

11. A patron asked Hollis Watts his name, and after Mr. Watts replied "Hollis" the patron stated, "What kind of name is that for a nigger?"

12. A racially derogatory record the respondent had purchased and placed on her jukebox entitled "She Ran Off With a Nigger" was played.

13. The patrons in the bar started singing with the song, yelling racial epithets such as "Yee hi, niggers," laughing, cheering and having fun with the song.

14. Many patrons started snickering and pointing at the complainant's table.

15. Although the respondent apologized to the complainant when she objected to the playing of the record, the respondent did not attempt to calm the crowd or to eject the record from the jukebox.

16. The complainant was offended and outraged by the record and by the racial harassment she experienced while in respondent's establishment.

17. The complainant protested her treatment and was thereupon asked to leave the premises with her friends, by the respondent.

18. The respondent refunded complainant's white companions the money they had expended for their drinks but refused to refund the money for complainant's and her companion's drinks.

19. The respondent did not ask white patrons who harassed and harangued the complainant to leave the premises.

20. The respondent, Johanna Spade, stated that on a given night there were probably as many non-members in the night club as there were members.

21. The respondent acknowledged that the record she purchased "could be" racially offensive but maintained that it was played "all in fun"; that it was a "money maker"; and that "Lots of people came in just to hear the song."

DISCUSSION

Jurisdiction

The West Virginia Human Rights Act at Code §5-11-3(j) defines a place of public accommodation as "any establishment or person, as defined hereon, including the state, or any political or civil subdivision thereof, which offers its services, goods, facilities or accommodations to the general public, but shall not include any accommodations which are in their nature private."

Respondent claims that it is a private club and hence exempt from the jurisdiction of the West Virginia Human Rights Act. In asserting this defense, respondent offers the following rationale: "Any club that sells liquor in the State of West Virginia is a private club."

Complainant submits that while respondent's establishment may be regarded as a "private club" for one purpose under the law (liquor licensing) that circumstance does not mean that it qualifies as an

accommodation which is in the nature private. a private club under the West Virginia Human Rights Act.

The West Virginia Supreme Court of Appeals has not specifically addressed the issue of what is meant by the exemption provided under the Act for "...accommodations which are in their nature, private." Nor has the court passed on the relationship of WV Code §5-11-3(j) to the private club exemption provided at WV Code §5-11-19.[1/] However, when faced with questions regarding interpretation of the West Virginia Human Rights Act, the West Virginia Supreme Court of Appeals has looked, in the absence of state precedent, to decisions of sister states and to cases construing federal civil rights statutes. Under these conditions, the nearest analogy can be drawn by looking to federal cases analyzing the concept of private clubs.

Reliance on federal case law warrants recalling, that during the 1960's and early 1970's, the federal courts were deluged with lawsuits against discriminatory establishments claiming to be "private clubs" and therefore exempt from the Civil Rights Act of 1964. During this era of stubborn resistance to desegregation, particularly in the Deep South, the federal courts embraced a pragmatic totality of the circumstances test for determining whether an establishment is indeed a bona fide private club. Construction &

[1/] Although the court found in Shepherdstown Volunteer Fire Dept. v. West Virginia Human Rights Commission, 309 S.E.2d 342 (WV 1983), that a volunteer fire department constituted a public accommodation, it was the fire department's statutory regulation and public funding which the court looked to in reaching a determination that the fire department was a "quasi-governmental body," providing services to the general public and thus a "place of public accommodation."

Application of §201(e) of the Civil Rights Act of 1964, Excluding from the Act's Coverage Private Clubs and Other Establishment Not in Fact Open to the Public, 8 ALR Fed. 634 (1969).

Based on federal precedent, the starting point in the commission's analysis is to recognize that respondent, as the party claiming an exemption from the Human Rights Act, bears the burden of proving that it truly operates a private club. Nesmith v. YMCA, 397, F.2d 96 (4th Cir. 1968); United States v. Richberg, 398 F.2d 523 (5th Cir. 1986); Wright v. Cork Club, 315 F. Supp. 1143 (S.D. Tex. 1970); United States v. Jordan, 302 F. Supp. 370 (E.D. La. 1969).

There are peculiar policy considerations and rules of statutory construction which apply whenever a court construes remedial legislation such as the West Virginia Human Rights Act. Specifically, coverage of the Act must be construed broadly and any exemptions to the statute, conversely, must be construed narrowly.[2/] Frank's Shoe Store v. West Virginia Human Rights Commission, 365 S.E. 2d 251 (1986) (Human Rights Act must be construed broadly to effectuate policies enunciated in WV Code §5-11-2 & 15); Ouijano v. University Federal Credit Union, 617 F.2d 129 (5th Cir. 1980) (term "employer" under Title VII must be

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2/ This rule is followed by all courts in interpreting and applying exemptions to broad, remedial legislation. Brennan v. Valley Towing Co., 515 F.2d 100 (9th Cir. 1975) (exemptions to Fair Labor Standards Act must be construed narrowly). Under these circumstances, respondent's resort to generic rules of statutory construction, rather than the rules of construction relating to remedial legislation, is inappropriate.

given a broad construction); Baker v. Stuart Broadcasting Co., 560 F. 2d 389 (8th Cir. 1977).

In the case at bar, the only evidence that respondent has offered in support of its claim to private club status is testimony of respondent/owner Johanna Spade that it is a club "that sells liquor in the State of West Virginia and therefore a private club." This commission's task, therefore, is rather simple in that respondent's testimony about selling liquor is insufficient as a matter of law to prove that its establishment is a bona fide private club. Indeed, had respondent proffered the liquor license of the Beckley Nite Spot in evidence of its position, it would still be inadequate. Wright v. Cork Club, 315 F. Supp. 1143 (S.D. Tex. 1970). In Wright, a racially segregated club advanced the argument that its liquor license issued pursuant to Texas' liquor law established that it was a true private club. The court forcefully rejected the club's claim to private club status.

The court in Wright examined several variables which evolved into certain "minimum standards," for determining private club status which include:

(1) whether the club has established machinery to screen applicants for membership; Tillman, supra; Wright v. Salisbury Club, supra; and Wright v. Cork Club, supra;

(2) whether the club limits the use of its facilities and services strictly to members and bona fide guests of members; Wright v. Cork Club, supra; Cornelius v. BPOE, 382 F. Supp. 1182 (D. Conn. 1974); Williams v. Rescue Fire Co. 254 F. Supp. 556 (D. Md. 1966); United States v. Trustees of the Fraternal Order of Eagles,

472 F. Supp. 1174 (E.D. Wis. 1979); United States v. Jack Sabin's Private Club, 265 F. Supp. 90 (E.D. La. 1967);

(3) whether the organization is controlled by the membership either in the form of general meetings or some other organizational form; Depaul, supra; Wright v. Cork Club, supra; Cornelius, supra;

(4) whether the organization is profit or non-profit; Wright v. Cork Club, supra; Williams, supra; Cornelius, supra;

(5) whether publicity is directed solely to members for their information and guidance; Wright v. Cork Club, supra;

(6) whether the organization is a club in the ordinary sense of the word; Daniel v. Paul, 395 U.S. 298 (1969).

Utilizing the above minimum standards enunciated by the various federal courts, it is clear that respondent does not meet the minimum standards of a "truly private club" as developed by the federal courts and applied by the EEOC. In our case, respondent, Beckley Nite Spot, has failed to prove any guidelines for screening applicants for membership to its night club. The evidence shows the only requirement to enter into the establishment was for the individual to sign the guest book.

The respondent consistently failed to limit the use of its facilities and services strictly to members and bona fide guests of members. The evidence reveals that the complainant and her three friends were not even members of the respondent's establishment, and without the benefit of being a guest of a member, were admitted into the establishment. Teresa Radford testified that she patronized respondent's establishment on prior occasions, although she was never

a member. The testimony of respondent, Johanna Spade, reflects the sham of the business concerning membership, since she admitted that many people were admitted to the club just by knowing an employee of the respondent, without any membership, and corroborates the fact that the club was accessible to people who were not members or bona fide guests of members. It defeats the purpose of a private club to allow the indiscriminate use of club facilities by non-members on a regular basis.[3/] Wright v. Cork Club, supra. The respondent produces no evidence that gives any indication that members were permitted to have any control over the operation or organizational formalities of the club. There is no testimony supporting whether the membership of the club scheduled general meetings to formulate the policies of the club. An organization hardly meets the definition of a private association where the members do not meet together. Wright v. Cork Club, supra, at 1152; Nesmith v. YMCA, 397 F.2d at 102. The respondent was a business establishment in operation solely as a private-making source. If a club is a commercial enterprise operated for the benefit of one person or a small group, the private club status is not met. Wright v. Cork Club, supra.

Finally, it is determined that respondent's argument that the issuance of a liquor license defines its status as "private club" under WV Code §60-7-2, is critically flawed. First, the liquor commissioner's determination is rendered in a non-adversarial setting.

3/ see note 54 Geo. L.J. 915, 923-24 (1966).

and does not purport to be a binding, adjudicatory decision which would satisfy the requirement for invoking the rule of collateral estoppel in future legal proceedings. Conley v. Spiller, 301 S.E.2d 216 (WV 1983). Second, the Liquor Commissioner has a vested interest in construing West Virginia's liquor licensing statute broadly for licensing purposes. Such a construction minimized revenue for the state.

Moreover, in Wright v. Cork Club, supra, at 1153, the court stated that, even if the Court Club qualified as a "private club" under the Texas Liquor Control Act, it is not persuasive with regard to the Civil Rights Act. Thus, the respondent's qualifications as a private club should be determined by the six minimum standards listed above. Under those standards, respondent is a place of public accommodation.

Consideration of the Merits

The West Virginia Human Rights Act provides in pertinent part that:

> [I]t shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation to:
>
> [r]efuse, withhold from and deny to any individual because of his race, religion, color, national origin, ancestry, sex, age, blindness or handicap, either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of such place of public accommodations.... (WV Code §5-11-9 (a)(6)(A).

The West Virginia Supreme Court of Appeals in its recent decision. K-Mart Corp. v. West Virginia Human Rights Commission, 383 S.E.2d 277 (WV 1989) addressed the elements the complainant must prove in order to establish a prima facie case of discrimination in a place of public accommodation. They are:

(a) that the complainant is a member of a protected 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.

The complainant's prima facie case can be rebutted if the respondent presents a nondiscriminatory reason for the action in question sufficient to overcome the inference of discriminatory intent.

The complainant may still prevail if it can be shown that the reason given by the respondent is merely a pretext for a discriminatory motive.

It should be noted that the court in K-Mart recognized the dirth of decisional law in West Virginia dealing with public accommodation discrimination, however, the scheme of proof as contained therein, can be applied with some adaptation to the facts at hand.

Two elements of the complainant's prima facie case are undisputed; namely, her protected class membership; and complainant's attempt to avail herself of respondent's facility and services on Mother's Day, in 1986. Development of the final prima facie element

is more circumspect. Although the evidence of record reveals that the complainant and her companions were "admitted" to respondent's establishment, the sequence of events from that point forward demonstrate, convincingly, that, in fact, respondent's accommodations, services and privileges were refused, withheld and denied her.

The record reveals that, shortly after complainant and her party were seated and served drinks, complainant's companion, Hollis Watts, was subjected to racially derogatory remarks by one of respondent's other patrons, who asked him his name and then commented "What kind of name is that for a nigger?"

The evidence of record further reveals that respondent's manager, Johanna Spade, had previously purchased a racially derogatory phonograph record entitled "She Ran Off with a Nigger," which admittedly she knew could be offensive to blacks and placed it on respondent's jukebox.

Credible testimony further establishes that Ms. Spade knowingly permitted the playing of the record while the complainant and her party were present; and also knowingly permitted other patrons to humiliate and embarrass the complainant and her companions by allowing the song to play, thereby inciting even more patrons to yell racial epithets at the complainant, such as "Yee hi, niggers", and to cheer, laugh, point and snicker at complainant's table. The evidence reveals that, when the complainant expressed displeasure and outrage with this racially charged atmosphere, the respondent requested that the complainant and her party leave to avoid trouble.

Restated, the very narrow issue presented here is whether complainant's subjection to a racially hostile environment at respondent's place of public accommodation is tantamount to a denial or refusal by the respondent of the advantages, privileges or services of its establishment to the complainant under the West Virginia Human Rights Act.

Borrowing from the area of employment discrimination law, there are a myriad of cases in both state and federal forums involving claims of racially hostile environments in the workforce. The first case to recognize a cause of action based upon a discriminatory work environment was Rogers v. EEOC, 454, F.2d 234 (5th Cir. 1971). In Rogers, the court held that a claimant could establish a Title VII violation by showing that the employer created and condoned a work environment charged with racial discrimination. Subsequently, several jurisdictions have refined that holding, finding that in order to sustain a racially hostile environment claim, the employee must show that the alleged racial harassment constituted an unreasonably abusive or offensive environment; and that the employer tolerated or condoned the situation. Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985).

Applying these standards to the case at bar, complainant has established that the harassment she experienced was racially abusive and offensive, and that respondent's manager tolerated and condoned the situation. Significantly, the complainant has also demonstrated that respondent's manager directly foresaw, contributed and encouraged this racially volatile environment, in itself, a direct contravention of WV Code§5-11-9(a)(9)(A) which makes it unlawful

"...For any person...to:...aid, abet [or] incite...any person to engage in...unlawful discriminatory practices...." The complainant has established a prima facie case.

The respondent's reasons for its actions were articulated by respondent as follows: Respondent's manager, Johanna Spade, testified that the phonograph record was purchased and placed on the jukebox as a money maker and to draw patrons, and that the record was played on the night in question "for fun." According to Ms. Spade, the complainant became loud and disruptive, making a "ruckus" when the song came on, and, therefore, she and her companions were asked to leave to avoid any trouble.

Respondent's rationale is disconcertedly discriminatory on its face. However, if, by some stretch of logic, its legitimacy could be argued, the complainant has established respondent's reasons to be pretextual. The evidence of record reveals that the respondent knew the record she purchased could be offensive to blacks and that it was in fact offensive and objected to by the complainant. Unrebutted evidence also reveals that white patrons who were harassing and targeting racial epithets and slurs at the complainant and her companion, the only blacks in the club, were not asked to leave.

The complainant has clearly and convincingly established by a preponderance of the evidence that she was discriminated against by the respondent, in violation of the West Virginia Human Rights Act.

While it may be argued that it is a lofty goal to seek to eradicate all racially motivated conduct or racial animus in establishments such as respondent's, constitutional considerations aside; it is clear, that under the West Virginia Human Rights Act, an

owner or agent of said place of public accommodation is required affirmatively to take action to mitigate said activity and to ensure that equal access, privileges and services are offered in a nondiscriminatory manner. Respondent's actions in this case, rather than to mollify, were undisputedly calculated and designed to encourage a racially charged atmosphere and to effectively deny to the complainant her statutorily created rights.

CONCLUSIONS OF LAW

1. The complainant, Mary L. Gray, is an individual aggrieved by an unlawful discriminatory practice, and is a proper complainant under the West Virginia Human Rights Act, WV Code §5-11-10, and the Rules and Regulations Pertaining to Practice and Procedure before the West Virginia Human Rights Commission.

2. The respondent, Beckley Nite Spot, is a place of public accommodation as defined by WV Code §5-11-3(j) and is subject to the provisions of the West Virginia Human Rights Act.

3. The respondent, Johanna Spade, is the manager of the Beckley Nite Spot and is a proper respondent for the purposes of unlawful discriminatory practices in a place of public accommodations.

4. The respondent, Johanna Spade, is the manager of the Beckley Nite Spot and is a proper respondent for the purposes of aiding and abetting in unlawful discriminatory practices as defined by WV Code §5-11-9(a)(9)(A).

5. The complaint in this matter was properly and timely filed in accordance with WV Code §5-11-10.

6. The West Virginia Human Rights Commission has proper jurisdiction over the parties and the subject matter of this action pursuant to WV Code §5-11-9 et seq.

7. Complainant has established a prima facie case of race discrimination.

8. The respondent has not articulated legitimate nondiscriminatory reasons for its action toward the complainant.

9. The reasons articulated by respondent have been shown by the complainant to be pretext for discrimination.

10. As a result of the unlawful discriminatory action of the respondent, the complainant is entitled to an award of incidental damages in the amount of $2,500.00 for the humiliation, embarrassment and emotional and mental distress and loss of personal dignity.

RELIEF AND ORDER

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

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

2. Within 45 days of receipt of this decision, the respondent shall pay to complainant incidental damages in the amount of $2,500.00 for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondent's unlawful discrimination.

3. The respondent shall pay ten percent per annum interest on all monetary relief.

It is so ORDERED.

Entered this 9th day of November, 1990.

WV HUMAN RIGHTS COMMISSION

BY _____
GAIL FERGUSON
HEARING EXAMINER