



**STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**WV HUMAN RIGHTS COMMISSION**

**1321 Plaza East**

**Room 104/106**

**Charleston, WV 25301-1400**

**GASTON CAPERTON**  
GOVERNOR

**TELEPHONE 304-348-2616**

**Quewanncoii C. Stephens**  
Executive Director

March 28, 1990

Cathy L. Beatty  
2063 Hutchinson St.  
#238  
Charleston, WV 25312

The Country's Best Yogurt  
108 Hills Plaza  
Charleston, WV 25312

Charles E. Pettry, Jr., Esq.  
Goodwin & Pettry  
209 Ruffner Ave.  
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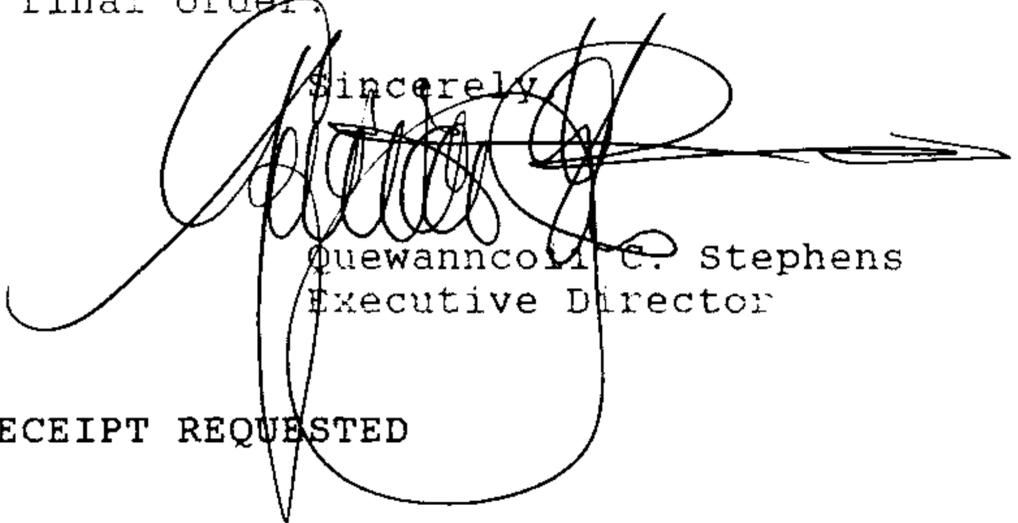
Mike Kelly  
Deputy Attorney General  
812 Quarrier St.  
L & S Bldg. - 5th Floor  
Charleston, WV 25301

Re: Beatty v. The Country's Best Yogurt (TCBY)  
ER-13-88

Dear Parties:

Herewith, please find the final order of the WV Human Rights Commission in the above-styled and numbered case. Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective July 1, 1989, any party adversely affected by this final order may file a petition for review with the Kanawha County Circuit Court within 30 days of receipt of this final order.

Sincerely,

  
Quewanncoii C. Stephens  
Executive Director

Enclosures

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

## 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 Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., 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, landlord, etc., against whom a complaint was filed. If the appeal is granted to a non-resident of this state, the non-resident 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 Section 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CATHY L. BEATTY,

Complainant,

v.

DOCKET NO. ER-13-88

THE COUNTRY'S BEST YOGURT, INC.,

Respondent.

FINAL ORDER

On 10 January 1990 the West Virginia Human Rights Commission reviewed the Proposed Order and Decision filed in the above-styled matter by hearing examiner, Theodore R. Dues, Jr. After consideration of the aforementioned, and the exceptions filed in response thereto by respondent, the Commission decided to, and does hereby, adopt said Proposed Order and Decision, encompassing the Findings of Fact and Conclusions of Law therein, as its own, with modifications and amendments as set forth below:

1. In the subsection entitled "Proposed Order," paragraph 1 is modified to read:

"Back pay in the amount of \$7,013.44."

2. In the subsection entitled "Proposed Order," paragraph 2 is modified to read:

"Incidental damages in the amount of \$2,500 for emotional and mental anguish suffered by complainant as a result of respondent's unlawful discriminatory practice."

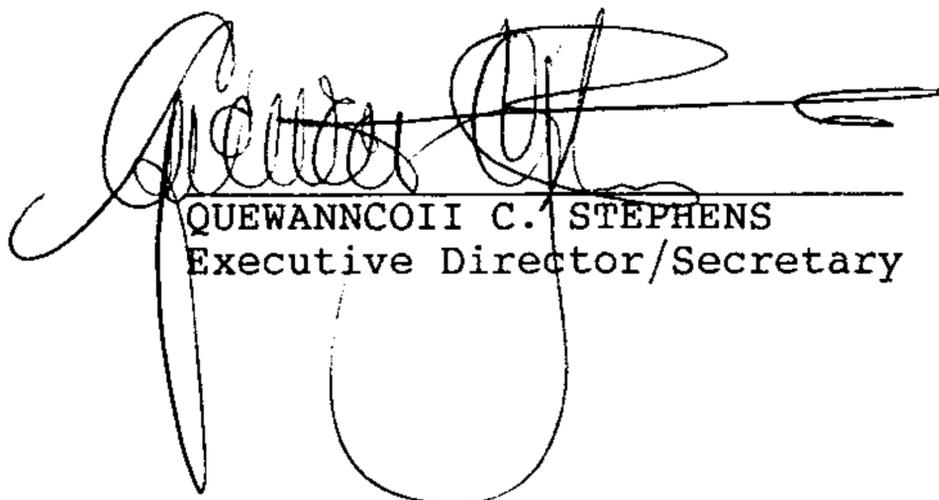
It is, therefore, the Order of the Commission that the hearing examiner's Proposed Order and Decision, encompassing his Findings of Fact and Conclusions of Law, and including his Supplemental Order regarding back pay, be attached hereto and made a part of this Final Order, except as amended by this Final Order.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and to the Secretary of State of the State of West Virginia, the parties are hereby notified that they have ten days to request a reconsideration of this Final Order and that they may seek judicial review.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 22<sup>d</sup> day of March, 1990, in Charleston, Kanawha County, West Virginia.

  
QUEWANNCOII C. STEPHENS  
Executive Director/Secretary

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

RECEIVED

KATHY A. BEATTY,

Complainant,

MAR 10 1989

v.

DOCKET NO: ER-13-88<sup>WV HUMAN RIGHTS COMM.</sup>  
Answered \_\_\_\_\_

MARTIN'S THE COUNTRY'S BEST YOGURT,

Respondent.

EXAMINER'S RECOMMENDED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

This matter matured for public hearing on December 13, 1988. The hearing was held in the Conference Room at the West Virginia Human Rights Commission, Charleston, Kanawha County, West Virginia. The hearing panel consisted of Theodore R. Dues, Jr., Hearing Examiner. The presence of a Hearing Commissioner was previously waived by the parties. The Complainant appeared in person and by her counsel, Kelli Talbott. The Respondent appeared by its representative, Russell L. Martin, II and by its counsel, Charles E. Pettry.

After a review of the record, any exhibits admitted in evidence, any stipulations entered into by the parties, any matter for which the Examiner took judicial notice during the proceedings, assessing the credibility of the witnesses and weighing the evidence in consideration of the same, the Examiner makes the following findings of fact and conclusions of law. To the extent that these findings and conclusions are generally consistent to any proposed findings of fact and conclusions of law submitted by the

parties, the same are adopted by the Examiner, and conversely, to the extent the same are inconsistent to the findings and conclusions, the same are rejected.

#### ISSUES

1. Did the Respondent discriminate against the Complainant, as indicated, on the basis of her race in the terms and conditions of her employment?

2. If so, to what relief is the Complainant entitled?

#### FINDINGS OF FACT

1. The Complainant was employed by the Respondent from September 1986 to June 1987.

2. The Complainant's initial position was that of cashier. She averaged 38 to 39 hours per week and worked at the Patrick Street store.

3. During this period of time, the store was owned by a Mr. Coley. In May 1987, the Patrick Street and the South Charleston stores were purchased by Russell Martin, II.

4. The Complainant was promoted to shift supervisor in April 1987. At that time she worked at the Patrick Street store from 9:00 to 3:00 p.m. and then went to the Court Street store where she supervised from 3:00 p.m. to closing.

5. Doug Harl was the manager of the Patrick Street

store.

6. On one occasion, Harl had informed the Complainant that if she quit her job at Hills that she could become a supervisor, and, if she was interested in relocating, that she would be made a manager in the Huntington store. As a result of this arrangement, Doug Harl required the Complainant to work back and forth between the two stores to prove that she could become supervisor or trained to be manager.

7. The Complainant was the only employee required to work back and forth between the stores.

8. During the first of May, the Complainant was placed on day shift by Ruby Harl, another manager, and assigned to the Court Street store.

9. The Complainant had requested this consideration to reduce the amount she had to pay for day care and babysitting.

10. The Complainant was performing this function when Russell and Barbra Martin purchased the Court Street and Patrick Street Stores from Coley and his partners.

11. During this time, the Complainant was earning Three Dollars and Sixty Cents (\$3.60) per hour.

12. Due to their inexperience in the yogurt industry, the Martins' relied upon the Harls for day to day operations and management of the stores.

13. Shortly after being placed on the schedule as the day supervisor, the Complainant was approached by Ruby

Harl and requested to assume some evening responsibilities for the purpose of accommodating Nina Elliott, another shift supervisor.

14. Nina Elliott is a white female, who at the time, had been employed by the Respondent for approximately 4 to 5 weeks; a much lesser period of time than the Complainant.

15. The Complainant was reluctant, for the aforementioned personal reasons, to assume evening shift responsibilities. However, Ruby Harl gave the Complainant the ultimatum of assuming some evening shift responsibility or taking a demotion to cashier at reduced pay.

16. The Complainant felt she had no choice and took the demotion and worked at the Court Street store as a cashier, at a reduced rate of pay. Subsequent to this, Ruby Harl reduced the Complainant's working hours.

17. The Complainant spoke with Martin, regarding her demotion and the reduction of the working hours.

18. Martin's position was that the Harls' ran the stores and essentially what they said went.

19. After this meeting, the Complainant was advised by Ruby Harl that if she wished to realized 40 hours of work a week she would have to return to the Patrick Street store. Accordingly, the Complainant returned to the Patrick Street store in the position of cashier on the day shift. Her rate of pay at the Patrick Street store was Three Dollars Fifty Cents (\$3.50) per hour.

20 The Complainant worked approximately 38 to 39

hours per week as cashier at the Patrick Street store.

21. The Complainant worked at the Patrick Street store for approximately one to one and half weeks.

22. During this one to one and half weeks, Doug Harl constantly harassed her by insisting that she perform multiple work duties at once.

23. During her employment tenure with the TCBY chain, the Complainant was subjected to various racially offensive remarks, by Doug Harl, directed toward her and Teresa Freison, the only other black employee working at the relevant stores during the Complainant's tenure.

24. An example of these remarks are: 1. That the Complainant blended in with the jungle, thus preventing Harl from seeing her while she was cleaning in the dining area; and 2. That Black people were like body snatchers and that they came from watermelon pods.

25. Due to the statement to her, by Martin, regarding the demotion and reduction in her hours, the Complainant reasonably felt it was of no probative value to approach Martin regarding these racial remarks by Doug Harl.

26. In addition, Ruby Harl, also made racial remarks regarding the Complainant's boyfriend, who on one occasion, came by the store. Ruby Harl told the Complainant's boyfriend to get his "Black self" out of the store with his "big handing lip self."

27. On or about June 12, 1987, Doug Harl told the Complainant that she had better shape up or ship out. The

Complainant quit her job shortly thereafter.

28. During her tenure with the Respondent, the Complainant performed her duties in a satisfactory manner.

29. During her tenure with the Respondent, the Complainant received one written warning. The warning pertained to the overall cleanliness of the store and that of a waffle cone machine. The warning was written by Nina Elliott, although Nina Elliott was not the Complainant's supervisor.

30. Subsequently, the Complainant and Teresa Freison, received a verbal reprimand from Ruby and Doug Harl regarding smoking in the store; notwithstanding the fact that Doug Harl had previously told all the employees that they could smoke, in that area, on their breaks and in between waiting on customers. Also the record reflects that other employees smoked in the same area.

31. After the warning to the Complainant and Teresa Freison, a sign was posted in the store stating that no smoking was allowed in the building.

32. After the Complainant's discharge, Nina Elliott assumed a portion of the Complainant's day shift supervisory duties.

33. The Complainant reasonably mitigated her damages.

34. As a result of the treatment received by the Complainant, during her tenure with the Respondent, she became depressed and began to argue and fight with her

boyfriend.

35. The Complainant became angry when subjected to the racially offensive remarks made by Doug and Ruby Harl.

36. The Complainant incurred a loss of wages as a result of the Respondent's conduct.

#### DISCUSSION

The Complainant proved a prima facie case of race discrimination in the terms and conditions of her employment by establishing that: she is a member of the protected group; that the terms and conditions of her employment were affected by her race, in as much as, she was constructively required to take a demotion and reduction in pay to continue a work schedule which was needed to address certain personal needs; that she was required to abandon her schedule to accommodate a white employee with much less seniority, and, with no greater pressing reason for the accommodation; that she was the subject of racial remarks by management; and that she was unjustifiably disciplined which ultimately lead to her constructive discharge. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973).

The Respondent's position, taken by Mr. Martin, the new owner, was that he was unaware of the Harls' conduct, nor, did he receive any complaints about the same. As to accommodating Nina Elliott, Martin, innocently suggests that he was just attempting to accommodate an employee who had a

problem. The Examiner applies little weight to these explanations for the reason that although Martin had little experience in the industry, at the time he bought the stores subject of this action, the law nevertheless imposed upon him accountability for the actions of those persons with whom he in fact delegated responsibility of the management of the day to day operations of the stores. It was not unreasonable for the Complainant not to approach Martin with the racial remarks by the Harls', in as much as, he made it unequivocally clear to her, at the time she approached him about, what she believed to be, the unjustified demotion and reduction in her work hours, that the Harls' were in total control of the details, pertaining to the day to day operations and management of the stores. Accordingly, the Examiner finds that Martin's conduct was deficient of reasonable care, and, in as much as, the Harls' were his agents at the time of the relevant unlawful conduct, the same is imputed to him. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981); Human Rights Commission v. Logan-Mingo Area Mental Health Agency Inc., 329 S.E. 2d 77, 85 (1985).

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties herein.
2. The Complainant established a prima facie case of race discrimination in the terms and conditions of her

employment, as well as, in her constructive discharge.

3. The Respondent failed to articulate a legitimate nondiscriminatory reason for its conduct.

4. The Complainant reasonably mitigated her damages.

5. The Complainant incurred a loss of wages and benefits as a result of the actions of the Respondent.

6. The Complainant sustained emotional distress and mental anguish as a result of the conduct of the Respondent.

#### PROPOSED ORDER

Accordingly, the Examiner does hereby recommend to the Commission that judgement be awarded to the Complainant and that she be provided the following relief:

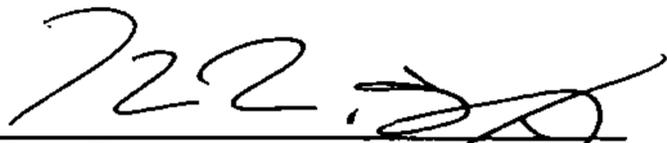
1. Back wages in an amount equivalent to what she would have earned had she not received the demotion to cashier and the reduction in pay. In addition to the pay received by Nina Elliott, as supervisor subsequent to the Complainant's discharge, to the date of hearing, less the interim earnings earned by the Complainant. The parties are hereby directed to calculate and provide an aggregate amount for lost pay and benefits realized by the Complainant, to be submitted within 10 days of the date of entry of this Order.

2. If the Bishop decision is determined not to be retroactive, then the Complainant should be awarded incidental damages in the amount of \$10,000 for emotional and mental anguish.

3. A cease and desist order prohibiting the Respondent from engaging in unlawful discriminatory practices.

DATED: MARCH 13, 1989

ENTER:

  
Theodore R. Dues, Jr.  
Hearing Examiner