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STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

215 PROFESSIONAL BUILDING
1036 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301

ARCH A. MOORE, JR.
Governor

TELEPHONE: 304-348-2616

12/31/85
~~December 20, 1985~~

Tod J. Kaufman
1206 Virginia Street, E.
Charleston, WV 25301

Robert Lovell
Smiley's Motel
6110 MacCorkle Avenue
St. Albans, WV 25177

RE: Robert Sykes V Smiley's Motel
ER-204-79

Dear Mr. Kaufman and Mr. Lovell:

Herewith please find the Order of the WV Human Rights Commission in the above-styled and numbered case of Robert Sykes V Smiley's Motel.

Pursuant to Article 5, Section 4 of the WV Administrative Procedures Act [WV Code, Chapter 29A, Article 5, Section 4] any party adversely affected by this final Order may file a petition for judicial review in either the Circuit Court of Kanawha County, WV, or the Circuit Court of the County wherein the petitioner resides or does business, or with the judge of either in vacation, within thirty (30) days of receipt of this Order. If no appeal is filed by any party within (30) days, the Order is deemed final.

Sincerely yours,

Howard D. Kenney
Howard D. Kenney
Executive Director

HDK/kpv

Enclosure

CERTIFIED MAIL/REGISTERED RECEIPT REQUESTED.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ROBERT SYKES,
Complainant,

V

DOCKET NO.: ER-204-79

SMILEY'S MOTEL
Respondent.

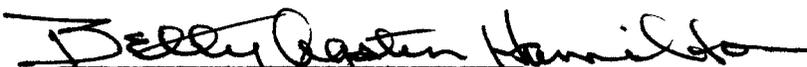
ORDER

On the 9th day of May 1985, the Commission reviewed Hearing Examiner Theodore R. Dues, Jr's., Findings of Fact and Commission of Law, dated Jan. 4, 1985. After consideration of the aforementioned, the Commission does hereby adopt the Findings of Fact and Conclusions of Law as its own.

It is hereby ORDERED that the Hearing Examiner's Findings of Fact and Conclusions of Law be attached hereto and made a part of this Order.

By this order, a copy of which to be sent by certified mail, the parties are hereby notified that THEY HAVE TEN DAYS TO REQUEST A RECONSIDERATION OF THIS ORDER AND THAT THEY HAVE THE RIGHT TO JUDICIAL REVIEW.

Entered this 5 day of December, 1985



CHAIR/VICE CHAIR
WEST VIRGINIA HUMAN
RIGHTS COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

ROBERT SYKES,

Complainant,

v.

DOCKET NO. ER-204-79

SMILEY'S MOTEL,

Respondent.

**EXAMINER'S RECOMMENDED FINDINGS OF FACT
AND CONCLUSION OF LAW**

This came on for hearing on December 11, 1984. The hearing was held at the Conference Room of the West Virginia Human Rights Commission, 1036 Quarrier Street, Charleston, West Virginia. The panel consisted of Theodore R. Dues, Jr., Hearing Examiner, and the Honorable Betty Hamilton, Hearing Commissioner.

The Complainant appeared in person and by his counsel, Tod J. Kaufman. The respondent appeared by its owner, Robert Lovell. The West Virginia Human Rights Commission appeared by its counsel, Roxanne Rogers.

FINDINGS OF FACT

1. The Complainant, Robert Sykes, is a black male.
2. The Complainant was employed by the Respondent in the capacity of dishwasher on or about September, 1978.

3. Robert Lovell is the owner/proprietor of Smiley's Motel.
4. That sometime during the month of September, 1978, the Complainant was transferred to perform certain tasks on a roofing job then being conducted on the premises of the Respondent.
5. The period of time for which the Complainant performed said services was approximately seven to ten days.
6. The Supervisor for the roofing job was Lawrence Smith, another employee of the Respondent.
7. The son of Lawrence Smith, Eddie Smith, was also a member of the work crew on the roofing job.
8. The Complainant was the only minority worker on the roofing job during his tenure at that assignment. Eddie Smith called the Complainant a "Nigger" on or about October 3, 1978, while atop a building on Respondent's property performing roofing work.
9. The Complainant and Eddie Smith had pulled a hammer on the other.
10. Lawrence Smith sent Eddie Smith from the roof as well as the Complainant.
11. Robert Lovell had the Complainant report to his office and report back to the kitchen and assume his dishwashing duties. Robert failed to admonish Eddie Smith in any form or fashion for his

conduct against the Complainant on October 3, 1978.

11. Robert Lovell represents that he did not transfer Eddie Smith to the job as dishwasher as a result of the incident which occurred on or about October 3, 1978, due to the fact Eddie Smith had no prior experience as a dishwasher.

12. The record is void of any indication that previous experience and/or skill is necessary to perform the dishwasher position for the Respondent during October, 1978.

13. Complainant filed a complaint with the West Virginia Human Rights Commission timely by perfecting the same within ninety (90) days of the alleged incident.

14. The Complainant suffered humiliation, pain and suffering as a result of the conduct of Robert Lovell's manner of addressing the incident of October 3, 1978.

15. The record indicates the Complainant to have incurred expense of transportation and loss of pay approximating Nine Hundred and Fifty Dollars (\$950.00)

16. The Complainant was treated desparately in his employment by the actions of the Respondent in its handling of the October, 1978, incident.

17. That the Complainant failed to reasonably mitigate his damages by refusing to accept the dishwasher position under a situation of which he was aware that he had no other committment for employment.

18. The conduct of the parties after the October 3, 1978 incident at the meeting in which the Complainant and Robert Lovell were present did not pose the element necessary for constructive discharge.

19. Accordingly, the Complainant is considered to have not been constructively discharged from his employment when he elected not to return to the kitchen to perform dishwasher duties.

20. The Counsel for the Complainant has incurred fees in the amount of Two Hundred Fifty-Eight Dollars and Seventy-Five Cents (\$258.75) for services rendered in their preparations and prosecution of this matter.

21. That the Complainant's counsel fees requested are deemed to be reasonable and necessary in the protection of the Complainant's interests in this matter.

CONCLUSIONS OF LAW

1. The West Virginia Human Rights Commission has jurisdiction over the subject matter and the parties in this matter.

2. As in all cases, the Complainant bears the burden of proving the allegations of his complainant that the Respondent discriminated against him because of his race in its decision

surrounding the October 3, 1978, incident by a preponderance of the evidence.

3. The complainant established a prima facie case by introducing evidence to establish that the Respondent treated him differently in its handling of the incident arising between him and a white worker on October 3, 1978.

4. The Respondent failed to provide a legitimate non-discriminatory explanation for its actions.

5. It is hereby recommended that the Respondent be found liable for racial discrimination in violation of the West Virginia Human Rights Act.

6. The Complainant incurred expense and a loss of wages as a result of having to perfect his appearance at this hearing. However, in equity it appears that only a portion of that should be ordered paid by the Respondent. Accordingly, it is recommended that the Commission order the Respondent to pay Four Hundred Fifty Dollars (\$450.00) of the Complainant's expenses and lost wages.

7. Complainant's counsel has petitioned this Examiner for attorneys fees in the amount of Two-Hundred Fifty-Eight Dollars and Seventy-Five Cents (\$258.75). It is hereby recommended that Complainant's counsel receive payment in the amount of Two Hundred Fifty-Eight Dollars and Seventy-Five Cents (\$258.75) the same being deemed to be reasonable and necessary in the prosecution of this matter.

8. The Complainant suffered some mental pain and anguish as a result of the action of the Respondent in its handling of the incident arising on October 3, 1978. Accordingly, it is hereby recommended that the respondent be ordered to pay unto the complainant the sum of Five Hundred Dollars (\$500.00) as damages for the mental pain and suffering.

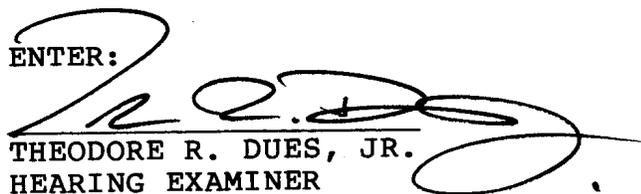
RELIEF

Judgement for the Complainant with an award of monetary damages in the amounts of Five Hundred Dollars (\$500.00) for mental pain and suffering, Four Hundred Fifty Dollars (\$450.00) in the lost wages and expenses and Two Hundred Fifty-Eight Dollars and Seventy-Five Cents (\$258.75) for Attorney's Fees.

The parties are hereby given notice that they have fifteen (15) days from the date of entry of this order to submit exceptions to this order to the Chairperson of the Commission.

DATED: JANUARY 4, 1985

ENTER:


THEODORE R. DUES, JR.
HEARING EXAMINER

RECEIVED

STATE OF NEW YORK
-6-
OFFICE OF THE HEARING EXAMINER