



STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

**WV HUMAN RIGHTS COMMISSION
1321 Plaza East
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Charleston, WV 25301-1400**

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**Quewanncoi C. Stephens
Executive Director**

April 24, 1990

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Re: Williams v. Donald & Marilyn Cunningham
HR-594-87

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 WV Supreme Court of Appeals within 30 days of receipt of this final order.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "Quewanncoi C. Stephens".

Quewanncoi 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

JOHNETTA L. WILLIAMS,

Complainant,

v.

DOCKET NO. HR-594-87

DONALD CUNNINGHAM and
MARILYN CUNNINGHAM,

Respondents.

FINAL ORDER

On 14 March 1990 the West Virginia Human Rights Commission reviewed the recommended decision filed in the above-styled matter by hearing examiner Gail Ferguson. After consideration of the aforementioned, as well as the transcript of record, arguments and briefs of counsel and the exceptions filed in response to the recommended decision 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 "Relief and Order" paragraph 2 is modified to read:

"Respondents shall pay complainant actual damages in the amount of \$1,026.79." The Commission has subtracted from the amount awarded by the hearing examiner a total of \$38.21,

which represents the total billing for sanitary and incinerator fees which were the obligation of the complainant.

2. In the subsection entitled "Proposed Order" paragraph 3 is modified to read:

"Respondents shall pay to the complainant the sum of \$500.00 in incidental damages as compensation for the humiliation, embarrassment, mental anguish and loss of personal dignity suffered by complainant as a result of their unlawful discriminatory acts.*

It is, therefore, the Order of the Commission that the Hearing Examiner's Proposed Order and Decision, encompassing her findings of fact and conclusions of law, be attached hereto and made a part of this Final Order, except as amended

*Russell VanCleve, hearing commissioner below, was not a member of the West Virginia Human Rights Commission at the time of the consideration of this case by the full Commission in March 1990 and did not participate in our deliberation of this matter. In the absence of a hearing commissioner at our discussion, the Commission reviewed this matter in accord with the limitations placed upon it by W. Va. Code § 5-11-8(d)(3) and consistent with the scope of review of an appellate court as outlined in West Virginia Human Rights Commission v. United Transportation Union, 167 W.Va. 282, 280 S.E.2d 653 (1981). Though the Commission found that neither complainant nor respondents presented their cases in a convincing light, we could not find that the decision of the hearing examiner was not supported by substantial evidence. Furthermore, since much of this matter rested on an assessment of credibility, the Commission felt bound to honor the hearing examiner's determination of the same since "the credibility of the witnesses is for the hearing examiner to determine." Westmoreland Coal v. Human Rights Commission, 382 S.E.2d 562, 567, n.6 (1989).

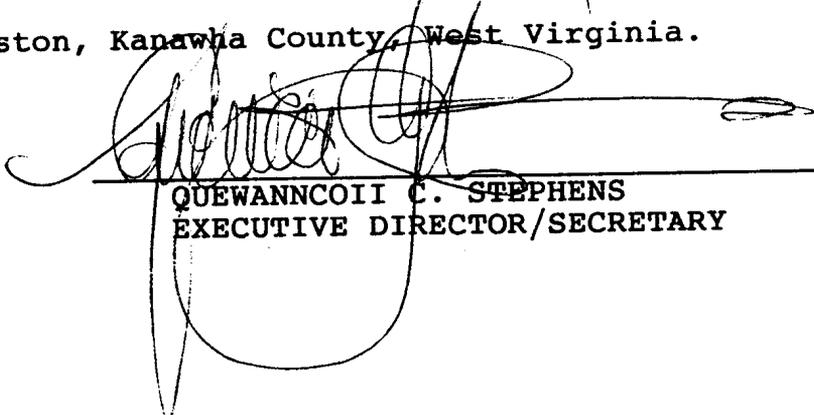
by this Final Order.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of the State of West Virginia, the parties are hereby notified that they have ten (10) days to request that the West Virginia Human Rights Commission reconsider this Final Order or 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 30th day of March, 1990, in Charleston, Kanawha County, West Virginia.



QUEWANNCOII C. STEPHENS
EXECUTIVE DIRECTOR/SECRETARY

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JOHNETTA L. WILLIAMS,
Complainant,

v.

DOCKET NUMBER: HR-594-87

DONALD AND MARILYN CUNNINGHAM,
Respondent.

HEARING EXAMINER'S RECOMMENDED DECISION

A public hearing in this matter was convened on May 18, 1988, in Kanawha County, at the office of the West Virginia Human Rights Commission, 1036 Quarrier Street, Charleston, West Virginia. The Hearing Panel consisted of Gail Ferguson, hearing examiner, and Russel Van Cleve, hearing commissioner.

The complainant, Johnetta L. Williams, appeared in person and by her counsel, Steve Barkley, Assistant Attorney General. The respondents, Donald and Marilyn Cunningham, appeared in person and by counsel, Fred F. Holroyd, Esquire.

All proposed findings submitted by the parties have been submitted 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

hearing examiner 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.

I.

ISSUES

1. Whether the complainant's eviction from her housing accommodation by the respondents constituted race discrimination in violation of the West Virginia Human Rights Act, specifically WV Code §5-11-9 (g) (1) and (2). Whether the respondents discriminated against the complainant in evicting her from her leased housing accommodation on the basis of her race.

2. If the answer to the above is in the affirmative, to what remedy is complainant entitled?

II.

FINDINGS OF FACT

1. At all times relevant to this matter, the respondents, Donald and Marilyn Cunningham, owned and controlled property located at 835 Somerset Drive, Charleston, West Virginia.

2. Complainant, Johnetta Cunningham, is a black female who resided in Charleston, West Virginia, from June of 1986 through April of 1988.

3. On June 11, 1986, the complainant leased the above-referenced premises from respondents with occupancy to begin July 1, 1986. At that time, the complainant indicated that because of the nature of her job, that she would probably remain in Charleston for not more than two years.

4. The rental agreement, a month-to-month tenancy, provided for monthly rental payments of \$425.00 in addition to a \$425.00 security deposit. The written agreement contained no provision for the payment of utilities.

5. By oral agreement, the complainant was responsible for payment of gas, electric, telephone and water. No other utility bills such as sanitation and incineration were included in this or any other agreement; however, since the sanitation bills were regularly received by complainant at her premises, the complainant always paid this bill.

6. During her ten months stay, the complainant requested that the respondents undertake minor repairs of the rental premises. The first of these was her toilet, in September of 1986, which was repaired. The second request made by complainant was that the respondents fix her back door; the door was never completely repaired by the respondents. The third request by complainant was in November, 1986, when the complainant requested that a hole in the wall be patched.

7. In November or December of 1986, the complainant requested that respondent replace or repair her shower faucets which were defective. Although the respondents attempted to fix the faucets, the complainant was informed in February that they could not afford to replace them and that complainant could deduct any excess in her water bill caused by the defective faucets from her rent.

8. On March 1, 1987, a few days after the above conversation, complainant was presented with a 30 day notice of eviction (termination of tenancy) by the respondents. According to the respondents, the reason for the notice to vacate was their intent to put the house up for sale.

9. On or about March 3, 1987, the complainant, for the first time, received an incineration bill from respondents which they had received in January, 1987.

10. Upon receipt of the eviction letter, March 1, 1987, complainant attempted to contact respondent, Donald Cunningham, to discuss the reason for her eviction. On March 9, 1987, the complainant found and rented a new apartment.

11. On March 13, 1987, the day the complainant moved out of the house, she saw respondent, Donald Cunningham. He told the complainant that his wife wanted to give the complainant grief. He also told the complainant that he would get her security deposit back. Complainant later received the deposit money less amounts for the incineration bill and an estimated sanitation bill, that complainant had previously paid.

12. On March 14, 1987, the complainant received a second eviction letter which represented that the reason for said termination of tenancy was the respondents' desire to sell the house and complainant's failure to pay her utilities.

13. The complainant's testimony that she was not told of the existence of an incineration bill until after her first eviction notice is found to be credible.

14. The house at 835 Somerset Drive was noticed for sale in Charleston Newspapers for one week only, beginning April 2, 1987. On April 9, 1987, exactly one week later, the house was advertised for rent in the same newspapers. From April 2, 1987 and April 24, 1987, there was no "For Sale" sign in front of the house.

15. On April 24, 1987, the respondents rented the house at 835 Somerset Drive to Lori Arthur, a white female. This lease agreement was not month-to-month, but was for one year, and was executed pursuant to the Housing and Urban Development (HUD) Housing Voucher Program. Under the HUD program, the landlords are responsible for repairs. These repairs were made by respondents, at their expense, prior to Ms. Arthur moving in.

16. The HUD lease agreement with Ms. Arthur also contained an addendum which prohibited the respondents from terminating the tenancy during its first year for the reason that they desire to sell the house. Respondent's testimony at the hearing that a side agreement, oral in nature, existed between them and Ms. Arthur whereby the tenant agreed to show the house to prospective buyers and move out if given 30 days' notice, is not credited.

17. Lori Arthur was not present at this hearing, and thus did not testify as to whether any side agreement existed between her and the respondents concerning termination of her tenancy if the premises were sold.

18. As of the date of this hearing, May 18, 1988, Lori Arthur was still renting the house at 835 Somerset Drive from the respondents.

19. The testimony of respondent, Marilyn Cunningham's mother, as to her daughter's fondness for the complainant is rejected as not credible. Based upon the demeanor of witnesses and substantial evidence of the record as a whole, it is clearly observed that there existed pervasive animosity by respondent, Marilyn Cunningham, toward the complainant.

20. As a result of the eviction and by reason of having to search for and acquire alternate housing accommodations, the complainant expended \$1,065.00, as follows:

- \$153.28 annual leave (8 hrs. at \$19.16/hr.) to hunt for another apartment
- 153.28 annual leave to move out of the respondents' house
- 153.28 annual leave to clean respondents' house
- 19.16 annual leave to contract a moving van and sign a new lease
- 60.00 expense for van rental
- 156.00 labor expenses
- 20.00 tip
- 212.50 one-half month's rent
- 48.00 transfer of telephone services
- 10.00 for gas used in apartment hunting and moving
- 38.21 sanitary and incinerator bills taken from deposit
- 41.56 interest on loan taken out for moving expenses

21. The complainant suffered mental distress and mental anguish and humiliation as a result of respondents' treatment toward her.

DISCUSSION

West Virginia Code §5-11-9(g)(1) and (2) provide, in pertinent part, that:

"It shall be unlawful discriminatory practice....:

"(g) For the owner, lessee, sublessee, assignee or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent, lease, assign or sublease any housing accommodations or real property or part or portion thereof, or any agent, or employee of any of them; or for any real estate broker, real estate salesman, or employee or agent thereof:

"(1) To refuse to sell, rent, lease, assign or sublease or otherwise to deny to or withhold from any person or group of persons any housing accommodations or real property, or part or portion thereof, because of race, religion, color, national origin, ancestry, sex, blindness or handicap of such person or group of persons: Provided, that this provision shall not require any person named herein to rent, lease, assign or sublease any housing accommodations or real property, or any portion thereof to both sexes where the facilities of such housing accommodations or real property or any portion thereof, are suitable for only one sex;

"(2) To discrimination against any person or group of persons because of the race, religion, color, national origin, ancestry, sex, blindness or handicap of such person or group of persons in the terms, conditions or privileges of the sale, rental or lease of any housing accommodations or real property, any part or portion thereof, or in the furnishing of facilities or services in connection therewith;...."

In order to establish a prima facie case of race discrimination in violation of the above-cited statutory provisions, with

regard to the respondents' eviction of the complainant from her leased premises, complainant must establish:

- a. that she is a member of a protected class;
- b. that respondent evicted her from her place of housing accommodation; and
- c. evidence from which to infer that complainant's race was a factor in respondent's decision to evict the complainant.

To be sure, complainant has established a prima facie case. There is no issue that complainant is in a protected class, that the respondents evicted the complainant from the rental premises without good cause and, thereafter, the same premises were rented to a white female.

Since the complainant has successfully created a presumption of discrimination, the burden then shifts to the respondents to articulate a legitimate non-discriminatory reason for their actions toward the complainant. In the instant action, the reasons set forth by the respondent are two-fold:

1. that they intended to sell the house because they needed the money; and
2. the complainant refused to pay the utility bills, and she was no longer satisfied with the leased premises.

The examiner concludes that the respondents have successfully rebutted the prima facie case by setting forth reasons for their action, which raise genuine issue of fact, the complainant must then satisfy her ultimate burden by proving the existence of factual issues demonstrating that stated reasons were merely a pretext for discrimination. This the complainant has done.

The first reason given by the respondents, that they were going to sell the house, has been demonstrated by the complainant to be pretextual since they, in fact, rented and have continued to rent the house to a white female since April of 1987.

The latter lease is for one year and prohibits the respondents from evicting the new lessee during the first year of the tenancy. The examiner agrees with the complainant that this action by respondent is in direct contravention of respondents' stated purpose for evicting the complainant and when buttressed by the additional factor, the race of the subsequent renter, establishes the stated reason as a pretext for discrimination.

The other reason advanced by respondents, as to why the complainant was evicted, is based upon a January 8, 1987 incinerator bill which the complainant did not receive until March 3, 1987.

The record clearly establishes that complainant kept her premises in a habitable manner and made no unreasonable demands upon the respondents for repairs and paid her utilities and rent in a timely manner.

The examiner finds credible the testimony of the complainant that she was not told of the existence of an incinerator bill that she should pay until after the first eviction notice, and further, the testimony of the complainant that the respondents, particularly Marilyn Cunningham, harassed the complainant by inviting relatives through her premises and by issuing eviction notices for no cause. Weighing the credibility and the demeanor of respondents and their witness, it was clearly observed that

both respondents were nervous, evasive and skitish during the respective examination. Moreover, the testimony of respondents' witness, Marilyn Cunningham's mother, as to her daughter's fondness for the complainant was rehearsed and simply not believable.

The complainant, on the other hand, testified in a straight forward, consistent and credible manner. Her recant of a conversation with Mr. Cunningham, wherein he informed her of his wife's intention to cause complainant grief was believable, not only as to the fact that the conversation took place, but as supported by the evidence of the record as a whole that as to the truth of the matter asserted therein.

To be sure, the respondents did cause the complainant grief because the complainant was an outspoken "highly sophisticated" black woman, as respondents' brief artfully pointed out, who merely asserted her rights as a tenant, and that this activism, on the part of the complainant, was intolerable to the respondents as not fitting their sterotypical mode for black persons. The grief respondents imposed upon the complainant took the form of harassing conduct culminating in her ultimate eviction. Respondents' efforts to articulate reasons for their actions, which have been established by complainant to be pretextual further belies a racial animus.

The record of evidence taken as a whole compels the conclusion that the complainant was evicted by the respondents because she is black.

CONCLUSIONS OF LAW

1. The complainant, a black female, is a member of the protected class.
2. Respondents were at all relevant times the owners and landlords of the house at 835 Somerset Drive, which house is a "housing accommodation" as defined in WV Code §5-11-3(k).
3. The parties are within the jurisdiction of the West Virginia Human Rights Commission.
4. At all relevant times herein the complainant, Johnetta L. Williams, was a citizen and resident of West Virginia within the meaning of WV Code §5-11-2.
5. At all relevant times herein the respondents, Donald and Marilyn Cunningham, were the persons having the right of ownership or possession of and the right to rent or lease the housing accommodation located at 835 Somerset Drive, Charleston, West Virginia, as defined by WV Code §5-11-9(g).
6. The complaint in this matter was properly and timely filed by the complainant in accordance with the procedures established by the West Virginia Human Rights Act and the administrative regulations of the West Virginia Human Rights Commission.
7. The complainant has established a prima facie case of race discrimination.
8. The respondents have articulated a legitimate non-discriminatory reason for its actions toward the complainant.
9. The complainant has demonstrated that the proffered reasons by respondents were pretextual for unlawful discrimination.

RELIEF AND ORDER

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

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

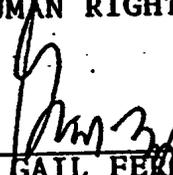
2. Respondent shall pay complainant actual damages of \$1,065.00.

3. Respondents shall pay to the complainant incidental damages in the amount of \$2,500.00 as compensation for humiliation, embarrassment, and mental anguish.

Entered this 7th day of September, 1989.

WV HUMAN RIGHTS COMMISSION

BY


GAIL FERGUSON
HEARING EXAMINER