No. 31854 – *Barbara Cobb v. West Virginia Human Rights Commission and Beverly Wattie, on behalf of Krystal Wattie, a minor*

Starcher, J., dissenting:

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I reviewed the briefs of the parties in the instant case, and reviewed the record as well, and I can only conclude that I am looking at a totally different case from the one reviewed by the majority of this Court.

First, I dissent to the majority opinion's elevation of this case to one of constitutional dimensions. The parties neither briefed nor argued, before this Court or any lower tribunal, the question of whether teachers have a constitutional right to impose discipline upon public school students. Yet somehow, in Syllabus Point 8, the majority opinion concludes as a matter of law that Article XII, Section 1 of the *West Virginia Constitution* "requires public schools and teachers to impose such discipline as is reasonably required to maintain order in our public schools[.]"

Second, the briefs and arguments of the parties are largely in agreement on the facts, and do not – repeat, do not – challenge the administrative law judge's findings of fact. Instead, appellant Barbara Cobb challenged the *inferences* that the administrative law judge drew from those facts. These were inferences drawn by the judge who heard the witnesses testify, and who saw the witnesses' demeanor. It is well-settled law that when conflicting inferences can be drawn from facts, appellate courts will defer to the fact finder's determination.

The majority opinion, unfortunately, bypassed the parties' briefs and arguments and invented a new point of error that was simply not raised by the appellant's attorney. Somehow, looking at the same record that was scrutinized by skilled attorneys representing the appellant and the Human Rights Commission – attorneys who also saw and heard the witnesses – the majority found a "number of blatant errors in the findings below." The majority opinion finds undotted "i's" and uncrossed "t's" in the administrative law judge's opinion where the attorneys saw none, and then uses these alleged errors to find that a teacher's racial discrimination against a student is permissible, so long as the teacher buries the discrimination under the guise of "discipline."

Here is what I saw in the record: Ms. Wattie, an African American, began attending Riverside High School as a ninth grader and continued attending through her senior year. For the first few months of Ms. Wattie's second semester as a ninth grader – in the spring of 2000 – she attended appellant Cobb's English class. Ms. Cobb took a medical leave of absence during the latter months of the semester, and Ms. Wattie never again enrolled in one of Ms. Cobb's classes.

Beginning in the spring of 2000, when Ms. Wattie was in Ms. Cobb's class, Ms. Cobb began a course of racial harassment. And, when Ms. Wattie and her mother (Beverly Wattie) objected, Ms. Cobb undertook a course of retaliation. For instance, the record indicates that Ms. Cobb would provide assignments or make up work to students who missed her class, but would not do so for Ms. Wattie. Ms. Cobb would not acknowledge Ms. Wattie when she raised her hand in class, and would lock her out of class if she was late. Ms.

Cobb repeatedly posted a grade sheet for the class reflecting that Ms. Wattie had failed to turn in assignments – assignments which had been graded and returned to her. When Ms. Wattie tried to correct these mistakes, Ms. Cobb repeatedly told her that it was "not the time to bring that up." It also appears that Ms. Cobb repeatedly sent Ms. Wattie to the office for being loud, apparently justifying it once by saying to Ms. Wattie, "I talked to my boyfriend about you . . . and he said it's in your all's nature to be loud like that." The record also indicates that Ms. Cobb would "fuss at" most African American students who asked questions in class,[1] but would vigorously argue with Ms. Wattie and often send her to the office for discipline. The students could not recall similar attention being directed toward white students.

When Ms. Wattie and other students – in concert with their parents – objected to Ms. Cobb's conduct to the school administration, the school's principal admitted that Ms. Cobb was in conflict with the African American students in the 9th grade English class. However, the principal's suggestion to ease the conflict was to remove the African American students from Ms. Cobb's class. Ms. Wattie's mother refused to have her daughter transferred.[2]

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[1]One African American student testified that she asked Ms. Cobb if she could have a Post-it Note to make a note for her locker. Ms. Cobb pulled a pad out from her desk said "You can go get some from someone else."

[2]Other parents approved the transfers, and the school's principal noted that students "did fine" once they were transferred out of Ms. Cobb's class. However, he also acknowledged the objections made by Ms. Wattie's mother: that it would be wrong for Ms. (continued...)

The record indicates that Ms. Wattie did well academically in Ms. Cobb's class – she was ranked number one in Ms. Cobb's class as far as posted graded assignments – yet received a "B" grade from Ms. Cobb.[3] After Ms. Cobb took a medical leave of absence and the class was taught by a substitute, Ms. Wattie's grade improved to an "A."

Ms. Wattie did not have Ms. Cobb as a teacher after the ninth grade. However, after Ms. Cobb returned to teach in the fall of 2000, and throughout Ms. Wattie's remaining years of high school, it appears that Ms. Cobb regularly confronted Ms. Wattie in the school's hallways. Ms. Cobb repeatedly sent discipline slips to the office for Ms. Wattie because she was allegedly being loud and disruptive in the hallways. Ms. Cobb acknowledged that other students who engaged in similar conduct were not reprimanded, but contended that those others were "good students." Ms. Wattie acknowledged that the noise in the hallways involving her and other students was brought to her attention by other teachers, but none of these other teachers referred her to the office.

The record indicates that the confrontations between Ms. Cobb and Ms. Wattie escalated. Ms. Cobb asserts that her actions were merely attempts to discipline an unruly student. One teacher testified to finding Ms. Cobb and Ms. Wattie heatedly arguing in the hallway. The teacher intervened and separated the two and led Ms. Wattie away; Ms. Cobb

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[2](...continued)
Wattie to alter her situation to fix a problem created by Ms. Cobb.

[3]At the time of Ms. Wattie's testimony in January 2003, she testified that her semester grade point average was 4.0, and her cumulative high school grade point average was 3.61. Ms. Wattie graduated in May 2003.

pursued, coming face to face with the teacher, pointing her finger at Ms. Wattie's face and saying "it's a good thing this lady intervened when she did because I don't know what would have happened."[4]

Both the school principal – who stated he had "a number of conversations about this issue" with Ms. Cobb – and the superintendent of the school board attempted to diffuse the situation by explicitly telling Ms. Cobb that she should avoid contact with Ms. Wattie. Furthermore, an aide was assigned to Ms. Wattie to escort her between classes. Still, the record suggests that Ms. Cobb sought out Ms. Wattie for disciplinary action. For instance, a teacher who was a native of Pakistan and who taught a specialized, university-based science and technology program, testified that she had Ms. Wattie as a student for her entire four years of high school. While the teacher had no disciplinary problems with Ms. Wattie during that time, she recalled that Ms. Cobb approached her in the teachers' lounge and demanded she remove Ms. Wattie from the program. When the teacher declined, Ms. Cobb moved very close to the teacher, pointed a finger at her and said, "[W]homever taught you English did an injustice to you" while imitating the teacher's accent.[5]

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[4]The record suggests that the only other incident where another teacher sent Ms. Wattie to the office for being in the hallways was initiated by a friend of Ms. Cobb, Jennifer Cavendar-McNeil. When Ms. Cavendar-McNeil told Ms. Wattie to move along and she did not, Ms. Cavendar-McNeil grabbed Ms. Wattie by the arm. An administrative law judge acknowledged that while both "being shouldered" and being grabbed by the arm could technically constitute a battery, he also concluded that "[i]n neither instance is criminal prosecution remotely appropriate."

[5]The teacher, who was born in Pakistan, taught for six years at the British School (continued...)

Ms. Wattie's complaint to the Human Rights Commission was brought against Ms. Cobb and two other parties: the Kanawha County Board of Education, and another teacher, Jennifer Cavendar-McNeil. The complaint alleged that Ms. Cobb and Ms. Cavendar-McNeil had created a racially hostile environment, and that the school system had done nothing to correct or eliminate the hostility. The school board and Ms. Cavendar-

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[5](...continued)
System in Pakistan, for one year in England, and for twenty-one years in Kanawha County. She has been a citizen of the United States since 1979.

Her specific testimony regarding the incident with Ms. Cobb is, in relevant part, this:

> One time we were – me and another HSTA [Health Science Technology Academy] teacher, we were downstairs in lounge, teacher's lounge, we were making some coffee, and Ms. Cobb, she stopped us and told us that you have to do something about Krystal. . . . [S]he said one of your HSTA students, she attacked me or assaulted me. . . .
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> I said, I'm not here to take any student out from HSTA or even take in, we have to send the application, if they're approved by the Board, then, they are in HSTA and if the Board approves it, but the student did not meet our departments of HSTA then they are going to be taken out . . . .
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> So, at that point . . . she just – I mean, she was very – getting very close to me with her finger on almost on me and she said where did you get your education, okay, like – and I told her, I have Master's, two Master's Degrees, and she said – whomever taught you English did an injustice to you. She said – and she was very, very close to me and I was really, I mean, I was trying to get back . . . and I shoved her back a little bit, so, at this point I was really calm at that point, really very calm, and she said that – I think she said that – whatever she was talking [about], it was imitating my accent talking.

Ms. Cobb left shortly thereafter, telling the teacher she would return to continue the discussion. The teacher waited for Ms. Cobb to return, but then left saying "I'm not going to listen to this crap, what she is saying, so, I left. And I was really very tense, I mean, felt very insulted[.]"

McNeil later settled with Ms. Wattie in exchange for a payment of $3,200.00; an agreement to refrain from future discrimination and to respond to discrimination allegations in the future; and an agreement to revise the school's multicultural diversity and Black History Month programs.

The administrative law judge reviewed the evidence presented against Ms. Cobb. The judge found numerous facts which, when taken together, inferred that Ms. Cobb had created a hostile environment for Ms. Wattie motivated by Ms. Wattie's race. The administrative law judge found, based upon Ms. Cobb's own testimony and demeanor, that Ms. Cobb resented Ms. Wattie; that she acted in a racially disparate fashion toward African Americans; and that she made racially stereotypical comments. The judge found that "Whether or not . . . Ms. Cobb[] consciously believes that she is racially discriminating" was unimportant because her actions "clearly indicate[] that a racial issue existed in fact for her students[.]" The actions of Ms. Cobb interfered in Ms. Wattie's right to enjoy equal access to a public accommodation, the public school system, and caused her humiliation, embarrassment, emotional distress and loss of personal dignity.

I agree that the administrative law judge found, as a matter of fact, that Ms. Wattie was chronically tardy to Ms. Cobb's class, and that she and her friends were frequently loud and disruptive in the school hallways, during her 9th grade year. The judge also found that Ms. Wattie was sometimes combative and confrontational with Ms. Cobb, goading Ms. Cobb by muttering things like "just let her say something" or gossiping to her peers about Ms. Cobb in ways calculated to embarrass Ms. Cobb. The administrative law

judge acknowledged that the behavioral shortcomings of Ms. Wattie provided a legitimate explanation for some of Ms. Cobb's disciplinary actions. However, the judge also found that many of Ms. Cobb's explanations were merely a pretext for discrimination, or that Ms. Cobb's actions toward Ms. Wattie would not have been undertaken absent a discriminatory motive. Taking Ms. Wattie's conduct into account, the judge only ordered Ms. Cobb to pay Ms. Wattie $500.00 in damages for her humiliation, embarrassment, emotional distress and loss of personal dignity, Ms. Cobb was also ordered to cease and desist from any future discrimination, and to pay the reasonable costs incurred by the Commission in prosecuting the case, in the amount of $1,426.31.

It cannot be disputed that Ms. Wattie was a member of a protected class as an African American. Furthermore, there is substantial evidence in the record that a racially hostile environment was created by Ms. Cobb, and that Ms. Cobb had denied or curtailed certain advantages, privileges and services to Ms. Wattie – advantages, privileges and/or services that were freely enjoyed by other students. I believe that the administrative law judge fairly found from the evidence that Ms. Cobb effectively denied Ms. Wattie her right to the public accommodation of attending a public school. I therefore dissent to the majority's substitution of its own interpretation of the record for that of the administrative law judge.

No one can argue that a teacher has a right to impose order in the classroom. But when the teacher's actions are motivated by a student's race, and as a result of those motivations the student is denied accommodations that are freely given to other students, the

Human Rights Commission is constituted and empowered to intervene and award the student some relief. The administrative law judge for the Commission in this case saw the evidence, watched and heard the witnesses, and drew inferences from the record as a whole that racial discrimination occurred. The majority opinion wrongly supplanted its own arguments for those of the parties, examined the record piecemeal, and drew its own inferences from the record to conclude that discrimination never occurred, and even if it did, the teacher had a constitutional right to impose discipline in her courtroom in whatever fashion she chose.

I therefore respectfully dissent to the majority's opinion, and state that Chief Justice Albright joins me in this separate opinion.