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Civil Rights — Administrative Enforcement — Damages as an Appropriate Remedy

With the formation of the West Virginia Human Rights Commission, West Virginia has become one of many states choosing to make equal opportunity available to their citizens through the administrative process.¹ By statute, the commission is directed to eliminate all discrimination due to race, color, religion, ancestry, national origin, sex, and age in housing, public accommodations and employment.² To aid in the promotion of equal opportunity, the commission is authorized to serve as a conciliatory and educative intermediary between various sectors of the public.³ In addition, the commission is empowered to hear and rule upon private complaints of alleged discrimination.⁴ The commission is placed in the unique position of enforcing the declared public policy of the State by providing some redress for the violation of individual civil rights.

This function has normally been performed through private civil litigation.⁵ However, the commission, charged with the responsibility of eliminating all discrimination, may consider complaints of discriminatory acts that are not significant enough to set the machinery of civil enforcement in motion. Without the probability of a substantial judgment to attract legal counsel, many disadvantaged persons could find themselves financially unable to protect their rights from the numerous small wrongs that can form the frustrating pattern of discrimination. Even when the wrong done is substantial, the expense, effort, and threat of community opprobrium involved in civil enforcement may make individuals hesitant to enforce their rights.⁶

The redress of personal rights by the Human Rights Commission, aside from being more efficient and accessible than the courts, serves the individual and the overall interests of the State. The commission's enforcement of private civil rights should have a strong educative effect on the community, because it illustrates that the State has a sufficient interest in equal opportunity to vindicate those per-

¹ The West Virginia Human Rights Commission is a creation of the West Virginia Human Rights Act, W. VA. CODE ch. 5, art. 11, §§ 1-19 (Michie 1971 replacement volume).

² *Id.* § 4.

³ *Id.* § 8(a), (b).

⁴ *Id.* § 8(c).

⁵ Bamberger & Lewin, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 HARV. L. REV. 526, 528 (1961).

⁶ *Id.* at 526.

sons denied rights guaranteed them by law. Thus the commission's primary function of education and promotion of equal opportunity is served in part by its secondary function, *i.e.*, disposition of individual complaints.⁷ It is important, therefore, that the commission be able to provide the individual with an adequate remedy. It has been stated that the inability of state and local human rights commissions to provide complainants with adequate relief is the greatest weakness of such agencies. This weakness contributes to the paucity of complaints, and is one reason many feel these commissions have failed to make equal opportunity any more of a reality for minority group members than conventional methods of civil enforcement.⁸

The problem of inadequate remedies has been most pronounced in the areas of housing and job discrimination. The delay between complaint and administrative hearing, made necessary by notice requirements, often results in the housing unit or job position being disposed of adversely by the respondent before a hearing can be held. Thus the complainant, often financially and socially disadvantaged, may be forced into some alternative arrangements until a hearing is conducted. There is no guarantee that the housing or job sought will still be available should he prevail. The complainant's sole reward for the defense of his rights may be a promise to place his name on a waiting list or to consider his application for the next available position.⁹ Additionally, by insisting on all procedural safeguards, the respondent may be able to delay hearing procedures until the complainant's financial condition forces him to abandon his complaint.

In measuring the extent to which this problem affects the West Virginia Human Rights Commission, a brief review of that commission's complaint procedure may be helpful. Upon receipt and docketing of a complaint, it is assigned to a "field representative" for investigation. If the field representative finds probable cause for substantiating the complainant's allegations, an informal meeting with the respondent is held, and some settlement of the matter is attempted. This phase of the proceedings, when most complaints are settled, is the conference and conciliation stage. If efforts to conciliate fail, the respondent is given a thirty day notice, and an administrative hearing is held. At the hearing the commission considers the entire record in the case and makes a formal determination whether

⁷ *Id.* at 528.

⁸ *Id.* at 557.

⁹ J. WITHERSPOON, ADMINISTRATIVE IMPLEMENTATION OF CIVIL RIGHTS 190-94 (1968).

the respondent has engaged in an unlawful discriminatory practice. If the commission finds that the respondent has engaged in unlawful practices, it may order him to cease and desist such practices; the commission may take any affirmative action it judges necessary to effectuate the purposes of the Human Rights Act.¹⁰ Even this brief review is sufficient to illustrate that a considerable amount of time may pass before any remedial action can be taken.

The Human Rights Commission has recognized the need for alternative forms of relief outside the realm of the consent agreement or promise by respondent to abstain from future acts of discrimination. Too often, because of procedural delays, the aggrieved complainant loses the opportunity for housing or employment. Therefore, the commission has decided that some damage award is necessary in proper cases. It also feels that the purposes of the Human Rights Act can best be served by awarding complainants compensation for expenses incurred and for mental suffering and humiliation caused by the respondent's act of discrimination. In cases where the deprivation of protected rights is of a malicious nature, the commission feels that an award of exemplary damages would be permissible, regardless of other remedies or compensation.¹¹ These damages could be assessed either at the conference and conciliation stage or following an administrative hearing. The question presented, and as yet unanswered, is whether the Human Rights Commission possesses the power to make such damage awards.

If such power does exist, its basis must lie somewhere within the Human Rights Act. The commission, as an administrative agency, can have only those powers expressly granted by statute and those that may reasonably be implied as necessary to fulfill the purposes for which the agency was created.¹² Therefore, an examination of the West Virginia Human Rights Act and the interpretation given similar acts by the courts of other states may be helpful.

As previously stated, the West Virginia Human Rights Commission, upon a finding of unlawful discrimination, may order the guilty respondent to cease and desist the unlawful practice and may take such affirmative action as in the commission's judgment will effectuate

¹⁰ W. VA. CODE ch. 5, art. 11, § 10 (Michie 1971 replacement volume).

¹¹ Letter from A. Andrew MacQueen to Harvey Peyton, Jan. 30, 1973, on file in West Virginia University Law Library.

¹² *Colvin v. State Workmen's Comp. Comm'r*, 175 S.E.2d 186 (W. Va. 1970).

the purposes of the Human Rights Act.¹³ The purposes of the Act are to eliminate discrimination in employment, public accommodations, and housing, because of race, religion, color, national origin, ancestry, sex, or age.¹⁴ Language similar to this is found in the chapter of the Oregon Code dealing with enforcement of civil rights.¹⁵ There the protection of civil rights is entrusted to the Bureau of Labor. As in West Virginia, investigation of complaints is made by field representatives. If efforts to meet with the respondent fail, a hearing is held, and administrative findings are made. If unlawful discriminatory practices are found, the commissioner may issue a cease and desist order to eliminate the effects of such practices. He may require the respondent to perform acts reasonably calculated to carry out the purposes of Oregon's civil rights legislation.¹⁶ The purposes of that legislation include the assurance of human dignity and the protection of health from the consequences of hostility and tensions of racial discrimination. The statute clearly states the intention of the legislature to provide an adequate remedy for persons aggrieved by acts of discrimination.¹⁷ Even though the commissioner is not expressly authorized by statute to assess damages, the Oregon court found that such authority did exist. The court upheld an award of two hundred dollars to complainant as compensation for humiliation and mental suffering that resulted from a racially motivated denial of housing. Further compensation for contingent moving expenses was found to be based on unreliable evidence and was set aside.¹⁸ Still, it is significant that a statute very similar to the West Virginia Human Rights Act was held to grant an administrative agency the power to assess compensatory damages.

In another case involving racially motivated denial of housing,¹⁹ the New Jersey court upheld the authority of the director of the Division on Civil Rights to grant compensatory damages other than those expressly set out in the New Jersey Law Against Discrimination.²⁰ The language of this act is more analogous to the West Virginia Human Rights Act than the Oregon civil rights legislation.²¹ As

¹³ W. VA. CODE ch. 5, art. 11, § 10 (Michie 1971 replacement volume).

¹⁴ *Id.* § 4.

¹⁵ ORE. REV. STAT. § 659 (1971). This section is entitled Enforcement of Civil Rights.

¹⁶ ORE. REV. STAT. § 659.010(2)(a) (1971).

¹⁷ *Id.* § 659.022.

¹⁸ *Williams v. Joyce*, 479 P.2d 513 (Ore. App. 1971).

¹⁹ *Jackson v. Concord Co.*, 54 N.J. 113, 253 A.2d 793 (1969).

²⁰ N.J. STAT. ANN. § 10:5-1 (Supp. 1973).

²¹ Compare N.J. STAT. ANN. § 10:5-17 (Supp. 1973), which provides in part for the issuance of orders requiring the respondent to cease and desist

in West Virginia, the New Jersey law mentions a back pay award. The New Jersey court interpreted this as a manifestation of the legislature's intention that damages be considered as part of an effective remedy. The mention of back pay was considered an indication of direction and not as a remedy exclusive of all other types of damages. The court noted that the language of the statute was analogous to the National Labor Relations Act,²² which has been construed to authorize money awards to workmen for losses suffered on account of unfair labor practices. This type of award vindicates the public policy that the National Labor Relations Board was charged to enforce.²³ The New Jersey court clearly indicated that the prevention of discrimination, a vindication of individual rights, is a vital interest of New Jersey.²⁴ The court apparently felt that the power to assess damages was necessary to the prevention of discrimination.

At least one state court has expressed a contrary view. In *Iron Workers, Local 67 v. Hart*,²⁵ the Iowa court interpreted provisions of the Iowa Civil Rights Act,²⁶ similar to those of New Jersey and West Virginia, and held that the Iowa Civil Rights Commission was not authorized to award damages. The court noted that the complaint filed with the commission contained no mention of damages and that there was no statutory language apprising the respondent that the administrative hearing might result in an award of damages. Therefore it concluded an award of damages would be unsuitable.²⁷ This argument was not presented in either the Oregon or New Jersey cases, which the Iowa court neither cited nor discussed in its decision. The court did note that the Iowa Civil Rights Act appeared to be a variation of the Model Anti-Discrimination Act,²⁸ which it felt was the model for several similar state acts.

from the unlawful practice and to take such affirmative action as, in the judgment of the director, will effectuate the purposes of the act, with W. VA. CODE ch. 5, art. 11, § 10 (Michie 1971 replacement volume).

²² 29 U.S.C. § 160(c) (1970), provides for the issuance of orders "requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this subchapter"

²³ NLRB v. Strong, 393 U.S. 357 (1969).

²⁴ Jackson v. Concord Co., 54 N.J. 113, 123, 253 A.2d 793, 798 (1969).

²⁵ 191 N.W.2d 758 (Iowa 1971).

²⁶ IOWA CODE ANN. § 601A.9(12) (Supp. 1973) provides for the issuance of an order "requiring such respondent to cease and desist from such . . . practice and to take such affirmative action . . . as in the judgment of the commission shall effectuate the purposes of this chapter."

²⁷ Iron Workers, Local 67 v. Hart, 191 N.W.2d 758, 767 (Iowa 1971).

²⁸ THE MODEL ANTI-DISCRIMINATION ACT (1966). For the text of this Act see, 4 HARV. J. LEGIS. 224 (1967).

What the Iowa court appears to have said is that without express authority to assess damages no such authority will be implied. The court stated that the usual remedies are sufficient and damages may be sought in subsequent civil actions. It held that the commission is an enforcer of public policy and not an arbiter of rights between individuals.²⁹ This ignores the proposition that individual redress may be essential to the furtherance of that public policy. If that proposition is correct the reasoning of the New Jersey court appears sound, not only for interpretation of New Jersey's Law Against Discrimination, but for the West Virginia Human Rights Act as well. If the award of damages is necessary to provide an adequate individual remedy, the power to make such awards should be considered indispensable to the powers expressly granted the Human Rights Commission. When construing administrative grants of power, the courts should and must accord such powers to the agency.³⁰

This necessarily leads one to question whether damage awards do present the most functional remedy for the complainant so as to be indispensable to the commission's functions. Obviously the most desirable remedy would be to offer the complainant the very privilege wrongfully denied him. It has been suggested that state civil rights agencies make extensive use of interim injunctive relief to hold the job or housing unit for the complainant until some administrative settlement can be made.³¹ The West Virginia Human Rights Commis-

²⁹ *Iron Workers, Local 67 v. Hart*, 191 N.W.2d 767, 768 (Iowa 1971).

³⁰ *Colvin v. State Workmen's Comp. Comm'r*, 175 S.E.2d 186 (W. Va. 1970). A claimant's protest was dismissed by the hearing commissioner for failure of the claimant to diligently prosecute his claim. The Workmen's Compensation Appeals Board reversed this action, stating that no express authority for such action by the commissioner existed in the statute that set up the Workmen's Compensation Commission. The West Virginia Supreme Court of Appeals, although upholding another part of the board's decision, reversed this point and held that the commissioner did have authority to dismiss claimant's protests for good cause, even without express statutory grant of such power. In reaching this decision, the court commented extensively on the power granted administrative agencies and the sources of power for such bodies outside the enabling statutes.

³¹ J. WITHERSPOON, *supra* note 9, at 190-95. For illustration, the author cites the experience of the New York City Commission on Human Rights. Prior to the express grant of authority to seek temporary injunctions, only 27% of the satisfactory adjustments achieved by the commission resulted in the offer of the same housing unit originally sought by the complainant. Uncertainty forced many complainants into other arrangements; only 16% of settlements resulted in the acquisition of the housing originally sought. When the commission achieved the ability to seek interim injunctive relief the number of adequate settlements increased appreciably. Interestingly, such injunctions were obtainable in as little as twenty-four hours. The accessibility of this remedy led Mr. Witherspoon to conclude that damages should not be allowed in cases where commissions had not made timely moves to secure needed injunctions.

sion is expressly authorized to seek such injunctions in cases of housing discrimination;³² this remedy is used whenever feasible.³³ However, the granting of these interim injunctions is conditioned upon certain bonding requirements,³⁴ which are often beyond the capabilities of complainants.³⁵ In addition, the geographic nature of West Virginia makes injunctive relief unattainable in many cases. If a complaint of housing discrimination is filed from Wheeling, West Virginia, for instance, the field representative must travel from the commission offices in Charleston, West Virginia, to meet with respondent and attempt to elicit a promise that the housing unit will not be disposed of adversely. If no such promise is forthcoming, the field representative must contact the commission's counsel in Charleston and request injunctive relief. Since the injunction must be sought in the circuit court of the county where the housing unit is located, the commission's counsel must then travel to Wheeling to present the commission's request. Depending upon the county where the complaint was filed, this procedure may consume from two to three days.³⁶ It has been the experience of the commission that attractive housing opportunities are seldom available in urban areas for more than a few days.³⁷ The only other alternative to the award of damages is to force the subsequent tenant to vacate the premises so that it would be available for the complainant. Such an order appears contrary to the commission's function. It would burden the innocent third party tenant instead of the guilty landlord respondent.³⁸

No express grant of power exists for the commission to seek interim injunctive relief in cases of job discrimination, but there is some authority for the proposition that the commission may have the implied power to do so.³⁹ Such an injunction was sought on at least one occasion.⁴⁰ Nevertheless, the problems involved in housing discrimination cases would be equally as prevalent in cases of job discrimination. The express grant of power to seek injunctions in

³² W. VA. CODE ch. 5, art. 11, § 18 (Michie 1971 replacement volume).

³³ Interview with A. Andrew MacQueen, Staff Counsel for West Virginia Human Rights Commission, in Charleston, West Virginia, Jan. 31, 1973. The discussion with Mr. MacQueen centered on complaint procedures, typical problem cases, and the feasibility of various remedies.

³⁴ W. VA. CODE ch. 5, art. 11, § 18 (Michie 1971 replacement volume).

³⁵ Interview, *supra* note 33.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Letter, *supra* note 11.

³⁹ Note, *Interim Injunctive Relief Pending Administrative Determination*, 49 COLUM. L. REV. 1124 (1949).

⁴⁰ Interview, *supra* note 33. The commission's sole attempt to gain interim injunctive relief in a case of employment discrimination was unsuccessful.

housing cases could even militate against the presence of such power in employment situations. The doctrine of *inclusio unis est exclusio alterius*⁴¹ could lead to the interpretation that the legislature intended no such authority to exist, though it is doubtful that the legislature would intentionally deprive an administrative agency of powers necessary to the performance of its duties.⁴² It seems apparent then that in a certain class of cases, *i.e.*, where the privilege sought has been disposed of before administrative action is possible, an award of damages may be necessary to fulfill the purposes of the Human Rights Act.

If damages are necessary, what types of damages are contemplated by the commission? The award of out-of-pocket expenses incurred by the complainant by the unlawful act of discrimination should present little problem. Like the expressly authorized awards of back pay, these expenses should be reimbursed if they can be proved with reasonable certainty.

Considerable more difficulty may be encountered in the award of damages to compensate the aggrieved party for the embarrassment, humiliation, and mental suffering caused by the respondent's act of discrimination. Even though numerous cases in other jurisdictions have recognized this type of injury as a compensable item of damages,⁴³ the weight of authority in West Virginia indicates that the wrongful act must result in some cognizable physical injury or effect before damages can be awarded for mental suffering, pain, and personal upset.⁴⁴ This concept is said to be based upon the proposition that without some attendant physical injury serving as a touchstone, the nature of physical anxiety is too vague and remote to be subject to pecuniary compensation.⁴⁵ The obvious flaw in this reasoning is that measurement of such damages should be no more difficult than

⁴¹ This rule of construction is defined as the inclusion of one is the exclusion of another. BLACK'S DICTIONARY 906 (rev. 4th ed. 1968).

⁴² See note 39, *supra*, at 1130.

⁴³ The embarrassment and emotional upset and suffering arising from discriminatory acts has been recognized as a compensable item of damages both under common law principles and under state civil rights statutes. For cases deciding this issue under common law principles see *Alcorn v. Anbro Eng'r, Inc.*, 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970) (action resulted from verbal abuse and dismissal from employment); *Ruiz v. Bertolotti*, 37 Misc. 2d 1067, 236 N.Y.S.2d 854 (Sup. Ct. 1962) (neighborhood threats forced abandonment of contract to purchase home); *Odom v. East Ave. Corp.*, 178 Misc. 363, 34 N.Y.S.2d 312 (Sup. Ct. 1942) (refusal of hotel to serve guests in hotel dining room). For cases decided under state civil rights statutes see note 50.

⁴⁴ *Toler v. Cassinelli*, 129 W. Va. 591, 41 S.E.2d 672 (1946); *Monteleone v. Co-Operative Transit Co.*, 128 W. Va. 340, 36 S.E.2d 475 (1945).

⁴⁵ *Monteleone v. Co-Operative Transit Co.*, 128 W. Va. 340, 351, 36 S.E.2d 475, 480 (1945).

setting a price on physical pain suffered by an accident victim, a practice that is common in our courts.⁴⁶

The West Virginia Supreme Court of Appeals has recognized that the difficulty of damage assessment is not the only reason for this impact-injury doctrine, and in doing so has given some indication that the doctrine may not apply to cases such as those heard by the Human Rights Commission. In *Sutherland v. Kroger Company*⁴⁷ the court clearly recognized the existence of two types of tortious acts. One is composed of those acts that are legal wrongs, in themselves constituting invasions of right. The other is made up of breaches of duty not necessarily violative of any legal right. For those acts amounting to breaches of duty, violation of right must be established by some actual physical damage. The presence of physical injury guarantees that acts not wrongful in themselves were actually harmful to the alleged injured party. Thus the necessity of physical harm or impact serves as a basis for the measurement of compensation and also guarantees the validity of claims based upon acts of negligence.

In the first classification, those acts *malum in se*, the right is violated when the act is committed, and damages flow from the wrongful act even though that act is unattended by perceptible loss or harm. The denial of the right of equal opportunity guaranteed by the West Virginia Human Rights Act clearly falls within this first class. The Act guarantees equal opportunity to all citizens as a personal civil right,⁴⁸ and practices that violate those rights are made unlawful.⁴⁹ Discriminatory practices are legal wrongs constituting an invasion of right. Damages for mental suffering, embarrassment, and humiliation will flow from the discriminatory act even though no physical injury can be shown. The adoption of similar reasoning in other jurisdictions to justify awards for mental suffering and humiliation in cases of discrimination lends credence to the validity of the distinction drawn in *Sutherland*.⁵⁰

⁴⁶ W. PROSSER, *THE LAW OF TORTS* 50 (4th ed. 1971).

⁴⁷ 144 W. Va. 673, 110 S.E.2d 716 (1959). *But cf.* *Amos v. Prom, Inc.*, 115 F. Supp. 127 (N.D. Iowa 1953). The district court refused to relinquish jurisdiction of a discrimination case in which damages for embarrassment were sought even though the controversy could have been settled under state civil rights law. The court held that there could be no adequate recovery under state law since there could be no recovery in Iowa for mental suffering or emotional distress without some accompanying physical injury.

⁴⁸ W. VA. CODE ch. 5, art. 11, § 2 (Michie 1971 replacement volume).

⁴⁹ *Id.* § 9.

⁵⁰ *Mass. Comm'n Against Discrimination v. Franzaroli*, 256 N.E.2d 311 (Mass. 1970) (wrongful refusal to rent); *Gray v. Serruto Builders, Inc.*, 110 N.J. Super. 297, 265 A.2d 404 (App. Div. 1970) (wrongful refusal to rent);

In addition to *Sutherland*, there are certain recurring *dicta* in some of West Virginia's leading "physical impact-mental suffering" decisions that point toward recovery for mental injuries regardless of physical harm. In *Monteleone v. Co-Operative Transit Company*,⁵¹ the court noted that the weight of authority supported recovery for mental and emotional disturbance resulting from defendant's intentional or wanton wrongful act without any need for physical injury. When the suitability of indignity, humiliation, and insult as a basis of compensatory damages was questioned, the court in *Toler v. Cassinelli*⁵² stated that such basis was proper where the injuries were inflicted by the defendant's willful acts. In the opinion no mention was made of physical injury. In *Browning v. Slenderella Systems of Seattle*,⁵³ the Washington court, incorporating language similar to that used in the two West Virginia decisions, found a denial of services, in violation of that state's civil rights laws, to be a "wrongful act intentionally done." In light of the character of the defendant's action, the court found that mental suffering could be compensated without any attendant physical harm. However, the application of this reasoning in West Virginia is uncertain, because in *Monteleone* and *Toler* there was some physical injury. An earlier case dealing with false imprisonment, cited for the willful act proposition in both *Monteleone* and *Toler*, provides a more favorable comparison. In *Jones v. Hebdo*,⁵⁴ the propriety of mental suffering awards as compensatory damages was in issue. No physical harm had been inflicted on the plaintiff. The court held that when the defendant acts wrongfully and unlawfully to injure the plaintiff's dignity or reputation, mental suffering should be compensated. Still, the basic questions of the impact requirement were not clearly raised because the wrongful act was in violation of a common law right and therefore within the first class of *Sutherland* torts. The issue of compensation for mental suffering in Human Rights Act violation cases is far from clear. There is, however, substantial authority favoring such awards when the complainant's humiliation and embarrassment can be shown with reasonable certainty.

Williams v. Joyce, 479 P.2d 513 (Ore. App. 1971) (wrongful refusal to rent); *Browning v. Slenderella Systems of Seattle*, 54 Wash.2d 440, 341 P.2d 859 (1959) (damages for humiliation and upset awarded even though act of discrimination was "polite" — plaintiff was simply left in waiting room and ignored).

⁵¹ 128 W. Va. 340, 36 S.E.2d 475 (1945).

⁵² 129 W. Va. 591, 41 S.E.2d 672 (1947).

⁵³ 54 Wash. 2d 440, 341 P.2d 859 (1959).

⁵⁴ 88 W. Va. 386, 106 S.E. 898 (1921).

The Human Rights Commission also has taken the position that awards of exemplary damages may be justified whenever the deprivation of personal rights is wanton or malicious, regardless of any other remedial or compensatory requirement.⁵⁵ Such awards may depend upon the commission's ability to assess substantial compensatory damages for the complainant's humiliation and mental suffering. While exemplary or punitive damages are not repugnant per se to the public policy of West Virginia, they must bear some reasonable relationship to the award of compensatory damages.⁵⁶ The compensatory damage award is an indispensable prerequisite to the award of any punitive damages.⁵⁷ Thus, without some measure of compensable harm, the award of exemplary damages would not seem justified. In certain cases, however, this restriction may be in doubt. A federal district court in *Gilliam v. City of Omaha*, denied jurisdiction of a civil rights case on the basis of an adequate state remedy; it commanded the Nebraska Equal Employment Opportunity Commission to award the aggrieved party punitive damages, even though such damages were repugnant to Nebraska public policy.⁵⁸ Citing the decision of the United States Supreme Court in *Ker v. California*,⁵⁹ the court said that United States constitutional rights could not be diminished by state legislation or court decisions. When a violation of state law also amounts to a violation of a United States constitutional right, awards of punitive damages must be made when necessary. The commission was directed to resort to federal civil rights cases when determining the appropriateness of damages in a given case. Although the interpretation of *Ker* may be strong, it remains that the West Virginia Human Rights Commission may be compelled to award punitive damages in cases where the practice made unlawful by the Human Rights Act is also an unconstitutional practice under the United States Constitution. As in *Gilliam*, such an award could be ordered even though repugnant to West Virginia's public policy. This would include those cases where there is no suitable compensatory award to serve as a basis for punitive damages.

As with all cases involving legislative grants of power, the propriety of the commission's damage awards must be considered in re-

⁵⁵ Letter, *supra* note 11.

⁵⁶ *Spencer v. Steinbrecher*, 152 W. Va. 490, 164 S.E.2d 710 (1968).

⁵⁷ *Id.*; *Toler v. Cassinelli*, 129 W. Va. 591, 41 S.E.2d 672 (1947).

⁵⁸ 331 F. Supp. 4 (D. Neb. 1971). The court stated that the complainant's allegation that she was discriminated against because of race or sex was sufficient to raise a federal constitutional question and to make the grant of punitive damages appropriate.

⁵⁹ 374 U.S. 23 (1963).

lation to the West Virginia constitution. While the West Virginia Supreme Court of Appeals has recognized that efficient government necessitates some overlapping of functions, it has clearly stated that the idea of separation of powers⁶⁰ will not be set aside when construing administrative grants.⁶¹ To pass constitutional muster, the discretionary power of the agency must be accompanied by adequate standards. Its power must be either prescribed by statute or inherent from the subject matter of the legislation.⁶² It is arguable that sufficient guidelines may be discerned from the subject matter of the Human Rights Act to restrict the commission's discretionary powers and bring it within constitutional bounds. The commission's power to formulate remedies and assess damages is founded not only on the unbridled discretion of its members but also on ascertained facts and precedent from cases where similar damages have been awarded. The provision for judicial review of commission orders should assure the judiciary that any unconstitutional extension of power would not go undetected.⁶³

A further constitutional provision, which preserves the right to trial by jury in suits at common law where the amount in controversy exceeds twenty dollars,⁶⁴ is clearly inapplicable. This section only applies to those actions that were a part of the common law when that provision was enacted.⁶⁵ This means the common law as it existed in 1880.⁶⁶ Therefore, the right to jury trial under the Human Rights Act, amended to provide remedial powers in 1967, does not exist.

The West Virginia constitution provides that circuit courts have original and general jurisdiction of all actions in which the value in controversy exceeds fifty dollars.⁶⁷ The effect of this provision on the litigation of damages by the Human Rights Commission is unclear. In *Halltown Paperboard Company v. C. L. Robinson Corporation*,⁶⁸ the defendant corporation attempted to have an action to settle rights between riparian owners dismissed because of plaintiff's failure to exhaust administrative remedies before the Water Resources Board.

⁶⁰ W. VA. CONST. art. V, § 1.

⁶¹ *Chapman v. Huntington Housing Authority*, 121 W. Va. 319, 3 S.E.2d 502 (1939).

⁶² *Id.* at 336, 3 S.E.2d at 511.

⁶³ Judicial review of the commission's order is guaranteed by the West Virginia Administrative Procedure Act, W. VA. CODE ch. 29A, art. 5, § 4 (Michie 1971 replacement volume).

⁶⁴ W. VA. CONST. art. III, § 13.

⁶⁵ *State v. Boggess*, 147 W. Va. 98, 126 S.E.2d 26 (1962).

⁶⁶ *Hickman v. Baltimore & O.R.R.*, 30 W. Va. 296, 4 S.E. 654 (1887).

⁶⁷ W. VA. CONST. art. VIII, § 12.

⁶⁸ 150 W. Va. 624, 148 S.E.2d 721 (1966).

The question of that board's primary jurisdiction to administer the water use laws was certified to the West Virginia Supreme Court of Appeals. The court held that the circuit courts could not be divested of their jurisdiction by the legislature and that the character of the action was within the circuit court's jurisdiction.⁶⁹ This could be interpreted as meaning that circuit courts may not be divested of jurisdiction in actions over which they have always held jurisdiction. Therefore, the activities of the Human Rights Commission, which were created by the legislature and over which the circuit courts have never had jurisdiction, would be exempt. The assignment of any meaning, of course, must await judicial action. Still, the constitutional inhibitions placed on the commission's ability to assess damages are far from insurmountable.

When the question of the Human Rights Commission's ability to award damages is considered as a whole, certain facts seem evident. First, the commission must provide adequate remedies for complainants if it is to fulfill its purpose and eliminate unlawful discrimination. Second, there are certain cases when damages afford the only functional remedy. Unlike the situation in Iowa, where damages may be sought after administrative action, the complainant's remedy before the West Virginia Human Rights Commission is exclusive and precludes subsequent court action.⁷⁰ Third, the types of compensatory damages the commission wishes to assess are probably compensable in West Virginia. In addition, the commission may occasionally find itself compelled to award exemplary damages for the vindication of United States constitutional rights even though such an award would not be proper under West Virginia law. In light of these factors, it becomes clear that if the constitutional barriers can be overcome, the power of the West Virginia Human Rights Commission to assess damages in proper cases should be recognized.

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⁶⁹ *Id.*

⁷⁰ W. VA. CODE ch. 5, art. 11, § 13 (Michie 1971 replacement volume), provides that

as to acts declared unlawful by . . . this article the procedure herein provided shall, when invoked, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the complainant concerned. If such complainant institutes any action based on such grievance without resorting to the procedure provided in this article, he may not subsequently resort to the procedure herein.