In the Commonwealth Court of Pennsylvania

No. 865 C.D. 1973

J. HOWARD BRANDT, INC., DOLORES S. BRANDT and J. HOWARD BRANDT,
Appellants

v.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BRIEF FOR APPELLEE

Appeal From the Final Order of the Pennsylvania Human Relations Commission, Docket No. H-1718.

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COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. Was a finding by the Pennsylvania Human Relations Commission of discrimination on the basic of race or sex in the rental of commercial housing supported by the testimony of a white male and a black female, who in all objective respects were the same but for their race and sex, that they made similar inquiries as to the availability of rental units within minutes of each other yet received substantially different responses from the appellants?

2. Do the Commission's findings of fact indicate that the testimony of the Director of Housing was considered in issuing its Decision?

3. Did the use of housing testers fall within any application of the entrapment doctrine?

COUNTER-HISTORY OF THE CASE

The appellants J. Howard Brandt, Inc., Dolores S. Brandt and J. Howard Brandt have taken exceptions to certain findings of fact and conclusions of law of the Pennsylvania Human Relations Commission (Commission) and have appealed the decision and final order issued pursuant thereto. Said decision is that the appellants violated Section 5(h)(1) of the Pennsylvania Human Relations Act of October 27, 1955, P. L. 744, as amended (43 P.S. §955 (h)(1)).

Field Representatives of the Commission Gerard Rugel, race white, and Margaret Mitchell, race black, testified at a public hearing convened by the Commission on December 28, 1972 that on February 3, 1972 they individually sought information concerning the availability of rental units leased through the agency of J. Howard Brandt, Inc. Real Estate in Wynnewood, Pennsylvania. Mitchell testified that she entered the Brandt office at 29 East Wynnewood Avenue ten minutes after Rugel departed and was told by Dolores Brandt that nothing was available. There is no testimony that she presented herself in a manner or gave any information about herself that would in any way distinguish her from Rugel, except for the obvious fact that she is a black female. Yet Rugel testified that in response to his inquiry, which was similar to Mitchell's he was offered a three bed-

room house by employee Frederick Erwin Haupt. Rugel and Mitchell thereafter filed their sworn reports with the Commission.

After checking the validity of these reports the Commission determined that there existed probable cause to believe that an unlawful discriminatory act had occurred. Whereupon the Commission served the respondents with a Human Relations Commission initiated complaint, pursuant to Section 9 of the Pennsylvania Human Relations Act (43 P.S. §959). Said complaint alleged violation of §959(h) of the Human Relations Act. After unsuccessfully attempting to eliminate or prevent future unlawful discriminatory acts by conference, conciliation and persuasion a public hearing was convened pursuant to Section 959 and conducted by Commissioners Joseph X. Yaffe, Esquire, presiding, Emily W. Sunstein and Alvin E. Echols, Jr., Esquire.

The Brandts and their employees testified that they could not remember the incident. The Brandts also denied the allegations by stating that they have always obeyed the Commonwealth's fair housing laws and regulations.

The hearing panel considered only the relevant, admissible evidence and resolved the credibility questions in favor of Rugel and Mitchell. Thereupon the Commissioners found that the appellants had violated §955(h). The findings, conclusions, decision and order issued pursuant thereto are the subject of the instant appeal.

ARGUMENT

I. There Is Sufficient Evidence To Support a Finding and Conclusion That on the Date In Question an Unlawful Discriminatory Act Occurred

Section 1710.44 of the Administrative Agency Law of June 4, 1945, P. L. 1388 §44, 71 P.S. §1710.-44, states with respect to appeals from adjudication of administrative agencies as follows:

> ". . . After hearing, the court shall affirm the adjudication unless it shall find . . . that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. . . ."

The appellants have expended much effort to impeach the credibility of the testers both at the public hearing and in their brief in an apparent attempt to cast doubt on whether the tests were in fact conducted. Yet little effort is made to impeach the validity of the tests themselves. The substantial evidence test should be applied only to that evidence which the fact-finder determines to be credible. The credibility of evidence has nothing to do with its capacity, if believed, to meet the substantial evidence test. And of course credibility is a matter to be determined only by the fact-finders. The Court cannot substitute its judgment for that of the Commission; nor can it weigh

the evidence or pass on the credibility of witnesses. *Pennsylvania Human Relations Commission v. Brucker,* 51 D. & C. 2d 369, 93 Dauph. 8 (C. P. Dauphin Co. 1970).

Hence it is not "significant to note,", as the appellants assert in their brief at p. 16 as well as in the History of the Case, that the white tester, Gerard Rugel, did not observe a white female in the office during his inquiry. Mr. Brandt testified that he had an inner office (R. 51a) which could explain why Rugel did not see Mrs. Brandt and Margaret Mitchell did not see Mr. Haupt in the outer office when they made their respective inquiries. Neither is it significant that Rugel could not identify Haupt in the hearing room during his initial testimony. During public hearings rooms are often crowded and many factors can contribute to the inability of a witness to make a visual identification during testimony, especially if the subject is not sitting at the counsel table as apparently was the situation at the hearing in question.

The point is that the hearing panel chose to believe that the tests were indeed conducted on February 3, 1972 as per the testimony of Rugel and Mitchell. The only issue is the substantive validity of those tests. But the appellants have chosen not to address themselves to that issue and have instead rested their case on picayune matters of credibility.

Was there sufficient evidence to demonstrate disparate treatment based on race or sex? If so,

may the Commission, based upon such evidence find that the appellants violated §5(h)(1) of the Pennsylvania Human Relations Act of October 27, 1955, P. L. 744, as amended (43 P.S. §955(h)(1))? It must first be emphasized that any act or omission which results in two or more persons being treated differently because of race or sex is unlawful if it occurs in connection with any of the proscribed areas, to wit housing, employment, etc. The Commission is duty bound to find that an unlawful discriminatory act occurred if two people, having no other perceptible differences between them but for race and sex, are given different information with respect to the availability of commercial housing, and no credible explanation for the occurrence is put forth. In the instant case the appellants chose not to *explain* but instead attempted to *refute*.

It should also be stated that the fact that the two testers each spoke to different persons during their respective tests is of no consequence. It is enough that they inquired within minutes of each other and spoke to persons charged with the responsibility of knowing what was available when dealing with prospects. As a federal court stressed in a case where the testimony of testers was used, a violation of housing laws is established "... where, as here, management's lack of supervision and failure to establish objective and reviewable standards have resulted in apartments being made unavailable to blacks by agents and employees. ..." *U. S. v. Youritan Construction Co.*, P-H Eq. Opp. Housing, ¶13,582 (D.C. N.D. Cal. Feb. 8, 1973).

Now let us turn to the testimony of the testers. Rugel, the white male tester, testified that on the day in question he entered the Brandt office and inquired about the availability of one or two bedroom apartments or houses (R. 18a). He testified that he presented himself as being married, with no children or pets. He further testified that he was offered a three bedroom accommodation at the Penn Wynne for a rental price of $300 per month (R. 19a).

Yet Mitchell, the black female tester, testified that ten minutes after Rugel departed she entered the same Brandt office seeking available rentals from one to three bedrooms with a rental price between $125 and $375 (R. 29a). Although she too presented herself as being married, and did not appear dissimiliar in background or need from Rugel, she was told there was nothing available (R. 30a). Since no one left the office during the ten minutes after Rugel's departure (R. 31a), it somewhat stretches credulity to believe that if Mitchell were white she would not have received the same information as had Rugel.

The testimony of the two testers raises more than a mere suspicion that an act of discrimination occurred. It requires no effort whatever for a reasonable mind to conclude, based on the above-summarized testimony, that Rugel and Mitchell received different information. That is the main conclusion made by the Commission (R. 104a). By

any definition of substantial evidence said conclusion is adequately supported by the relevant evidence, as summarized in the findings of fact (R. 102a, 103a).

In a similar case involving an almost identical statute enforced by the Ohio Civil Rights Commission where the only evidence of discrimination was the disparate treatment afforded a black prospect as compared to a subsequent white inquirer, with respect to one apartment, the court in affirming the adjudication and issuing an extensive order against a rental agent stated in response to the assertion that the findings were not supported by substantial evidence:

> ". . . the Court has read and reread the record in this case and is convinced that there is reliable, probative and substantial evidence to support the Commission's finding of unlawful discrimination. . . .
>
> * * * * * *
>
> "While it is true that the Commission's case lies primarily on circumstantial evidence, this is about all one will ever get in this type of case."

Miller Properties, Inc. et al. v. Ohio Civil Rights Commission, P-H Eq. Opp. Housing, ¶15,016, pp. 15,026, 15,027 (Ct. of C.P., Franklin Co., Ohio, April 21, 1972).

A New Jersey Appellate Division Court recently affirmed a decision of that State's Division on Civil Rights based on a similar record where testers were used. *Polk v. Cherry Hill Apartments, Inc. et al.*, 118 N.J. Super. 106, 286 A. 2d 712 (App. Div. 1972, appealed on other grounds, see 62 N.J. 55 (1972)).

The testimony of the testers established at least a prima facie case of discrimination which the appellants made no effort to rebut. As stated, the efforts of the appellants were centered on challenges to the credibility of that testimony. The appellants have cited *Pennsylvania Human Relations Commission v. Altman*, 42 D. & C. 2d 317 (1967), as supporting their assertion that no unlawful discriminatory act can be established upon the facts in the instant case.

The text of the *Altman* opinion reveals that the appellants' witnesses made a good faith effort to explain why different information was disseminated. Mrs. Hayward, the appellants' part-time employee, testified that she erred in telling the white tester that three units were available. Her testimony was corroborated by that of Albert Wachs, the property manager, who testified that at the time the white tester inquired and subsequently at the time the bona fide black renter inquired, no units were available in the section devoted to families with children. Both the white and black inquirers reported they had one child.

Furthermore, Hayward testified that she lied to the black inquirer. Although the Commission chose to disbelieve most of these attempts to explain why the black inquirers were told no units were available, the point is that by so attempting

they gave the court rebuttal evidence to consider. The appellants in *Altman* did not rest their case on an effort to impugn the credibility of the Commission's witnesses. By putting forth testimony to explain why the blacks were rejected they effectively rebutted any presumptions created by the disparity in information disseminated, thereby reducing the conclusion to be drawn from that evidence to, what the court considered, a mere suspicion of discrimination.

Conversely, in the instant case the prima facie case remains unrebutted as there was no attempt to explain the occurrence. All the appellants have given the court to consider are challenges to the credibility of the testers.

It must also be stressed that the Court in *Altman* obviously erred in re-evaluating the credibility of the witnesses, since that is not a proper function of the reviewing court. Furthermore, the precedential value of *Altman* is slight since the court imposed upon the Commission an unusual burden of proof which more recent cases in the area of housing discrimination have shunned.

II. The Record Does Not Indicate That the Housing Director's Testimony Was Used Against the Appellants or That It Adversely Affected Their Case

It has long been held by both the federal courts and the courts of this Commonwealth as a rather fundamental precept of jurisprudence that the admission into evidence of immaterial or incompetent evidence, over objection, is not necessarily prejudicial, particularly where it appears that such evidence was eventually disregarded. Even when it is unclear whether or not such evidence was disregarded it will be presumed so, especially in non-jury proceedings. *Stewart et al. v. American Life Ins. Co.*, 89 F. 2d 743 (10th Cir. 1937). *Lion Yarn Co. v. Flock et al.*, 154 Pa. Superior Ct. 528, 36 A. 2d 246 (1944).

This doctrine is particularly germane where the appellant had the opportunity to cross-examine the witness of the appellee who gave the testimony to which it takes exception but declined to do so. *Grosso v. Englert*, 381 Pa. 351, 113 A. 2d 250 (1955). Such was the appellants' choice in the instant case (R. 43a).

The appellant made timely and continuing objections to the admission of testimony from the Commission's Housing Director. Initially the presiding Commissioner emphasized the fact that the rules of evidence at agency hearings are more relaxed than those applied in courts (R. 34a). Such relaxation is permitted by the Administra-

tive Agency Law, supra, P. L. 1388, §32, 71 P.S. §1710.32, which makes relevance the only restriction upon evidence. The obvious reason for wide latitude is that the hearings of administrative tribunals are intended to be designed to get at all the facts, from lay and expert witnesses, to enable agencies exercising special expertise in particular fields to make informed, intelligent decisions.

The presiding Commissioner then noted the objection and reserved a decision thereon, stating specifically that under no circumstance would the Commission permit the Director's testimony to prejudice the respondent's case (R. 35a, 36a). The Director was then permitted to testify but nothing he said was considered in the Commission's decision. The findings of fact do not include reference, even tangentially, to any testimony given by the Housing Director (R. 102a, 103a). There should be no reversal where the fact-finder admits evidence with doubt and reservation but does not mention it in the findings or opinion. This is a conclusive indication that such testimony was unnecessary to the decision and was not prejudicial. *Appeal of Pennsylvania's Northern Lights Shoppers City, Inc.*, 419 Pa. 31, 213 A. 2d 268 (1965).

Furthermore, excluding the testimony of the Housing Director, there was nevertheless other competent evidence received sufficient to support the Findings of Fact. Hence there can be no reversal simply because the alleged irrelevant evidence was heard. *Stewart et al. v. American Life Ins. Co.*, supra.

Even if the Commission had made findings based upon the challenged testimony, the appellant would still be required to demonstrate that such findings were "necessary to support its adjudication." 71 P.S. §1710.44, supra.

III. The Use of Testers Did Not, in Any Sense, Constitute Entrapment

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Proceeding at the risk of dignifying a patently spurious contention the appellee can only assert that its use of testers in this or in any other case does not, by any recognized definition, constitute entrapment.

The appellants have not cited any cases to support their position to that effect. Such is understandable. Violation of the Human Relations Act is not a crime although wilful violation of an order or interference with its agents is a misdemeanor (43 P.S. §961). Although the Commonwealth's new crimes Code at 18 P.S. §313 sets forth a rather broad definition of the concept of entrapment, it none the less requires the encouragement of conduct constituting an *offense*. The word "offense" generally implies a crime. The entrapment doctrine is out of place when used in proceedings other than criminal prosecutions.

That is not to say that the doctrine has not been invoked in non-criminal proceedings. In the Commonwealth it has been asserted frequently in pro-

ceedings before the Liquor Control Board. Usually the courts have either refused to answer the question of whether the doctrine applies in non-criminal proceedings as in *In Re Hoffco Corp.*, 198 Pa. Superior Ct. 1, 180 A. 2d 270 (1962); or have held that if applicable no entrapment existed. *In Re Reiter et al.*, 173 Pa. Superior Ct. 552, 98 A. 2d 465 (1953).

It suffices to say that the testers in the instant case merely presented themselves as would any other prospective tenants. Neither tester said anything to induce, encourage or cause the dissemination of disparate information. They merely afforded an opportunity for the Brandts to do that which they were already predisposed to do.

Hence *even if* the doctrine of entrapment could be asserted against the Commission, a quote from the *Reiter* case, supra, citing one of the principal federal precedents, is most appropriate:

> ". . . Though a citation proceeding is not, strictly speaking, a criminal proceeding, the statement of Mr. Justice Hughes . . . is none the less applicable. 'It is well settled that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises.' " 98 A. 2d at 468.

Finally, the U. S. Supreme Court recently further restricted the use of the entrapment doctrine and affirmed the Court's long-held position that

". . . there are circumstances when the use of deceit is the only practicable law enforcement technique available." *U. S. v. Russell,* U.S. , 93 S. Ct. 1637, 1645, U.S.L.W., 13 Crl 3055 (1973).

CONCLUSION

For the reasons set forth herein it is respectfully asserted by the appellee that the findings of fact, conclusions of law, decision and final order of the Pennsylvania Human Relations Commission should be affirmed.

Respectfully submitted,
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