In the Commonwealth Court of Pennsylvania

No. 935 C.D. 1973

LAKESIDE APARTMENTS, MR. WEBER, Agent, JACOB SEIDMAN, MERRILL SEIDMAN, and MORRIS SEIDMAN, Trustee Co-Partners Trading as MORRIS SEIDMAN & SONS,

Appellants

v.

PENNSYLVANIA HUMAN RELATIONS COMMISSION,

Appellee

BRIEF FOR APPELLEE

Appeal From the Decision and Final Order of the Pennsylvania Human Relations Commission Dated June 20, 1973, Docket No. H-1702.

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COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. May employees of the Pennsylvania Human Relations Commission qualify as prospective occupants or users of commercial housing where they testify that at the times of their respective inquiries they represented themselves as bona fide applicants?

2. Was a prima facie case of discrimination on the basis of race or sex in the rental of commercial housing established 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 same employee of the appellants?

3. May the Pennsylvania Human Relations Commission hold the appellant owners responsible, on an agency basis, for the acts of a resident employed full time by them to show available apartments to and receive applications from prospective tenants?

4. Does the final order of the Pennsylvania Human Relations Commission reasonably effectuate the policies/and purposes of the Human Relations Act?

COUNTER-HISTORY OF THE CASE

Field Representatives of the Pennsylvania Human Relations Commission (Commission) Gerard Rugel, race white, and Margaret Mitchell, race black, testified at a public hearing on December 28, 1972 that on January 25, 1972 they individually sought information concerning the availability of rental units at the Lakeside Apartments in Melrose Park, Pennsylvania. Mitchell testified that she entered the complex ten minutes after Rugel departed and was told by resident manager Ernest Weber that no apartments were available. There is no testimony that she presented herself in a manner or gave 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 not only informed of an available apartment by Weber but shown it. Rugel and Mitchell filed their sworn reports with the Commission on or about January 26, 1972.

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's staff ascertained the names of the owners of Lakeside Apartments and served upon

the Respondents a Human Relations Commission initiated complaint, pursuant to section 9 of the Pennsylvania Human Relations Act, Act of October 27, 1955, P. L. 744, as amended, 43 P.S. §959. Said complaint alleged violation of §955 (h) of the Human Relations Act.

On or about the same day of service, May 5, 1972, the Commission's staff presented the appellants with a proposed consent order and decree in order to foster negotiations pursuant to the Commission's mandate to endeavor to eliminate discriminatory practices by conference, conciliation and persuasion (§959). Said efforts having failed the Commissioners convened a public hearing pursuant to section 959 after serving proper notice upon all parties.

The hearing ended without the appellants seeking to determine whether there were any discrepancies in the information given to or inquiries made of Mr. Weber by Rugel and Mitchell such as would explain the discrepancies in the information Rugel and Mitchell received. Neither did the appellants elicit such information from their own witnesses such as would inform the Commissioners of the circumstances when different information might be given. Instead the appellants chose to question whether the incident occurred at all and relied substantially on the testimony of Mr. Weber that not only could he not remember the incident but that he was under instructions to show all available apartments to all inquirers.

The Commissioners resolved the credibility questions in favor of Rugel and Mitchell and thereupon found that the appellants had violated §955 (h). It is the order issued pursuant to that determination that the appellants appealed.

ARGUMENT

I. The Commission's Employees are Deemed to be Prospective Occupants or Users at the Times of Their Respective Inquiries, Which Inquiries Were Followed by Proper Commission Procedure

The essential thrust of the Human Relations Act is that where all relevant, objective factors appear equal, persons should not be treated differently simply because they are of different races, sexes, religions, etc. A passing review of criminal statutes makes clear to even the layman reader that when the legislature is concerned with motive and intent it so indicates. The legislature was not concerned with the inner motives and intentions of parties in enacting the provisions of the Human Relations Act except as these intentions manifest themselves in objective acts and events. Hence the use of the words "any prospective owner, occupant or user . . ." in section 5(h)(1) of the Pennsylvania Human Relations Act, 43 P.S. §955 (h)(1) should not be read as having anything whatever to do with the motives of one who seeks housing except as those motives are manifested in present words and actions.

The clause "any prospective owner . . ." must be read in its proper grammatical context. It is not an independent clause and should not be set

apart for the purpose of extrapolating from it meanings not intended by the legislature.

Section 955(h)(1) makes it unlawful:

> "(h) For any person to:
>
> (1) Refuse to sell, lease, finance or otherwise to deny or withhold commercial housing from *any person(s)* because of the race, color, religious creed, ancestry, sex or national origin of any prospective owner, occupant or user. . ." (Emphasis added.)

The clause "any prospective owner . . ." is clearly used only to supplement the class of proscribed harms that might befall "any person." That is, it is primarily "any person" who is protected from unlawful refusals. *In addition,* said person is protected if he or she is subjected to an unlawful refusal because of the "race, color . . ." of any (other) "prospective owner, occupant or user," who may reside or plan to reside with the primary user. How else could the legislative drafters have indicated their intent to identify not only those instances where the discrimination is based on the race, color, etc. of the person who actually negotiates and plans to sign the contract but also those instances where it is not *that* person but someone in his or her family whose race, color, etc, offends the perpetrator? Both variables are covered. The refusal is unlawful regardless of the objects thereof, be that object the person who seeks the housing or the person(s) who will reside or use the housing with him. Prime examples include

the proverbial landlord who refuses to rent to a man after the latter indicates that his roommate will be an unmarried woman, but who would have no qualms if the roommate was another man. Similar situations are presented by interracial marriages and it is in this secondary respect that §955(h)(1) is used in such cases. See *Pennsylvania Human Relations Commission v. Brucker,* 51 D. & C. 2d 369, 93 Dauph. 8 (C.P. Dauphin County 1970).

The foregoing is the *only* reason the words "any prospective owner . . ." were inserted by the legislature. To say that these words were included to somehow prevent the use of testers is to substantially distort the legislature's intent. It can only be said that "any person" who inquires as to the availability of housing is a prospective owner, occupant or user. One does not become less so simply because he or she is testing for compliance with the law.

The testers in the instant case did not identify themselves as such on the day of their tests, but simply presented themselves as would anyone making inquiries as to the availability of rental units (R. 14a, 32a). Housing tests are not new to the courts as the results of feigned inquiries have been admitted as the only direct and conclusive evidence of disparate treatment based on race. This has been particularly true under the federal civil rights and fair housing laws. *Brown v. Ballas,* 331 F. Supp. 1033 (N.D. Tex. 1971). Such evidence has also been admitted even where the

groups conducting the tests had no prior concrete knowledge of discriminatory practices on the part of the lessor and were simply checking at random for compliance with fair housing laws. *U.S. v. Youritan Construction Co.,* P-H Eq. Opp. Housing, ¶13, 582 (D.C. N.D. Cal Feb 8, 1973) (see footnote No. 3, p. 13,829). Title VIII of the Civil Rights Act of 1968, 42 U.S. C. 3604, which provided the basis for the complaint in the *Youritan* case, is substantially unlike §955(h)(1) of the Human Relations Act, but neither can be read to totally bar the admission of test results into evidence.

There is no question that in light of the broad mandate of the Human Relations Commission "(T)o formulate policies to effectuate the purpose of this act. . ." 43 P.S. §957(d), the Legislature intended it to be a body whose sophistication in seeking out and eliminating discrimination would increase just as rapidly as the sophistication in techniques and nuances of discrimination. As a law enforcement body the Commission is obligated to check for compliance with the law and, if possible, prevent discrimination *before* it finds its victims. As with victims of crime, *after* is often too late. The results of random tests conducted by the Commission are not new to this Court either. It is the substantive validity of those tests that the Court has been concerned with, not the Commissions statutory authority. *Marhoefer v. Pennsylvania Human Relations Commission,* 4 Pa. Commonwealth Ct. 242, 285 A. 2d

547 (1971). *Pennsylvania Human Relations Commission v. Tomlinson Agency,* No. 373 C.D. 1973.

Furthermore, the claim that the hearing and the Commission's subsequent order are prejudicial to the appellants is without legal sufficiency. All evidence received of the Commission's employees during the hearing was relevant and reasonably probative. Such is the only real restriction on evidence imposed by the Administrative Agency Law, Act of June 4, 1945, P. L. 1388 §32, 71 P.S. §1710.32. Nothing precludes the hearing Commissioners from making findings based solely upon the admissible testimony of staff members especially if such is necessitated by the fact that the complaint is one initiated by the Commission. The power to initiate its own complaint is a power specifically conferred upon the Commission by the Legislature (43 P.S. §959). It must follow then that the Legislature envisioned circumstances where findings would have to be based primarily on the testimony of Commission investigators.

Moreover, the *Brucker* case certainly does not preclude the Commission from basing a finding adverse to the appellants on the testimony of staff investigators. The only issue raised in *Brucker* in that respect was whether the testimony of the investigator was *substantively* prejudicial to a party.

The mere fact that the Commission bases findings upon the testimony of its field investigators

does not create an unlawful combination of functions. The Commissioners did not conduct the investigation. They only sat objectively to hear the results. Hence there was a proper separation of functions to the extent that the hearing Commissioners had not made prior determinations vis a vis the credibility of testimony subsequently placed before it at the hearing. It should also be noted that "a combination of investigative and judicial functions within an agency does not violate due process", *F.T.C. v. Cinderella Career and Finishing Schools, Inc.,* 131 U.S. App. D.C. 331, 404 F. 2d 1308 (1968), also cited by this Court in *Wasniewski v. State Civil Service Commission,* 7 Pa. Commonwealth Ct. 166, 168, 299 A. 2d 676, 678 (1973). Administrative due process and judicial process are not the same and must not be equated, *Pennsylvania Publications v. P.U.C.,* 152 Pa. Superior Ct. 297, 32 A. 2d 40 (1943); reversed on other grounds at 349 Pa. 184, 36 A. 2d 777 (1944).

II. A Prima Facie Case of the Existence of a Discriminatory Policy Was Established and Was Not Rebutted

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The two testers were of different races and sexes. The black female tester entered the rental office ten minutes after the white male (R. 32a). As the white tester testified earlier (R. 14a), the black tester similarly inquired about available units. She testified that Mr. Weber told her no

units were available (R. 32a) and refused to give her a business card (R. 33a). Note that Weber rejected Mitchell so quickly she had little opportunity to volunteer information which could be used to validly disqualify her (R. 32a and 33a).

Yet ten minutes earlier the white tester inspected an apartment ready and waiting for him (R. 14a). Since both persons made similar inquiries and received different responses the Commission could validly determine this disparate treatment to have been based on race or sex, there being no other perceptible differences between the two.

The Human Relations Act is founded on the precept that when two people are similarly situated and all other things are equal but for one or more of the specified classifications (race, sex, etc.), the Commission must find discrimination if they are treated differently absent some sound explanation. The appellants chose not to elicit such testimony as would explain the fact that the testers received different information. Instead they rested on the assertion that the testers were not bona fide prospects and the assumption that the alleged instructions given to Mr. Weber by his employers lessened the probability of such an incident. The latter involves a credibility determination. The credibility question was resolved against the appellants. As stated the testers were prospective tenants from a statutory standpoint. The burden of explaining the incident now having passed to the appellants, they are left having

neglected to deduce evidence which could impeach the validity of the tests. A prima facie case of discrimination was established and is unrebutted.

Certainly the test evidence meets the substantial evidence test of the Administrative Agency Law (71 P.S. §1710.44). The Commission's order is not based on a mere scintilla of evidence or suspicion of discrimination. Furthermore, this one incident is sufficient to show the existence of a policy of discrimination such as would support a broad order protecting all black persons who may subsequently seek housing at Lakeside, *Brown v. Ballas,* supra, 331 F. Supp. at 1038.

Appellants concede that at the time of the test no blacks resided at Lakeside (p. 14 of brief). To assert that persons of other nationalities resided there avoids the issue. As a Court stated in a similar case with respect to a federal statute ". . . this is not a case in which the plaintiff claims that the defendants have discriminated against 'browns'. The Civil Rights Act of 1866 may well redound to the benefit of browns—but the color which Congress had in mind in §1981 et seq., was not brown—it was black." *Newbern v. Lake Lorelei, Inc.,* 308 F. Supp. 407 (S.D. Ohio 1968). The same can be said of the Legislature in enacting the Human Relations Act. Hence the prima facie case is also supported by the statistics. *U.S. v. Reddoch,* 467 F. 2d 897 (5th Cir. 1972). Mr. Weber admitted that he could remember receiving applications (written and/or oral) from at least ten black persons but was evasive when asked what happened to them (R. 270a to 273a).

The appellants seem to conclude that the procedure employed by the Commission subsequent to the tests somehow shades the validity of those tests. Yet the record shows that the testers filed their reports with the Commission within no more than a day after the tests were conducted (R. 25a, 33a). Said reports were deemed by the Commission's staff to provide sufficient grounds for a Commission—initiated complaint.

There is no indication that the investigation did not begin promptly as the Act requires. It necessarily had to include validation studies and the identification of the proper parties for purposes of conciliation. Although the Record does not include an itemization of the specific internal steps leading up to the determination of probable cause and service of the complaint, it is certainly the appellant's burden to rebut the presumption that these official acts and duties were properly performed. *Tremont Township School District Appeal,* 366 Pa. 404, 409, 77 A. 2d 403, 406 (1951). It should also be noted that nothing in the Human Relations Act requires the Commission to serve a copy of a complaint upon the Respondent prior to the issuance of notice for a public hearing. If it is done prior to that time it is most appropriate to serve it with a *proposed* consent order to foster meaningful conciliation. As appellants admit such is what occurred in the instant case. Conciliation having begun immediately after the determination of probable cause and service of the complaint, but being unsuccessful, the Commission convened a public hearing.

III. The Acts of the Rental Agent Are Imputable to the Owners

Even if the fact-finders were to believe that Mr. Weber, the resident manager, was instructed by his superiors to show all apartments on a non-discriminatory basis, such would not—as the appellants seem to indicate—be conclusive on the issue of whether that was in fact his practice. Neither would it be conclusive with respect to his acts on the day of the test. The Commissioners chose to believe the testers, which they are entitled to do.

The Commissioners may have believed that such instructions were never given to Weber. But such a determination need not be included in the formal Findings of Fact since it is not germane to the issue of what happened on the day of the test.

But even if they *did* believe that such instructions were given, what would be the legal significance? It certainly would not dissipate the agency relationship that existed between Mr. Weber and the owners. Weber had been full time resident supervisor for approximately two and a half years (R. 48a). He received and passed on the acceptability of applicants in this capacity (R. 48a). He was the general supervisor and overseer. He decided who was to see an apartment and who would not (R. 48a). His capacity as agent for the owners is clear. As the Court stated in *Youritan, supra,* at p. 13,831:

> "The discriminatory conduct of an apartment manager or rental agent is, as a general rule, attributable to the owner and property manager of the apartment complex, both under the doctrine of *respondent superior* and because the duty to obey the law is non-delegable."

Secondly, if the fact-finders *did* believe that Weber was instructed as the appellants assert they could not automatically conclude that no discriminatory policy existed. As the Court in *Youritan* states at p. 13,832:

> "Principals who provide any atmosphere in which agents may and do, easily and without supervision or control, make housing unavailable because of race engage in a *pattern or practice* of discrimination even though no specific instructions were given to agents to do so *and even though management gives perfunctory instructions to 'treat everyone alike' without any effective effort to insure that the instructions are carried out.*" (Emphasis added.)

Principals have been enjoined from violating the law even where their agents were instructed at regular staff meetings to obey the law. *U.S. v. Mitchell,* 335 F. Supp. 1004 (N.D. Ga. 1971).

IV. The Commission's Final Order Is Reasonably Designed to Prevent Future Unlawful Discrimination

The appellants have apparently chosen to ignore the fact that in *Alto-Reste Park Cemetery Association v. Pennsylvania Human Relations Commission,* 453 Pa. 124, 306 A. 2d 881 (1973), this Court's decision, cited on page 22 of the appellant's brief, was modified. The two sections of the *Alto-Reste* order that were reinstated by the Supreme Court dealt with record-keeping requirements and advertising. Similar requirements are contained in the Order issued to the appellants and are just as appropriate as in *Alto-Reste.* The Courts have also imposed such broad remedies in apartment testing cases. *Youritan, supra.*

As far as the objections of the appellants to other sections of the Order are concerned it suffices to quote from the *Alto-Reste* decision with respect to 43 P.S. §959:

> "The words 'as in the judgment of the Commission' indicate to us that the Legislature recognized that only an administrative agency with broad remedial powers, exercising particular expertise, could cope effectively with the pervasive problem of unlawful discrimination. Accordingly, the Legislature vested in the Commission, quite properly, maximum flexibility to remedy and hopefully eradicate the 'evils' of discrimination." *Alto-Reste,* 306 A. 2d at 887.

Any language in lower court opinions cited by the appellants which is inconsistent with the Court's dicta in *Alto-Reste* must be presumed superceded.

The assertion of the appellants that the term "minority" is vague is absurd. The appellants know very well what the Order means and what will and will not satisfy the Commission. The law protects all minorities who fall within the specified classifications. The definition of the term depends on the context and may vary depending on which classification is under-represented or given incorrect information at the Lakeside complex. The Order is also flexible to the extent that it accrues to the parties and appropriately prohibits discriminatory activity at any other complex they own, operate or supervise.

CONCLUSION

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

Respectfully submitted,

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