# In the Commonwealth Court of Pennsylvania

**No. 895 C.D. 1973**

BELMONT REALTY COMPANY,
*Appellant*

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*-1749.


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## COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Can a finding by the Pennsylvania Human Relations Commission of discrimination on the basis of race or sex, based upon the testimony of "testers", be adjudged as unsubstantiated on appeal simply because the appellant's witnesses testified that the disparate information was disseminated in error?

2. Was the appellant's evidence concerning prior sales to racial minorities relevant to the issue of whether it committed an unlawful discriminatory act on the day in question with respect to rentals to the Commission's housing testers?

## COUNTER-HISTORY OF THE CASE

The appellant Belmont Realty Company has taken exceptions to certain findings of fact and conclusions of law of the Pennsylvania Human Relations Commission (Commission) and has 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 17, 1972 they individually sought information concerning the availability of rental units leased through the agency of the Belmont Realty Company in Bridgeport, Pennsylvania. Mitchell testified that she entered the Belmont office at 1170 DeKalb Street on Route 202 at approximately 3:20 p.m. and was told by Rudolph DiGiacomo, the owner, that the last available unit had just been rented to Rugel. 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 made at about 2:45 p.m. and was similar to Mitchell's, Mr. DiGiacomo offered and gave him a tour of an available apartment in the 300 block of Prospect Street in Bridgeport which offer Rugel expressly rejected immediately. 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 respondent 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 §955(h) of the Human Relations Act. After unsuccessfully attempting to eliminate and prevent future unlawful discriminatory acts by conference, conciliation and persuasion a public hearing was convened pursuant to §959 and conducted by Commissioners Joseph X. Yaffe, Esquire, presiding, Emily W. Sunstein and Alvin E. Echols, Jr., Esquire.

Mr. DiGiacomo testified that he handled rentals at 313 Prospect Avenue and that on the day in question he showed apartment 2A to Mr. Rugel. He admitted that Rugel expressed a lack of interest in the unit immediately after inspecting it.

The hearing panel considered only the relevant evidence and resolved the credibility questions in favor of Rugel and Mitchell. Thereupon the Commissioners found that the appellant 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

The appellant is urging this Court to reweigh the testimony given at the public hearing of December 28, 1972 and in so doing, reach a conclusion contrary to the Commission's. The Court is being asked to make a credibility determination; that is, to *believe* that its witnesses, Mr. and Mrs. Owoc, just happened to have signed an application for the last available unit the day before the test. The appellant urges the Court to *believe* that Mr. DiGiacomo, a 16 or 17 year veteran of the real estate business (R. 35), simply erred when he gave false information to the black tester. Even if these items of evidence were as believable as the appellant asserts, it is well settled that this Court cannot do what the appellant requests. *Wilkinsburg School District v. Pennsylvania Human Relations Commission*, 6 Pa. Commonwealth Ct. 378, 295 A. 2d 609 (1972). 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).

The Court apparently is not being asked to overturn any particular finding of fact as being unsupported by substantial evidence. If the appellant is asserting that any finding of fact is so unsupported, it is difficult to determine from a reading of the brief and record which findings the Court is being asked to isolate and adjudge as being unsubstantiated. The appellant appears to object to Finding of Fact Number 10 (R. 56) but the brief is not specific in that respect. The appellant has not made its exceptions, if they were in fact filed, part of the record. The appellee is therefore unaware of them. It is respectfully asserted that section 1710.44 of the Administrative Agency Law of June 4, 1945, P. L. 1388, §44, 71 P.S. §1710.44 requires that the Court affirm the Commission's adjudication in this case not only because the findings survive the substantial evidence test unscathed but also because the appellant's failure to properly invoke that test and state its exceptions makes its appeal patently defective.



The appellant has sought to minimize the events of February 17, 1972 by asserting that while DiGiacomo realized Rugel had refused the apartment, he simply erred in using the name of Rugel instead of Owoc in response to Mitchell's inquiry (Brief for Appellant at p. 6). As such, the Commission allegedly abused its discretion in concluding that an unlawful discriminatory act occurred since, according to the appellant, there was in point of fact nothing available. But this is more argument than substance. Let us take a look at what was and was not presented by the appellant for the Commission's consideration.

The record reveals that DiGiacomo had actually written Rugel's name on a slip of paper and it was

apparently that paper, not mental recall, that he was relying on (and in all likelihood reading from) when he mentioned Rugel's name to Mitchell (R. 19). Certainly the hearing panel was entitled to infer from that fact that the reference to Rugel was not a mere slip of the tongue. It appears that Mr. DiGiacomo, caught in a situation where he had to give a name, *any name,* to avoid having to show a unit to Mitchell, simply used the name conveniently on a slip of paper on his desk as an "out". Certainly the panel was also entitled to infer that if the Owocs in fact completed an application the prior day (R. 26), and if DiGiacomo in fact found immediately before Mitchell's entry that he had received two calls from Mrs. Owoc, then it would not be too difficult for a man with 16 or 17 years of experience to remember the name of his new tenants.

Moreover, the combined testimony of DiGiacomo and his tenant, Michael Owoc, leaves room for considerable doubt on the issue of when Owoc first saw the apartment and signed an application. After hearing the confusing testimony, including the conflicting dates, the panel members were certainly entitled to believe that it was all prefabricated for the hearing.

Owoc testified that it was on February 16, 1972 that he was told he could have the apartment (R. 32). He had allegedly inspected it the previous day (R. 31). If this is true, then DiGiacomo must have had at least one other apartment available on February 17 when he spoke to Rugel, contrary to his testimony that only apartment 2A was available at that



time (R. 41). The appellant produced no office records to show that only one unit was available on the 17th. Certainly it was the appellants' burden to bring in and introduce such records since DiGiacomo disseminated the disparate information. The presumption of discriminaiton was his to rebut. The appellant could not even produce Owoc's lease when it was requested by one of the hearing commissioners (R. 32). The lease certainly would have been the best documentary evidence of the tenancy of the Owocs. Counsel for the appellant could have offered to make the lease part of the record after the hearing. We would then know when it was signed. As the record now stands, the only date we have with respect to the acceptance of the tenancy of the Owocs is March 1 (R. 33 and 34), which is two weeks after the date in question.

DiGiacomo thereafter added to the confusion by testifying that it was on the 16th of February that he showed the apartment to Owoc (R. 38) instead of the 15th as Owoc had testified earlier. He finally admitted, under cross-examination, that the only thing of which he was sure was that he had an application signed by the Owocs dated February 16. He was not sure when he actually spoke to the Owocs, or when their two phone calls were made, or when he decided to rent an apartment to them (R. 46). He added that as far as he was concerned, he had rented the apartment to the Owocs as of the date the application was signed, yet he would have rented to Rugel on the day the apartment was shown to him (R. 49).

This review of the transcript is not intended to invite the Court to indulge in guessing and surmising. It is simply to emphasize that there were certain determinations of credibility to be made which are best left to the Commission for final resolution. Apparently the hearing commissioners were not convinced that Mitchell could not have been accommodated when she inquired. DiGiacomo's use of Rugel's name at that time was not looked upon sympathetically by the Commission. If the Court now gave a more sympathetic reading to this testimony, it would in effect be re-trying the case.

It is ironic that the appellant asserts that an innocent error was made and yet appeals an order designed solely to prevent such errors from happening again. The Commission has not ordered the appellant to admit Mitchell as a tenant. The Commission is simply ordering the implementation of office procedures and monitoring devices designed to prevent such a thing from happening again. The next black inquirer may be a bona fide applicant. Surely the Commission would be partially at fault if, because of its failure to require such procedures, the appellant is found unlawfully denying housing in the future. As a federal court stated in a recent case involving the use of housing testers:

> "(a)ny course of conduct or way of doing business which *actually* or *predictably* results in different treatment of whites and blacks is a discriminatory pattern or practice, irrespective of motivation" (emphasis added). *U. S. v. Grooms et al.*, 348 F. Supp. 1130, 1133 (M.D. Fla. 1972).



Indeed, carelessness and error which impact adversely upon a black as opposed to a white who was lucky enough not to be a victim results in just as much pain, suffering and humiliation to the black person as if the act was committed intentionally. Hence, the Human Relations Act as well as federal anti-discrimination laws do not require proof of evil motivation or intent as the appellant's use of the word "conscious" seems to imply (Brief for Appellant at p. 5).

The Court's decision in *Marhoefer et al. v. Pennsylvania Human Relations Commission,* 4 Pa. Commonwealth Ct. 242, 285 A. 2d 547 (1971), certainly does not, as the appellant implies, require the Commission to find a conscious withholding of facts in housing test cases.

In fact, the turning point of the *Marhoefer* case was that there was nothing of record to indicate that the two prospective tenants received different information. This Court made it quite clear that as it read the transcript the first (white) tester testified that she was told that there was an apartment with a "hold" on it (285 A. 2d at 549). The black tester was told nothing was available. The Court concluded that the two received substantially the same information and were asked to do the same things. That is a far cry from the instant case where the two testers quite obviously received different information.

The appellant has further cited the case of *Pennsylvania Human Relations Commission v. Altman,* 42 D. & C. 2d 317 (1967), as dispositive on the issue

of whether the evidence in housing testing cases such as this meets the substantial evidence test.

The best that can be said of the *Altman* case is that it contains *bad law*. Unfortunately it was not appealed. There have been numerous cases on both the state and federal level since 1967 that have accepted the testimony of housing testers as crucial evidence of whether a party had violated fair housing laws on an individual or on a pattern basis. 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 in various jurisdictions have shunned.

Attention must also be drawn to the manner in which the Court in *Altman* re-evaluated the credibility of the witnesses and reweighed the evidence. Such is beyond the competence of the appellate court. *Wilkinsburg School District* and *Brucker,* supra.

Admittedly, it is extremely difficult to resist the temptation to reweigh the evidence presented at the trial or agency level. It is respectfully suggested that the Court undertook to do this recently in *Tomlinson Agency v. Pennsylvania Human Relations Commission,* —— Commonwealth Ct. ——, 312 A. 2d 117 (1973).

The *Tomlinson* case, which is a similar housing testing case, was one in which the Commission's conclusions were based upon the unlawful omission of information when the black tester inquired. The Court yielded to the temptation to *guess* and *surmise* by saying:



> ". . . it is not unlikely that Appellant did not give Strader information on an $85.00 per month living unit because he felt it would not accommodate a married couple. This *supposition* gains additional credence when one considers that Strader's initial inquiry went to an apartment which rented for $215. *Absentmindedness, distraction and any number of conceivable human malfunctions can account for the omission and in fairness to both black and white, substantial evidence must be produced to demonstrate that the omission was based solely on the color of anyone's skin.* (312 A. 2d 121) (Emphasis added.)

The above-quoted language is strikingly similar to that used by the Dauphin County Court in 1967 in *Altman.* It is respectfully submitted that it is as wrong now as it was then (and perhaps more so) for the Court to "suppose" or to surmise. *It is not the Commission's job to fill in all the gaps.* The testimony of the testers creates a rebuttable presumption of an unlawful discriminatory act assuming the test itself was substantively valid (the validity of the test being, of course, a proper matter for judicial scrutiny).

If the two testers were objectively identical but for race or sex, gave similar information about themselves and then received different information, it is not only the Commission's right, it is indeed its *duty,* to find that as a matter of law their testimony leaves a rebuttable presumption of unlawful discrimination. The Commission must then request that the

respondent bring forth convincing evidence that nothing unlawful occurred. The Commission was not so convinced in the instant case.

Finally, the Commission need not find that the discrimination was based "solely" on race as this Court implied in the *Tomlinson Agency* case, supra. No such finding was made by the Commission either in *Tomlinson Agency* or in the instant case. The Commission found only that the ". . . failure to provide Ms. Mitchell with the same information . . . was prompted by considerations of race and/or sex . . ." (R. 56, Finding No. 10).

That is, the Commission need only find that race (or sex) was a factor, however small. A Federal Court held in *Smith v. Sol D. Adler Realty Co.*, 436 F. 2d 345 at 349 and 350 (7th Cir. 1971), in applying the Federal Civil Rights Act that:

> ". . . race is an impermissible factor in an apartment rental decision and that it cannot be brushed aside because it neither is the sole reason for discrimination nor the total factor of discrimination. *We find no acceptable place in the law for partial racial discrimination.*" (Emphasis added.)

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## II. The Appellant's Evidence of Alleged Prior Sales to Minorities Was Properly Excluded

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The presiding hearing Commissioner made it quite plain that if the appellant had any evidence to offer concerning prior *rentals* to minorities, the panel



would hear it, but testimony regarding sales was not at all relevant to the issue raised by the testimony of the testers (R. 44).

It must also be stressed that since the only issue was whether an unlawful discriminatory act was committed by the appellant on the day and at the time in question, even evidence of prior rentals to minorities would be of questionable relevance. An unlawful discriminatory act, as opposed to a pattern or practice of discrimination, is one which is clearly defined in time and duration. Proof of such an act is not synonymous with proof of an ongoing pattern or scheme. Both are forbidden. This is precisely where this Court appeared to have misunderstood the Commission's case in the *Tomlinson Agency* opinion, supra, where it wrote:

> "A case based on patterns, responses to questions and the testimony of additional witnesses may have and probably would have supported the Commission testers' suspicions . . ." (312 A. 2d 121)

The testimony of the testers, if uncontradicted, proves that with respect to the moments they conducted their tests, an unlawful act occurred. They entered with no preconceived notions or "suspicions". Indeed, it is unfortunate that the Commission cannot present the numerous cases where tests are conducted but no disparate information is received and hence, no complaint is filed.

Therefore, the issue is not whether the appellant owner is or is not a "racist," as counsel seemed to imply at R. 43. Unlawful acts are oftentimes commit-

ted absentmindedly, or by the well-intentioned, or by persons who have extensive dealings with minorities. Such acts are unlawful nevertheless and the Commission need not prove scienter or ill-motive. As stressed earlier, the remedy is designed solely to reduce the possibility of such an incident from occurring again.

Moreover, the appellant's poor record of *rentals* to blacks, which came out during cross-examination (R. 45), while of questionable relevance, certainly did not help its case. The appellant is located in an area where black families would reside if there were accommodations, as the presence of some black families tends to indicate (R. 45). Yet, the appellant's complexes were all white (R. 45).

As a Federal Court once noted in a similar case involving a federal statute barring discrimination in the sale or rental of housing where no blacks resided in the subject apartments: "(n)othing is as emphatic as zero." *U. S. v. Reddoch et al.,* P-H Eq. Opp. Housing, ¶13,569, p. 13,776 (S.D. Ala. 1972), affirmed at 467 F. 2d 897 (5th Cir. 1972).

The *Altman* case, on which the appellant partially relies, also concerned a complex where there were no blacks (317 D. & C. 2d at 327). Hence, the *Altman* opinion, on this count, also contains bad law.

Finally, it appears that the appellant's admitted practice of renting primarily to people referred by other residents of Bridgeport, which all parties have agreed is a predominantly white community, only compounds the problem and is certainly a practice of questionable legality (see R. 48-49).



## CONCLUSION

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

Respectfully submitted,

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