

MISS. COPY

In the Supreme Court of Pennsylvania

Middle District

No. 53 May Term, 1974

BESSIE ZAMANTAKIS and GEORGE
ZAMANTAKIS,

Appellees

vs.

PENNSYLVANIA HUMAN RELATIONS
COMMISSION,

Appellant

BRIEF FOR APPELLANT

*Appeal From the Decision of the Commonwealth
Court of Pennsylvania at No. 1300 C.D. 1972
Modifying the Order of the Pennsylvania Hu-
man Relations Commission Dated November
27, 1972 at Docket No. H-1657.*

SANFORD KAHN
General Counsel, Pennsyl-
vania Human Relations
Commission
Attorney for Appellant

100 N. Cameron Street
Harrisburg, Pennsylvania 17101

INDEX TO BRIEF

| | PAGE |
|--|------|
| Statement of Jurisdiction | 1 |
| Statement of Question Involved | 2 |
| History of the Case | 3 |
| Summary of Argument | 5 |
| Argument | 7 |
| Opinions of the Commonwealth Court | 33 |
| Petition for Allowance of Appeal From the Decision and Order of the Commonwealth Court of Pennsylvania | 50 |
| Order Granting Petition for Appeal | 65 |
| CASES: | |
| Allen v. Gifford, P.H. E.O.H. Rptr. ¶13,599 (E.D. Va. 1973) | 23 |
| Batista v. Weir, 310 F. 2d 74 (3rd Cir. 1965) 27, 28 | |
| Bowe v. Colgate Palmolive, 416 F. 2d 711 (7th Cir. 1969) | 22 |
| Brown v. Board of Education, 347 U.S. 483 (1954) | 28 |
| Caperci v. Hootoon, 397 F. 2d 799 (1st Cir. 1968), cert. denied 393 U.S. 940 (1968) | 27 |
| Cash v. Swifton Land Corp., 434 F. 2d 569 (6th Cir. 1970) | 23 |
| Everett v. Harron, 380 Pa. 123 (1955) | 18 |
| Fibreboard Paper Products Corp. v. N.L.R.B. et al., 379 U.S. 205, 85 S. Ct. 398 (1964) | 10 |

| | |
|---|---------------|
| Franklin v. Agostinelli, P.H. E.O.H. Rptr. 15,555 (W.D. Wash. 1971) | 24 |
| Gillian v. City of Omaha, 531 Pa. F. Supp. 4 (Neb. 1971) | 24 |
| Humphrey v. Southwestern Portland Cement Company, 5 EPD 88501 (W.D. Tex., February 1973) | 21 |
| Iron Workers Local 677 v. Hart, 191 N.W. 2d 758 (1971) | 14 |
| Jackson v. Concord Company, 253 A. 2d 793 (1969) | 13, 17, 18 |
| Jones v. Mayer, 392 U.S. 409 (1968) | 22, 23 |
| Massachusetts Commission Against Discrimination v. Franzaroli, 551 Mass. 112, 256 N.E. 2d 511 (1970) | 14 |
| Passaic Daily News v. Blair, 308 A. 2d 649 (1975) | 12 |
| Pennsylvania Human Relations Commission v. Alto-Reste Park Cemetery Association, 506 A. 2d 881 (July 2, 1973) | 5, 10, 11, 13 |
| Pennsylvania Human Relations Commission v. Chester School District, 427 Pa. 157 (1967) | 19 |
| Pennsylvania Human Relations Commission v. St. Andrews Development Co., Inc., No. 52 May Term, 1974 | 31 |
| Peoples v. Doughtie, P.H. E.O.H. Rptr. 13,575 (M.D. Ala. 1971) | 24 |
| PHRC v. Straw, No. 31 May Term, 1974 | 50 |
| Rady v. Hollis, P.H. E.O.H. Rptr. 15,019 (August 3, 1972) | 25, 26 |
| Seaton v. Sky Realty Co., P.H. E.O.H. Rptr. 15,550 (N.D. Ill. 1972) | 24 |

| | |
|--|----------------|
| Solomon v. Pennsylvania R. R., 96 F. Supp. 709 (S.D. N.Y. 1951) | 27 |
| State Commission for Human Rights v. Speer, 29 N.Y. 2d 555, 272 N.E. 2d 884, 324 N.Y.S. 2d 297 | 16 |
| State Division of Human Rights v. Luppino, 29 N.Y. 2d 558, 272 N.E. 2d 885, 324 N.Y.S. 2d 298 (1971) | 16 |
| Steele v. Title Realty Corp., 478 F. 2d 544 (7th Cir. 1973) | 24 |
| Sullivan v. Little Hunting Park, 366 U.S. 229 (1969) | 18, 23 |
| Washington v. Official Court Stenographer, 251 F. Supp. 945 (E.D. Pa. 1966) | 27 |
| Wayne v. Venable, 260 F. 64 (8th Cir. 1919) | 27 |
| Williams v. Joyce, 479 P. 2d 513 (Or. App. 1971) | 15 |
| Zahorian v. Fitt Real Estate Agency, 501 A. 2d 754 (1973) | 15, 17, 18, 29 |
| MISCELLANEOUS: | |
| Civil Rights Act of 1866, 42 U.S.C. 1982 | 19, 25 |
| Civil Rights Act of 1968, Section 810(c) | 20 |
| Pennsylvania Human Relations Act, 45 P.S. §951 et seq.: | |
| Section 2 | 5, 7, 8 |
| Section 5(h) (1) | 3 |
| Section 9 | 5, 7, 8, 10 |
| Section 12(a) | 5, 7, 8 |
| Section 12(b) | 18 |
| Simpson & Yingler, Racial and Cultural Minorities, page 217 (1958) | 28 |

Title VII of the Civil Rights Act of 1964, 42
U.S.C. 2000 et seq. 19, 21, 22
Title VIII of the Fair Housing Act of 1968,
42 U.S.C. 3604 19

Statement of Jurisdiction

STATEMENT OF JURISDICTION

Jurisdiction is based upon Section 204(a) of the Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P. L. 223, 17 P.S. §211.204(a), which provides for discretionary allowance of appeals from final orders of the Commonwealth Court, and upon the following order entered by the Supreme Court of Pennsylvania on Appellant's petition for allowance of appeal: "Petition granted this 18th day of October, 1975 Per Curiam."

STATEMENT OF QUESTION INVOLVED

The Commission

I. Does PHRC have the authority to order a respondent who has unlawfully discriminated against a complainant to compensate that complainant for the mental anguish, humiliation, inconvenience and disruption of normal family life suffered as a direct result of respondent's unlawful act? (Answered in the negative by the Court below.)

HISTORY OF THE CASE

On February 16, 1972 Sylvester Thornton filed a complaint with the Pennsylvania Human Relations Commission (hereinafter PHRC) charging that the Appellees George and Bessie Zamantakis had refused to rent them an apartment in Easton, Pennsylvania because of their race, Negro, in violation of Section 5 (h) (1) of the Pennsylvania Human Relations Act, 43 P.S. §951 et seq.

Pursuant to the procedures set forth in the Act, PHRC investigated the complaint, found probable cause to credit the allegations therein, attempted to settle the matter by conciliation, and that failing, convened a public hearing on April 4, 1972.

After the public hearing, upon the recommendation of the Hearing Commissioners, PHRC issued and served upon the Respondents its findings of fact and conclusions of law and final order (see Record).

PHRC found that Appellees had denied the complainants an apartment because of their race in violation of the Human Relations Act. This finding and conclusion of law, although not appealed by Appellees, was expressly upheld by the Court below.

In paragraph 2 of its final order PHRC ordered Appellees "pay to each of the Complainants the sum of \$250.00 in order to compensate them for the mental anguish and humiliation which they experienced as a result of Respondent's unlawful discriminatory practices."

The Commonwealth Court in its opinion filed on August 14, 1975 held that PHRC had no authority to award compensatory damages to the Complainants for mental anguish and humiliation and set aside this provision of the final order. It was from this holding which PHRC asked and was granted leave to appeal. Upon subsequent petition of PHRC this Court ordered the instant case consolidated for oral argument with the case of *PHRC vs. Marian and Lewis Straw*, No. 31 May Term, 1974. It also ordered that the case of *PHRC vs. St. Andrews Development Co., Inc.*, No. 32 May Term, 1974, in which the issue of PHRC's power to order compensatory damages was also involved, be argued at the same session of Court as the other two cases.

SUMMARY OF ARGUMENT

Read together, three sections of the Pennsylvania Human Relations Act—Section 9 which authorizes PHRC after a finding of unlawful discrimination to take affirmative action “including but not limited to” certain specified measures as in its judgment will effectuate the purposes of the Act; Section 2 which declares in the strongest terms the legislative purpose to eliminate the evils of discrimination; and Section 12(a) which directs that the provisions of the Act “shall be construed liberally for the accomplishment of the purposes thereof”—permit no other conclusion but that PHRC has the power to order a respondent to pay to a complainant compensatory damages, including damages for mental anguish caused by the respondent's unlawful discriminatory conduct.

It is obvious, as Judge Rogers recognized in his dissent in *Zamantakis*, that the knowledge that conduct in violation of the Act could result in an order requiring them to pay compensatory damages to the victim could prove a significant deterrent to prospective violators of the Act.

The decision of this Court in *Pennsylvania Human Relations Commission vs. Alto-Reste Park Cemetery Association*, 306 A. 2d 881 (July 2, 1973), is strong authority for PHRC's power in this regard. The highest courts of New Jersey, New York, Oregon and Massachusetts, under virtually identical or substantially similar Acts, have upheld the authority of its state's civil rights agency to award such compensatory damages.

Further evidence for construing the Act in the manner urged by Appellant is found in the drastic effect the lower court's construction would have upon PHRC, federal civil rights agencies, and victims of discrimination in Pennsylvania. Presumably far fewer victims of unlawful discrimination would seek redress through PHRC since such a move would threaten to bar them from access to the courts where compensatory damages are routinely available. The Equal Employment Opportunity Commission and the civil rights enforcement arm of the Department of Housing and Urban Development would presumably no longer defer complaints to PHRC since it would no longer possess the "equivalent" powers required under the terms of the deferral agreements. PHRC's conciliation program would be severely weakened since the Commission could hardly recommend to a complainant that he or she enter into an agreement, signing a release from subsequent court action, for something substantially less than the complainant might, in fact, obtain from court. And respondents too would, as many already have indicated, be far less ready to conciliate in good faith with a weakened agency than they would with one with strong enforcement powers.

The Court below expressed concern that the absence of guidelines or standards for fixing the amount might permit excessive or arbitrary awards. But, as Judge Rogers pointed out in his dissent, "The same possibility exists with jury verdicts and the simple answer is that such orders of the Commission would be subject to judicial review both as to the sufficiency of evidence of mental suffering and as to the reasonableness of the amount awarded."

ARGUMENT

I. PHRC has the authority to order a respondent who has unlawfully discriminated against a complainant to compensate that complainant for the mental anguish, humiliation, inconvenience and disruption of normal family life suffered as a direct result of respondent's unlawful act.

Three sections of the Pennsylvania Human Relations Act, 43 P.S. §951, et. seq., are particularly relevant to this argument—Sections 2, 9 and 12—and, it is submitted, when they are read together, they permit no other conclusion but that the Commission has the power herein at issue.

Section 9 in its pertinent part reads:

"If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to hiring, reinstatement or upgrading of employes, with or without back pay, admission or restoration to membership in any respondent labor organization, or selling or leasing specified commercial

housing upon such equal terms and conditions and which such equal facilities, services and privileges or lending money, whether or not secured by mortgage or otherwise for the acquisition, construction, rehabilitation, repair or maintenance of commercial housing, upon such equal terms and conditions to any person discriminated against or all persons as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance."

The pertinent part of Section 12 reads:

"(a) The provisions of this Act shall be construed liberally for the accomplishment of the purposes thereof. . ."

As for the purposes referred to in the preceding sections, they are reflected throughout the Act. But it is well that Section 2(a) should be reviewed in its entirety:

"The practice or policy of discrimination against individuals or groups by reason of their race, color, religious creed, ancestry, use of guide dogs because of blindness of the user, age, sex or national origin is a matter of concern to the Commonwealth. Such discrimination foments domestic strife and unrest, threatens the rights and privileges of the inhabitants of the Commonwealth, and undermines the foundations of a free democratic state. The denial of equal employment, housing and public accommodation opportunities because of such discrimination, and

the consequent failure to utilize the productive capacities of individuals to their fullest extent, deprives large segments of the population of the Commonwealth of earnings necessary to maintain decent standards of living, necessitates their resort to public relief and intensifies group conflicts, thereby resulting in grave injury to the public health and welfare, compels many individuals to live in dwellings which are substandard, unhealthful and overcrowded, resulting in racial segregation in public schools and other community facilities, juvenile delinquency and other evils, thereby threatening the peace, health, safety and general welfare of the Commonwealth and its inhabitants."

Here, the Legislature set down in the strongest terms the scope of the problem and the sense of urgency it was conveying to the administrative agency it was creating to deal with it. Few would dispute that although 19 years have ensued, the problems the Commission was created to eliminate remain with us. In his dissent in the instant case, Judge Rogers saw and stated clearly the obviousness of the answer to the question now before this Court:

"I can conceive of no affirmative action which the Commission could order which would better effectuate the central purpose of the Act to end racial discrimination than that of directing the violator to pay damages to persons upon whom injuries have been inflicted."

It was believed that this question of PHRC's remedial powers was conclusively resolved by this

Court in *Alto-Reste*, where the Court analyzed the identical language of Section 9, placing great weight on the phrase "as in the judgment of the Commission" in arriving at its conclusion that the "Legislature recognized that only an administrative agency with broad remedial power 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. . . . The legislative mandate that the provisions of the Act be 'construed liberally' seems to reinforce this view." *Pennsylvania Human Relations Commission vs. Alto-Reste Park Cemetery Association*, 453 Pa. 124, 306 A. 2d 881 (July 2, 1973).

This Court adopted as its own, the United States Supreme Court's statement in *Fibreboard Paper Products Corp. v. N.L.R.B. et al.*, 379 U.S. 203, 216, 85 S. Ct. 398, 405-06 (1964) dealing with a provision of the Taft-Hartley Act:

"The Board's power is a broad discretionary one, subject to limited judicial review. 'The relation of remedy to policy is peculiarly a matter for administrative competence' . . . 'In fashioning remedies to undo the effects of violation of the Act, the Board must draw on enlightenment gained from experience.' . . . The Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' . . ."

The Court below took note of *Alto-Reste* but concluded it did not control the instant case. This conclusion can only be based on the Commonwealth Court's belief that compensatory damages including damages for the emotional distress suffered by violations of unlawful discrimination cannot fairly be said, in the judgment of the Commission, to effectuate the purposes of the Act. If this is indeed the Court's view, it does not fully grasp these purposes. As this Court observed in *Alto-Reste*:

"It is beyond cavil that the Human Relations Act was intended, by the Legislature, to protect more than individuals unlawfully discriminated against—of equal importance is the Act's intent that the public generally be protected from such discrimination. . . . Accordingly, it is . . . incumbent upon the Commission to not only fashion an effective remedy for the individual aggrieved, but also to guard against and deter the same discriminatory act from recurring, to the detriment of others within the same class."

Surely an order that a respondent pay a victim compensatory damages, both in terms of affording redress to the aggrieved individual and as a means of deterring future discrimination by making it expensive, has as much relevance to the purposes of the Act as the record-keeping or the advertising provision upheld in *Alto-Reste*.

One statement of the Court below is indicative of its approach in reviewing actions of PHRC, in other cases as well as the instant case, including *Alto-Reste* itself:

"The missing link in the Commission's argument is the absence of any specific legislative authority to ascertain, and hence to award damages."

As Appellant stated in its petition for allowance of appeal, in addressing itself to the manner in which the Court below approaches PHRC cases:

"At bottom, the problem here clearly is the apparent fundamental inability of the Commonwealth Court, based obviously upon a different judicial philosophy, to implement the legislative directive to construe this act liberally for the accomplishment of its purposes."

The New Jersey Court in *Passaic Daily News v. Blair*, 308 A. 2d 649 (1975), set forth the general principles of construction that courts have applied to civil rights statutes even in the absence of explicit instruction in the statute:

"This Court has heretofore adopted a broadly sympathetic construction of the law against discrimination and has interpreted the provisions therefore pertaining to the remedial powers of the Division on Civil Rights . . . with that high degree of liberality which comports with the preeminent social significance of its purposes and objects . . . we are moreover warranted in placing considerable weight on the construction of the statute by the administrative agency charged by the statute with the responsibility of making it work. *Griggs v. Duke Power* 401 U.S. 424, 453-454 (1971)"

In *Alto-Reste* this Court quoted at length and with approval from the decisions of the New Jersey Supreme Court in *Jackson v. Concord Company*, 253 A. 2d 793 (1969), and *Zahorian v. Fitt Real Estate Agency*, 301 A. 2d 754 (1973). *Zahorian*, under a statute with enforcement provisions virtually identical to those in our Act, upheld the authority of the New Jersey Civil Rights Division to order a respondent to pay compensatory damages for humiliation, pain and suffering. *Zahorian* relied heavily on *Jackson*.

"Justice Hall [in *Jackson*] noted that the basic question was whether the Legislature intended to give such power to the director and that although it was not granted expressly [by the Act] it was fairly to be implied in the light of the 'broad language of the section' and the 'overall design of the Act.' . . . He noted further that the term 'include' is to be dealt with as a word of 'enlargement and not of imitation' and that this was especially true where as in [the Act] it was followed by the phrase 'but not limited to' the illustrations given. . . ."

"Justice Hall's opinion in *Jackson* stressed the legislative intent to create an effective enforcement agency which would serve towards eradication of 'the cancer of discrimination' and whose remedial actions would serve not only the interest of the individual involved but also the public interest."

In Appellant's brief to the Court below it was pointed out that as far as it could be determined,

the highest courts in four States had considered the authority of the State's civil rights agency to order a respondent to pay damages for mental anguish under statutes comparable to Pennsylvania's, and that all four had upheld such authority.¹

The Court below acknowledged the New Jersey statute's similarity but summarily dismissed the results as "confusing and unacceptable under the Pennsylvania statute." The Court below dismissed the precedents of Massachusetts, New York and Oregon by declaring, without explaining, that in those States "there is some statutory authority for the human relations authorities to award damages."

The Massachusetts statute relied upon by their Supreme Court in *Massachusetts Commission Against Discrimination vs. Franzaroli*, 357 Mass. 112, 256 N.E. 2d 511 (1970), in upholding an award by the Commission of \$250.00 for the emotional distress suffered by the aggrieved complainant included the language, "... damages not to exceed \$1,000.00."

This clause was cited by Judge Kramer during oral argument as distinguishing it from the Pennsylvania statute. Again, it must be respectfully stated that the distinction does not appear to be valid. The

¹ The Supreme Court of Iowa, construing statutory language comparable to Pennsylvania's held that the Iowa agency did not have the power to award damages. *Iowa Workers Local 677 v. Hart*, 191 N.W. 2d 758 (1971). An important distinction between the Iowa and Pennsylvania statutes, however, is that the Iowa statute did not bar resort to the courts once the Iowa agency had been invoked. On this point, see *infra*.

\$1,000.00 maximum indicated a legislative determination to limit the size of the award, a limitation the Pennsylvania Legislature did not elect to impose. This limitation is clearly not relevant to the very power of the agency to award damages for emotional suffering. That power was found by the Court in the "including but not limited to" provision in the Act, a clause identical to that in Pennsylvania's Act.

In *Williams vs. Joyce*, 479 P. 2d 513 (Or. App. 1971), the language the Court relied upon to award \$200.00 for humiliation, frustration and anxiety was not as close to Pennsylvania's as the others cited above but its thrust was clearly that of Pennsylvania's. The Oregon Act authorized its agency to require a respondent after a finding of discrimination to "... perform an act . . . reasonably calculated to carry out the purposes of ORS 695.010 to 695.110, eliminate the effects of an unlawful practice found, and protect the rights of the complainant and other persons similarly situated. . . ."

The Pennsylvania statute and the other statutes cited were more specific in enumerating the kinds of affirmative action their respective commissions could take "as, in the judgment of the Commission will effectuate the purposes of this Act." Whether the words are "effectuate the purposes of the Act" or "reasonably calculated to carry out the purposes of the Act", it is submitted that the thrust is the same:

As the Oregon Court explained in *Joyce*:

"As shown above, other state courts have recognized mental anguish as one of the effects

of racial discrimination. ORS 695.010(2) gives the Commissioner of Labor the right to issue an order which requires an individual to perform an act reasonably calculated to carry out the purposes of [the Act], one of which is to ensure human dignity, and to eliminate the effects of an unlawful practice found. . . . In the context of the statute, mental anguish as well as pecuniary loss can be an effect of racial discrimination. The award of damages to compensate for a victim's humiliation is an act reasonably calculated to eliminate the effects of discrimination."

In *State Commission for Human Rights vs. Speer*, 29 N.Y. 2d 555, 272 N.E. 2d 884, 524 N.Y.S. 2d 297, and *State Division of Human Rights vs. Luppino*, 29 N.Y. 2d 558, 272 N.E. 2d 885, 524 N.Y.S. 2d 298 (1971), the New York Court of Appeals upheld the authority of that State's Division of Human Rights to award damages for mental anguish. In so doing, the Court relied on the provision of the law granting the New York Commission power to issue:

" . . . an order . . . requiring such respondent to cease and desist from such unlawful discriminatory practice; . . . take such affirmative action, including (but not limited to), reinstatement or upgrading of employees; . . . awarding of compensatory damages to the person aggrieved by such practice, as, in the division, will effectuate the purposes of this article . . ." N. Y. Executive Law, 297(4) (c).

The scheme and basic language is virtually identical to our Section 9. The key words, stressed by those

courts which have interpreted these provisions, are "including but not limited to," which follow the statutory directive to the agency to "take such affirmative action. . ."

The words "compensatory damages" are included in the remedial section of the New York Act, which otherwise closely parallels that section of the Pennsylvania and New Jersey statutes. It is submitted that the mere inclusion of the words compensatory damages is an invalid basis for dismissing the New York cases as precedent. The *Zahorian* court relied heavily on the New York decisions. Prior to *Zahorian*, the New Jersey Court in *Jackson*, supra, interpreted its statute as providing for compensatory damages. The Court below, of course, has underpinned its holding on its conclusion that Appellant has no power to order compensatory damages of any kind.

The argument Appellant has made above on its authority to order damages for mental anguish applies with equal force to the authority to award damages of any kind. The underlying premise of the decision is stressed, however, to convey the drastic and utterly unrealistic implications of the Court Below's interpretation. Under that interpretation, even precisely measurable out-of-pocket losses such as the difference in rent a complainant was forced to pay because of the respondent's unlawful refusal to rent, or a fee paid to an employment agency by an unlawfully discharged complainant in order to obtain a new job, would not be remediable.

The *Zahorian* Court also relied heavily on another provision of the New Jersey Act which is virtually

identical to Section 12(b) of the Pennsylvania Act, which reads in its pertinent part:

“ . . . but as to acts declared unlawful by section five of this act 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 act, he may not subsequently resort to the procedure herein. . . ”

The *Zahorian* Court concluded that a complainant who invoked the provisions of the State anti-discrimination act “would be barred from recompense elsewhere and the [*Jackson*] Court suggested that it might fairly be inferred from this that the Legislature understood that the director had the power to award such recompense.”

Clearly a court of this Commonwealth has the authority to award damages for mental anguish to a victim of unlawful discrimination. See e.g., *Everett v. Harron*, 580 Pa. 125 (1955). Indeed it is well settled that “the existence of a statutory right implies the existence of all necessary and appropriate remedies.” *Sullivan vs. Little Hunting Park*, 366 U.S. 229, 239 (1969). By its holding the Court below would retain the statutory right but effectively deprive the complainant who goes to the Commission and is thus barred from State Court of a necessary remedy.

Can it reasonably be argued that the Legislature intended to discourage victims of discrimination from utilizing the machinery of the very agency it created by investing the agency with less than complete remedial powers? Yet this would be the certain effect of a holding by this Court that Appellant has no authority to order complete relief; presumably only the victims who are unable to obtain the services of an attorney would go to PHRC. But this Court has emphasized the clear intent of the Legislature to create “an effective enforcement agency.” See *Pennsylvania Human Relations Commission vs. Chester School District*, 427 Pa. 157 (1967).

Federal Courts routinely award substantial compensatory damages for mental anguish as well as substantial punitive damages to victims of unlawful discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 et seq., and Title VIII of the Fair Housing Act of 1968, 42 U.S.C. 3604, as well as the Civil Rights Act of 1866, 42 U.S.C. 1982. Appellant believes that neither a State legislature nor a State court can foreclose a complainant who had had his case determined by the State Commission which has less than the full remedial powers available in Federal Court from then going into Federal Court. But assuming the complainant could still go into Federal Court, this is hardly an answer to the destructive impact the Commonwealth Court’s decision would have on PHRC’s effectiveness. It would needlessly burden the respondent and the complainant by involving them in multiplicitous litigation as well as unnecessarily add to the federal case load as well

as presumably its backlog, it would place the burden on a complainant to obtain an attorney to seek complete relief and undoubtedly many would resign themselves to the partial relief the Commonwealth Court would allow. And to the extent that respondents are not required to fully compensate victims of unlawful discrimination and are thus less deterred from continuing their unlawful conduct, to that extent the very fundamental purpose of the Act would be thwarted.

Finally, PHRC's conciliation program would be severely wounded if not crippled. The Commission could hardly recommend to a complainant that he or she enter into an agreement, signing a release from bringing any subsequent court action, for something substantially less than the complainant might in fact obtain from a court. And respondents too would, as many already have, be far less ready to conciliate in good faith with a greatly weakened agency than they would with one with strong enforcement powers.

Not only would the Commission be rendered drastically less than effective; presumably the Federal civil rights enforcement agencies, the Equal Employment Opportunity Commission and the Department of Housing and Urban Development, would as well. Where now they defer complaints to an existing state agency if it has equivalent powers,² they would pre-

² Section 510(e) of the Civil Rights Act of 1968 provides:

"Wherever a state or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the

sumably be forced to process complaints in Pennsylvania themselves. We can only speculate whether they would be given the additional resources to cope with this enormously increased case load.

The federal enforcement agencies could not defer cases to an agency without the power to order compensatory damages. For as already noted, Federal Courts in ever increasing numbers recognize that the prime purpose of civil rights statutes, to end discrimination, "will be best served if all the injuries which are caused by discrimination are entitled to recognition." *Humphrey v. Southwestern Portland Cement Company*, 5 EPD §8501 (W.D. Tex., February 1973). In *Humphrey*, the Court found a Black worker had been discriminated against in violation of Title VII of the 1964 Civil Rights Act. The remedial provision of the statute is very similar to that in the Pennsylvania Act and includes the same "affirmative action including but not limited to" scheme. It also contains the additional provision that the Court may order "any other equitable" relief which it deems

rights and remedies provided in this Title . . ." (Emphasis provided.)

EEOC's policy in this regard is set forth in a memorandum from Peter C. Robertson, Director of its Office of State and Community Affairs to the executive directors of state and local anti-discrimination agencies dated June 9, 1973. Paragraph 3 provides:

"Standards for Designation: Basically the standards for designation as a "706 Agency" are simple. The law enforced by the agency must be comparable in scope both as to coverage, remedies and enforceability to Title VII of the Civil Rights Act of 1964."

appropriate. In ordering the employer to pay \$1200.00 damages for mental anguish as well as \$2500.00 for loss of a chance to learn and gain experience, the Court articulated its rationale in these powerful words:

"... as the trial progressed it became apparent that the psychic harm which might accompany an act of discrimination might be greater than would first appear. For the loss of a job because of discrimination means more than the loss of just a wage. It means the loss of a sense of achievement and the loss of a chance to learn. Discrimination is a vicious act. It may destroy hope and any trace of self-respect. That, and not the loss of pay, is perhaps the injury which is felt the most and which is the greatest."

The Court in *Bowe v. Colgate Palmolive*, 416 F. 2d 711 (7th Cir. 1969), considering the above remedial provision of Title VII, said:

"This granting of authority [to order such affirmative action as may be appropriate] should be broadly read and applied so as to effectively terminate the practice and make its victims whole. The full remedial powers of the Court must be brought to bear and all appropriate relief given."

An express provision for compensatory damages and punitive damages up to a maximum of \$1,000.00 is incorporated into the Fair Housing Act of 1968. The United States Supreme Court in *Jones v. Mayer*,

392 U.S. 409 (1968), held that the Civil Rights Act of 1866 bars all racial discrimination, private as well as public, in the sale or rental of property. *Sullivan vs. Little Hunting Park*, supra, established that compensatory damages may be awarded under the 1866 Act even though it contained no express provision for such compensation.

The Court in *Cash vs. Swifton Land Corp.*, 454 F. 2d 569, 572 (6th Cir. 1970), points out why remedies short of compensatory damages would be inadequate to the task of effectively combatting discrimination in housing:

"Neither the settlement of the parties as to the rental of the apartment, nor the awarding of costs and waiver of fees and security moots the question of damages. 42 U.S.C. §3612(b) (1968). Indeed Section 3612, with its provision for actual damages and punitive damages up to a maximum of \$1,000 per violation of the Fair Housing Act of 1968, is a strong congressional condemnation of unlawful discriminations in housing. Such a provision prevents a landlord from following a wilful pattern of discrimination or from resisting certain applicants and withdrawing his resistance when the applicant seeks relief by court litigation, without an accounting therefor."

In *Allen v. Gifford*, P.H. E.O.H. Rptr. 15,599 (E.D. Va. 1975), in a case brought under the 1866 Act, the Court awarded \$3500.00 in mental anguish damages and \$5,000.00 in punitive damages to a Black denied a house although he eventually obtained

it. See also e.g., four cases awarding mental anguish damages: *Franklin v. Agostinelli*, P.H. E.O.H. Rptr. ¶15,555 (W.D. Wash. 1971); *Peoples v. Doughie*, P.H. E.O.H. Rptr. ¶15,575 (M.D. Ala. 1971); *Seaton v. Sky Realty Co.*, P.H. E.O.H. Rptr. ¶15,550 (N.D. Ill. 1972); and *Steele v. Title Realty Corp.*, 478 F. 2d 544 (7th Cir. 1975).

It may be, in the light of this establishment without question in the Federal courts of the right to compensatory and punitive damages in civil rights cases, that neither the Court below nor even the Legislature could diminish the worth or the enforceability of those rights. In *Gilliam v. City of Omaha*, 331 Pa. F. Supp. 4 (Neb. 1971), the Court denied jurisdiction of a civil rights case on the basis of an adequate state remedy. The Court ordered the Nebraska State Commission to consider the facts of the case and if appropriate to award punitive damages even though punitive damages were repugnant to public policy under Nebraska law:

"If punitive damages are necessary to fully vindicate a Constitutional right, when that right is before a federal court, then such damages are every bit as necessary when that right is before a state administrative commission or a state court. *Basic Federal Constitutional rights cannot be watered down by state statutes or state court opinions.* Cf. *Kerr v. California*, 374 U.S. 25 (1963)"

The Court below, after focusing on the absence of any specific authority under the Act to support the Commission's power to order a respondent to pay

compensatory damages, also deplored the failure of the Commission to publish or offer any standard or guidelines utilized in fixing the amount of the award. It also concluded that in *Zamantakis* the record does not support the finding of fact that the complainants did in fact suffer mental anguish as a result of the unlawful discrimination—the refusal to rent to the complainants because they were Black.

In her concurring opinion, Judge Blatt expressed her view that compensatory damages including possibly damages for mental anguish would appear to be a proper and effective way to effectuate the purposes of the Act and to remedy the "evils" of discrimination. She concurred in the majority Opinion, however, because of the absence of "the prior adoption of proper standards by the Commission and of substantial evidence that an injury had been suffered for which damages are appropriate."

Judge Rogers incisively disposed of these concerns:

"As for the contention that the Commission may make excessive, arbitrary or inconsistent orders in this regard, the same possibility exists with respect to jury verdicts. The simple answer is that such orders of the Commission would be subject to judicial review both as to the sufficiency of the evidence or mental suffering and as to the reasonableness of the amount awarded."

None of the courts previously cited even addressed themselves to this issue of guidelines and standards. Presumably Judge Rogers' "simple answer" was taken for granted by them. In *Rody v. Hollis*, P.H.

E.O.H. Rptr. ¶15,019 (August 5, 1972), the Supreme Court of Washington, in denying the challenge to the power of the Washington State Commission to award damages up to \$1,000.00 "for loss of the right to be free from discrimination," stated:

"The Legislature must provide standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it."

Certainly, the Pennsylvania Legislature defined in general terms what is to be done by PHRC, the instrumentality it established to accomplish it.

The *Rod* court continued:

"We believe it is perfectly clear what the award is to be for; the only discretion left to the hearing tribunal is to determine the amount of the award. And where the purpose of the award is made clear—to provide damages for loss of the right to be free from discrimination in housing transaction—it is clear by implication that the amount of the award is to be adjusted to accomplish these purposes. Standards to guide administrative action need not, and cannot, be perfectly specific. This is particularly so where the power which is exercised is quasi-judicial in nature, as in the instant case. Judicial power is traditionally and of necessity largely discretionary and standardless. The judicial process operates upon individuals and, in so doing, attempts to treat them as such. All that can, and should, be done is to define the conduct

sought to be punished, or the injury to be compensated, set out the normally acceptable limits of punishment or compensation, and then allow the adjudicative body to determine the appropriate punishment or compensation by applying general principles of morality and traditional concepts of justice."

As to the necessity of a record of substantial evidence that an injury had been suffered for which damages are appropriate, it is submitted at the outset that the mere wilful deprivation of a civil right should, without more, sustain an award of compensatory damages. Note the State of Washington Act: Damages up to \$1,000.00 for the loss of the right to be free from discrimination. Whether it is termed damages for mental anguish or exemplary or punitive damages, it is well established under federal law that "in the eyes of the law this right [civil right, such as the right to vote] is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property or any other valuable thing." *Wayne vs. Venable*, 260 F. 64, 66 (8th Cir. 1919). Punitive damages have frequently been awarded in civil rights cases where no proof of actual damages was offered on the theory that damages are presumed as well as on the theory that this is necessary to protect the right. See e.g., *Batista v. Weir*, 510 F. 2d 74 (5th Cir. 1965); *Caperci v. Hootoon*, 397 F. 2d 799 (1st Cir. 1968) cert. denied, 395 U.S. 940 (1968); *Solomon v. Pennsylvania R.R.*, 96 F. Supp. 709 (S.D. N.Y. 1951); *Washington v. Official Court Stenographer*, 251 F. Supp. 945 (E.D. Pa. 1966).

In *Batista*, the following language of the Court although in the context of punitive damages is equally applicable to a consideration of damages for mental anguish.

“But if it be once said that such additional damages [punitive] may be assessed against the wrongdoer and when assessed may be taken by the plaintiff—and such is the settled state of the federal courts—there is neither sense nor reason in the proposition that such additional damages may be recovered by a plaintiff who is able to show that he has lost \$10.00 and may not be recovered by some other plaintiff who has sustained, it may be, far greater injury but is unable to prove that he is poorer in the pocket by the wrong doing of the defendant.”

Courts have recognized the enormous emotional harm inflicted upon victims of unlawful discrimination. Expert testimony has been submitted and is available to corroborate this. See e.g. *Brown v. Board of Education*, 347 U.S. 483 (1954); *Simpson & Yingler, Racial and Cultural Minorities*, page 217 (1958). The kind of discrimination herein involved, the denial of a place to live because of race, is a vicious and evil act. Courts, and administrative agencies, may project, without being reckless, the inevitable impact of such an ugly deed upon its victim. It is submitted that the bare testimony of the complainant Lewis Thornton, that he was “upset” over the refusal to rent is sufficient to sustain a nominal award of \$350.00.

Appellant's position is that the size of an order to pay emotional damages is a question of fact for the fact-finder to be determined by the facts and circumstances of each case subject, of course, to judicial review, as to whether there was an abuse of discretion.

In *Zahorian*, the New Jersey Court in upholding the award of \$750.00 for mental anguish, confined the agency's authority to an award which “truly constituted only ‘incidental relief’ . . .” rather than “. . . where because of the severity of the consequential injury and the extensiveness of the claim, the item of damages has become primary and the other relief incidental.”

The Court appears to suggest that where the complaint involves a claim of serious and permanent physical or mental disability which would “entail extensive adversary litigation, it might be better reserved to traditional court proceedings.”

It may not be possible to categorize the issues and claims involved in a discrimination case neatly as involving either an incidental or a primary damage claim. In every case the Commission, in fashioning a remedy, looks to what must be done to eliminate the unlawful practice involved but also seeks, to the extent it is possible, to make an aggrieved complainant whole. Nevertheless, it has no quarrel with leaving to the courts the rare case apparently contemplated by the *Zahorian* Court. Presumably that Court was referring to a case where the claim of serious and permanent physical or mental disability is manifestly attributable to the unlawful act in question

and the injury is manifest and capable of being diagnosed and capable of being strongly confirmed by a physician.

Realistically, many Blacks who complain to the Commission may have been permanently emotionally scarred by an act of discrimination, but seldom is there manifested the direct injury flowing from the act and capable of being medically diagnosed and confirmed. There is no realistic possibility that the Commission would enter an award in a sum remotely commensurate to the damage which may in fact have been done.

Appellant urges that this Court affirm its power to order compensatory damages, including the kind herein in question, and to affirm it in those terms necessary for it to effectuate the central purpose of the Act of ending racial discrimination. Appellant is concerned that the imposition of an arbitrary token ceiling on amounts which it can order a respondent to pay would render the power ineffective as a deterrent to acts of unlawful discrimination. Where the facts of one case may appear to justify only a nominal award, those of another may justify one substantially higher, and it should be clearly impressed upon every potential respondent that if he discriminates, he must take his victim as he finds him.

In *PHRC v. Straw*, Appellant's order was a more substantial \$5500.00 to compensate the complainant for the "mental anguish, humiliation, inconvenience and disruption of normal family life" which she experienced as a result of respondent's refusal to rent to her because of her race (Record, Final Order, para.

3). Substantial evidence in support of the damages found by the Commission was introduced in behalf of the complainant (N.T. 31a-33a) and was reflected in the Findings of Fact (Record, Findings paras. 10-12). In *Pennsylvania Human Relations Commission vs. St. Andrews Development Co., Inc.*, the third case decided on the same day by the Court below in which PHRC's power to order compensatory damages was involved, the order was to pay the two complainants \$750.00 each for "mental anguish, humiliation and embarrassment". The Commission found that the respondents had refused to rent an apartment to them and to the younger woman's son because of their race, Black. The finding of mental anguish was supported by strong testimony of the complainant, Geraldine Cobb, including the following:

"Q. Miss Cobb, getting back to the time you were rejected, could you relate to the Commissioners how you as a person felt?

A. How I felt?

Q. Yes.

A. About us being rejected?

Q. Yes.

A. I was very hurt, myself. I was upset. Me and my mother both, we both wanted to live out in the Governor's Place, and my mother has a heart condition, I think this kind of weighed on her heart. Because she did worry about it a lot. . .

Q. Did it affect your day to day conduct?

A. I think both of us it affected. We were both irritable. And frustrated. We neglected

my little brother. At the end of the day, she felt like she didn't want to be bothered. She just worried about the situation.

Q. Were you very close to your mother?

A. Very.

Q. And things that would have affected her, would they have affected you as well?

A. Very much so.

Q. And this did bother your mother?

A. Yes.

Q. What about Darian, the youngster? Your brother?

A. Well, usually, Darian goes to bed about 9:00. Around the time we was rejected, my mother seemed to spend this time with him. She would spend this time. I would say what is wrong. Why wasn't Darian in bed. She was worried about the apartment. Whether we would get it or not.

This weighed on both of us."

Clearly there was no basis for the Court below saying, as it did in footnote 4, that the records of the different cases "fail to disclose any distinction or basis for the disparity in the respective awards."

Respectfully submitted,

SANFORD KAHN

General Counsel, Pennsylvania Human Relations Commission

Attorney for Appellant.

OPINIONS OF THE COMMONWEALTH COURT

IN THE COMMONWEALTH COURT OF
PENNSYLVANIA

No. 1300 C.D. 1972

George Zamantakis and Bessie Zamantakis,
Appellants

v.

Commonwealth of Pennsylvania, Pennsylvania
Human Relations Commission,

Appellee.

Before

Honorable James S. Bowman, President Judge.

Honorable James C. Crumlish, Jr., Judge.

Honorable Harry A. Kramer, Judge.

Honorable Roy Wilkinson, Jr., Judge.

Honorable Glenn E. Mencer, Judge.

Honorable Theodore O. Rogers, Judge.

Honorable Genevieve Blatt, Judge.

Argued May 9, 1973—Harrisburg.

Opinion by Judge Kramer, August 14, 1973:

This is an appeal from an Order of the Pennsylvania Human Relations Commission (Commission) dated November 27, 1972, in which George Zamantakis and Bessie Zamantakis, his wife (collectively referred to as Zamantakis) were ordered to cease and desist from committing any unlawful and discriminatory practices as defined in Section 5(h) (1) of the Pennsylvania Human Relations Act (hereinafter referred to as the Act), Act of October 27, 1955, P. L. 744, as amended, 45 P.S. §955 (h) (1).¹ Zamantakis was also ordered by the Commission to pay to Sylvester Thornton and Willis Thornton² (Thorntons) "the sum of \$250.00 [each] in order to compensate them for the mental anguish and humiliation which they experienced as a result of the [Zamantakis'] unlawful discriminatory practices."

¹ On July 2, 1973, the Pennsylvania Supreme Court filed an opinion in the case of *Alto Riste Park Cemetery Association v. Pennsylvania Human Relations Commission*, 453 Pa. 124, A. 2d (1973), affirming in part and reversing in part an opinion of this Court at 7 Pa. Commonwealth Ct. 203, 295 A. 2d 619 (1972). We have carefully reviewed that Supreme Court opinion and conclude that it is not controlling on the result of this case.

² The original complaint and the amended complaint filed with the Commission were signed only by Sylvester Thornton. At the beginning of the hearing, before the Commission, the attorney for the Commission orally moved to amend the complaint so as to include the brother of Sylvester, namely Willis Thornton, as a complainant. Counsel for the Zamantakis did not oppose the adding of Willis Thornton as a complainant. The record, however, discloses that pleadings (complaint) were never physically amended, and no complaint was ever signed or acknowledged by Willis Thornton.

In appealing to this Court, Zamantakis has presented only the question whether the Commonwealth committed an error of law by going beyond the scope of its statutory authority in awarding compensatory damages to the Thorntons in the stated sums for "mental anguish and humiliation." Zamantakis has not appealed from the findings and conclusions of the Commission that Zamantakis committed an unlawful discriminatory practice in violation of the Act.

The facts are not in dispute. Zamantakis owned and operated an apartment house, and advertised in a local newspaper for the rental of a four-room apartment as follows: "Folk St.—4 rooms and bath, air conditioning, wall-to-wall carpeting, \$130 plus utilities. Adults. 252-5836." Without going into any great detail, we need only say that the record supports the Commission's findings that Zamantakis refused to rent the advertised apartment to the Thorntons because of their race and sex. Among the 22 findings of fact by the Commission, No. 17 is pertinent to this Opinion, and it reads as follows: "17. Realizing that they were being denied the opportunity to rent the apartment in question in part at least because of their race, the Thorntons felt humiliated. Mr. Willis Thornton, who had recently returned from Vietnam, was, in fact, quite upset to find that the freedom for which he had fought was being denied him here in the United States."—In the Commission's conclusions of law, we find: "3. The Complainants, Sylvester and Willis Thornton, are each entitled to receive compensation from the Respondents for the mental anguish and humiliation which they experi-

enced as the result of the discriminatory treatment inflicted upon them." The two paragraphs of the Commission's Order which are before us read as follows:

"2. That the Respondents, George Zamantakis and Bessie Zamantakis pay to each of the Complainants the sum of \$250.00 in order to compensate them for the mental anguish and humiliation which they experienced as a result of the Respondents' unlawful discriminatory practices.

"3. Payment of the above amount shall be paid by the Respondents George Zamantakis and Bessie Zamantakis, within 30 days from the date of this Order with interest to accumulate at the rate of 6 per cent per annum in the event said sum is not paid during this period."

As stated in the Act (45 P.S. §960), our scope of review is governed by the Administrative Agency Law, Act of June 4, 1945, P. L. 1588, as amended, 71 P.S. §1710.1 et seq., whereby we are to determine whether the Commission's adjudication "is not in accordance with law" or whether "any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence." *See also Wilkinsburg School District v. Human Relations Commission*, 6 Pa. Commonwealth Ct. 378, 295 A. 2d 609 (1972); *Pennsylvania Human Relations Commission v. Chester School District*, 209 Pa. Superior Ct. 57, 224 A. 2d 811 (1966).³ In view of the fact that Zamantakis has raised only the question of whether the Commission has exceeded its statutory

³ *Modified*, 427 Pa. 157, 233 A. 2d 290 (1967).

authority in the awarding of compensatory damages, for the purpose of disposition, we need not look to the record to determine whether or not the Commission abused its discretion in its findings of fact.

In support of its contention that it has the statutory power to order compensatory damages, the Commission points to Section 9 of the Act, 43 P.S. §959. That section reads as follows:

"If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the *Commission* shall state its findings of fact, and *shall issue* and cause to be served on such respondent *an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action* including but not limited to . . . leasing specified commercial housing upon such equal terms and conditions and with such equal facilities, services and privileges . . . to any person discriminated against or all persons *as, in the judgment of the Commission, will effectuate the purposes of this act.* . . .

"The Commission shall establish rules or practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder." (Emphasis added.)

The Commission contends that Section 9 authorizes it to take "affirmative action." As we read that section, the Legislature authorized the Commission to order the "respondent . . . to take such affirmative action." We believe that there is a real difference here.

If we could find in the statute authority in the Commission to ascertain damages, or even to impose punitive or compensatory damages upon a respondent, then we could uphold the Commission's contention that it could order respondent to pay such damages as affirmative action. However, absent such legislative language or clear intent, the Commission may order a respondent only to take such affirmative action as guided by the statute, e.g., the leasing of an apartment to the complainant upon equal terms and conditions. The missing link in the Commission's argument is the absence of any specific legislative authority to ascertain, and hence to award, damages.

A reading of the declarations of policy found in the Act, 45 P.S. §§952 and 953, indicates that the legislative purpose is to provide and foster equal opportunity for all persons to (among other things) lease an available dwelling place regardless of his or her race, color, religion, creed, ancestry or sex. Also included within the protected class are persons who use guide dogs because of blindness. The Commission's zeal to utilize effective methods of enforcing its orders so as to accomplish the declared policy of this Commonwealth is commendable. The problem, however, is that the Commission, as a regulatory agency, cannot go beyond the powers given it by the Legislature. As the Court said in the case of *Pennsylvania Human Relations Commission v. Brucker*, 95 Dauph. 8, 17, 51 Pa. D. & C. 2d 569, 581 (1970): "It is well settled that an administrative body such as the Human Relations Commission is exercising powers delegated to it by the Legislature, and that it is limited in its powers to

those granted. In *re Pesognelli's Restaurant Liquor License*, 191 Pa. Super. 320, 156 A. 2d 540 (1959); *Sanitary Water Board v. Glen Alden Corporation*, 83 Dauph. 108 (1964). It is equally well settled that courts should not interfere with the actions of governmental bodies or administrative tribunals in absence of an abuse of power. See *Goodman Appeal*, 425 Pa. 23, 227 A. 2d 816 (1967). These principles of law are to be applied in reviewing actions of the Human Relations Commission. See *Pennsylvania Human Relations Commission v. Chester School District*, 85 Dauph. 18, 40 D. & C. 2d 493 (1966), affirmed in 209 Pa. Super. 37, 224 A. 2d 811 (1966), and modified in 427 Pa. 157, 253 A. 2d 290 (1967). The Court later said: "The Legislature may grant tribunals broad discretion in the application of standards, but these standards must be limited in scope by provisions in the statute. *Pesognelli's Liquor Case*, supra." 93 Dauph. at 18, 51 Pa. D. & C. 2d at 382.

We fully recognize that our Supreme Court in the cases of *Alto Reste Park Cemetery Association v. Pennsylvania Human Relations Commission*, 453 Pa. 124, A. 2d (1973) and *Pennsylvania Human Relations Commission v. Chester School District*, 427 Pa. 157, 253 A. 2d 290 (1967) laid down the principle that the Commission should be given broad discretionary power to make its orders effective. A careful reading of those cases, however, does not permit us to extend the discretionary power of the Commission beyond that authorized by the Legislature. The *Chester School District* case highlights the problems presented by this case. The deprivation

of an equal opportunity to education also creates mental anguish in minority students, and the damages could be infinitely greater than the possible damages resulting from a discriminatory refusal of a lease. If the Commission's position is upheld here, could it order a school district to pay hundreds or thousands of dollars in compensatory damages to each of the thousands of minority students in the Chester School District? We can find no such statutory authority.

Our reading of Section 9 of the Act, 43 P.S. §959, leads us to conclude that the Legislature has authorized the Commission to issue a cease and desist order from unlawful discriminatory practices, and also has given it the power to order the culprit to take additional affirmative action on leasing discrimination upon such equal terms and conditions as will permit the Commission to effectuate the purposes of the Act. In carrying out that power, the Commission is directed by that same section of the Act to establish rules to govern, expedite and effectuate its procedure and action. No such rules relating to damages have been disclosed. Nowhere in Section 9 do we find any statutory power in the Commission to order compensatory damages for mental anguish and humiliation as a result of leasing discrimination. Unlike employment discrimination, where Section 9 permits the Commission to reinstate an employe with back pay (a readily and reasonably ascertainable statistic), the statute is silent as to any provision for humiliation and mental anguish compensatory damages (a nebulous ascertainment, at best) in leasing discrimination cases.

In a comparable matter, this Court in the case of *Corder v. Civil Service Commission*, 2 Pa. Commonwealth Ct. 462, 468, 279 A. 2d 368, 371 (1971), stated: "We note in passing that the appellant, in her brief, has requested punitive damages for her 'embarrassment and heartbreak.' We find no statutory basis for this request and therefore her argument is without merit." Furthermore, this Court recently said in *Alto-Reste Park Cemetery Association v. Pennsylvania Human Relations Commission*, 7 Pa. Commonwealth Ct. 203, 298 A. 2d 619 (1972): "The Commission in requiring a *formal public* letter of apology went beyond the scope of its delegated authority. Interpretation of the term 'formal public letter' is subject to a variety of personal subjective notions. I recognize that the act allows the Commission to require affirmative action to implement its effectiveness but a requirement such as we have before us in Paragraph 4 could well lead to varied, arbitrary, and even oppressive orders under the guise of giving proper effectuation of the purposes of the Act." (Emphasis in original.) 7 Pa. Commonwealth Ct. at 209-210, 298 A. 2d at 623.

Our holding on Paragraph 4 was affirmed by our Supreme Court in *Alto Reste*, *supra*, for the reason that the Commission was attempting to achieve ends other than those which can fairly be said to effectuate the purposes of the statute.

The issue of whether the Commission can award compensatory damages is one of first impression in this Commonwealth. In view of this fact, the Commission had laid great stress on the law of other

jurisdictions. Our research into the cases the Commission cited permits us to conclude that in Oregon, Massachusetts and New York, there is some statutory authority for the human relations authorities to award damages. Admittedly, the New Jersey statute is similar to ours, and is silent on damages. However, in the case of *Zahorian v. Russell Fitt Real Estate Agency*, 62 N.J. 399, 301 A. 2d 754 (1975), cited by our Commission, the majority opinion refers to "minor or incidental awards" "justified by the evidence." We find the New Jersey result to be confusing and unacceptable under the Pennsylvania statute.

As we view our role in this case, on this issue, we must determine whether our Legislature intended our Commission to award compensatory damages for "humiliation and mental anguish." We first note that in the Pennsylvania statute, there is no specific legislative language authorizing the Commission to award such damages. Next, we note that the statutorily provided proceeding is directed to be expeditious and informal, as are most administrative procedures. There are none of the formal trappings, evidentiary protections, and strict procedures of a court of law. In addition, the members of the Commission necessarily need not be trained or learned in the law. As so often happens in an administrative proceeding, the Commission and its employes are the investigators, the prosecutors, the judges and jury. On balance, this results in an unduly heavy force on the side of the proponents of damages. Traditionally, damages, in this Commonwealth, have been a matter for courts

of law, under an adversary system of justice, and therefore unless the Legislature clearly authorizes the Commission to award damages we cannot extend to it such authority by judicial fiat, nor can we broaden the scope of the Commission's authority into a full-scale lawsuit. See 43 P.S. §960.

Even if one could find statutory authority in the Commission to award such damages, the record in this case does not support the Commission's order. We have carefully read the entire record. We note with interest that the Commission has seized upon one short (nine lines) statement of Willis Thornton, in the record to the effect that he was "upset" over being refused the rental of the Zamantakis apartment as the basis for its conclusion that both Thorntons were entitled to compensatory damages. The words "humiliation" or "mental anguish" are not found anywhere in the record except in the Commission's adjudication. *Sylvester* Thornton did not mention his personal feelings at any place in the record. A reading of the record also discloses an absence of any support for the Commission's determination of the \$250 figure. The Commission has not pointed to any statutory or regulatory guidance or standard for such damages. The Commission has not presented any regulatory rule, regulation or standards for reaching its conclusion. We must conclude that the Commission's determination of the \$250 figure was arbitrary. If regulatory agencies are permitted to utilize their philosophical and sociological thinking and feeling as the basis for compensatory damages, any time a citizen violates such legislation, only chaos can result. The

Commission's standard or basis for a \$25 or \$250, or \$25,000 humiliation or mental anguish is left to one's imagination.⁴ Due process of law requires that our citizens be notified and fully advised of what is entailed in a regulatory agency hearing. Under the procedure used by the Commission in this case, a citizen is not afforded any protection during the hearing to permit him to mitigate or defend against the imposition of compensatory damages. The inconsistency of the Commission is highlighted when we notice that in its Finding No. 17, quoted above, only "humiliation" is mentioned, yet in its final order, the Commission awards compensatory damages also for "mental anguish," which is not supported anywhere in its findings.

In summary then, we conclude that the Commission committed an error of law in awarding compensatory damages to the two Thorntons for humiliation and mental anguish. We therefore

Order

And Now, this 14th day of August, 1973, final order of the Pennsylvania Human Relations Commis-

⁴ Filed simultaneously herewith are two similar cases where the Commission awarded compensation for humiliation, etc. In the case of *Straw v. Pennsylvania Human Relations Commission*, No. 16 C.D. 1973; it awarded \$3,500; and in *St. Andrews Development Company v. Pennsylvania Human Relations Commission*, No. 32 C.D. 1973, it awarded \$750 to the estate of a deceased complainant (who did not testify) and for which there was no personal representative, and \$750 to another claimant. The records of these three cases fail to disclose any distinction or basis for the disparity in the respective awards.

sion dated November 27, 1972, in the above matter, Paragraphs 1, 4, 5 and 6 are affirmed, and Paragraphs 2 and 3 are set aside.

Concurring Opinion by Judge Blatt:

While I concur with the result reached herein by the majority, I cannot agree that the Pennsylvania Human Relations Commission (Commission) lacks any power whatsoever to award compensatory damages to victims of a discriminatory practice which is in violation of the Pennsylvania Human Relations Act, Act of October 27, 1955, P. L. 744, 43 P.S. §951 et seq. As our Supreme Court has recently noted in *Pennsylvania Human Relations Commission v. Alto-Reste Park Cemetery*, 455 Pa. 124, A. 2d (1973), the Legislature has "vested in the Commission, quite properly, maximum flexibility to *remedy* and hopefully eradicate the 'evils' of discrimination. . . . The legislative mandate that the provisions of the Act be 'construed liberally' . . . serves to reinforce this view." (Emphasis added.) 455 Pa. at 134, A. 2d at .

The statutory basis upon which I believe that the Commission may assess damages is Section 9 of the Act, 43 P.S. §959. This section provides that, if the Commission should determine that a respondent has engaged in or is engaging in any unlawful discriminatory practice, it shall order such respondent "to take such affirmative action including but not limited to . . . [several specific courses of action] as, in the judgment of the Commission, will effectuate the purposes of this act. . . ." It seems reasonable to expect that one such affirmative course of action might well

be the payment of damages to a complainant who has been harmed by a respondent's unlawful discriminatory action. Indeed, this would appear to be a clearly proper and effective way to effectuate the purposes of the Act and to remedy the "evils" of discrimination.

I believe, for example, that it would be appropriate to award such damages in order to reimburse complainants for out-of-pocket expenses sustained as the result of an unlawful discriminatory practice, as in a case where the complainant lost a day's wages or incurred heavy travel expense to answer an advertisement only to find that the owner would not rent to him for some discriminatory reason. Nor would I rule out the possibility of compensation for mental anguish and humiliation.

I also believe, however, that there are two conditions precedent to the award of any such damages by the Commission: (1) the prior adoption of proper standards by the Commission, and (2) the introduction of substantial evidence that an injury has been suffered for which damages are appropriate. Neither condition, of course, is present in this particular case. Certainly the Commission has not established any intelligible standards regarding the basis on which damages are assessed.¹ And, as the majority has correctly indicated, there has been no evidence presented

¹ See, *Straw v. Pennsylvania Human Relations Commission*, 10 Pa. Commonwealth Ct. 99, 308 A. 2d 619 (1973), and *St. Andrews Development Company v. Pennsylvania Human Relations Commission*, 10 Pa. Commonwealth Ct. 123, 298 A. 2d 623 (1973).

that the complainants have suffered a compensable injury as the result of any unlawful discriminatory action of the respondents.

Concurring and Dissenting Opinion by Judge Rogers:

I respectfully dissent from the holding of the majority that the Human Relations Commission is not empowered to award compensatory damages to victims of illegal discrimination. Section 9 of the Pennsylvania Human Relations Act empowers the Commission upon a finding of an unlawful discriminatory practice to order the offender "to take such affirmative action *including but not limited to* hiring, reinstatement or upgrading of employes, with or without back pay, admission or restoration to membership in any respondent labor organization, or selling or leasing specified commercial housing upon such equal terms and conditions and with such equal facilities, services and privileges or lending money . . . as, in the judgment of the Commission, will effectuate the purposes of this Act. . . ." Act of October 27, 1955, P. L. 744, 43 P.S. §959. The policy of the Commonwealth sought to be carried out by the Act is, *inter alia*, that of assuring "equal opportunities to all individuals and to safeguard their rights . . . to secure commercial housing regardless of race, color, religious creed, ancestry, sex, . . . or national origin." Section 2 of the Pennsylvania Human Relations Act, 43 P.S. §952.

I can conceive of no affirmative action which the Commission could order which would better effec-

uate the central purpose of the Act to end racial discrimination than that of directing the violator to pay damages to persons upon whom injuries have been inflicted. With the abandonment of the requirement of physical impact as a precondition to recovery for damages for emotional suffering by *Niederman v. Brofsky*, 455 Pa. 401, 261 A. 2d 84 (1970), the concept of an award for such cause in human relations proceedings standing alone would not be unique. As for the contention that the Commission may make excessive, arbitrary or inconsistent orders in this regard, the same possibility exists with respect to jury verdicts. The simple answer is that such orders of the Commission would be subject to judicial review both as to the sufficiency of the evidence of mental suffering and as to the reasonableness of the amount awarded. In short, I believe that the Legislature has authorized orders of compensatory damages by conferring upon the Commission the power to order the taking of affirmative action to effectuate the purposes of the Act.¹

The Supreme Court of Pennsylvania has twice instructed that the Commission has been invested with broad discretionary powers. It is my opinion that the award made in this case is consistent with the legislation so construed. *Pennsylvania Human Relations Commission v. Chester School District*, 427 Pa.

¹ Additional reasons for my conclusion are fully expressed and expounded in the court's opinion in *Zahorian v. Russell Fit: Real Estate Agency*, 62 N.J. 399, 301 A. 2d 754 (1973). The New Jersey statute is pertinently identical to the Pennsylvania Human Relations Act.

157, 235 A. 2d 290 (1967); *Alto-Resse Park Cemetery Association v. Pennsylvania Human Relations Commission*, 455 Pa. 124, A. 2d (1975).

In the instant case, however, as the majority observes, there is no evidence whatsoever of the effect of respondent's conduct upon Sylvester Thornton. I agree, therefore, that the order with respect to the payment of damages to him is not supported by the record. I would affirm the order requiring the payment of the modest sum of Two Hundred and Fifty Dollars (\$250.00) to Willis Thornton for the mental distress caused him by the respondent's unlawful conduct.

IN THE SUPREME COURT OF PENNSYLVANIA

 Allocatur Docket No. 99

 George Zamantakis and Bessie Zamantakis,
Appellants

vs.

 Commonwealth of Pennsylvania, Pennsylvania
 Human Relations Commission,
Appellee

 PETITION FOR ALLOWANCE OF APPEAL
 FROM THE DECISION AND ORDER OF THE
 COMMONWEALTH COURT OF PENNSYLVANIA

To the Honorable, the Justices of the Said Court:

The Petition of the Pennsylvania Human Relations Commission respectfully represents:

1. That a Complaint was filed by Sylvester and Willis Thornton with Petitioner Pennsylvania Human Relations Commission (hereafter PHRC) charging that the Respondents George and Bessie Zamantakis had refused to rent them an apartment in Easton, Pennsylvania because of their race, Negro, in violation of Section 5(h) (1) of the Pennsylvania Human Relations Act.

2. That pursuant to the procedures set forth in the Act, Petitioner investigated the complaint, found probable cause to credit the allegations therein, attempted to settle the matter by conciliation, and that failing, convened a public hearing on April 4, 1972.

3. That after the public hearing, upon the recommendation of the Hearing Commissioners, Petitioner issued and served upon the Respondents its Findings of Fact and Conclusions of Law and Final Order.

4. That Petitioner found that Respondents had denied them an apartment because of their race in violation of the Human Relations Act and that this Finding and Conclusion of Law, although not appealed by the Respondents, was expressly upheld by the Commonwealth Court. (Opinion, Page 2)

5. That in paragraph 2 of its Final Order Petitioner ordered Respondents to "pay to each of the Complainants the sum of \$250.00 in order to compensate them for the mental anguish and humiliation which they experienced as a result of Respondent's unlawful discriminatory practices."

6. That the Commonwealth Court in its Opinion filed on August 14, 1973 held that PHRC had no authority to award compensatory damages to the Complainants for mental anguish and humiliation and set aside this provision of the Final Order. It is from this holding that the Petitioner now seeks to appeal.

7. That the question presented in this Petition for Allowance of Appeal is:

Does PHRC have the authority to order a respondent who has unlawfully discriminated

against a complainant to compensate that complainant for the mental anguish and humiliation suffered as a direct result of respondent's unlawful act? (Answered in the negative by the Court below)

8. That taking into consideration the very strong command in the declaration of policy of the Act to PHRC to eliminate the evils of discrimination, the requirements in Section 12 that the "provisions of this Act shall be construed liberally for the accomplishment of the purposes of the Act, that Section 12 provides that when Complainants invoke the procedures of the Human Relations Act they waive further recourse to State courts, the relationship of PHRC and State law and Federal law, where compensatory damages and even punitive damages are well established, the interpretation of PHRC's powers by the Pennsylvania Supreme Court as well as other decisions of this Court, and the unanimity with which other State courts have upheld the power of state anti-discrimination agencies to order such damages identical or similar to our Act, it is clear that PHRC does have the authority which the Commonwealth Court would deny it.

ARGUMENT

The Commonwealth Court erred at the outset of its discussion on the question when after reciting the language of Section 9 from which PHRC derives its power to fashion remedies:

"If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this Act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to . . . leasing specified commercial housing upon such equal terms and conditions and with such equal facilities, services and privileges . . . to any person discriminated against or all persons as, in the judgment of the Commission, will effectuate the purposes of this act. . ."

It stated that:

"The Commission contends that Section 9 authorizes it to take 'affirmative action'. As we read that section, the Legislature authorized the Commission to order the 'respondent . . . to take such affirmative action'. We believe there is a real difference here."

A question of this moment does not turn on whether the Commission is authorized to take affirmative action or may merely order the Respondent to do so. But nowhere in its Brief or oral argument did PHRC contend what the Court attributed to it. Accepting the Court's interpretation that the Commission may only order the Respondent to take affirmative action, it is clear that that is precisely what PHRC does when it orders a respondent to pay compensatory damages.

If there is a distinction between ordering a respondent to take the affirmative action paying compensatory damages and ordering that it keep records and advertise its non-discriminatory policy in a newspaper, remedial provisions upheld by this Court in *Pennsylvania Human Relations Commission vs. Alto-Reste Park Cemetery Association*, 306 A. 2d 881 (July 2, 1975), Petitioner fails to perceive it.

As Judge Rogers stated in his excellent Dissent:

"I can conceive of no affirmative action which the Commission could order which would better effectuate the central purpose of the Act to end racial discrimination than that of directing the violator to pay damages to persons upon whom injuries have been inflicted." (Page 2)

It was believed that this question of PHRC's remedial powers was conclusively resolved by this Court in *Alto-Reste*, where the Court analyzed the identical language of Section 9, placing great weight on the phrase "as in the judgment of the Commission" in arriving at its conclusion that "the Legislature recognized that only an administrative agency with broad remedial power 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 'evil' of discrimination . . . The legislative mandate that the provisions of the Act be 'construed liberally' seems to reinforce this view."

In *Alto-Reste* the Court also applied the Rules of Statutory Construction to the phrase "including but

not limited to." Although its discussion was in the context of the phrase's appearance in another section the analysis applies equally to its appearance in Section 9.

"The language of that section ('include but not limited to') is broad and all inclusive. If it was the intent of the Legislature to narrow the broad scope of the phrase 'any place of public accommodation,' inept language was used for that purpose. The verb 'include' has not been defined so as to give it such a restrictive meaning. . . Indeed, this Court has held, as the Legislature has directed, that the provisions of the Pennsylvania Human Relations Act . . . be construed liberally for the accomplishment of the purposes thereof."

The Commonwealth Court indeed erroneously cites this Court's Opinion in *Alto-Reste* as supporting its holding. It states:

"Our holding on paragraph 4 was affirmed by our Supreme Court in *Alto-Reste* for the reason that the Commission was attempting to achieve ends other than those which can fairly be said to effectuate the purposes of the statutes."

This, of course, is not the reason cited by this Court in affirming the Commonwealth Court on paragraph 4 while reversing it on the other two paragraphs of the Order in dispute. This Court said:

"The Commission's action in imposing the advertising requirements of paragraph 8 amply

serves the purpose of informing the public that Alto-Reste no longer adheres to its all—Caucasian policies.”

The Commonwealth Court apparently believes that compensatory damages, including damages for the emotional distress suffered by a victim of unlawful discrimination, cannot fairly be said, in the judgment of the Commission, to effectuate the purposes of the Act. If this is indeed the Commonwealth Court's view, they do not fully grasp those purposes. As this Court recognized in *Alto-Reste*:

“It is beyond cavil that the Human Relations Act was intended, by the Legislature, to protect more than individuals unlawfully discriminated against—of equal importance is the Act's intent that the public generally be protected from such discrimination. . . . Accordingly, it is . . . incumbent upon the Commission to not only fashion an effective remedy for the individual aggrieved, but also to guard against and deter the same discriminatory act from recurring, to the detriment of others within the same class.”

Surely an order that a respondent pay a victim compensatory damages, both in terms of affording redress to the aggrieved individual and as a means of deterring future discrimination by making it expensive, has as much relevance to the purposes of the Act as the record-keeping or the advertising provision upheld in *Alto-Reste*.

* * * * *

Section 12(b) of the Act provides that once a complainant invokes the procedure of the Human Relations Act, he has waived his right to bring any other action. The State, of course, has no power over the jurisdiction of federal courts. Thus, the applicability of Section 12 is limited to State courts.

Clearly, if a complainant chose not to invoke the procedures of the Human Relations Act but go into State court instead, he would be entitled to recover compensatory damages. See e.g., *Everett v. Harron*, 380 Pa. 123 (1955).

The holding of the Commonwealth Court necessarily assumes that the Legislature intended to punish persons who elected to seek redress through PHRC by denying them the full relief available if they bypassed the Commission, with its conciliation processes, and went to court. Nor is it a sufficient answer to say that the complainant would still have available the federal forum. This option is unsatisfactory and unacceptable. It would needlessly burden the respondent and the complainant by involving them in multiplicitous litigation as well as unnecessarily add to the federal case load as well as presumably its backlog, it would place the burden on a complainant to obtain an attorney to seek complete relief and undoubtedly many would resign themselves to the partial relief the Commonwealth Court would allow. And to the extent that respondents are not required to fully compensate victims of unlawful discrimination and are thus less deterred from continuing their unlawful conduct, to that extent the very fundamental purpose of the Act would be thwarted.

It is questionable that the Legislature could limit the relief available to a victim of unlawful discrimination. As the Court stated in *Teamsters Local v. City of West Point, Nebraska*, 358 F. Supp. 927 (D. Neb. 1972):

"This Court would express great doubt that any state has the power to reduce the measure of a federal constitutional right by state legislation."

In *Gillian v. City of Omaha*, 331 F. Supp. 4 (D. Neb. 1971) the Court held that the Nebraska State anti-discrimination agency, under a statute with remedial language similar to PHRC's, was *required* to award punitive damages when appropriate, even though punitive damages were not permitted under Nebraska State law. The Court reasoned that when the Nebraska agency considered an act of employment in the light of the Nebraska statute, it must at the same time have considered it as a violation of the Federal Constitution:

"If punitive damages are necessary to fully vindicate a constitutional right when that right is before a Federal Court, then such damages are every bit as necessary when that right is before a state administrative commission or state court."

* * * * *

In Petitioner's Brief to the Court below, it was pointed out that every State court that had considered the power of an anti-discrimination agency to award compensatory damages for mental anguish had upheld

such power. It was pointed out that the scheme and language of these state statutes was similar to or virtually identical to the Pennsylvania Human Relations Act. The Commonwealth Court acknowledged that in Oregon, Massachusetts and New York there is "some statutory authority for the human relations authorities to award damages," but without further discussion dismissed those cases as authority. See e.g. *Williams v. Joyce*, 477 P. 2d 515 (Or. App. 1971); *Massachusetts Commission Against Discrimination v. Franzaroli*, 256 N.E. 2d 311 (1970), and *State Commission for Human Rights v. Speer*, 272 N.E. 2d 884 (N.Y. Court of Appeals 1971).

The Court also acknowledged that the "New Jersey statute is similar to ours, and is silent on damages." It added, however, that in *Zahorian v. Russell Fitt Real Estate Agency*, 301 A. 2d 754 (1973), the majority opinion refers to "minor or incidental awards' 'justified by the evidence.'" The questions of the amount and nature of the evidence necessary to sustain an award and the scope of the award are of course distinct from the fundamental question of PHRC's very power to order compensatory damages. They will be addressed below. The Commonwealth Court, however, acknowledging the similar language of the New Jersey statute (It is virtually identical), declared enigmatically that, "We find the New Jersey result to be confusing and unacceptable under the Pennsylvania statute."

It is submitted that on the contrary the New Jersey (Zahorian) result is squarely on all fours with the instant case on the basic question of the agency's

power to award damages for mental anguish. The New Jersey Court construed the language of the act in the manner urged herein and emphasized, as we emphasize here, the design of the act and the clear intent of the Legislature to create "an effective enforcement agency." See *Pennsylvania Human Relations Commission v. Chester School District*, 427 Pa. 157 (1967).

Nor do the Federal courts construe civil rights statutes as narrowly and restrictively as the Court below.

The language of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000-5(g) was very similar to the Human Relations Act, including the phrase, "... and order such affirmative action as may be appropriate. . . ."

The Court in *Humphrey v. Southwestern Portland Cement Co.*, 5 E.P.D. 18501 (W.D. Tex. 1973) held that psychic injuries are proper in Civil Rights Act suits. Finding that the purpose of the act obviously is to end discrimination the Court concluded that "the purpose of the act will best be served if all the injuries which are caused by discrimination are entitled to recognition."

At bottom, the problem here clearly is the apparent fundamental inability of the Commonwealth Court, based obviously upon a different judicial philosophy, to implement the legislative directive to construe this act liberally for the accomplishment of its purposes.

¹ This provision was amended in 1972 to add the phrase "... or any other equitable relief as the Court deems appropriate."

This is reflected in its Opinion in this case where it states, "the missing link in the Commission's argument is the absence of any specific legislative authority to ascertain; and hence to award damages." (Page 4)

The lesson to be learned from the cases cited above is that in construing civil rights cases our Courts overwhelmingly look to the overall purpose of the Act and, particularly when the language includes words of enlargement such as "including but not limited to", they construe the statute in a manner in keeping with its purposes. Where courts in civil rights cases look to whether the statute specifically precludes the interpretation consistent with the purposes of the Act, the Court below looks to whether the language specifically authorizes it.

(In conclusion it should be stressed that while the instant case involves only compensatory damages for mental anguish, the Court below based its holding on its conclusion of law that PHRC has no power to order a respondent to pay damages of any kind.)

The foregoing argument on the power to award damages for mental anguish applies with equal force to the power to award damages of any kind. The underlying premise of the decision is stressed, however, to convey to the Court the drastic and utterly unrealistic implication of the Court's interpretation. Under the Court's view even precisely measurable out-of-pocket losses such as the difference in rent a complainant was forced to pay because of respondent's unlawful refusal to rent, would not be recoverable.)

Chairperson
JOSEPH X. YAFFE
Vice-Chairperson
DORIS M. LEADER
Secretary
ELIZABETH M. SCOTT
Executive Director
HOMER C. FLOYD



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
HUMAN RELATIONS COMMISSION

100 N. Cameron Street - 2nd Floor
Harrisburg, PA 17101
Telephone: (717) 787-4410

Commissioners
ALVIN E. ECHOLS, JR.
MARY DENNIS DONOVAN C.S. J.
CONSUELO RODRIGUEZ JORDAN
BENJAMIN S. LOEWENSTEIN
DORIS A. SMITH
E. E. SMITH
ROBERT JOHNSON SMITH
JOHN P. WISNIEWSKI

Reply to:
P. O. Box 3145
Harrisburg, PA 17105

April 27, 1977

J. Heniel Henry, Deputy Prothonotary
Supreme Court of Pennsylvania
Middle District
P.O. Box 624
Harrisburg, Pennsylvania 17108

RE: Pennsylvania Human Relations Commission v.
Marion and Lewis Straw, No. 31 May Term 1974

Pennsylvania Human Relations Commission v. St.
Andrews Development Co., No. 32 May Term 1974

Pennsylvania Human Relations Commission v.
George and Bessie Zamantakis, No. 33 May Term
1974

Dear Mr. Henry:

I've noted that opposing Council in these cases have raised questions about whether briefs will be filed in connection with the re-argument in October of 1977. Please be advised that the Pennsylvania Human Relations Commission strongly believes that supplemental briefs should be submitted to assist the court in its reconsideration of the very important question of law involved -- the power of the Commission to order compensatory damages after unlawful discrimination has been found -- where more than three years have elapsed since the original briefs were submitted.

The Commission also believes that oral argument is important and strongly opposes the suggestion of Mr. Goldberg that the case be decided on briefs alone.

Thank you.

Sincerely,


Sanford Kahn
General Counsel

SK/sf

cc: Walter Wilt, Esq.
Harry B. Goldberg, Esq.
J. Stephen Kreglow

[J-23]

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

PENNSYLVANIA HUMAN RELATIONS COMMISSION, : No. 33 May Term, 1974
: :
Appellant : Appeal from the decision of the
: Commonwealth Court of Pennsylvania
vs. : at No. 1300 C.D. 1972 Modifying
: the Order of the Pennsylvania
BESSIE and GEORGE ZAMANTAKIS, : Human Relations Commission dated
: November 27, 1972 at Docket No.
: H-1657.
Appellees :

O P I N I O N

LARSEN, J.

FILED: MAY 8 - 1978

The sole question to be determined is whether the Pennsylvania Human Relations Commission has the authority to award damages for mental anguish and humiliation which may arise as a result of unlawful discrimination. We answer in the negative.

The facts which give rise to this appeal are as follows: On February 15, 1972, George and Bessie Zamantakis placed an advertisement in a local newspaper offering to rent a four room apartment. Sylvester and Willis Thornton responded to the advertisement on that same day and were not permitted to rent the apartment. On February 16, 1972, the Thorntons, who are black, filed a complaint with the Commission charging that the Zamantakis, who are white, had refused to rent them the

apartment because of the Thorntons' race. Pursuant to the procedures set forth in the Pennsylvania Human Relations Act,¹ the Commission found that the Zamantakises had denied the Thorntons the apartment because of their race, and on November 27, 1972, ordered, among other things, the Zamantakises to pay each Thornton \$250.00 within 30 days in order to compensate them for mental anguish and humiliation.² An appeal from this order was taken to Commonwealth Court, which in an opinion written by the late and Honorable Harry A. Kramer and filed on August 14, 1973, held that the Commission had no authority to award damages for mental anguish and humiliation.³ A petition for allowance of appeal to this Court was then filed by the Commission. We granted that allowance on October 18, 1973.

The Commission asserts that its authority to award damages for mental anguish and humiliation is conferred by Section 9 of the Pennsylvania Human Relations Act. We disagree. The pertinent part of Section 9 is as follows:

"If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action

¹Act of October 27, 1955, P.L. 744 §1, as amended, 43 P.S. §951 et seq.

²The Commission also ordered the Zamantakises to cease and desist from any further unlawful discrimination, to rent to the Thorntons the next available four room apartment and to post fair housing notices in their apartment buildings.

³Zamantakis v. Pennsylvania Human Relations Commission, 10 Pa. Commonwealth Ct. 107, 308 A.2d 612 (1973).

including but not limited to hiring, reinstatement or upgrading of employees, with or without back pay, admission or restoration to membership in any respondent labor organization, or selling or leasing specified commercial housing upon such equal terms and conditions and with such equal facilities, services and privileges or lending money, whether or not secured by mortgage or otherwise for the acquisition, construction, rehabilitation, repair or maintenance of commercial housing, upon such equal terms and conditions to any person discriminated against or all persons as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance." (Emphasis added).

We have held that the Legislature has given the Commission broad discretionary power to effectuate the policies of the Pennsylvania Human Relations Act. Pennsylvania Human Relations Commission v. Alto-Reste Park Cemetery Association, 453 Pa. 124, 306 A.2d 881 (1973). However, the Commission, like all administrative agencies, can only exercise those powers which have been conferred upon it by the Legislature. Pennsylvania Human Relations Commission v. St. Joe Minerals Corporation, Zinc Smelting Division, ____ Pa. ____, ____ A.2d ____ (Filed: January 27, 1978).

We quote with approval and adopt the language used by the Commonwealth Court in this case.⁴

"As we view our role in this case, on this issue, we must determine whether our Legislature intended our Commission to award compensatory damages for 'humiliation and mental anguish'. We first note that in the Pennsylvania statute, there is no

⁴Zamantakis v. Pennsylvania Human Relations Commission, supra, at 308 A.2d 616.

specific legislative language authorizing the Commission to award such damages. Next, we note that the statutorily provided proceeding is directed to be expeditious and informal, as are most administrative procedures. There are none of the formal trappings, evidentiary protections,⁵ and strict procedures of a court of law. In addition, the members of the Commission necessarily need not be trained or learned in the law. As so often happens in an administrative proceeding, the Commission and its employes are the investigators, the prosecutors, the judges and jury. On balance, this results in an unduly heavy force on the side of the proponents of damages. Traditionally, damages, in this Commonwealth, have been a matter for courts of law, under an adversary system of justice and therefore unless the Legislature clearly authorizes the Commission to award damages, we cannot extend to it such authority by judicial fiat, nor can we broaden the scope of the Commission's authority into a full scale lawsuit. See 43 P.S. §960."

The Commission concurrently argues that the Legislature must have meant for the Commission to have the power to assess damages for humiliation and mental anguish because the Commission, when the provisions of the Human Relations Act are invoked, is the exclusive vehicle for correcting discrimination.⁶ This argument fails; exclusiveness and unlimited power are not wed together. If one were to adopt this argument, the Commission could fine and imprison persons for discrimination.⁷ Of course, no such power

⁵(Our footnote) Section 9 also provides that "the Commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity".

⁶When the provisions of the Act are not invoked, an aggrieved party may seek redress in the courts. Daly v. School District of Darby Township, 434 Pa. 286, 252 A.2d 638 (1969).

⁷The Human Relations Commission is not without powers to obtain compliance with its orders. The Human Relations Act provides that wilful violation of an order of the Commission is a misdemeanor. 43 P.S. §961.

emanates out of the Act. Sixteen months after Commonwealth Court's decision in this case, the Legislature amended the Human Relations Act.⁸ This amendment eliminated the Commission as the exclusive remedy for discrimination when the provisions of the Human Relations Act are invoked, and provided, under certain conditions, access to the Court of Common Pleas. The amendment gave to the courts authority to order, in addition to the same "affirmative action" as the Commission, "any other legal or equitable relief as the Court deems appropriate". "Legal or equitable relief" includes damages for humiliation and mental anguish. We must presume that the Legislature was aware of Commonwealth Court's decision in this case, yet the Legislature still chose not to give the Commission the power to award these types of damages, but instead chose to have the Common Pleas Court award these damages.

A majority of our sister states have found that absent express legislative authority, a civil rights agency cannot award damages in the nature of those sought in this case.⁹

The order of the Commonwealth Court is affirmed.

⁸Section 12(c) was added to the Pennsylvania Human Relations Act by the Act of December 19, 1974, P.L. 966, No. 318 §6.

⁹No damages permitted: Ohio - Ohio Civil Rights Commission v. Lysyj, 38 Ohio St.2d 217, 313 N.E. 2d 3 (1974); Maryland - Gutwein v. Easton Publishing Company, 325 A.2d 740 (1974); Wisconsin - Murphy v. Industrial Commission, 37 Wis. 2d 704, 155 N.W. 2d 545, 157 N.S. 2d 568 (1968); Iowa - Iron Workers Local No. 67 v. Hart, 191 N.W. 2d 758 (1971); District of Columbia - Mendota Apts. v. District of Columbia Commission on Human Rights, 315 A.2d 832 (1974).

Damages permitted: West Virginia - West Virginia Human Rights Commission v. Pauley, 212 S.E. 2d 77 (1975); Illinois - A. P. Green Services Division of Bigelow-Liptak Corporation v. State of Illinois Fair Employment Practices Commission, 19 Ill. App. 3d 875, 312 N.E. 2d 314 (1974); Oregon - Williams v. Joyce, 4 Or. App. 482, 479 P.2d 513 (1970); New Jersey - Jackson v. Concord Co., 54 N.J. 113, 253 A.2d 793 (1969) and Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 301 A.2d 754 (1973).

Mr. Justice Manderino filed a Concurring Opinion.

Mr. Justice O'Brien and Mr. Justice Pomeroy concurred
in the result.

Mr. Justice Roberts filed a Dissenting Opinion in which
Mr. Justice Nix joined.

SUPREME COURT OF PENNSYLVANIA
Middle District

PENNSYLVANIA HUMAN RELATIONS
COMMISSION,

Appellant

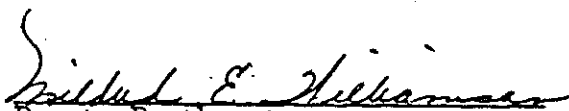
v.

GEORGE ZAMANTAKIS and
BESSIE ZAMANTAKIS

NO. 33 MAY TERM, 1974

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the Commonwealth Court of Pennsylvania be, and the same is hereby affirmed.


Deputy Prothonotary

Dated: May 9, 1978

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

| | | |
|---|---|---|
| PENNSYLVANIA HUMAN RELATIONS COMMISSION | : | No. 33 May Term, 1974 |
| | : | |
| Appellant | : | |
| | : | |
| V. | : | Appeal from the decision of the Commonwealth Court of Pennsylvania at No. 1300 C. D. 1972 Modifying the Order of the Pennsylvania Human Relations Commission dated November 27, 1972 at Docket No. H-1657 |
| BESSIE and GEORGE ZAMANTAKIS, | : | |
| | : | |
| Appellees | : | |

CONCURRING OPINION

JUSTICE MANDERINO

FILED: MAY 8 - 1978

I do not agree with the majority that legislative authority is lacking for the award of damages by the Pennsylvania Human Relations Commission.

See Pennsylvania Human Relations Commission v. Straw, ___ Pa. ___, ___ A.2d ___ (1978) (Filed April ___, 1978) (dissenting opinion of Manderino, J.).

I concur in the result reached by the majority because I find no substantial evidence of humiliation and mental anguish in the record sufficient to support an award for such damages. The only evidence put forward by the Commission for these damages is that complainant was "upset" over being refused the rental. This falls far short of the Commission's own standards, as set forth in their "guidelines and considerations in Fixing Monetary Damages To Complainant (Adopted by PHRC July 1, 1974). Therein it is stated, inter alia, that

"[t]o be compensable there must be something more than mere disappointment or regret."

The "guidelines" indicate that such damages "must be supported by substantial evidence" such as testimony of a physician or records of prescriptions if a physician has been consulted or medication required; testimony of the complainant or other witnesses as to the effect of the incident; testimony of experts on the effects of such discrimination on emotional health; or introduction of the writings of such experts. The "guidelines" conclude that

"The Hearing Panel must scrutinize with care the evidence offered in support of the claim and observe carefully the demeanor of the complainant and complainant's witnesses and must approach the matter with caution. But if the Panel and the Commission is satisfied that a fair preponderance of the evidence supports the claim, the complainant is entitled to be compensated for his mental distress and suffering."

Assuming the adequacy of these guidelines for an administrative agency exercising delegated power, the Commission has failed to meet its own standards of proof. I therefore agree that the damages herein claimed must be disallowed.

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

PENNSYLVANIA HUMAN RELATIONS : No. 33 May Term, 1974
COMMISSION, :
: Appellant :
: :
V. : Appeal from the decision of the Common-
: wealth Court of Pennsylvania at No.
: 1300 C.D. 1972 Modifying the Order of
: the Pennsylvania Human Relations
BESSIE ZAMANTAKIS and GEORGE : Commission dated November 27, 1972 at
ZAMANTAKIS : Docket No. H-1657.

DISSENTING OPINION

ROBERTS, J.

FILED: MAY 8 - 1978

For the second time in three months, the majority has crippled the efforts of the Legislature and the Pennsylvania Human Relations Commission to combat discrimination proscribed by the Pennsylvania Human Relations Law. In Pennsylvania Human Relations Comm'n. v. St. Joe Minerals Corp., ___ Pa. ___, 382A.2d 731 (J. 287, 1976, filed January 26, 1978), the majority concluded that the Law does not authorize the PHRC to compel a party to answer written interrogatories designed to assist the PHRC's investigation of alleged unlawful discriminatory practices. Today, the majority, applying the same discredited theory of limited statutory interpretation, concludes that the PHRC is without power to award compensatory damages for

* Act of October 27, 1955, P.L. 744, §§ 1 et seq., as amended, 43 P.S. §§ 951 et seq. (1964 and Supp. 1977).

humiliation and mental anguish. I dissent.

Section 9 of the Law, 43 P.S. § 959, provides:

"If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to hiring, reinstatement or upgrading of employees, with or without back pay, admission or restoration to membership in any respondent labor organization, or selling or leasing specified commercial housing upon such equal terms and conditions and with such equal facilities, services and privileges or lending money, whether or not secured by mortgage or otherwise for the acquisition, construction, rehabilitation, repair or maintenance of commercial housing, upon such equal terms and conditions to any person discriminated against or all persons as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance." (emphasis added)

Though the Law does not specifically empower the PHRC to award damages for mental anguish and humiliation, it provides that the PHRC is required to take "such affirmative action . . . as, in the judgment of the Commission, will effectuate the purposes of this act." The Legislature has made it plain that permissible remedial devices include, "but [are] not limited to" those enumerated.

This Court's proper inquiry is therefore whether the PHRC has determined correctly that damages are a proper remedy for enforcing the Human Relations Law. An order requiring a party violating the Law to pay a victim compensatory damages would provide redress for the victim for deprivation of his civil rights as well as deterring future illegal discrimination. The Legislature surely had these important

goals in mind when it enacted the Human Relations Law, and a remedy of damages is entirely consistent with other remedies available to the PHRC. The Legislature's command that the provisions of the Human Relations Law be construed liberally, see Human Relations Law, § 12(a), 43 P.S. § 962(a); Pennsylvania Human Relations Comm'n. v. Alto-Reste Park Cemetery Ass'n., 453 Pa. 124, 306 A.2d 881 (1973), as well as modern authority interpreting comparable statutes, e.g., Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 301 A.2d 754 (1973), has once again been ignored by the majority. See Pennsylvania Human Relations Comm'n., v. St. Joe Minerals Corp., supra (Roberts, J., joined by Nix, J., dissenting).

Moreover, the majority errs even on its own terms. The majority concedes that the PHRC has discretion to tailor its relief by choosing from the various remedies available. The agency acted under the view that compensatory damages were a proper form of relief. Had the PHRC known that today the Court would hold that it lacked power to impose this form of relief, it might have shaped its order to include other remedies or to stiffen penalties validly imposed. Thus, so that the PHRC may have an opportunity to correct its order and to award the proper relief which it alone may determine, subject only to review for abuse of discretion, the majority should not affirm the order of the Commonwealth Court but should instead remand to the PHRC so that it may impose appropriate remedies not inconsistent with today's unwise opinion.

I would reverse the order of the Commonwealth Court and reinstate the order of the Pennsylvania Human Relations Commission. Alternatively,

[23-4]

even on the majority's theory the proceedings should be remanded to the PHRC for reconsideration of its order in light of today's holding.

Mr. Justice Nix joins in this dissenting opinion.

SUPREME COURT OF PENNSYLVANIA
Middle District

PENNSYLVANIA HUMAN RELATIONS
COMMISSION,
Appellant

NO. 33 MAY TERM, 1974

v.

GEORGE ZAMANTAKIS and
BESSIE ZAMANTAKIS

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the Commonwealth Court of Pennsylvania be, and the same is hereby affirmed.


Deputy Prothonotary

Dated: May 9, 1978

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

PENNSYLVANIA HUMAN RELATIONS COMMISSION : No. 33 May Term, 1974
 :
 Appellant :
 :
 V. : Appeal from the decision of the Commonwealth
 : Court of Pennsylvania at No. 1300 C. D.
 : 1972 Modifying the Order of the Pennsylvania
 BESSIE and GEORGE ZAMANTAKIS, : Human Relations Commission dated November
 : 27, 1972 at Docket No. H-1657
 Appellees :

CONCURRING OPINION

JUSTICE MANDERINO

FILED: MAY 8 - 1978

I do not agree with the majority that legislative authority is lacking for the award of damages by the Pennsylvania Human Relations Commission.

See Pennsylvania Human Relations Commission v. Straw, ___ Pa. ___, ___ A.2d ___ (1978) (Filed April ___, 1978) (dissenting opinion of Manderino, J.).

I concur in the result reached by the majority because I find no substantial evidence of humiliation and mental anguish in the record sufficient to support an award for such damages. The only evidence put forward by the Commission for these damages is that complainant was "upset" over being refused the rental. This falls far short of the Commission's own standards, as set forth in their "guidelines and considerations in Fixing Monetary Damages To Complainant (Adopted by PHRC July 1, 1974). Therein it is stated, inter alia, that

"[t]o be compensable there must be something more than mere disappointment or regret."

The "guidelines" indicate that such damages "must be supported by substantial evidence" such as testimony of a physician or records of prescriptions if a physician has been consulted or medication required; testimony of the complainant or other witnesses as to the effect of the incident; testimony of experts on the effects of such discrimination on emotional health; or introduction of the writings of such experts. The "guidelines" conclude that

"The Hearing Panel must scrutinize with care the evidence offered in support of the claim and observe carefully the demeanor of the complainant and complainant's witnesses and must approach the matter with caution. But if the Panel and the Commission is satisfied that a fair preponderance of the evidence supports the claim, the complainant is entitled to be compensated for his mental distress and suffering."

Assuming the adequacy of these guidelines for an administrative agency exercising delegated power, the Commission has failed to meet its own standards of proof. I therefore agree that the damages herein claimed must be disallowed.

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

PENNSYLVANIA HUMAN RELATIONS COMMISSION, : No. 33 May Term, 1974
: :
: :
Appellant : :
: :
V. : Appeal from the decision of the Common-
: wealth Court of Pennsylvania at No.
: 1300 C.D. 1972 Modifying the Order of
: the Pennsylvania Human Relations
BESSIE ZAMANTAKIS and GEORGE : Commission dated November 27, 1972 at
ZAMANTAKIS : Docket No. H-1657.

DISSENTING OPINION

ROBERTS, J.

FILED: MAY 8 - 1978

For the second time in three months, the majority has crippled the efforts of the Legislature and the Pennsylvania Human Relations Commission to combat discrimination proscribed by the Pennsylvania Human Relations Law. ^{*} In Pennsylvania Human Relations Comm'n. v. St. Joe Minerals Corp., ___ Pa. ___, 382A.2d 731 (J. 287, 1976, filed January 26, 1978), the majority concluded that the Law does not authorize the PHRC to compel a party to answer written interrogatories designed to assist the PHRC's investigation of alleged unlawful discriminatory practices. Today, the majority, applying the same discredited theory of limited statutory interpretation, concludes that the PHRC is without power to award compensatory damages for

* Act of October 27, 1955, P.L. 744, §§ 1 et seq., as amended, 43 P.S. §§ 951 et seq. (1964 and Supp. 1977).

humiliation and mental anguish. I dissent.

Section 9 of the Law, 43 P.S. § 959, provides:

"If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to hiring, reinstatement or upgrading of employees, with or without back pay, admission or restoration to membership in any respondent labor organization, or selling or leasing specified commercial housing upon such equal terms and conditions and with such equal facilities, services and privileges or lending money, whether or not secured by mortgage or otherwise for the acquisition, construction, rehabilitation, repair or maintenance of commercial housing, upon such equal terms and conditions to any person discriminated against or all persons as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance." (emphasis added)

Though the Law does not specifically empower the PHRC to award damages for mental anguish and humiliation, it provides that the PHRC is required to take "such affirmative action . . . as, in the judgment of the Commission, will effectuate the purposes of this act." The Legislature has made it plain that permissible remedial devices include, "but [are] not limited to" those enumerated.

This Court's proper inquiry is therefore whether the PHRC has determined correctly that damages are a proper remedy for enforcing the Human Relations Law. An order requiring a party violating the Law to pay a victim compensatory damages would provide redress for the victim for deprivation of his civil rights as well as deterring future illegal discrimination. The Legislature surely had these important

goals in mind when it enacted the Human Relations Law, and a remedy of damages is entirely consistent with other remedies available to the PHRC. The Legislature's command that the provisions of the Human Relations Law be construed liberally, see Human Relations Law, § 12(a), 43 P.S. § 962(a); Pennsylvania Human Relations Comm'n. v. Alto-Reste Park Cemetery Ass'n., 453 Pa. 124, 306 A.2d 881 (1973), as well as modern authority interpreting comparable statutes, e.g., Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 301 A.2d 754 (1973), has once again been ignored by the majority. See Pennsylvania Human Relations Comm'n., v. St. Joe Minerals Corp., supra (Roberts, J., joined by Nix, J., dissenting).

Moreover, the majority errs even on its own terms. The majority concedes that the PHRC has discretion to tailor its relief by choosing from the various remedies available. The agency acted under the view that compensatory damages were a proper form of relief. Had the PHRC known that today the Court would hold that it lacked power to impose this form of relief, it might have shaped its order to include other remedies or to stiffen penalties validly imposed. Thus, so that the PHRC may have an opportunity to correct its order and to award the proper relief which it alone may determine, subject only to review for abuse of discretion, the majority should not affirm the order of the Commonwealth Court but should instead remand to the PHRC so that it may impose appropriate remedies not inconsistent with today's unwise opinion.

I would reverse the order of the Commonwealth Court and reinstate the order of the Pennsylvania Human Relations Commission. Alternatively,

[23-4]

even on the majority's theory the proceedings should be remanded to the PHRC for reconsideration of its order in light of today's holding.

Mr. Justice Nix joins in this dissenting opinion.

[J-23]

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

| | | |
|--|---|---|
| PENNSYLVANIA HUMAN RELATIONS COMMISSION, | : | No. 33 May Term, 1974 |
| | : | |
| Appellant | : | Appeal from the decision of the Commonwealth Court of Pennsylvania at No. 1300 C.D. 1972 Modifying the Order of the Pennsylvania Human Relations Commission dated November 27, 1972 at Docket No. H-1657. |
| vs. | : | |
| BESSIE and GEORGE ZAMANTAKIS, | : | |
| Appellees | : | |

O P I N I O N

LARSEN, J.

FILED: MAY 8 - 1978

The sole question to be determined is whether the Pennsylvania Human Relations Commission has the authority to award damages for mental anguish and humiliation which may arise as a result of unlawful discrimination. We answer in the negative.

The facts which give rise to this appeal are as follows: On February 15, 1972, George and Bessie Zamantakis placed an advertisement in a local newspaper offering to rent a four room apartment. Sylvester and Willis Thornton responded to the advertisement on that same day and were not permitted to rent the apartment. On February 16, 1972, the Thorntons, who are black, filed a complaint with the Commission charging that the Zamantakises, who are white, had refused to rent them the

apartment because of the Thorntons' race. Pursuant to the procedures set forth in the Pennsylvania Human Relations Act,¹ the Commission found that the Zamantakises had denied the Thorntons the apartment because of their race, and on November 27, 1972, ordered, among other things, the Zamantakises to pay each Thornton \$250.00 within 30 days in order to compensate them for mental anguish and humiliation.² An appeal from this order was taken to Commonwealth Court, which in an opinion written by the late and Honorable Harry A. Kramer and filed on August 14, 1973, held that the Commission had no authority to award damages for mental anguish and humiliation.³ A petition for allowance of appeal to this Court was then filed by the Commission. We granted that allowance on October 18, 1973.

The Commission asserts that its authority to award damages for mental anguish and humiliation is conferred by Section 9 of the Pennsylvania Human Relations Act. We disagree. The pertinent part of Section 9 is as follows:

"If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action

¹Act of October 27, 1955, P.L. 744 §1, as amended, 43 P.S. §951 et seq.

²The Commission also ordered the Zamantakises to cease and desist from any further unlawful discrimination, to rent to the Thorntons the next available four room apartment and to post fair housing notices in their apartment buildings.

³Zamantakis v. Pennsylvania Human Relations Commission, 10 Pa. Commonwealth Ct. 107, 308 A.2d 612 (1973).

including but not limited to hiring, reinstatement or upgrading of employees, with or without back pay, admission or restoration to membership in any respondent labor organization, or selling or leasing specified commercial housing upon such equal terms and conditions and with such equal facilities, services and privileges or lending money, whether or not secured by mortgage or otherwise for the acquisition, construction, rehabilitation, repair or maintenance of commercial housing, upon such equal terms and conditions to any person discriminated against or all persons as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance." (Emphasis added).

We have held that the Legislature has given the Commission broad discretionary power to effectuate the policies of the Pennsylvania Human Relations Act. Pennsylvania Human Relations Commission v. Alto-Reste Park Cemetery Association, 453 Pa. 124, 306 A.2d 881 (1973). However, the Commission, like all administrative agencies, can only exercise those powers which have been conferred upon it by the Legislature. Pennsylvania Human Relations Commission v. St. Joe Minerals Corporation, Zinc Smelting Division, ___ Pa. ___, ___ A.2d ___ (Filed: January 27, 1978).

We quote with approval and adopt the language used by the Commonwealth Court in this case.⁴

"As we view our role in this case, on this issue, we must determine whether our Legislature intended our Commission to award compensatory damages for 'humiliation and mental anguish'. We first note that in the Pennsylvania statute, there is no

⁴Zamantakis v. Pennsylvania Human Relations Commission, supra, at 308 A.2d 616.

specific legislative language authorizing the Commission to award such damages. Next, we note that the statutorily provided proceeding is directed to be expeditious and informal, as are most administrative procedures. There are none of the formal trappings, evidentiary protections,⁵ and strict procedures of a court of law. In addition, the members of the Commission necessarily need not be trained or learned in the law. As so often happens in an administrative proceeding, the Commission and its employes are the investigators, the prosecutors, the judges and jury. On balance, this results in an unduly heavy force on the side of the proponents of damages. Traditionally, damages, in this Commonwealth, have been a matter for courts of law, under an adversary system of justice and therefore unless the Legislature clearly authorizes the Commission to award damages, we cannot extend to it such authority by judicial fiat, nor can we broaden the scope of the Commission's authority into a full scale lawsuit. See 43 P.S. §960."

The Commission concurrently argues that the Legislature must have meant for the Commission to have the power to assess damages for humiliation and mental anguish because the Commission, when the provisions of the Human Relations Act are invoked, is the exclusive vehicle for correcting discrimination.⁶ This argument fails; exclusiveness and unlimited power are not wed together. If one were to adopt this argument, the Commission could fine and imprison persons for discrimination.⁷ Of course, no such power

⁵(Our footnote) Section 9 also provides that "the Commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity".

⁶When the provisions of the Act are not invoked, an aggrieved party may seek redress in the courts. Daly v. School District of Darby Township, 434 Pa. 286, 252 A.2d 638 (1969).

⁷The Human Relations Commission is not without powers to obtain compliance with its orders. The Human Relations Act provides that wilful violation of an order of the Commission is a misdemeanor. 43 P.S. §961.

emanates out of the Act. Sixteen months after Commonwealth Court's decision in this case, the Legislature amended the Human Relations Act.⁸ This amendment eliminated the Commission as the exclusive remedy for discrimination when the provisions of the Human Relations Act are invoked, and provided, under certain conditions, access to the Court of Common Pleas. The amendment gave to the courts authority to order, in addition to the same "affirmative action" as the Commission, "any other legal or equitable relief as the Court deems appropriate". "Legal or equitable relief" includes damages for humiliation and mental anguish. We must presume that the Legislature was aware of Commonwealth Court's decision in this case, yet the Legislature still chose not to give the Commission the power to award these types of damages, but instead chose to have the Common Pleas Court award these damages.

A majority of our sister states have found that absent express legislative authority, a civil rights agency cannot award damages in the nature of those sought in this case.⁹

The order of the Commonwealth Court is affirmed.

⁸Section 12(c) was added to the Pennsylvania Human Relations Act by the Act of December 19, 1974, P.L. 966, No. 318 §6.

⁹No damages permitted: Ohio - Ohio Civil Rights Commission v. Lysyj, 38 Ohio St.2d 217, 313 N.E. 2d 3 (1974); Maryland - Gutwein v. Easton Publishing Company, 325 A.2d 740 (1974); Wisconsin - Murphy v. Industrial Commission, 37 Wis. 2d 704, 155 N.W. 2d 545, 157 N.S. 2d 568 (1968); Iowa - Iron Workers Local No. 67 v. Hart, 191 N.W. 2d 758 (1971); District of Columbia - Mendota Apts. v. District of Columbia Commission on Human Rights, 315 A.2d 832 (1974).

Damages permitted: West Virginia - West Virginia Human Rights Commission v. Pauley, 212 S.E. 2d 77 (1975); Illinois - A. P. Green Services Division of Bigelow-Liptak Corporation v. State of Illinois Fair Employment Practices Commission, 19 Ill. App. 3d 875, 312 N.E. 2d 314 (1974); Oregon - Williams v. Joyce, 4 Or. App. 482, 479 P.2d 513 (1970); New Jersey - Jackson v. Concord Co., 54 N.J. 113, 253 A.2d 793 (1969) and Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 301 A.2d 754 (1973).

Mr. Justice Manderino filed a Concurring Opinion.

Mr. Justice O'Brien and Mr. Justice Pomeroy concurred
in the result.

Mr. Justice Roberts filed a Dissenting Opinion in which
Mr. Justice Nix joined.

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

PENNSYLVANIA HUMAN RELATIONS COMMISSION : No. 33 May Term, 1974
 :
 Appellant :
 :
 V. :
 : Appeal from the decision of the Commonwealth
 : Court of Pennsylvania at No. 1300 C. D.
 : 1972 Modifying the Order of the Pennsylvania
 BESSIE and GEORGE ZAMANTAKIS, : Human Relations Commission dated November
 : 27, 1972 at Docket No. H-1657
 Appellees :

CONCURRING OPINION

JUSTICE MANDERINO

FILED: MAY 8 - 1978

I do not agree with the majority that legislative authority is lacking for the award of damages by the Pennsylvania Human Relations Commission.

See Pennsylvania Human Relations Commission v. Straw, ___ Pa. ___, ___ A.2d ___ (1978) (Filed April ___, 1978) (dissenting opinion of Manderino, J.).

I concur in the result reached by the majority because I find no substantial evidence of humiliation and mental anguish in the record sufficient to support an award for such damages. The only evidence put forward by the Commission for these damages is that complainant was "upset" over being refused the rental. This falls far short of the Commission's own standards, as set forth in their "guidelines and considerations in Fixing Monetary Damages To Complainant (Adopted by PHRC July 1, 1974). Therein it is stated, inter alia, that

"[t]o be compensable there must be something more than mere disappointment or regret."

The "guidelines" indicate that such damages "must be supported by substantial evidence" such as testimony of a physician or records of prescriptions if a physician has been consulted or medication required; testimony of the complainant or other witnesses as to the effect of the incident; testimony of experts on the effects of such discrimination on emotional health; or introduction of the writings of such experts. The "guidelines" conclude that

"The Hearing Panel must scrutinize with care the evidence offered in support of the claim and observe carefully the demeanor of the complainant and complainant's witnesses and must approach the matter with caution. But if the Panel and the Commission is satisfied that a fair preponderance of the evidence supports the claim, the complainant is entitled to be compensated for his mental distress and suffering."

Assuming the adequacy of these guidelines for an administrative agency exercising delegated power, the Commission has failed to meet its own standards of proof. I therefore agree that the damages herein claimed must be disallowed.

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

| | | |
|--|---|---|
| PENNSYLVANIA HUMAN RELATIONS COMMISSION, | : | No. 33 May Term, 1974 |
| | : | |
| Appellant | : | |
| | : | |
| V. | : | Appeal from the decision of the Commonwealth Court of Pennsylvania at No. 1300 C.D. 1972 Modifying the Order of the Pennsylvania Human Relations Commission dated November 27, 1972 at Docket No. H-1657. |
| BESSIE ZAMANTAKIS and GEORGE ZAMANTAKIS | : | |

DISSENTING OPINION

ROBERTS, J.

FILED: MAY 8 - 1978

For the second time in three months, the majority has crippled the efforts of the Legislature and the Pennsylvania Human Relations Commission to combat discrimination proscribed by the Pennsylvania Human Relations Law. ^{*} In Pennsylvania Human Relations Comm'n. v. St. Joe Minerals Corp., ___ Pa. ___, 382A.2d 731 (J. 287, 1976, filed January 26, 1978), the majority concluded that the Law does not authorize the PHRC to compel a party to answer written interrogatories designed to assist the PHRC's investigation of alleged unlawful discriminatory practices. Today, the majority, applying the same discredited theory of limited statutory interpretation, concludes that the PHRC is without power to award compensatory damages for

* Act of October 27, 1955, P.L. 744, §§ 1 et seq., as amended, 43 P.S. §§ 951 et seq. (1964 and Supp. 1977).

humiliation and mental anguish. I dissent.

Section 9 of the Law, 43 P.S. § 959, provides:

"If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to hiring, reinstatement or upgrading of employees, with or without back pay, admission or restoration to membership in any respondent labor organization, or selling or leasing specified commercial housing upon such equal terms and conditions and with such equal facilities, services and privileges or lending money, whether or not secured by mortgage or otherwise for the acquisition, construction, rehabilitation, repair or maintenance of commercial housing, upon such equal terms and conditions to any person discriminated against or all persons as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance." (emphasis added)

Though the Law does not specifically empower the PHRC to award damages for mental anguish and humiliation, it provides that the PHRC is required to take "such affirmative action . . . as, in the judgment of the Commission, will effectuate the purposes of this act." The Legislature has made it plain that permissible remedial devices include, "but [are] not limited to" those enumerated.

This Court's proper inquiry is therefore whether the PHRC has determined correctly that damages are a proper remedy for enforcing the Human Relations Law. An order requiring a party violating the Law to pay a victim compensatory damages would provide redress for the victim for deprivation of his civil rights as well as deterring future illegal discrimination. The Legislature surely had these important

[23-3]

goals in mind when it enacted the Human Relations Law, and a remedy of damages is entirely consistent with other remedies available to the PHRC. The Legislature's command that the provisions of the Human Relations Law be construed liberally, see Human Relations Law, § 12(a), 43 P.S. § 962(a); Pennsylvania Human Relations Comm'n. v. Alto-Reste Park Cemetery Ass'n., 453 Pa. 124, 306 A.2d 881 (1973), as well as modern authority interpreting comparable statutes, e.g., Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399, 301 A.2d 754 (1973), has once again been ignored by the majority. See Pennsylvania Human Relations Comm'n., v. St. Joe Minerals Corp., supra (Roberts, J., joined by Nix, J., dissenting).

Moreover, the majority errs even on its own terms. The majority concedes that the PHRC has discretion to tailor its relief by choosing from the various remedies available. The agency acted under the view that compensatory damages were a proper form of relief. Had the PHRC known that today the Court would hold that it lacked power to impose this form of relief, it might have shaped its order to include other remedies or to stiffen penalties validly imposed. Thus, so that the PHRC may have an opportunity to correct its order and to award the proper relief which it alone may determine, subject only to review for abuse of discretion, the majority should not affirm the order of the Commonwealth Court but should instead remand to the PHRC so that it may impose appropriate remedies not inconsistent with today's unwise opinion.

I would reverse the order of the Commonwealth Court and reinstate the order of the Pennsylvania Human Relations Commission. Alternatively,

[23-4]

even on the majority's theory the proceedings should be remanded to the PHRC for reconsideration of its order in light of today's holding.

Mr. Justice Nix joins in this dissenting opinion.

SUPREME COURT OF PENNSYLVANIA
Middle District

PENNSYLVANIA HUMAN RELATIONS
COMMISSION,

Appellant

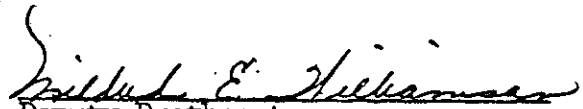
v.

GEORGE ZAMANTAKIS and
BESSIE ZAMANTAKIS

NO. 33 MAY TERM, 1974

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the Commonwealth Court of Pennsylvania be, and the same is hereby affirmed.


Deputy Prothonotary

Dated: May 9, 1978

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

No. 33 May Term, 1974

PENNSYLVANIA HUMAN RELATIONS
COMMISSION,

Appellant

v.

BESSIE ZAMANTAKIS and GEORGE
ZAMANTAKIS,

Appellees

APPELLANT'S SUPPLEMENTAL BRIEF
FOR REARGUMENT

Appeal From the Order of the Commonwealth Court
of Pennsylvania at No. 1300 C.D. 1972
Modifying the Order of the Pennsylvania
Human Relations Commission Dated November
27, 1972 at Docket No. H-1657.

SANFORD KAHN
General Counsel
Pennsylvania Human Relations
Commission
Attorney for Appellant

100 North Cameron Street
Harrisburg, Pennsylvania 17101
(717) 787-4416

TABLE OF CONTENTS

| | PAGE |
|--|------|
| STATEMENT OF QUESTION INVOLVED..... | 1 |
| STATEMENT OF THE CASE..... | 2 |
| SUMMARY OF ARGUMENT..... | 4 |
| ARGUMENT..... | 6 |
| CONCLUSION..... | 22 |
| PHRC GUIDELINES AND CONSIDERATIONS IN FIXING MONETARY DAMAGES TO COMPLAINANT (Appendix "A")..... | 23 |

TABLE OF CITATIONS

| | PAGE(S) |
|--|---------|
| <u>Albermarle Paper Company v. Moody,</u> 422 U.S. 405, 421 (1975)..... | 18 |
| <u>Atlas Roofing Company v. Occupational</u> <u>Safety and Health Review Commission,</u> 45 L.W. 4312 (March 23, 1977)..... | 20 |
| <u>Bournewood Hospital v. Massachusetts</u> <u>Commission Against Discrimination,</u> 358 N.E. 2d 235 (November 4, 1976)..... | 10, 11 |
| <u>Clairborne v. Illinois Central Railroad</u> <u>Company, 401 F.Supp 1022 (E.D. La. 1975).....</u> | 19 |
| <u>EEOC v. Detroit Edison Company,</u> 515 F.2d 301, 308 (1975)..... | 19 |
| <u>Green Services Division of Bigelow-</u> <u>Liptak Corporation v. Illinois</u> <u>Fair Employment Practices Commission,</u> 312 N.E. 2d 344 (Appellate Court of Illinois, April 10, 1974)..... | 8 |
| <u>Gutwein v. Easton Publishing Company,</u> 325 A.2d 740, 743..... | 15 |
| <u>Harrison v. Heinzeroth Mortgage Company,</u> <u>Equal Opportunity in Housing, ¶15,202</u> <u>(D.C., N.D. Ohio 1977).....</u> | 21 |
| <u>Humphrey v. Southwestern Portland</u> <u>Cement Company, 5 EPD ¶8501</u> <u>(W.D. Tex., 1973).....</u> | 12 |
| <u>Marshall v. Electric Hose and</u> <u>Rubber Company, 413 F.Supp</u> 663 (D.Delaward, 1976)..... | 18 |
| <u>Massachusetts Commission Against Dis-</u> <u>crimination v. Franzaroli, 256 N.E.</u> 2d 311 (1970)..... | 11 |
| <u>Mendota Apartments v. District of</u> <u>Columbia Commission on Human Rights,</u> 315 A.2d 832, 835 (1974)..... | 17 |

Table of Citations (cont'd)

| | PAGE(S) |
|---|---------|
| <u>Ohio Civil Rights Commission v. Lysyj</u> , 313 N.E. 2d 3, 7 (June 12, 1974)..... | 15, 16 |
| <u>PHRC v. Alto-Reste Cemetary Association</u> , 453 Pa. 424, 306 A.2d 881, 888 (1973)..... | 10 |
| <u>PHRC v. Chester School District</u> , 427 Pa. 157 (1967)..... | 7 |
| <u>PHRC v. Midland Heights Homes</u> , No. 139, March Term, 1977..... | 2 |
| <u>PHRC v. St. Andrews Development Co.</u> , No. 32, May Term, 1974..... | 2 |
| <u>PHRC v. Straw</u> , No. 31, May Term, 1974..... | 2 |
| <u>PHRC v. Walnut Gardens Apartments</u> , No. 136, March Term, 1977..... | 2 |
| <u>Presseisen v. Swarthmore College</u> , 71 F.R.D. 341 (E.D. Pa., 1976)..... | 18, 19 |
| <u>Richardson v. Jones</u> , 45 L.W. 2457 (March 7, 1977)..... | 19 |
| <u>Rosen v. Public Services Electric and Gas Co.</u> , 42 U.S.C. §2000(e)-5(g), 477 F.2d 90, 96 (1973)..... | 18 |
| <u>Taylor v. Ford Motor Company</u> , 8 EPD 253(W.D. Mo. 1974)..... | 19 |
| <u>West Virginia Human Rights Commission v. Pauley</u> , 212 S.E. 2d 77 (1975)..... | 6, 8 |
| <u>Zahorian v. Russell Fitt Real Estate Agency</u> , 301 A.2d 754 (1973)..... | 8, 11 |

| STATUTES: | PAGE(S) |
|---|---------|
| 1968 Fair Housing Act, 42 U.S.C. §3612..... | 21 |
| Title VII, Civil Rights Act of 1964..... | 18, 19 |
| Illinois Revised Statute, 1971 ch. 48 §1858(f)..... | 9 |
| At 746 (Maryland)..... | 15 |
| G.L.C. 151 B, 15 (Massachusetts)..... | 10 |
| G.L.C. 151 B, §5 (Massachusetts)..... | 11 |
| 358 N.E. 2d at 242 (Massachusetts)..... | 12 |
| 265 N.E. 2d at 242 (Massachusetts)..... | 12 |
| R. C. §4112.051 (A)(E) (Ohio)..... | 16 |
| Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq..... | 20 |
| Pennsylvania Human Relations Act | |
| §12..... | 4 |
| 43 P.S. §962..... | 8 |
| §9..... | 9 |
| West Virginia Code, 1931, 5-11-13..... | 7 |

STATEMENT OF QUESTION INVOLVED

DOES THE COMMISSION HAVE THE AUTHORITY TO ORDER A RESPONDENT WHO HAS UNLAWFULLY DISCRIMINATED AGAINST A COMPLAINANT TO COMPENSATE THAT COMPLAINANT FOR THE MENTAL ANGUISH, HUMILIATION, INCONVENIENCE AND DISRUPTION OF NORMAL FAMILY LIFE SUFFERED AS A DIRECT RESULT OF RESPONDENT'S UNLAWFUL ACT?

(Answered in the negative by the Court below)

STATEMENT OF THE CASE

On April 26, 1974, this Court heard oral argument on the common question of law presented in the instant case and the two other cases consolidated with it for oral argument, PHRC v. Straw, No. 31, May Term, 1974, and PHRC v. St. Andrews Development Co., No. 32, May Term, 1974.

On April 5, 1977, the Court entered the following order with regard to these three appeals:

"The appeals in the above-captioned matters are hereby ordered to be re-argued on the same day during the session of this court beginning on October 17, 1977 in Philadelphia."

At the same time, the Court granted the Pennsylvania Human Relations Commission's (hereafter the "Commission") petition for allowance of appeal in two other cases involving essentially the same legal question, the Commission's power to order a respondent to pay compensatory damages. These cases were:

PHRC v. Midland Heights Homes, No. 139
March Term, 1977, and

PHRC v. Walnut Gardens Apartments, No.
136, March Term, 1977.

In Midland Heights, the order for compensatory damages involved

only out-of-pocket expenses suffered by the victim of housing discrimination.

Subsequently, the Court sua sponte entered an order scheduling oral argument for all of these cases for the January, 1978 session of the Court in Philadelphia.

On April 28, 1977, Counsel for the parties in the previously-argued cases were advised by letter from J. Haniel Henry, Deputy Prothonotary, that they had leave, if they chose, to submit an updated brief in connection with re-argument.

The Commission has sought in its brief for re-argument to supplement its first brief by advising the Court of the developments in the law bearing on the issue in these cases which have occurred since the first brief was submitted.

SUMMARY OF ARGUMENT

Appellate courts in West Virginia, Illinois, and Massachusetts have provided further authority in support of the Commission position that it has the power to order a respondent to pay compensatory damages to a victim of unlawful discrimination. These courts, construing statutes very similar to the Act, have relied heavily on the legislative intent to have an effective agency and upon the obvious inadequacy to otherwise make a complainant whole.

The West Virginia court noted that once a complainant proceeded under the statute with a civil rights agency, the remedy afforded by the agency is an exclusive one, and stressed the unfairness of denying to such an individual compensatory damages for loss suffered as a result of unlawful discrimination.

Appellate courts in Maryland, Ohio and the District of Columbia have denied civil rights agencies the power to order compensatory damages.

Among the factors serving to distinguish these cases from the aforementioned decisions affirming state agency power is the fact that the applicable statutes do not make the agency remedy the exclusive one.

Section 12 of the Pennsylvania Act, of course, provides that a final determination by the Commission excludes any other action based on the same grievance.

There is a split of authority as to whether compensatory damages are available under Title VII of the Civil Rights Act of 1964. Those courts that bar such awards rely on the provision of the statute authorizing the court to award "equitable relief".

The Pennsylvania Act does not limit the Commission's broad remedial powers to "equitable relief".

A recent decision of the United States Supreme Court clearly supports the authority of a state to establish a statutory scheme committing the enforcement of civil rights to an administrative agency such as the Commission.

The power to award compensatory damages is necessarily implicit in the Act if the Commission is to be an effective enforcement agency and carry out its dual purpose of guarding against and deterring unlawful discrimination and fashioning an effective remedy for the victim.

ARGUMENT FOR APPELLANT

Since the first brief was submitted in this case, appellate courts in West Virginia, Illinois, Massachusetts, Maryland, Ohio and the District of Columbia have addressed the question of the authority of their comparable civil rights administrative agencies to order a respondent to pay compensatory damages to a victim of unlawful discrimination.

The courts in West Virginia and Illinois upheld the authority of their state's respective administrative agency to order compensatory damages. Supreme Court of Massachusetts upheld the agency's authority to order compensatory damages for "emotional distress, pain and suffering" in an employment discrimination case where the only provision in the statute for compensatory damages related to discrimination in housing.

On the other hand, the courts of Maryland, Ohio and the District of Columbia have construed applicable statutes to deny the civil rights administrative agency the authority to order compensatory damages.

The West Virginia Supreme Court of Appeals upheld the authority of the state agency to order compensatory damages in West Virginia Human Rights Commission v. Pauley, 212 S.E. 2d 77 (1975).

The West Virginia statute did not expressly authorize the Commission to order monetary damages. Its remedial provision virtually tracks that of the Pennsylvania Human Relations Act, (hereafter the "Act") authorizing the agency to order a respondent to cease and desist and "to take such affirmative action, including, but not limited to hiring, reinstatement or upgrading of employes, with or without backpay ... as in the judgment of the Commission, will effectuate the purposes of this article..."

The Court concluded that the agency's power was given by implication considering the broad language and overall design of the Act. In particular, the Court noted the forceful language used by the Legislature in the declaration of policy, a declaration certainly no more forceful than that found in the Pennsylvania Act, and found that the Legislature intended the West Virginia Commission to "effectively" enforce the law. The Pennsylvania Supreme Court has declared its belief that the Legislature intended to create an "effective" agency to enforce the Act. See PHRC v. Chester School District, 427 Pa. 157 (1967).

Significantly, the Court relied upon the provision the West Virginia statute designated "Exclusiveness of Remedy". West Virginia Code, 1931, 5-11-13:

Therein, it is provided that when one proceeds under that article, such action is exclusive and one may not take any other action, either civil or criminal. Experience has shown that

in cases involving unlawful discrimination, whether it be in the field of employment, housing accommodations or other, the victim thereof often suffers "out-of-pocket" monetary loss. Fairness requires and justice demands that he be permitted to recover such loss. This he is precluded from doing if the remedy before the Commission does not allow the award of money damages. State Human Relations Commission v. Pauley, Supra at 81.

An exclusiveness of remedy provision of the New Jersey statute was relied upon by the New Jersey Supreme Court in Zahorian v. Fitt Real Estate Agency, 301 A.2d 754 (1973), in upholding an agency award for humiliation and pain and suffering damages. The Pennsylvania Act, of course, contains an exclusiveness of remedy provision virtually identical to New Jersey's, 43 P.S. §962.

The Illinois Commission authority to order compensatory damages was upheld in Green Services Division of Bigelow-Liptak Corporation v. Illinois Fair Employment Practices Commission, 312 N.E. 2d 344 (Appellate Court of Illinois, April 10, 1974).

The Illinois Commission ordered compensatory damages in an employment case. The Illinois remedial provision is similar to the Pennsylvania Act but it does not specifically enumerate back-

pay as affirmative action that may be taken.

... An order requiring such respondent to cease and desist from the unfair employment practice complained of and to take such affirmative or other actions with respect to the complainant as will eliminate the effect of the practice originally complained of.

Illinois Revised Statute, 1971, ch. 48 ¶858(f).

The Court relied heavily on the language "... affirmative action with respect to the complainant as will eliminate the effect of the practice complained of." (Emphasis the court's).

The Pennsylvania Statute does not limit the affirmative action that the respondent may be ordered to take but it does specify backpay and the other examples given in §9 are all of the kind that are "with respect to a complainant" (as well as the class of which complainant may be a member) and would all eliminate some of the effects of the practice complained of.

This Court, of course, has made clear its view of the dual purpose of the legislature in enacting the Act.

"... It is incumbent upon the Commission to not only fashion an effective remedy for the individual aggrieved, but also to guard against and deter the same discriminatory action from

recurring to the detriment of others
within the same class."

PHRC v. Alto-Reste Cemetary Association, 453
Pa. 424, 306 A.2d 881, 888 (1973).

The Massachusetts Supreme Court upheld the agency authority
in Bournewood Hospital v. Massachusetts Commission Against Dis-
crimination, 358 N.E. 2d 235 (November 4, 1976).

The Massachusetts statute contains remedial language essen-
tially identical to the Commission's:

If upon all the evidence at the hearing the
Commission shall find that a respondent has
engaged in unlawful practice ... the Commission
shall state its finding of fact and shall issue
and cause to be served on such respondent an
order requiring such respondent to cease and
desist from such unlawful practice ... and to
take such affirmative action, including, but not
limited to, hiring, reinstatement or upgrading
of employes, with out without backpay, or
restoration to membership in any respondent
labor organization as in the judgment of the
Commission will effectuate the purposes of this
chapter ... G.L.C. 151 B, 15.

The Massachusetts remedial section has the following additional clause:

If upon all the evidence, the Commission shall find that a respondent has engaged in such unlawful practice relative to housing or real estate ... it may, in addition to any other action which it may take under this section, award the petitioner damages not to exceed \$1000, which damages shall include but shall not be limited to the expense incurred by the petitioner for obtaining alternative housing or space, for storage of goods and effects, for moving and for other costs actually incurred by him as a result of such unlawful practice ... G.L. c.151B, §5.

The Massachusetts Supreme Court had previously, in a housing case, interpreted the statute to authorize its Commission to order a respondent to pay damages for emotional distress. Massachusetts Commission Against Discrimination v. Franzaroli, 256 N.E. 2d 311 (1970).

In Bournewood Hospital, supra, the Court upheld an agency award of damages for emotional distress in an employment case. The Court cited New Jersey case of Zahorian v. Russell Fitts Real Estate Agency, supra. It noted the language in the statute" ...as, in the judgment of the Commission, will effectuate the purposes of

chapter...", which it found represented a "significant delegation of discretion and authority by the legislation to the administrative agency ..." 358 N.E. 2d at 242. It also pointed to the provision of the statute requiring a liberal construction for the accomplishment of the purposes of the statute, a provision identical to Section 12 of the Act.

The Court also took note of the inadequacy under the circumstances of the case of a simple backpay order.

He also may have considered the shortcomings inherent in a simple backpay order. It is clear to us that such an order is remedial only in the sense that it tells the violator that he did wrong and not to do it again; it hardly makes the aggrieved party whole. 256 N.E. 2d at 242. ¹

¹ In awarding \$3700 to the victim of employment discrimination under Title VII, the court in Humphrey v. Southwestern Portland Cement Company, 5 EPD ¶8501 (W.D. Tex., 1973), said:

"... as the trial progressed it became apparent that the psychic harm which might accompany an act of discrimination might be greater than would first appear. For the loss of a job because of discrimination means more than the loss of just a wage. It means the loss of a sense of achievement and the loss of a chance to learn. Discrimination is a vicious act. It may destroy hope and any trace of self-respect. That, and not the loss of pay, is perhaps the injury which is felt the most and which is the greatest."

The Massachusetts Court concluded that the finding by the agency that the respondent had retaliated against the complainant for filing the first complaint "alone permitted the inference of emotional distress as a normal adjunct to the Hospital's actions." It then observed in a footnote:

The standards applicable to an award of damages for emotional distress, pain and suffering ... as a means of enforcing the Commonwealth's employment discrimination statutes are, for obvious reasons of statutory construction and policy, not as stringent as those applicable to actions of tort for intentional infliction of emotional distress. Footnote 11 at 243.

It would be appropriate to note here that the Commission soon after the first oral argument in this case adopted internal guidelines to be used in connection with its consideration of monetary damage remedial awards. A copy is attached as Appendix A to this brief.

Just as the Massachusetts Court took note of the frequently inherent inadequacy of a simple backpay order, so the Commission experience in the more than three years since the instant case was argued has made frustratingly clear the shortcomings inherent in an interpretation of the Act which denied the Commission the authority to order compensatory damages, the frequent impossibility

in housing cases of fashioning an effective and fair remedy for the individual aggrieved without awarding monetary damages. 2

In all three cases ordered to be reargued, the individual complainant who has been a victim of unlawful discrimination in attempting to obtain a place to live did not obtain the housing unit in question or any housing unit from the respondent. The facts and reasons vary but very often the housing unit is no longer available by the time the Commission has adjudicated or the courts have reviewed the case. In the meantime, of course, the victims must turn elsewhere for housing. 3

2

The Commission has not to date ordered compensatory damages for mental anguish in non-housing cases. Other than backpay, compensatory damages for out-of-pocket expenses have generally been confined to housing cases.

3

"When a person is denied the opportunity to buy or lease real property, there is an immediate economic loss incurred. The expenditure of money in connection with the plaintiff's efforts to arrange the transaction with the defendant owner or agent is wasted because of the defendant's discriminatory refusal. Moreover, a second expenditure usually follows the defendant's denial: the cost of finding alternative housing. Both types of expenditures might include lost wages, lost time, costs of transportation, and communication costs. The expense of finding alternative housing might also include the costs of temporary shelter, storage and moving expenses, and the cost differential between the disputed and the alternative housing. All of these expenditures should be returned to the plaintiff in full, as part of the actual damage award to put the plaintiff in the same position, so far as money can do, as he would have been had there been no injury or breach of duty."

Volume X, Suffolk University L.R., Number 4, P.968.

Maryland, Ohio and the District of Columbia Appellate Courts have set aside compensatory damage awards of civil rights agencies.

In Gutwein v. Easton Publishing Company, the Maryland Court of Appeals stressed that the Maryland statute did not speak in terms of remedying the "effects" of employment discrimination, or of preventing economic loss, redressing individual rights or compensating victims of discrimination. The Act is "plainly" couched in prohibitory and not compensatory terms." 325 A.2d 740, 743.

The Maryland statute did not specify backpay as affirmative action that could be ordered and the Maryland Court pointed to this, stating:

No court, without more statutory direction, has construed the bare words "affirmative action as will effectuate the purposes of the statute" to authorize a monetary award. At 746.

The Pennsylvania Act, of course, is clearly concerned with remedying the effects of discrimination and the examples of affirmative action, including backpay, are concerned with redressing individual rights.

In Ohio Civil Rights Commission v. Lysyj, the Supreme Court of Ohio set aside a compensatory damage award in a housing case. The Ohio statute contains language similar to the Act's Section 9. The Ohio Court said:

The power to award damages to a person suffering loss as a result of the unlawful action of another has traditionally been limited to judicial proceedings. We are not willing to imply a grant of that power to an administrative agency. 313 N.E.2d 3, 7 (June 12, 1974).

It should be noted that the Ohio statute does not contain an exclusivity of remedy provision similar to Pennsylvania's. On the contrary, it specifically provides that the rights provided by the statute may be enforced by aggrieved private persons by filing civil actions in a Court of Common Pleas, and that the court "may grant such relief as it deems appropriate, including a permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages, together with the court costs." R.C. §4112.051 (A) (E)

In Mendota Apartments v. District of Columbia Commission on Human Rights, the District of Columbia Court of Appeals set aside an order of the District of Columbia Commission awarding damages for mental anguish and out-of-pocket expenses. The Court noted that the District of Columbia statute provided that if a respondent does not correct the unlawful activity within 15 days the matter would be turned over to the local corporation counsel which may institute civil proceedings and criminal proceedings.

The Court further noted that Article 45, §10(a) of the statute said, "Nothing herein shall prevent any person from exercising any right or seeking any remedy to which he might otherwise be entitled... Thus an injured party is not precluded by filing a complaint with the Office of Human Rights from seeking a civil remedy, including an action for damages in the Court." 315 A.2d 832, 835 (1974).

Thus, in addition to other distinguishing factors noted, a strong common basis exists for distinguishing the statutes of those latter three jurisdictions which rejected the statutory authority of its civil rights agency to order compensatory damages from the Pennsylvania Act. The Maryland statute did not contain an exclusivity of remedy provision, while Ohio and the District of Columbia expressly authorized an aggrieved individual to sue in a court which could award damages.

The significance of this distinction as an aid in determining legislative intent cannot be stressed too highly. The high courts in New Jersey and West Virginia relied heavily on the exclusivity of the civil rights agency's remedy in concluding that it had the power to order compensatory damages, as did the Commission in its first brief.

Although this Court has given strong recognition to the fact that one of the purposes of the Act is to "fashion an effective remedy for the individual aggrieved", "to give redress to the individual who complains", it has not yet articulated that purpose

in such absolute terms as "make whole" or "restore to the rightful economic status" which have appeared in the decisions of other courts.

The United States Supreme Court in Albermarle Paper Company v. Moody, speaking in the context of backpay awards under Title VII of the Civil Rights Act of 1964, referred to the "central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. 405, 421 (1975)

The United States Court of Appeals for the Third Circuit invoked the "make whole" doctrine in Rosen v. Public Service Electric and Gas Co. The case involved a retirement plan found to be discriminatory under Title VII. The District Court ordered the victims compensated to the extent of their loss. The Court of Appeals considered the remedial provision of Title VII authorizing the District Court to order "such affirmative action as may be appropriate, which may include, but is not limited to ... backpay", and found that "this grant of authority should be broadly read and applied so as to effectively terminate the practice and make its victims whole." 42 U.S.C. §2000(e)-5(g), 477 F.2d 90, 96 (1973). United States district courts within the Third Circuit have held that compensatory damages are not available under Title VII, finding that the "compensatory damages" in Rosen were limited to backpay. See Marshall v. Electric Hose and Rubber Co., 413 F.Supp 663 (D. Delaware, 1976) and Presseisen v. Swarthmore College, 71 F.R.D. 341

(E.D. Pa., 1976).

In the 1972 amendment to Title VII, there was added to the remedial section a provision that permitted the court to award "... any other equitable relief as the court deems appropriate." The Third Circuit Court of Appeals recently construed that language as barring the award of punitive damages under Title VII. See Richardson v. Jones, 45 L.W. 2457 (March 7, 1977). Other federal courts have interpreted this clause as barring compensatory as well as punitive damages. The Sixth Circuit in EEOC v. Detroit Edison Company set aside an award under Title VII on this basis, distinguishing backpay as a form of restitution as opposed to compensatory damages. The court stated that restitution (backpay) is an equitable remedy so that a jury trial was not required. 515 F.2d 301, 308 (1975).

Other federal courts have recently held that compensatory damages are available under Title VII. See, e.g. Taylor v. Ford Motor Company, 8 EPD 253 (W.D. Mo. 1974) and Clairborne v. Illinois Central Railroad Company, 401 F.Supp 1022 (E.D. La. 1975).

Thus, there is a split of authority on whether compensatory damages are available under Title VII.

* * * *

There are many bases for this court distinguishing and not following decisions barring compensatory damages under Title VII.

The Pennsylvania Act, in conferring the broadest discretion and flexibility on the Commission to fashion remedies "to effectuate the purposes of the Act," does not limit the Commission to "equitable relief."

Nor, need there be a Seventh Amendment concern.

In Atlas Roofing Company v. Occupational Safety and Health Review Commission, 45 L.W. 4312 (March 23, 1977), the issue before the court was: "... whether, consistent with the Seventh Amendment, Congress may create a new cause of action in the Government for civil penalties enforceable in an administrative agency where there is no jury trial."

Under the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq., Congress authorized a federal administrative agency to impose civil penalties, including monetary damages up to ten thousand dollars, for violation of that statute.

In upholding the authority of the administrative agency to do this against a Seventh Amendment challenge, Mr. Justice White, speaking for a unanimous court, declared:

The point is that the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for fact finding in civil cases. It took the existing legal order as it found it, and there is little or no basis for concluding that the amendment should now be interpreted to provide an impenetrable barrier to administrative fact finding under otherwise valid federal regulatory statutes.

We cannot conclude that the amendment rendered Congress powerless -- when it concluded that remedies available in courts of law were inadequate to cope with a problem within Congress' power to regulate -- to create new public rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law -- such as an administrative agency -- in which facts are not found by juries. At 4317.

It is submitted that the Seventh Amendment similarly did not render the Legislature of Pennsylvania powerless to create a statutory scheme under which it committed the enforcement of precious civil rights of its citizens to an administrative agency. The Commission has long argued that this is precisely what the Legislature sought to do with the Pennsylvania Human Relations Act.

The Commission has urged, and reasserts in the light of its experience, that the authority to order compensatory damages is needed to make the Act effective, to serve as a deterrent to those who are inclined to discriminate, and to fairly and significantly redress individuals aggrieved by unlawful practices.⁴

4

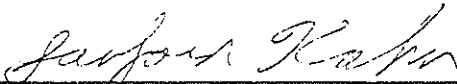
In awarding \$5,000 in compensatory damages to victims of housing discrimination under the 1968 Fair Housing Act, 42 U.S.C. §3612, an Ohio Federal Judge said:

"Compensatory damages for a violation of civil rights in general must be more than nominal. Certainly, one who has been deprived of his right not to be discriminated against has suffered real and substantial injury." Harrison v. Heinzerth Mortgage Company, Equal Opportunity in Housing, ¶15,202 (D.C., N.D. Ohio 1977).

CONCLUSION

For the reasons set forth in Appellant's original brief and those set forth in this supplemental brief, the Commission respectfully prays the Court to reverse the decision and order of the Commonwealth Court of August 14, 1973 and reinstate in its entirety the Commission's final order and hold that the Commission has the authority to order a respondent to pay compensatory damages where in the Commission's judgment this will effectuate the purposes of the Act.

Respectfully submitted,



SANFORD KAHN, General Counsel
Pennsylvania Human Relations Commission

Attorney for Appellant

DELETES AND CONFIDENTIAL TO TEXT
MONETARY DAMAGES TO COMPLAINANT

Commissioners and Staff

FROM
Sanford Kahn
General Counsel
Pennsylvania Human Relations Commission

INTRODUCTION

An order to a respondent to pay money to a complainant (in addition to any other remedies which may be called for under the facts of the case) is appropriate where:

1. Respondent's unlawful conduct was the direct and immediate cause of complainant's suffering actual, clearly measurable money losses.
2. Complainant incurred monetary expenses or losses which may fairly and reasonably be said to have followed naturally or foreseeably from respondent's unlawful conduct.
3. Respondent's unlawful conduct caused complainant to suffer significant damages but of a kind not capable of being reduced to a monetary figure with any degree of certainty.

(1), (2) and (3) above are classified as compensatory damages.

4. Respondent's conduct has not only violated the Act, but has been done with malice, or recklessly, wantonly, or oppressively. These are called punitive (or exemplary) damages. The purpose is not to compensate a complainant for loss, but to deter the respondent from repeating the conduct and, more importantly, to deter by this example others who may be similarly inclined.

APPENDIX "A"

Page 23

* * *

In employment cases, back pay, pay differential or loss of other benefits are obvious examples.

If the unlawful practice was of a continuing nature which commenced long before filing of the complaint, the period for which respondent is liable for loss shall commence at the earliest identifiable time, but no earlier than the date upon which the provision of the Act which was violated was enacted. The Commission shall have the discretion to determine how far back to go in computing; such losses and shall consider among other factors whether or not there was any reasonable uncertainty as to the unlawfulness of the practice in question and whether respondent has or should have had notice that the practice was unlawful.

(2) Monetary Losses Which May Fairly and Reasonably
be Said to have Followed Naturally and Foreseeably
from Respondent's Unlawful Conduct

The respondent is liable not only for the immediate and natural consequences of his unlawful conduct but for all such consequential injuries as can reasonably be anticipated as the probable result.

This concept is less clear-cut than (1) and must be carefully measured and applied, avoiding the inclusion of remote consequences or those which the respondent could not be held to a duty to have foreseen, but it should not be ignored in compiling the total damages. For example, in employment cases, employment agencies' fees incurred because complainant was unable to obtain another position after he was unlawfully discharged or not hired. In housing cases, differential in rent between what complainant would have paid, but for respondent's unlawful act, and what complainant actually paid elsewhere.

It must be kept in mind that a complainant has a duty to act reasonably in mitigation of damages. That is, it must be shown that the complainant reasonably sought other comparable employment or housing at comparable rates.

Simple interest at the rate of 6% per year shall be added to the awards under (1) and (2).

Proof of (1) and (2)

Wherever possible, the complainant must substantiate the claimed losses with relevant records, such as pay records, cancelled checks or receipts, income tax returns, authenticated bills. However, where a complainant has explained to the satisfaction of the Commission his failure to document a claim with the best evidence, it is sufficient if a reasonable basis of computation is afforded even though the result is only approximate. What is required is that evidence of such certainty as the nature of the particular case permits should be provided.

as a Real Estate Appraiser, to substantiate the fact of damage to the damages, adequate notice must be afforded to the respondent together with a copy of the expert's report, if any. The expert's fees may be made payable by the respondent.

Measure of Damages

The measure of damages under (1) and (2) above are quite simply the sum of money already lost or paid out by a complainant as a result of respondent's unlawful conduct.

(3) Significant Damages of a Nature not Susceptible of Being Reduced to Monetary Figures with Reasonable Certainty

Most significant in this category, although not necessarily solely so, are damages suffered to the emotional health and personality of the complainant.

The injuries may be either permanent or long-term in nature or short-term. Included within this injury to the health and personality is the pain and suffering which may have been occasioned by it. These damages are by their nature difficult to isolate. To be compensable, they must be something more than mere disappointment or regret.

The injuries in this category vary from fundamental injuries such as damages to the self-respect or confidence of the complainant or instillation of an abiding fear or an abiding hatred of the class which the respondent represents, to injuries of varying degrees of less fundamental seriousness, such as the conditions and attendant symptoms including pain and suffering, which are natural reactions of any victim of an act of discrimination -- anguish, humiliation, anger, anxiety, frustration.

Proof

This kind of injury, like those in (1) and (2) supra, must be supported by substantial evidence. If the complainant was treated by or consulted with a physician of any kind with regard to these injuries, the testimony of the physician should be provided if possible. In any event, the respondent should be provided with the name of any physician who treated complainant for the claimed injury and a copy of any report of the physician.

If complainant has taken medicine of any kind, either prescribed by a physician or upon complainant's own initiative, this fact should be substantiated as fully as possible, by prescription, bill, etc.

However, the fact that a complainant has not been treated by or consulted a physician or has not taken medicine shall not preclude recovery for the injury hereunder discussion providing that the claim is supported by other substantial evidence. This may be provided by the testimony of the complainant, other

witnesses to the incident or to the subsequent effect upon the complainant, the testimony of experts such as psychologists or sociologists who have written on the effect of such discrimination on the emotional health of the victim or by the introduction of the writings or studies of such experts. If the complainant intends to produce such experts or introduce such reports, he shall give the respondent adequate notice of such fact and provide him, in advance of the hearing, with a copy of whatever documents which will be offered into evidence.

From the nature of this injury and the evidence which may be offered to substantiate it, it may be difficult to prove or disprove its existence or extent with certainty and there is always the possibility that there is no real basis for the claim or that the suffering is to a greater or lesser extent exaggerated. For that reason, the Hearing Panel must scrutinize with care the evidence offered in support of the claim and observe carefully the demeanor of the complainant and complainant's witnesses and must approach the matter with caution. But if the Panel and the Commission is satisfied that a fair preponderance of the evidence supports the claim, the complainant is entitled to be compensated for his mental distress and suffering.

Measure of Damages

The amount of an award for injury to emotional health and personality and for mental pain and suffering rests ordinarily in the sound and intelligent discretion of the Commission, although to the extent that objective criteria may be applicable, such as medical bills or loss of earnings, that must be used. Aside from those aspects of the injury for which objective criteria are available, the measure of damages has been stated to be the judgment of a reasonable man or woman or of enlightened jurors or Commissioners. Substantial damages may be allowed, but awards must be reasonable in light of all relevant factors disclosed by the evidence. Factors to be considered include but are not limited to the seriousness or intensity of the injury to the health or personality or of the pain and suffering, the length of time during which the injury has been and probably will be experienced, the effect of the injury on the complainant's ability to lead a normal life. The seriousness of the injury varies in every case with the personality and health and temperament of the complainant, and the respondent must take the victim as he found him. That is, if a complainant's personality is unusually sensitive and vulnerable to injury because of unlawful discrimination, the respondent is fully liable for the injury caused by his unlawful conduct.

Where the complainant's claim has not been substantiated by medical testimony, the amount of the award may not exceed \$10,000.

(4) Punitive Damages

Punitive damages may be awarded only for what the Commission finds to be outrageous conduct. That is, for acts done with a bad motive or with a reckless indifference to the interest of others. It must be based on malicious, wanton, reckless, willful or oppressive conduct.

An act or failure to act is "maliciously" done if prompted or accompanied

of toward all persons in one or more groups or categories of which the injured person is a member.

An act or failure to act is "wantonly" done if done in reckless or callous disregard or indifference to the rights of one or more persons, including the injured person.

An act or failure to act is "oppressively" done if done in a way or manner which injures or damages or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power or by taking advantage of some weakness or disability or misfortune of another.

Punitive damages may be awarded only if the Commission first finds that the complainant suffered actual damages. If the Commission finds that a complainant has been deprived of a fundamental right under the Act by the respondent but has not suffered substantial damages as a result, it may award the complainant nominal damages for the mere deprivation of a civil right. Such an award of nominal damages, which may be in the amount of \$1.00, is sufficient to sustain an award of punitive damages.

Both the Commission's determination to award punitive damages and its decision as to the amount must be fixed with calm discretion and sound reason, keeping in mind the central purpose of deterring the respondent and others from outrageous unlawful conduct.

Both the decision to award punitive damages and the decision as to the amount must be supported by a unanimous vote of the Commission. No award shall exceed \$10,000 per individual or class complainant.

sf