

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

YOLANDA BACHARACH,
Complainant

v.

ANTONIO COSTA,
Respondent

DOCKET NO. H-6170

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OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
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YOLANDA BACHARACH,

Complainant

DOCKET NO.: H-6170

v.

ANTONIO COSTA,

Respondent.

STIPULATIONS OF FACT

The following facts are stipulated to by all parties to the above-captioned case and no further proof thereof shall be required:

1. The Complainant herein is Yolanda Bacharach.
2. The Respondent herein is Antonio Costa.
3. On or about January 7, 1994, Complainant filed a verified complaint against Respondent, with the Pennsylvania Human Relations Commission (hereinafter Commission), alleging that on or about August 15, 1993 Respondent refused to rent an apartment to her because of her familial status.
4. The Complaint was served upon Respondent on or about January 28, 1994.
5. Upon receipt of the Complaint, Respondent contacted the Commission; and timely answered the Complaint, wherein he denied all the allegations of the Complaint, and, inter alia, responded to the Complaint by alleging the Complainant did not rent the unit because she stated to him

that his unit only had 2 prong receptacle plugs, but she needed a 3 prong receptacle plug for her computer; Respondent further alleged in his answer to the Complainant's Complaint that Complainant never told him that she had a son; and that after August 8, 1993, he never spoke with the Complainant again.

6. Following an investigation, a probable cause finding was approved by the legal division on September 17, 1996 and Respondent was notified of the finding.
7. A conciliation meeting was scheduled for October 30, 1996 and conciliation failed. Other attempts at settlement have also failed.
8. The case was approved for Public Hearing by the Executive Director and was placed on the Public Hearing Docket by the Commission at its May 19, 1997 meeting.
9. A Prehearing Conference was held on August 6, 1997.
10. The property involved in this Complaint, located at 5707 Wellesley Avenue (third floor apartment unit), Pittsburgh, PA, was at the time of the alleged violation of the Pennsylvania Human Relations Act, owned by Respondent.
11. There was a 3rd floor unit available for rent.
12. Respondent alleges Complainant was the only person to respond to Respondent's advertisement for said 3rd floor unit.
13. Respondent alleges he never rented said 3rd floor unit, neither prior to the within alleged matter, nor subsequent thereto.
14. Respondent's counsel has agreed with the Commission's counsel that an extension beyond thirty days be provided for the Commission to provide notice as to any forthcoming testimony of witness Ronald Wilson.

15. The Commission will not call Ronald Wilson as a witness.
16. The record in this matter is open pending agreement and signatures by both counsel to the stipulations and submission of such stipulations to the Permanent Hearing Examiner.
17. The Commission's counsel agrees that the Respondent's counsel may submit further documentary evidence to the Permanent Hearing Examiner for admission on the record, and which will be incorporated into the transcript of the Public Hearing held on September 8, 1997 as additional and/or rebuttal evidence offered by the Respondent; and which will address the Complainant's ownership interest of property located at 326 South Lang Street, Pittsburgh, PA 15208, which she has owned since March 29, 1989 to the present, jointly with her husband, as tenants by the entireties.
18. Agreement to the above stipulations and submission of such stipulations to the Permanent Hearing Examiner is an agreement by both counsels that such record may be closed for a recommendation to the commission.

These Stipulations of Fact will become a part of the official record in this case and will be incorporated into the transcript prepared during the course of the Public Hearing held on September 8, 1997 and any subsequent Public Hearing held in this matter.

By Respondent's Attorney:

John F. Morris
John F. Morris, Esquire

1-8-98
Date

By Pennsylvania Human Relations Commission:

Kathryn Waters-Perez
Kathryn Waters-Perez, Esquire
Assistant Chief Counsel
Housing Division

1-12-98
Date

FINDINGS OF FACT *

1. The Complainant herein is Yolanda Bacharach, 326 South Lang Avenue, Pittsburgh, PA 15206. (NT 34.)
2. The Respondent herein is Antonio Costa, 5707 Wellesley Avenue, Pittsburgh, PA 15206. (NT 74.)
3. The Complainant became aware of an apartment located at 5707 Wellesley Avenue through an ad in the *Pittsburgh Post Gazette*, dated August 8, 1993. (NT 35.)
4. The Complainant contacted the Respondent on that same day, August 8, 1993. (NT 35.)
5. On August 8, 1993, Respondent showed the apartment to Complainant. (NT 37.)
6. Complainant explained that she was a student at the University of Pittsburgh. (NT 37.)
7. She also informed the Respondent that she would be sharing the apartment with her ten-year-old son. (NT 39-40.)

* The foregoing Stipulations of Fact are incorporated herein as if fully set forth. To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

CE	Complainant's Exhibit
NT	Notes of Testimony
RE	Respondent's Exhibit
SF	Stipulations of Fact

8. The Complainant's son would be staying with her from Thursday nights to Monday mornings. (NT 39-40.)

9. At the same time (August 8, 1993), the Respondent told Complainant that the previous tenant was also a Pitt student. (NT 38-39.)

10. After viewing the apartment, the Complainant informed Respondent that she wanted the apartment and offered to pay \$100 deposit and four months' rent in advance. (NT 43.)

11. Also on August 8, 1993, Respondent told Complainant that the rent was \$250 per month. (NT 42.)

12. The Respondent also informed Complainant that he would accept the proffered deposit payable on August 13, 1993. (NT 42-43.)

13. While at the Respondent's house, the Complainant met his mother, brother, and sister-in-law. (NT 43.)

14. The Complainant indicated that she had a computer and questioned whether her use of the computer would over-charge the system. (NT 44.)

15. The Respondent's brother indicated that there would not be any additional load on the system. (NT 44.)

16. On August 13, 1993, the Complainant attempted to tender her \$100 deposit at the Respondent's house. (NT 45.)

17. The Respondent was not there, however, his mother refused to accept the deposit. (NT 45.)

18. The Complainant returned on August 14, 1993, and attempted to pay the deposit, and there was no answer at the Respondent's home. (NT 46.)

19. The Complainant attempted to reach the Respondent on the telephone at least four times. (NT 46.)

20. On August 15, 1993, the Complainant finally reached Respondent by phone and indicated to Respondent that she was still interested in the apartment. (NT 47.)

21. During the phone conversation on August 15, 1993, the Respondent told Complainant that he did not rent to her because he was concerned about the safety and possible unruliness of her child. (NT 47-49.)

22. The Complainant was distressed and upset about not getting the apartment. (NT 66.)

23. As a result of Respondent's actions, the Complainant had to stay with friends two months into the school year. (NT 66.)

24. The Respondent withdrew the apartment from the market, and never rented it. (NT 106; SF 13.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and subject matter of this case.
2. The parties and the PHRC have fully complied with the procedural prerequisites to a public hearing.
3. The Complainant and Respondent are persons within the meaning of the Pennsylvania Human Relations Act ("PHRA").
4. The property that the Complainant attempted to rent was a housing accommodation within the meaning of the PHRA.
5. The Complainant established a *prima facie* case of familial status discrimination by showing that:
 - a) the Complainant was a member of a protected class;
 - b) the Respondent was aware that the Complainant was a member of a protected class;
 - c) the Complainant was ready to accept the Respondent's offer to rent; and
 - d) the Respondent refused to rent the apartment to the Complainant.
6. The Respondent articulated legitimate, non-discriminatory reasons why the Complainant was not allowed to rent the apartment.
7. The Complainant proved by a preponderance of the evidence that the Respondent's articulated reasons for failing to rent the property to the Complainant were pretextual.

8. The Complainant has met her ultimate burden of persuasion that the Respondent's action violated Section 5(h)(1) of the PHRA.

9. After a finding of unlawful discrimination, the PHRC may award actual damages, including damages caused by humiliation and embarrassment.

10. The Commission may order a Respondent to cease and desist from the discriminatory practice and to take such affirmative action as justice may require.

OPINION

On or about January 7, 1994, a complaint was filed by Yolanda Bacharach (hereinafter "Complainant") against Antonio Costa (hereinafter "Respondent"), alleging that on or about August 15, 1993, the Respondent violated Sections 5(h)(1), 5(h)(3) and 5(e) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, *as amended*, 43 P.S. §§951, *et seq.* (hereinafter "PHRA"). The Complainant alleges that the Respondent unlawfully discriminated against her by refusing to rent an apartment to her because her ten-year-old son would be living with her on a part-time basis.

The Pennsylvania Human Relations Commission (hereinafter "PHRC") investigated the Complainant's allegation, and at the conclusion of the investigation informed the Respondent that probable cause existed to credit the Complainant's allegation. Thereafter, the PHRC attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion, but such efforts were not successful. Subsequently, the PHRC notified the parties that it had approved a public hearing in this matter.

The public hearing was held on September 8, 1997 in Pittsburgh, Pennsylvania, before Permanent Hearing Examiner Phillip A. Ayers. The Commission's interest in the complaint was overseen by PHRC Housing Division's Assistant Chief Counsel Jonathan J. Williams. John F. Morris, Esquire, appeared on behalf of the Respondent. Both Commission Counsel and Respondent filed post-hearing briefs.

In the instant case, the Complainant alleges unlawful familial status discrimination pursuant to 43 P.S. §§955 5(h)(1), (h)(3) and (e). However, after a

review of the record before the Commission, it is clear that the instant case involves an alleged Section 5(h)(1) violation. The relevant provision is as follows:

"It shall be an unlawful discriminatory practice. . .

(h) for any person to:

(1) Refuse to. . . lease. . . or otherwise to. . . withhold any housing accommodation or commercial property. . . from any person because of the. . . familial status. . . of any person. . . occupant, or user of such housing accommodation or commercial property. . .

In discrimination cases, the Pennsylvania Supreme Court has adopted the model established by the case of McDonnell-Douglas v. Green, 411 U.S. 792 (1973). Even though the McDonnell-Douglas model was used for employment cases, the analysis has been modified for housing cases. Utilizing the McDonnell-Douglas analysis, the Complainant has the initial burden of establishing a *prima facie* case of discrimination. Once a *prima facie* case is established, the Respondent must produce evidence of a legitimate non-discriminatory reason for its action. If the Respondent is successful in meeting its burden of production, then the Complainant still has the ultimate burden of proving that she is the victim of unlawful discrimination. There was a four-pronged *prima facie* model used in the McDonnell-Douglas case. However, the McDonnell-Douglas methodology was never intended to be rigid, mechanized or ritualistic. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 2754 (1993). The requirements of a *prima facie* case in a housing discrimination case are as follows:

- 1) Complainant was a member of a protected class;
- 2) Respondent was aware that the Complainant was a member of a protected class;

3) Complainant was ready and able to accept the Respondent's offer to rent; and

4) Respondent refused to rent the apartment to the Complainant.

Firstly, the Complainant is clearly a member of a protected class in that she fits the definition of familial status. Familial status is defined as one or more individuals under the age of eighteen years, domiciled with a parent having legal custody of such individual or individuals. In the instant case, the Complainant is the mother of a ten-year-old son who was living with her, pursuant to a custody agreement with her then estranged husband.

Secondly, the Respondent was aware that the Complainant was a member of this protected class. The Complainant specifically told the Respondent that her son would be living with her. The Complainant asked the Respondent whether her son's presence would increase her rent. Furthermore, the Respondent expressed concerns that the Complainant and her ten-year-old son would be sharing such small quarters.

Thirdly, the Complainant was ready and able to accept the offer to rent. The Complainant not only verbalized her intention on her first visit, but she later attempted to deliver a security deposit to the Respondent.

Lastly, after the meetings and subsequent phone calls, the Respondent specifically refused to rent the apartment to the Complainant during a phone conversation on August 15, 1993. The Complainant has met her burden of establishing a *prima facie* case.

Once the Complainant meets her burden, the burden of production then shifts to the Respondent to present evidence of a legitimate, non-discriminatory reason for his action. The Respondent in this case has testified that the reason he did not rent

the apartment to the Complainant was that the Complainant did not like the number of electrical outlets in the apartment and, therefore, was not interested. This rationale satisfies the Respondent's burden of production.

Since the Respondent has met his burden of production, the Complainant still has the ultimate burden of proving that she is the victim of unlawful discrimination. The Complainant can prevail by showing that the proffered reason is pretextual, or unworthy of credence. Allegheny Housing Rehabilitation Corp. v. Pennsylvania Human Relations Commission, 516 Pa. 124, 532 A.2d 315 (1987). Based upon the record before the Commission, the reason set forth by the Respondent is not worthy of credence. In a matter such as the instant case, the issue of credibility is extremely important. The Respondent in this case simply was not a credible witness. As Commission Counsel notes, ". . . when a Respondent's testimony becomes riddled with weaknesses, implausibilities, inconsistencies, incoherences, and contradictions, the trier of fact may reasonably infer such testimony does not reflect the Respondent's real motivation for his actions, and that his testimony is unworthy of credence. Fuentes v. Perskie, 32 F.2d 759 (3rd Cir. 1994). Also, ". . . The fact-finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993).

A review of Respondent's testimony indicates evasiveness and obvious contradictions. The Respondent denied:

- a) that Complainant voiced an interest in the apartment;
- b) that Respondent told her another Pitt student had rented the apartment;
- c) that Complainant spoke with Respondent's relatives on August 8, 1993;
- d) that Respondent's mother refused to accept the security deposit; and
- e) that he had a conversation with Complainant on August 15, 1998.

The Respondent would not give a reason for advertising the apartment, nor could he explain why he could not accommodate the alleged concerns about electrical outlets. (NT 101.) Furthermore, the Respondent was not truthful when answering simple questions, such as whether anyone had answered his advertisement. The Respondent initially said "No." The Complainant has shown that the Respondent's articulated reasons for his action are not worthy of credence.

Even Respondent's action in withdrawing the apartment from the market was clearly to evade the law. The Respondent had no rational or business-related reason for withdrawing the apartment. When a respondent takes housing off the market to evade anti-discrimination laws, courts have held that a complainant need not prove that the housing was available to others. Chapp v. Bowman, 750 F.Supp. 274 (1990); Madison v. Jeffers, 494 F.2d 114 (1974). Upon questioning at the public hearing, the Respondent could not give a reason why he did not attempt to rent the apartment after this incident.

Upon review of all the evidence and testimony before the Commission, the Complainant has met her ultimate burden of showing that the Respondent refused to rent the apartment to her because of familial status. Said refusal violates Section 5(h)(1) of the PHRA.

Having found that the Complainant has met her ultimate burden in this matter, we now move to the issue of remedy.

In dealing with remedy, the Commission, by virtue of Section 9 of the PHRA, has broad discretion in awarding a remedy. Williamsburg Community School District v. PHRC, 99 Pa.Comnwl. 206 512 A.2d 1339 (1986). In addition, where the Complainant alleges violations of Section 5(h), the Commission "may award actual damages, including damages caused by humiliation and embarrassment." In the instant case the Complainant requests appropriate remedies including, but not limited to, a cease and desist order and \$7,000 in damages. Certainly a cease and desist order is necessary to prevent the Respondent from engaging in further unlawful discriminatory practices.

Next, we move to the issue of damages. The Complainant did not credibly testify as to her humiliation and embarrassment when Respondent refused to rent her the apartment because of her child. She testified:

"I was homeless. I was left homeless for a while. I was upset . . . I was disconcerted. . . everything was up in the air. . . I was feeling victimized. . . I was staying with friends. . . And so I had to remain a burden to my friends until two months into the school year."

(NT 66.)

While the Commission recognizes that any individual in the Complainant's situation may suffer emotional harm under these circumstances, we must also deal with the issue of credibility in determining remedy. The Complainant repeatedly testified that she was homeless. She testified that she lived with friends for two months. However, the Respondent presented evidence that she resided at 326 South Lang Avenue, and had owned the property from March 29, 1989 up to the

date of the public hearing. Certainly the Commission is sensitive to the emotional impact of Respondent's actions, but the Complainant's unreasonable request for damages does not help her case. Accordingly, the Commission will award \$1,000 in damages for the embarrassment and humiliation suffered by the Complainant. Also, a civil penalty shall be imposed upon the Respondent in the amount of \$1,000.

An appropriate Final Order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

**YOLANDA BACHARACH,
Complainant**

v.

**ANTONIO COSTA,
Respondent**

DOCKET NO. H-6170

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Complainant has proven discrimination in violation of Section 5(h)(1) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission.

If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

By: Phillip A. Ayers
Phillip A. Ayers
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

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DOCKET NO. H-6170

FINAL ORDER

AND NOW, this Twenty-first day of December, 1998, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion as its own findings in this matter, and incorporates same into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

O R D E R S

- 1. That the Respondent shall cease and desist from discrimination on the basis of familial status.**
- 2. That the Complainant be awarded \$1,000, plus six percent interest *per annum*, for humiliation and embarrassment.**

3. That, within thirty days of the effective date of this Order, the Respondent shall deliver to PHRC Housing Division Assistant Chief Counsel Nancy L. Gippert a check payable to the Commonwealth of Pennsylvania in the amount of \$1,000, which amount represents an assessment of a civil penalty under Section 9(f)(2)(i) of the PHRA.

4. That the Respondent shall report the means by which he will comply with all components of this Order, in writing, to Nancy L. Gippert, Assistant Chief Counsel, Housing Division, in care of the PHRC at PO Box 3145, Harrisburg, PA 17105-3145.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Raquel Otero de Yiengst
Raquel Otero de Yiengst
Vice-Chairperson

Attest:

Gregory J. Ceka, Jr.
Gregory J. Ceka, Jr.
Secretary

