COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

CHARESE BURTON, Complainant	:	
v.	:	DOCKET NO. H-5138
NORMAN RASP, AND NORTHWOOD REALTY, Respondents	:	

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

CHARESE BURTON, COMPLAINANT	:	
V.	:	DOCKET NO: H-5138
NORMAN RASP AND NORTHWOOD REALTY, RESPONDENTS	:	

STIPULATIONS OF FACT

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

1. The Complainant herein is Charese Burton, 623 Straight Street, Sewickley, PA 15143.

2. The Respondents herein are Norman Rasp, 600 Chatham Park Drive, Pittsburgh, AP 15220 and Northwood Realty, 4100 Route 8, Allison Park, PA, 15101.

3. The unit in question is located at 497 Marietta Place, Pittsburgh, PA 15228.

4. On or about may 29, 1991, Complainant timely filed a formal Complaint, ~~against Respondents with the Pennsylvania Human~~ Relations Commission ~~alleging that on or until May 21, 1991, Respondents violated section 5(h)(1) of the Pennsylvania Human~~

~~Relations Act, Act of October 27, 1955, P.L. 744, as amended, by refusing to rent her a unit on the basis of race.~~

5. The complaint, docketed at H-5138 was served upon respondents on or about June 19, 1991.

6. Although not formally answering, Respondent Norman Rasp issued a written response on or about July 30, 1991.

7. Respondent Northwood Realty did not make a formal response.

8. A fact finding conference was held on or about july 29, 1991.

9. Following an investigation, a probable cause finding was approved by the Commissions' housing division Legal staff on or about January 22, 1992. Respondents were notified of the probable cause finding on or about February 18, 1992.

10. Subsequent to the finding of probable cause, efforts were made to eliminate the alleged discrimination through a conciliation meeting held on or about April 30, 1992. This and all other attempts at conciliation have failed.

11. The above captioned case was approved for Public Hearing and placed on the Public Hearing Docket at the Commission's meeting of January 30, 1995.

12. On or about March 13, 1995 Complainant filed an amended complaint.

13. Respondent Northwood timely answered the amended complaint.

~~14. Respondent Norman Rasp was the owner of the property located at 497 Mariotta Place.~~

15. Mr. Rasp listed his property with Northwood Realty, the Mt. Lebanon office.

16. Ms. Claire Healey, an agent of Northwood Realty, was the listing agent.

By Respondents:

_____ _____
Date

Christopher M. Abernethy — July 11, 1995
Date

Theresa Wasser — 7-11-95
RESPONDENTS Date

By: Pennsylvania Human Relations Commission:

Nancy Gippert — 7/11/95
Nancy Gippert, Esquire Date
Assistant Chief counsel
Housing Division

FINDINGS OF FACT *

1. The Complainant herein is Charese Burton (hereinafter "Burton"), a black female. (SF 1.)

2. The Respondents herein are Norman Rasp (hereinafter "Rasp") and Northwood Realty (hereinafter "Northwood"). (SF 2.)

3. Between 1987 and June 1991, Burton rented a property in Coraopolis, Pennsylvania, from Roosevelt and Shelly Jones. (NT 23, 68, 139.)

4. Burton, then the mother of two school-aged children and expecting a third child in August 1991, married in April 1991. (NT 18.)

5. On or about April 1991, Burton decided to seek larger living accommodations. (NT 18.)

6. Burton began her search for a 3-4 bedroom rental in the $600-625 price range in areas relatively close to where Burton worked. (NT 18-19.)

7. At that time, Burton was a manager for Nutri System in Sewickley, Pennsylvania; however, Burton was aware that her job with Nutri System was ending due to growing financial difficulties being experienced by Nutri System. (NT 33-34, 47.)

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* 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
SF	Stipulations of Fact

8. Burton anticipated that she might have an opportunity to work for Jenny Craig in Greentree after the birth of her third child in August 1991. (NT 34.)

9. In the later part of April, after beginning the search for a new rental, Burton told the Joneses that she intended to move, and established the self-imposed deadline of June 1, 1991 within which to vacate the Jones's apartment. (NT 44, 45, 142.)

10. As part of Burton's search for a rental, Burton called FFV Realty (hereinafter "FFV"). (NT 19-20, 92.)

11. FFV is a real estate company which has approximately eight locations, two of which are located in the Mt. Lebanon area. (NT 97.)

12. At one FFV Mt. Lebanon location, FFV had an employee named Jeanne Gerrero (hereinafter "Gerrero"). (NT 97, 120.)

13. At FFV's other Mt. Lebanon location, FFV had an employee named Jeffrey Hayes (hereinafter "Hayes"). (NT 92.)

14. When Burton called FFV, she spoke with Hayes. (NT 19-20, 92.)

15. Many available rental properties are listed on a computerized multi-listing. (NT 93.)

16. Hayes checked the multi-listing and advised Burton of the availability of Rasp's property located at 497 Marietta Place, Mt. Lebanon (hereinafter "Rasp's property"). (NT 19-20, 93; SF 3.)

17. The rental on Rasp's property was listed as $575 per month. (NT 96; CE 3.)

18. The listing of Rasp's property had a notation that: "Owner does lease and meets and approves tenant." (NT 94, 207; CE 3.)

19. In early May 1991, Burton and Hayes toured Rasp's property. (NT 21, 94.)

20. Burton liked Rasp's property and instructed Hayes to forward her name in regard to making an application to rent Rasp's property. (NT 21.)

21. Prior to Hayes showing Burton Rasp's property, Gerrero had shown Rasp's property to another prospective tenant. (NT 97, 103, 121.)

22. Gerrero left her business card at Rasp's property. (NT 128.)

23. Subsequent to Burton's tour of Rasp's property, Hayes called Burton and asked if she could return and tour Rasp's property again with Rasp. (NT 21.)

24. On or about May 7, 1991, Burton re-toured Rasp's property with Rasp and Hayes. (NT 21, 76.)

25. Rasp asked Burton for information regarding both past landlords and her credit. (NT 22, 57, 94.)

26. Burton provided Rasp with all the information he requested. (NT 22, 27, 43, 57, 95.)

27. Rasp told Burton that he was looking to rent the property by May 15, 1991, and that after checking her credit references he would contact her. (NT 22-23, 45, 95.)

28. Rasp did contact Ms. Jones. (NT 23-24.)

29. Approximately two or three days after Burton furnished Rasp with the information Rasp requested, Burton called Hayes to check if he had heard anything. (NT 23, 44, 56, 58, 96.)

30. After several calls to Hayes and some time after May 15, 1991, Burton called Rasp. (NT 24, 56, 59.)

31. Rasp told Burton that his wife had been ill and that the property needed some painting. (NT 24.)

32. Burton volunteered to paint if that would facilitate Rasp's decision to rent to Burton. (NT 24.)

33. Rasp told Burton that it would not be necessary for Burton to paint, as Rasp had men to paint. (NT 24.)

34. Rasp never called either Burton or Hayes. (NT 23, 95, 96.)

35. Rasp did call Gerrero. (NT 97, 121.)

36. During the conversation between Rasp and Gerrero, Rasp pressed the question of whether Gerrero's prospect was going to make a decision. (NT 121.)

37. Rasp angered Gerrero when Rasp asked Gerrero who were her prospects? Could he meet them? And, what was their nationality? (NT 121, 130.)

38. Rasp also asked Gerrero if she had any additional prospects. (NT 136.)

39. On or about May 18 or 19, 1991, at the suggestion of her broker, Gerrero called the listing agent for Rasp's property, Clair Healey (hereinafter "Healey"). (NT 122, 130, 210, 211.)

40. Gerrero excitedly conveyed to Healey that there was a racial problem regarding a prospective tenant of the Rasp property. (NT 220.)

41. In effect, Healey explained to Gerrero that Northwood handled other properties for Rasp, and that Healey was not aware that Rasp discriminated. (NT 125, 135, 213.)

42. After speaking with Healey, Gerrero called her prospective tenant and gave instruction to deal directly with Northwood. (NT 126.)

43. Gerrero also spoke to Hayes regarding Rasp's call. (NT 126.)

44. On or about May 21, 1991, Hayes related the nature of Gerrero's information to Burton. (NT 80, 87, 97.)

45. Hayes also called Healey to convey what Gerrero had told him. (NT 99.)

46. Hayes felt Healey was disinterested as he tried to convey that he believed Rasp was discriminating against one of his prospective tenants. (NT 99.)

47. Hayes testified that Healey said something to the effect that, "Well, it's his house. I can't do anything about it. It's not my problem." (NT 99.)

48. Healey testified that she did not think that Rasp would discriminate. (NT 222.)

49. Healey shared with her colleagues the nature of Gerrero's call and discussed the issue of whether Rasp was prejudiced with her manager. (NT 227.)

50. Healey's manager asked Healey what she thought and took no further action when Healey responded, "If he is, he sure doesn't show it." (NT 228.)

51. After speaking with Gerrero and Hayes, Healey had occasion to speak with Rasp, at which time Healey merely indicated there was someone very interested in Rasp's property. (NT 216-217.)

52. Rasp informed Healey that he knew it and that he was working on it as fast as normally. (NT 217.)

53. In mid to late May 1991, when Hayes told Burton what Gerrero said, Burton stated that she was "Hurt, because that was the first time anything like that had taken place; I was truly disgusted." (NT 26, 27.)

54. After her conversation with Hayes, Burton pursued a complaint and "[I] just let that go and proceeded to use my energy in looking for another home." (NT 27.)

55. Burton expressed that, upon forming the belief she was denied Rasp's unit because of her race, she experienced a "heart-felt sorrow," and that she was "more or less stunned because [she] couldn't believe something like that could take place in this day and time." (NT 39.)

56. Burton also expressed a disappointment in not being allowed to rent Rasp's property. (NT 40.)

57. Burton did not call Rasp again. (NT 27.)

58. Burton told Hayes that she was going to look for something else and thanked Hayes for his help. (NT 27-28, 79.)

59. Burton continued to look for a rental and did find an available unit in Midland, Pennsylvania, near the Ohio border, approximately 45 minutes further away from her employment than Rasp's property. (NT 54.)

60. Rent on the Midland property was $425 per month. (NT 46.)

61. After weighing the pros and cons of moving to Midland, on June 1, 1991, Burton entered a one-year lease on the Midland property, as Burton considered this her best option. (NT 55, 62, 66, 82.)

62. Burton did not tell the Joneses of the difficulty she had experienced. (NT 75.)

63. Burton knew she could have stayed in the Jones's apartment beyond June 1, 1991. (NT 45, 46.)

64. It would not have presented an inconvenience to the Joneses, had Burton remained after June 1, 1991. (NT 147.)

65. Burton testified that she did not want to delay the people who would be renting the Jones's apartment after Burton. (NT 27-28, 45, 63.)

66. From October 1991 through July 1992, Burton worked for Jenny Craig in Greentree. (NT 37.)

67. In July 1992, Burton went on maternity leave. (NT 34.)

68. After the birth of Burton's fourth child, Burton was unable to return to Jenny Craig because her hours had been dramatically changed. (NT 34.)

69. Prior to her maternity leave in July 1992, Burton would work until approximately 4 p.m. (NT 48.)

70. If she returned from maternity leave, Burton would have been expected to begin work at 8 a.m., work until midday, be off several hours, and be back in again at 5 p.m. (NT 48, 64.)

71. Burton chose not to return to Jenny Craig. (NT 49.)

72. After the expiration of the initial one-year lease on the Midland property, Burton did not look for another property but signed another one-year lease beginning June 1, 1992. (NT 55, 84.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and the 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 Respondents are persons within the meaning of the Pennsylvania Human Relations Act ("PHRA").

4. The property located at 497 Marietta Place was a housing accommodation within the meaning of the PHRA.

5. Burton established a *prima facie* case of race discrimination against Rasp by showing that:

(a) Burton is a member of a protected class;

(b) Burton inquired about renting the property located at 497 Marietta Place, which was available to rent and which Burton was qualified to rent;

(c) Rasp denied Burton the opportunity to rent the available property; and,

(d) the property remained available to rent and was ultimately rented by someone not in Burton's protected class.

6. Rasp articulated legitimate nondiscriminatory reasons why Burton was denied the opportunity to rent the property.

7. Burton successfully proved by a preponderance of the evidence that Rasp's articulated reasons were pretextual.

8. Burton has met her ultimate burden of persuasion that Rasp's actions violated Section 5(h)(a) of the PHRA.

9. To be an aider or abettor, one must share the interest or purpose of the principal actor.

10. Burton has not shown that Northwood aided or abetted Rasp's discriminatory refusal to rent.

11. Northwood's agent, Claire Healey, violated the PHRA by failing to conduct a proper investigation of allegations made against an owner of a property listed by Northwood.

12. Northwood Realty is liable for the actions of its agent, Healey.

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

OPINION

This case arises on a complaint filed by Charese Burton (hereinafter "Burton") against Norman Rasp (hereinafter "Rasp") and Northwood Realty Co. (hereinafter "Northwood"), on or about May 29, 1991, at Pennsylvania Human Relations Commission (hereinafter "PHRC") Docket No. H-5138. In her complaint, Burton alleged that Rasp had denied Burton an opportunity to rent property because of Burton's race, black, and that an agent of Northwood had been contacted and, despite knowing of Rasp's actions, was unwilling to speak to Rasp and expressed a lack of concern. Burton's complaint alleged these actions of Rasp and Northwood violate Section 5(h)(1) of the Pennsylvania Human Relations Act (hereinafter "PHRA"). On or about March 13, 1995, Burton filed an amended complaint which added a Section 5(e) aiding and abetting claim against Northwood.

The PHRC investigated Burton's allegations, and at the conclusion of the investigation informed Rasp and Northwood that probable cause existed to credit Burton's race-based allegations. Thereafter, the PHRC attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently, the PHRC notified the parties that it had approved a public hearing.

The public hearing was held on July 11, 1995 in Pittsburgh, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The PHRC's interest in the complaint was overseen by the PHRC Housing Division's Assistant Chief Counsel Nancy L. Gippert. Theresa L. Wasser, Esquire, appeared on behalf of Rasp, and Christopher M. Abernethy, Esquire, appeared for Northwood. The parties were

afforded an opportunity to submit post-hearing briefs. Both Attorney Gippert's post-hearing brief and Rasp's post-hearing brief were received on October 20, 1995. Northwood's post-hearing brief was received on October 23, 1995. On November 3, 1995, Attorney Gippert submitted a reply brief, and on November 7, 1995, Rasp also submitted a reply brief.

Since the allegations against Rasp and Northwood are substantially different, each claim will be analyzed separately.

R A S P

Section 5(h)(1) of the PHRA states in pertinent part:

> It shall be an unlawful discriminatory practice. . . [f]or any person to: [r]efuse to. . . lease. . . or otherwise deny or withhold any housing accommodation. . . from any person because of the race. . . of any. . . prospective. . . occupant or user of such housing accommodation. . .

Generally, Burton claims that Rasp treated her less favorably than other prospective occupants of a rental property because of her race, black. Such a claim is a classic disparate treatment allegation.

If this were an employment case, the system of shifting burdens of proof so frequently seen would clearly apply. However, this matter is an allegation found under the housing provision of the PHRA. To date, Pennsylvania courts have not been presented with a disparate treatment refusal to rent claim, thus, no clear standard has been articulated in Pennsylvania regarding a useful pattern of proof.

Since 1980, the Pennsylvania Supreme Court has recognized that there are particularly appropriate situations where the interpretation of the PHRA and federal civil rights legislation should be in harmony. Chmill v. City of Pittsburgh, 412 A.2d

860 (Pa. 1980). In Chmill, the Pennsylvania Supreme Court declared: "Indeed, as our prior cases have suggested, the Human Relations Act should be construed in light of principles of fair employment law which have emerged relative to the federal [statute]. . . " citing General Electric Corporation v. PHRC, 469 Pa. 292, 365 A.2d 649 (1976).

As recently as 1993, appellate courts in Pennsylvania have continued to recognize federal precedent as valuable in interpreting the PHRA. Kryeski v. Schott Glass Technologies, ____ Pa. Super. ____, 626 A.2d 595 (1993). Accordingly, we turn to federal precedent which has generally adopted the proof model articulated by McDonnell-Douglas v. Green, 411 U.S. 792 (1973), for use in federal housing cases under Title VIII. Use of federal guidance articulated in federal Fair Housing Act cases is particularly appropriate since the substantially equivalent housing provisions of the PHRA are the state analog to the Fair Housing Act's provisions. Accordingly, to prevail, Burton must prove that Rasp had a discriminatory intent or motive. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987).

Since direct evidence is very seldom available, a system of shifting burdens of proof is consistently applied which is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.8 (1981). Here, Burton would normally be required to carry the initial burden of establishing a *prima facie* case of discrimination. Allegheny Housing, *supra*; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The phrase "*prima facie* case" denotes the establishment of a legally mandatory, rebuttable presumption, which is inferred from

the evidence. Burdine, 450 U.S. at 254 n.7. Establishment of the *prima facie* case creates the presumption that the employer unlawfully discriminated against the employee. *Id.* at 254. The *prima facie* case serves to eliminate the most common nondiscriminatory reasons for the employer's actions. *Id.* It raises an inference of discrimination "only because we presumed these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. Furnco Construction Corp. v. Waters, 438 U.S. 467, 577 (1978).

The PHRC Housing Division's post-hearing brief submits that to make out a *prima facie* case, Burton would have to establish that:

(a) she is a member of a protected class;

(b) the property in question was available to rent and that Burton was qualified to rent it;

(c) Burton was denied the opportunity to rent the property; and

(d) the property remained available after Burton was denied an opportunity, and that the property was ultimately rented by someone not in Burton's protected class.

This articulation of the required elements of a *prima facie* case is similar to that stated in the case of HUD v. Ro, PH Fair Housing, Fair Lending Rptr. ¶ 25,106 (HUD ALJ 1995). In Ro, proof of a *prima facie* case would have been demonstrated by proof that:

(a) the Complainant is a member of a protected class;

(b) the Complainant inquired about renting an apartment;

(c) the owner refused to negotiate the rental of the apartment with the Complainant or otherwise make it available; and

(d) the owner simultaneously expressed a willingness to negotiate with and otherwise make the apartment available to someone not in the Complainant's protected class.

In Rasp's post-hearing brief, Rasp asserts that Burton fails to establish a *prima facie* case. Rasp concedes that Burton is a member of a protected class, and applied to rent an apartment from Rasp. However, Rasp argues that Burton did not establish that she was qualified to rent the property. Rasp further argues that Burton has not shown that Rasp refused to rent to Burton.

Regarding being qualified, the record reflects that together Burton and her husband had a combined annual income of nearly $65 thousand. Rent on the Rasp property was $575 per month. Common sense says that financially, Burton was more than qualified to rent Rasp's property. Additionally, Burton's prior landlord, with whom Rasp spoke, had only good things to say about Burton as a tenant.

Rasp suggests that Burton's application was incomplete, leaving Rasp unable to adequately check Burton's references. The issue of whether Rasp was unable to fully check Burton's references does not go to the *prima facie* question of qualification, but instead will be addressed regarding the issues of articulation of a legitimate nondiscriminatory reason for refusing a rental to Burton, and the question of pretext.

Thus, the record contains sufficient information to enable Burton to meet this facet of her *prima facie* showing: that she was qualified to rent the property.

Rasp also asserted that Burton has not shown that Rasp refused to rent to Burton. Rasp correctly observes that there came a point when Burton simply abandoned her pursuit of the rental of the Rasp property. In effect, Rasp submits

that Burton's reliance on third-hand information to decide to stop pursuing the Rasp property was unreasonable.

First, as illustrated by the case of Pinchback v. Armistead Homes Corp., 689 F.Supp. 541 (D.Md. 1988); aff'd. 907 F.2d 1447 (4th Cir. 1990), when a Complainant can establish that she would have applied but for learning of an owner's discrimination, and that the Complainant would have been discriminatorily rejected had she applied, she should be on equal footing with one who actually completes an application process. The theory dealt with in Pinchback is called the "futile gesture" theory.

This theory applies to an individual in a liability context where an individual can demonstrate they were deterred from continuing a process because of discrimination, and that had the individual continued the process, they would have been discriminatorily rejected. Here, Burton submits that she was made aware of information which caused Burton to believe Rasp did not want to rent to her because of her race.

Rasp submits that it was unreasonable of Burton to rely upon what she was told by one real estate agent, Jeffrey Hayes, about what another real estate agent, Jeanne Gerrero, told Hayes that Rasp had told her. Rasp suggests Gerrero's testimony regarding what was said to her was not at all clear. While Gerrero did testify that she thought Rasp's comments amounted to discrimination, Gerrero could not specifically recall the type of discrimination the conversation reflected. Gerrero indicated she was told to get her prospects to make a decision and asked if she had other prospects. Also, "Nationality or color or something" entered the discussion.

Rasp also submits that the evidence is not clear that Gerrero's caller was Rasp. However, the evidence is clear that Gerrero told Hayes that it was Rasp with whom she spoke.

Hayes testified that Gerrero had spoken to him and told him that Rasp told Gerrero that she should bring in some more prospects because Hayes was showing the property to black people. Hayes further testified that he conveyed this information to Burton.

The critical question which must be resolved regarding the futile gesture theory as applied here is whether under the circumstances perceived by Burton at the time, Burton reasonably regarded Hayes as a reliable information source, thereby justifying Burton's decision to give up on the Rasp property.

On this issue, Hayes was not only the agent working for Burton, but a long-standing friend. As an agent, it was reasonable for Burton to assume Hayes could be relied upon for accurate information. Furthermore, Burton's direct experiences with Rasp contributed to Burton's reasonable perception that Rasp was not interested in renting to her. The combination of this factor and what Hayes told her led Burton to reasonably conclude Rasp would discriminate against her if she continued to pursue the property.

The final element of Burton's *prima facie* showing is met by the introduction of evidence which showed that the property was ultimately rented by a white family. Accordingly, Burton has established a *prima facie* case.

Because Burton has established a *prima facie* case of race-based discrimination, the burden of production shifts to Rasp to articulate legitimate non-discriminatory reasons for not renting the property to Burton. In his brief, Rasp

argues that there are three legitimate nondiscriminatory reasons the property was not rented to Burton: (1) when Rasp attempted to check Burton's credit references, he was told that he had to pay a fee to get the information, and Rasp was not willing to pay a fee; (2) Rasp did not receive adequate information from Burton's prior landlords, Mr. and Mrs. Jones, because Mr. Jones did not return Rasp's telephone call; and (3) Rasp's wife was seriously ill, and this required Rasp's care and attention.

By articulating these reasons, Rasp has successfully presented legitimate nondiscriminatory reasons for failing to rent to Burton. In order for Burton to prevail she must establish by a preponderance of the evidence that Rasp's proffered reasons are a pretext for race-based discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-56 (1981). At this stage, Burton's burden of showing pretext merges with her ultimate burden of persuasion that she has been the victim of intentional race-based discrimination. *Id.* Burton may meet her burden of showing that Rasp's articulated reasons were not the true reasons Burton was denied the opportunity to rent the apartment either by demonstrating that a discriminatory motive was more likely the reason Burton was unable to rent the property than the legitimate reasons offered by Rasp, or by undermining Rasp's credibility with respect to the proffered reasons. In Burdine, the U.S. Supreme Court stated that pretext could be shown "either directly by persuading the court that a discriminatory reason more likely motivated the [actor] or indirectly by showing that the. . . proffered explanation is unworthy of credence." *Id.* at 256.

After a review of the total record, we are compelled to conclude that Rasp's proffered reasons are neither credible nor likely to be Rasp's actual motivation for

denying Burton the opportunity to rent the property. Succinctly put, this case is one in which Burton's initial evidence, combined with inconsistencies in Rasp's testimony, suffice to totally discredit Rasp's explanation.

First, Rasp submits that he had difficulty checking Burton's credit references. Burton credibly testified that when she presented Rasp with credit information, Rasp told Burton that he would contact Burton after he completed the check on her references. However, as Rasp testified, at no time did he either call Burton or Hayes to convey that he was having difficulty with Burton's reference check. Rasp indicated that had Burton provided substitute credit information, he would have checked the alternate credit source, but again, Rasp specifically indicated he did not communicate the problem he says he experienced to Burton. (NT 187.)

Rasp attempted to convey that he always waited for prospective tenants to call him, however, Rasp testified that he did return calls to FFV when they had a prospect. This testimony is particularly telling because Rasp indicated he did not have a telephone answering machine, yet he would return calls.

FFV agent Gerrero testified that she had shown the property to prospective tenants and had left her business card at the property. Gerrero further testified that Rasp subsequently called her. This is consistent with Rasp's indication that he would call FFV "whenever they had something that was available and they had a prospect and thought they'd be interested and made the arrangements for me to meet them at the property." (NT 168.)

Rasp specifically denied calling Gerrero, but Gerrero clearly had left her card at the property after showing the property to prospective tenants. It is only common

sense that Rasp would call Gerrero to inquire about prospective tenants. Accordingly, Rasp's testimony that he never called Gerrero is simply not credible.

Gerrero's highly credible version of the substance of her conversation with Rasp was sincere and persuasive and is accepted as true. Rasp not only pressed Gerrero to get a decision from her prospect, but also made the crucial inquiry about either the race, color, or national origin of her prospect.

With respect to Rasp having conversations with Hayes, at first Rasp's testimony consistently indicated with assurance that Rasp had only had one telephone conversation with Hayes. However, when presented with a copy of his July 30, 1991 answer to Burton's complaint (CE 2), Rasp had to agree that Hayes had called him at least twice. Rasp's testimony indicated that by the second call from Hayes, there was nothing Rasp regarded as requiring any more attention. (NT 182.) Hayes credibly testified that he made numerous calls to Rasp and that, on one occasion, Rasp told Hayes that Burton's credit references were fine.

Rasp testified that the only time he spoke with Burton was when he and Hayes and Burton had toured the property together. Burton credibly testified that Hayes instructed Burton to personally call Rasp, and that she did. Burton indicated that Rasp told her no decision had been made yet because of his wife's illness and because the property needed painting. Burton's offer to assist with the painting was rejected, and Burton was not told of any problems Rasp was having regarding a check on her credit information.

Rasp also offered testimony that there came a point when he just figured Burton was not interested. This too is not credible. On cross examination Rasp said that when he met Burton she did convey a sense of urgency and that he knew

she wanted to rent the property. When Healey testified, she indicated that during a telephone conversation with Rasp, he told her he knew Burton was very interested. This conversation with Healey occurred at a point Rasp would have us believe he concluded Burton was not interested. Rasp's suggestion that he just figured Burton was not interested is not even close to being credible.

Rasp's suggestion that he did not receive enough information from Burton's prior landlords because Mr. Jones did not return Rasp's telephone call is equally not credible. Ms. Jones, a witness without a personal stake in this case, testified credibly that when Rasp called, Ms. Jones told Rasp that she had handled most of the matter regarding Burton's tenancy. Ms. Jones testified that she responded to Rasp's question about cleanliness by telling Rasp Burton kept her place immaculate. Additionally, Jones answered Rasp's question about the behavior of Burton's children by telling Rasp they were very well disciplined, and answered Rasp's question about whether Burton paid her rent with a positive response. Ms. Jones also testified that Rasp had wanted to speak with Mr. Jones, who was not home when Rasp called. Ms. Jones then told Rasp that if he wanted to speak with Mr. Jones, Rasp should feel free to call back and gave Rasp a specific time Mr. Jones would be home. Ms. Jones specifically contradicted Rasp's testimony which suggested he asked that Mr. Jones call him. By far, Ms. Jones offered the more credible version of who was to call whom. Furthermore, Ms. Jones specifically indicated that as a landlord herself, she knew what things are important for a landlord to know about a prospective tenant and knew she had given Rasp sufficient pertinent information about Burton.

Finally, Rasp's testimony that he was not at all concerned that the property might sit and not be rented was specifically contradicted by the credible testimonies of both Burton and Ms. Jones. Burton testified that when she first met Rasp at the property, Rasp indicated he wanted to rent the property quickly and was looking to have the property rented by May 15, 1991. Ms. Jones indirectly corroborated Burton's observation when Ms. Jones testified that during her conversation with Rasp, Rasp indicated he was interested in getting the property rented because otherwise there could be break-ins. (NT 141.)

Applying common sense finds that a person with a sick spouse would more likely be inclined to expeditiously handle an outstanding matter so as to enable them to focus entirely on the spouse's needs.

In summary, an assessment of the evidence as a whole reveals that Rasp's articulated reasons for failing to rent to Burton are not credible, and it is much more likely that Rasp violated Burton's rights under the PHRA. Having determined that Burton has established Rasp's reasons are pretextual, consideration of a proper remedy is appropriate.

First, prior to the public hearing, the Respondents filed a Motion in Limine which sought to preclude any testimony concerning, or any award of, damages for alleged mental anguish and/or humiliation. Generally, the Respondent's motion pointed out that the events upon which Burton's complaint are based occurred in May 1991, a time prior to a December 20, 1991 amendment to the PHRA which added the right to seek damages for embarrassment and humiliation, and also provided for the potential imposition of civil penalties. By Interlocutory Order dated July 6, 1995, the Motion in Limine was denied. The Interlocutory Order generally

found that the amended damage provisions of the PHRA were retroactive and thus applicable to this matter.

Sections 9(f)(1) and (2) of the PHRA state in pertinent part:

> (f) (1) 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, reimbursement of certifiable travel expenses in matters involving the complaint, compensation for loss of work in matters involving the complaint. . . and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice, provided that in those cases alleging a violation of Section 5(d), (e), or (h) or 5.3, where the underlying complaint is a violation of Section 5(h) or 5.3, the Commission may award actual damages including damages caused by humiliation and embarrassment 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.
>
> (2) Such order may also assess a civil penalty against the respondent in a complaint of discrimination filed under Section 5(h) or 5.3 of this act:
>
> (i) in an amount not exceeding ten thousand dollars ($10,000) if the respondent has not been adjudged to have committed any prior discriminatory practice. . .

When discrimination has been proven, the PHRC has broad discretion in fashioning a remedy. Murphy, *et al.* v. PHRC, 506 Pa. 549, 486 A.2d 388 (1985). Here, Burton seeks a remedy which includes an array of expenses and generally an award for embarrassment and humiliation.

Before going over individual expenses claimed, a review of the factual setting is in order. In April 1991, Burton made a decision to look for larger living accommodations. At that time Burton worked in Sewickley, Pennsylvania, for Nutri

System. In the later part of April 1991, Burton told her landlord she intended to move and established the self-imposed deadline of June 1, 1991 within which to leave the Jones's apartment. In early May 1991, Burton became aware that the Rasp property was available to rent and toured the property. Approximately May 7, 1991, Burton re-toured the Rasp property with Rasp. Subsequently, on or about May 21, 1991, Burton was given information which caused her to infer that Rasp was improperly using race as a factor in determining eligibility to rent. Burton thereafter abandoned her desire to pursue renting the Rasp property.

Knowing that she could have remained in Jones's apartment beyond June 1, 1991, Burton chose instead to enter a year lease and move into a rental property in Midland, Pennsylvania, a considerably greater distance from her employment. Rent on the Midland property was $425 per month. Rent on the Rasp property would have been $575 per month.

In October 1991, Burton began working for Jenny Craig in Greentree, Pennsylvania, where she worked until July 1992, at which time Burton went on maternity leave. Earlier, in June 1992, Burton signed another year lease on the property in Midland.

In the fall of 1992, Burton chose not to return to Jenny Craig because the position being offered to Burton had a severe change of schedule. After the lease expired on the Midland property in June 1993, Burton and her husband began looking for a house to buy. Subsequently Burton and her husband separated.

Looking specifically at expenses claimed, Burton claims increased travel expenses between Midland and her jobs. Burton suggests that had Rasp not discriminated against her, she would not have to travel so far to work. Burton also claims

additional moving expenses and baby-sitting expenses. Rasp argues that Burton's added expenses are not attributable to Rasp but are instead a result of Burton's own choice to move to Midland.

First, we note that Burton paid $150 less per month by moving to Midland than she would have paid renting the Rasp property. This factor, combined with the facts that prior to moving to Midland Burton weighed the pros and cons of such a move and considered that action her best option, and that Burton did not have to move by June 1, 1991, leads to the conclusion that the $150 difference in rent more than covers the additional expenses which might be said to be attributable to Rasp.

Burton also claims that Rasp's actions are responsible for her losing her job at Jenny Craig in the fall of 1992. Burton claims lost wages and various medical expenses incurred. However, these expenses are also not recoverable because there is an insufficient causal connection between Rasp's action and what happened over a year later with respect to an action by an employer changing Burton's hours.

We next turn to an area where Burton may be compensated. This is in the area of embarrassment and humiliation. In this area, precise proof is not required to support a reasonable award. See, Block v. R.H. Macy & Co., Inc., 712 F.2d 1241 (8th Cir. 1983). Such damages may be inferred from the circumstances of the discrimination, as well as established by testimony. See, Seaton v. Sky Realty Co., Inc., 491 F.2d 634 (7th Cir. 1974). Additionally, emotional distress damages can be no more than what is within reason under the particular circumstances. See, Douglas v. Metro Rental Services, 827 F.2d 252 (7th Cir. 1987).

The particular circumstances here are that Rasp surreptitiously attempted to avoid dealing with Burton without giving Burton a definite rejection. Instead, Burton is told by Hayes that Rasp had asked Gerrero a question about the race or national origin of another prospective tenant. Hearing this, Burton simply abandoned her pursuit of renting the Rasp property. In this instance, Rasp's actions were not face-to-face, and not occasioned by threats or associated violence.

Burton testified that upon forming the belief Rasp was using race as a factor, she experienced a "heart-felt sorrow" and that she was "more or less stunned because [she] couldn't believe something like that could take place in this date and time." Burton also expressed disappointment in not being allowed to rent Rasp's property.

PHRC investigator Lyle Woods testified that Burton had previously assessed the value of her embarrassment at one thousand five hundred dollars ($1,500). (NT 157.) In the PHRC Housing Division's post-hearing brief this figure dramatically increased to twenty thousand dollars ($20,000). Under the circumstances present here, Rasp's actions, while embarrassing, did not have the serious consequences associated with the enormous damage award sought by Burton. Here, a reasonable award for embarrassment is two thousand five hundred dollars ($2,500).

One final remedial measure against Rasp is appropriate to consider. Under the PHRA, a civil penalty may be assessed. Factors to be considered on this question were clearly enunciated in HUD v. Weber, PH Fair Housing, Fair Lending Rptr, ¶ 25,041 (HUD ALJ, 1993). In Weber, the following factors are to be considered in determining the amount of a civil penalty:

1. the nature of the violation;

2. the degree of culpability;

3. the Respondent's financial resources;

4. the goal of deterrence; and

5. other matters, as justice may require.

In this case, Rasp demonstrated no remorse, but need not be individually deterred from possible future actions. Rasp no longer rents properties. Nevertheless, a civil penalty is a strong message to other self-proclaimed neighborhood segregationists that all neighborhoods in every city are open to members of all protected classes, and that interference with this basic right will be penalized. A civil penalty of two thousand five hundred dollars ($2,500) will be imposed here.

NORTHWOOD

Turning to Burton's claim against Northwood, Burton generally asserts that Northwood had an obligation to further investigate the information Hayes and Gerrero conveyed to Healey. Burton also claims that by maintaining Rasp's listing, Northwood aided and abetted Rasp's discrimination.

Section 5(e) of the PHRA states in pertinent part:

> It shall be an unlawful discriminatory practice. . . [f]or any person. . . to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder, or to attempt, directly or indirectly, to commit any act declared by this section to be an unlawful discriminatory practice.

Here, Claire Healey, an agent of Northwood, was, in effect, told by two FFV agents that Rasp was looking for non-black prospective tenants for a property which

had been listed by Northwood. Healey had a fifteen-year professional relationship with Rasp, during which time not a single black prospective tenant had ever been presented to Rasp. Healey's reaction to Hayes and Gerrero was to generally discuss the issue with her manager and colleagues and to convey her impression that Rasp would not do such a thing. Healey neither brought the matter to her broker's attention nor raised the question to Rasp in a subsequent conversation with him.

Northwood argues that Healey lacked the requisite knowledge of a discriminatory practice to be found liable for aiding and abetting. All Healey had were two allegations which, alone, were insufficient cause to discontinue a listing.

In the case of NOW v. Buffalo Courier-Express, 5 FEP 95 (NY Supreme Ct. 1972), it was determined that an aider and abettor must share the intent or purpose of the actor. An aider or abettor does not succeed to responsibility merely on the basis that, in retrospect, it could be said that, in an objective sense, such party might be considered helpful or of use to the actual perpetrator. To be an aider or abettor, one must share the interest or purpose of the principal actor. There can be no partnership in an act where there is no community of purpose.

Here, had Northwood directly and purposefully assisted or facilitated Rasp's intent to discriminate, an aiding or abetting charge might apply. However, Northwood is correct that it would be inappropriate to remove a listing after receipt of a mere allegation.

However, this does not end the inquiry. Instead, we look to whether Northwood violated the PHRA by the degree of its reaction to the allegations of Hayes and Gerrero. On this account, Northwood failed to conduct a proper investigation. This failure violates Section 5(h)(8)(i) of the PHRA.

Section 5(h)(8)(i) states in pertinent part:

> It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race. . .

Here, Northwood's failure to even question Rasp in the face of allegations of discriminatory conduct from two FFV agents amounts to a facilitation of making a transaction unavailable because of race.

Because Healey was employed by Northwood at the time she did not investigate the allegations of Hayes and Gerrero, Northwood is vicariously liable for Healey's inaction. See, HUD v. Banai, PH Fair Housing, Fair Lending Rptr. ¶ 25,095 (HUD ALJ 1995).

Considering the five factors previously indicated, a small civil penalty will demonstrate to Northwood as well as other realtors that when faced with allegations of unlawful discrimination by an owner of a property listed with that agency, a full investigation must be made. Realtors are encouraged to accept the responsibility to do what they can to prevent owners from committing acts of discrimination. Northwood shall pay a civil penalty of two hundred fifty dollars ($250).

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

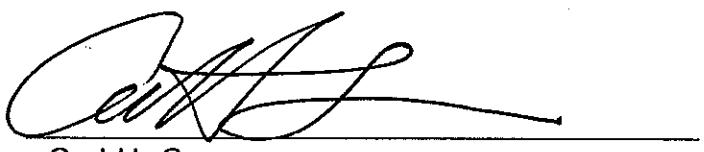
PENNSYLVANIA HUMAN RELATIONS COMMISSION

CHARESE BURTON, **Complainant**	:	
v.	:	**DOCKET NO. H-5138**
NORMAN RASP, AND NORTHWOOD REALTY, **Respondents**	:	

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Respondent Rasp denied Burton the opportunity to rent a property because of Burton's race, black. Accordingly, Burton has proven discrimination against Rasp in violation of §5(h)(1) of the PHRA. The Permanent Hearing Examiner also finds that Burton has proven that Northwood failed to properly investigate allegations that an owner of a property listed by Northwood was using race as a factor in a rental decision, in violation of §5(h)(8)(i) of the PHRA.

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.



Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

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CHARESE BURTON, **Complainant**	:	
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FINAL ORDER

AND NOW, this 26th day of March, 1996, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission ("PHRC"), pursuant to Section 9 of the Pennsylvania Human Relations Act ("PHRA"), 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 finding in this matter and incorporates the 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 Respondent Rasp shall pay to Complainant Burton, within thirty days of the effective date of this order, the lump sum of $2,500 to compensate Burton for the humiliation and embarrassment he caused her.

2. That, within thirty days of the effective date of this order, Respondent Rasp shall deliver to PHRC Housing Division Attorney Nancy L. Gippert a check payable to the Commonwealth of Pennsylvania in the amount of $2,500, which amount represents an assessment of a civil penalty pursuant to Section 9(f)(2)(i) of the PHRA.

3. That Respondent Northwood shall cease and desist from failing to properly investigate allegations of discrimination by owners who have property listed through Northwood.

4. That, within thirty days of the effective date of this order, Respondent Northwood shall deliver to PHRC Housing Division Attorney Nancy L. Gippert a check payable to the Commonwealth of Pennsylvania in the amount of $250, which amount represents a civil penalty pursuant to §9(f)(2)(i) of the PHRA.

5. That, within thirty days of the effective date of this order, Respondents Rasp and Northwood shall both report to the PHRC on the manner of their compliance with the terms of this order by letter addressed to Nancy L. Gippert, Assistant Chief Counsel, PHRC Housing Division, PO Box 3145, Harrisburg, PA 17105.

Pennsylvania Human Relations Commission

By: _____
Robert Johnson Smith, Chairperson

Attest:

_____
Gregory J. Celia Jr., Secretary