COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

CHARLES FLENORY and TALLULAH FLENORY, Complainants
v.
KAREN STEPHENS and MIKE STEPHENS, Respondents

DOCKET NO. H5293

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. Complainants Charles Flenory and Tallulah Flenory are individuals whose race is black.

2. During all times relevant to this matter Respondent Mike Stephens, whose race is white, owned an apartment building located at 330 Camp Avenue, Arnold, Pennsylvania. (NT 36-37, 313, 342.)

3. Respondent Karen Stephens, whose race is white, was Mike Stephens' wife at all times relevant to this matter and managed Mike Stephens' apartment building at 330 Camp Avenue. (NT 391.)

4. There are two apartments at the 330 Camp Avenue building: a first floor and a second floor apartment. (NT 39.)

5. Respondents Mike Stephens and Karen Stephens owned five properties in which there were 24 apartments. (NT 309, 441.)

6. Over the past ten to fifteen years Respondents have rented their apartments to at least a dozen African Americans. (NT 15, 20, 274, 371, 377, 393, 410, 412, 414, and 428.)

***** 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	Complainants' Exhibit
NT	Notes of Testimony
RE	Respondents' Exhibit

7. The Respondents have also had long-term tenants with children. (NT 373, 378, 412, 429.)

8. Prior to December 1991, the Complainants lived in an apartment at 562 Third Avenue, New Kensington, Pennsylvania. (NT 41-43, 195.)

9. Prior to December 1990, the Complainants lived in the apartment located above the residence of their daughter, Carmen Flenory Pack (hereinafter "Pack"). (NT 41.)

10. The apartment building at 562 Third Avenue had two apartments which shared utilities. (NT 42, 43.)

11. The utilities at 562 Third Avenue were in Pack's name. (NT 44.)

12. Approximately December 1990, Pack moved from 562 Third Avenue to 1312 Kenneth Avenue. (NT 44, 46.)

13. Approximately a year later Pack and her mother, Tallulah Flenory, went to Mike Stephens' property at 330 Camp Avenue to view the vacant first-floor apartment. (NT 29, 40, 391-392.)

14. Tallulah Flenory met with Karen Stephens, who was very nice to Tallulah Flenory. (NT 29, 77, 391-392.)

15. Charles and Tallulah Flenory signed a one-year lease which began on December 1, 1991, for the first-floor apartment at 330 Camp Avenue. (NT 30, 119; CE 1.)

16. While only Charles and Tallulah were listed on the lease, Karen Stephens understood and agreed that the Flenory's twenty-one year old son, Cary Flenory, would live there with the Flenorys. (NT 118, 185, 388; CE 1.)

17. Karen Stephens did not list Cary Flenory on the lease because he was with his parents. (NT 427-428.)

18. Karen Stephens lent Tallulah Flenory a stove. (NT 35, 36.)

19. The rent for the first-floor apartment was $310 per month. (NT 34, 341.)

20. The security deposit was also $310. (NT 34, 341.)

21. The Complainants were responsible for the electric service. (NT 35.)

22. The electric account was established in Pack's name. (NT 40, 194, 249, 259.)

23. The Complainants moved into the first-floor apartment at 330 Camp Avenue in December 1991. (NT 31.)

24. Pack was a licensed practical nurse and worked swing shifts at Presbyterian Nursing Home. (NT 50, 247.)

25. Pack had three children: Bryce, age thirteen; Courtney, age six; and Bradley, age two. (NT 50, 52, 249.)

26. Two to three times a week, the Flenorys babysat Pack's three children. (NT 53, 55, 143, 187, 247.)

27. When the Flenorys moved to 330 Camp Avenue the upstairs tenant was a woman and her young daughter. (NT 30, 37, 405-406.)

28. Shortly after the Flenorys moved in, the upstairs tenant moved. (NT 36.)

29. Tallulah Flenory had indicated to Karen Stephens that the first floor apartment made her feel "closed in." (NT 297, 388.)

30. When the upstairs apartment became vacant, Tallulah Flenory asked Karen Stephens if the Flenorys could rent the upstairs, instead of the first floor. (NT 30, 38, 137, 184, 296-297, 388.)

31. Karen Stephens gave the Flenorys permission to move upstairs. (NT 48, 138.)

32. At the time, Karen Stephens considered the Flenorys to be fine tenants. (NT 297, 388.)

33. No new lease was signed, instead it was verbally agreed that the lease applicable to the first-floor apartment would continue. (NT 74, 193-194, 388.)

34. Both the monthly rent and security deposit for the second-floor apartment were $340. (NT 341, 388.)

35. Approximately the second week of January 1992, the Flenorys began moving upstairs. (NT 317.)

36. Karen Stephens did not give the Flenorys a deadline regarding the move. (NT 389.)

37. The move upstairs occurred gradually over approximately a two-week period. (NT 390.)

38. On January 22, 1992, Pack called the electric company and had the electric account in her name transferred upstairs. (NT 259, 261.)

39. Normally neither Karen Stephens nor Mike Stephens came around the 330 Camp Avenue property except to show a vacant apartment. (NT 70.)

40. When the Flenorys moved upstairs, some remodeling of the first floor began. (NT 48.)

41. Karen Stephens' brother, Gary Berkoben (hereinafter "Berkoben"), and his helper, Chris Davnick, worked in the first-floor apartment for approximately three and one-half weeks, on Monday through Friday, 8:00 a.m. to 4:00 p.m. (NT 49, 280, 320, 349.)

42. Berkoben and his helper took out a wall and made a two-bedroom apartment into a one-bedroom. (NT 348-349.)

43. Over a ten-day period Mike Stephens worked in the first-floor apartment approximately four to five nights: approximately 8:00 p.m. until midnight. (NT 49.)

44. Mike Stephens' task generally involved modification of electrical wiring, changing light switches, and installing lights. (NT 281, 304.)

45. Although Mike Stephens generally attempted to drill and hammer when he first arrived, he did, on one occasion, use a hammer to install a small stud at approximately 11:00 p.m. (NT 282, 308, 320.)

46. At the time Mike Stephens used his hammer at a later hour, there was significant noise upstairs. (NT 308, 320.)

47. Mike Stephens described the noise from upstairs as like a circus the whole time he was there, and continuing each evening until he left. (NT 283, 288, 317, 319.)

48. Mike Stephens described the noise from upstairs as:

a. running back and forth over the floor;
b. wheels being driven back and forth across the linoleum flooring;
c. doors slamming;
d. TV blaring; and
e. screaming children up and down the stairs. (NT 283, 284, 288, 300, 322, 434.)

49. Mike Stephens also described the amount of noise as "mind boggling." (NT 300.)

50. Charles Flenory came in one evening while Mike Stephens was working, poked his head into the first-floor apartment, and generally asked "how is it going?" (NT 286.)

51. Mike Stephens told Charles Flenory that it was pretty loud upstairs and that he needed to get it quieted down a bit. (NT 286, 312, 394.)

52. Charles Flenory informed Mike Stephens that he would do something about the noise. (NT 286, 313.)

53. The situation did not change. (NT 287.)

54. Berkoben also described hearing significant noise levels, on and off during the day, which caused him to glance at his helper a few times and exchange a look which said "what is going on upstairs?" (NT 352, 363.)

55. Berkoben described the level of noise as being intolerable if he had lived there. (NT 352.)

56. On several occasions Berkoben told Mike Stephens that the noise level was extreme. (NT 286, 289, 319.)

57. Both Mike Stephens and Berkoben told Karen Stephens that the noise coming from the second floor was excessive. (NT 314, 393, 394.)

58. Berkoben also discussed with Mike Stephens the number of people which appeared to be in the second-floor apartment. (NT 286, 289, 319.)

59. Charles Flenory agreed that if an observer looked at the circumstances of Pack and her children's coming and going, it was reasonable to assume that more than the Flenorys lived there. (NT 233.)

60. Karen Stephens called the power company to check whose name the second-floor apartment electric account was in, and was informed the account was in Pack's name. (NT 289, 395, 423.)

61. Karen Stephens formed the belief that Pack and her three children were living with the Flenorys. (NT 397, 422, 435.)

62. This factor, in combination with the reports of excessive noise, prompted Karen Stephens to go to the Flenory's apartment, at which time Karen Stephens verbally advised Tallulah Flenory that she would have to move. (NT 60, 170, 251, 440.)

63. Karen Stephens informed Tallulah Flenory that there had been too much noise. (NT 60, 170, 251, 394-395.)

64. On February 3, 1992, Karen Stephens filed a Landlord and Tenant Complaint in the office of District Justice John Smittle. (NT 398; CE 2.)

65. In the complaint Karen Stephens alleged that the Flenorys breached their lease by:

> (a) Tenants have caused, allowed or permitted other residents on the premises in excess of original agreement; and
>
> (b) Tenants have allowed or caused continuing excessive noise and disturbances beyond reasonableness as prohibited in lease. (NT 153, 154; CE 2.)

66. The Landlord and Tenant Complaint was served upon the Flenorys. (NT 63.)

67. The district justice scheduled a hearing for 10:00 a.m., February 20, 1992. (CE 2.)

68. Just days prior to the scheduled hearing Tallulah Flenory called Karen Stephens and told her the Flenorys would be moving. (NT 290, 398.)

69. Mike Stephens decided not to attend the hearing, as he understood the Flenorys would be moving. (NT 67, 290, 399.)

70. Karen Stephens appeared at the designated time. (NT 398.)

71. District Justice Smittle called the Flenorys on the hearing date, apparently reminding them to appear. (NT 404.)

72. When Karen Stephens attempted to offer testimony regarding the noise problem, District Justice Smittle ruled her testimony as hearsay. (NT 67, 212.)

73. The Flenorys contested the allegations because they wanted to remain in the apartment. (NT 120.)

74. District Justice Smittle issued a finding in favor of the Flenorys. (NT 198; CE 3.)

75. On April 10, 1992, two young men moved into the first-floor apartment at 330 Camp Avenue. (NT 68.)

76. Tallulah Flenory described these tenants as beer drinkers who parked a motorcycle out front, had sheets over their windows, and played music. (NT 68.)

77. Although personally disturbed and frightened by her new neighbors, Tallulah Flenory did not convey her concerns to Karen Stephens. (NT 70, 153, 203, 316.)

78. Instead, Tallulah Flenory told Charles Flenory that he had to get her out of there. (NT 69.)

79. At some point in late-April 1992, the Flenorys vacated the second-floor apartment. (NT 75, 292, 317.)

80. The Flenorys' April rent check had been returned as "Not Sufficient Funds." (NT 160, 161, 311.)

81. Tallulah Flenory understood that she left the apartment prior to the lease term ending. (NT 119.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "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. Charles and Tallulah Flenory are individuals within the meaning of the Pennsylvania Human Relations Act (hereinafter "PHRA").

4. Mike Stephens' unit is a housing accommodation within the meaning of the PHRA.

5. The Flenorys failed to present direct evidence of Sections 5(h)(1), (3), and (5) violations.

6. Respondents articulated legitimate, non-discriminatory reasons for asking the Flenorys to vacate their apartment.

7. The Flenorys failed to establish by a preponderance of the evidence that the Respondents' articulated reasons were pretextual.

8. Karen Stephens did not violate Section 5(h)(5) when she informed Tallulah Flenory that she had to move because of too much noise.

OPINION

This case arises on a complaint filed by Charles and Tallulah Flenory against Karen and Mike Stephens at Pennsylvania Human Relations Commission (hereinafter "PHRC") Docket No. H-5293.

In their initial complaint the Flenorys alleged that on or about January 27, 1992, the Stephens' ordered them to vacate an apartment located at 330 Camp Avenue, Arnold, Pennsylvania, because of familial status. The Flenorys' complaint alleged the Stephens' action violates Sections 5(h)(1), (3), and (5) of the Pennsylvania Human Relations Act (hereinafter "PHRA"). Subsequently the Flenorys amended their complaint to add the allegation that they were ordered to vacate their apartment because of their race, African American.

The PHRC investigated the Flenorys' allegations and, at the conclusion of the investigation, informed the Stephens' that probable cause existed to credit the Flenorys' 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 September 15, 1998, in Greensburg, Pennsylvania, before PHRC Permanent Hearing Examiner Carl H. Summerson. The Commission's interest in the complaint was overseen by the PHRC Housing Division's Assistant Chief Counsel Kathryn Waters-Perez. William C. Kaczynski, Esquire, appeared on behalf of the Stephens'. The parties were afforded an opportunity to submit post-hearing briefs. The post-hearing brief on behalf of the complaint was received on February 8, 1999. The Respondents' post-hearing brief was received on February 10, 1999.

At issue in this race- and familial status-based case are the following provisions of the PHRA that make it an unlawful discriminatory practice for any person to:

> 1. Refuse to. . . lease. . . or otherwise deny or withhold any housing. . . from any person because of the. . . race. . . familial status . . . of any person. . . (PHRA, Section 5(h)(1));
>
> 2. Discriminate against any person in the terms or conditions of . . . leasing any housing accommodation. . . because of the. . . race. . . familial status. . . of any person. . . (PHRA, Section 5(h)(3)); and
>
> 3. . . . publish or circulate any statement. . . relating to the. . . lease . . . of any housing accommodation. . . which indicates any preference, limi-tation, specification, or discrimination based upon. . . race. . . familial status . . . (PHRA Section 5(h)(5)).

During his opening statement the attorney for the Respondents made an oral motion to dismiss the race-based allegation. The Respondents assert that the Complainants' race-based allegation was not timely filed.

A ruling on the motion was reserved to afford the Complainants an opportunity to articulate any reasons why the one hundred and eighty day filing period might be equitably tolled. In fact, counsel on behalf of the PHRC's interest in the complaint was directed, pursuant to 1 Pa. Code §35.128, to explore equitable issues regarding the filing of the race-based allegation, and to submit some evidence regarding the precise filing date of the amended complaint. At the public hearing, counsel on behalf of the complaint did not solicit evidence on either issue.

The Complainants' amended complaint was verified on August 29, 1992, and therefore was either filed with the PHRC on that date or thereafter. To be timely, Section 9(h) of the PHRA requires that "[A]ny complaint filed. . . must be so filed within one hundred eighty days after the alleged act of discrimination. . ."

Here, there is no dispute that the Complainants filed their alleged familial status-based allegation timely. The alleged act of discrimination occurred only one day before the Complainants' initial complaint was filed: The alleged act occurred on January 27, 1992 and the Complainants' initial complaint was filed on January 28, 1992.

Since the amended complaint alleging a race-based claim was not filed until on or after August 29, 1992, the Respondents moved to dismiss this allegation. August 29, 1992 is two hundred and fifteen days after January 27, 1992. There appears to be no dispute regarding this calculation.

At the public hearing, in response to the Respondents' motion, PHRC counsel on behalf of the complaint generally argued that the amended complaint should be allowed because the race-based allegation "came out of the same incident and concerns the same property, the same dates, the same times and so, therefore, they should be incorporated and there should be no problem with the fact that the complaint was amended to cure defects which were material." (NT 16-17.)

The parties were instructed that they would have an opportunity to fully address this issue in their post-hearing briefs. However, the brief on behalf of the complaint specifically declared that it would neither brief the timeliness issue nor, for that matter, the substantive race-based allegation (p.11 brief on behalf of the complaint). Instead, arguments made at the public hearing were simply incorporated.

PHRC regulation at 16 Pa. Code §§42.35(a) and (b) addresses the issue of complaint amendments. This regulation states in pertinent part:

> (a) The complaint. . . may be amended at any time prior to approval of a hearing on the merits. . .
>
> (b) The complaint may be amended to cure technical defects or omissions, to clarify or amplify allegations made therein, or to add material allegations which are related to or grow out of the subject matter of the original complaint, and these amendments shall relate back to the original filing date of the complaint.

Subsection (b) articulates three instances where an amendment is permitted: (1) cure technical defects; (2) amplification or clarification of an allegation; and (3) adding an allegation which is related to or grows out of the subject of the original complaint. Quite clearly, the Complainants' August 29, 1992 amendment neither attempts to cure a technical defect nor amplify or clarify the original familial status-based claim. Instead, the amendment adds a race-based allegation.

The question here is whether the race-based allegation is either related to or grows out of the familial-status allegation. Since this precise issue has not arisen in the Pennsylvania courts, we logically turn to federal precedent in the civil rights arena.

As this opinion proceeds, it will be readily apparent that many federal and state fair employment concepts are imported into this state fair housing matter. Although federal fair employment and fair housing statutes create and protect distinct rights, their similarities have traditionally facilitated the development of common or parallel methods of proof when appropriate. *Pinchback v. Armistead Homes Corp. et al*, 907 F.2d 1447 (4th Cir. 1990).

It will also be readily apparent that federal precedent, in both the fair employment and fair housing areas, is useful. 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 employ-ment 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. *Krveski v. Schott Glass Technologies*, ___Pa. Super.___, 626 A.2d 595 (1993).

In the case of *Drummer v. DCI Contracting*, 61 FEP 1162 (SD NY 1991), a federal court was presented with a question similar to the issue presented here. In *Drummer*, a complainant had timely filed a sex-based claim. Subsequently, the complainant in *Drummer* filed an amendment adding a religion-based claim. This amendment was outside the filing period.

On the question of relation back, the *Drummer* court stated, "[R]elation back is not appropriate where the facts alleged in the timely EEOC charge refer exclusively to one type of discrimination wholly distinct from that alleged in the untimely amendment", *citing Rizzo v. WGN Continental Broadcasting Co.*, 601 F.Supp. 132, 135, 37 FEP 586 (ND Ill. 1985).

Looking at the original complaint in this matter, the allegations of paragraph 3 are specifically as follows:

> The complainant(s) allege(s) that on or about or until about January 27, 1992, the respondent(s) ordered the Complainant's [sic] to vacate their 3-bedroom apartment located at 330 Camp Avenue, Arnold, Pa., based on the pretext that their grandchildren make too much noise:
>
> 1. The Complainants are the grandparents of three children who are aged 13, 6, and 2.

2. The grandchildren visit the Complainants from time to time with their mother's permission. The children's mother is the Complainants' daughter.

3. The children spent the weekend of January 24 and 25, 1992 with the Complainants.

4. On the night of January 24, the Respondent, Mike Stephens, was working in the downstairs apartment remodeling.

5. On January 27, 1992, the Respondent Karen Stephens told the Complainants that they would have to vacate the apartment within two weeks.

6. When Complainant, Tallulah Flenory, asked why the Respondent, Karen Stephen, [sic] that it was because of the presence of their grandchildren. She further stated that the children made noise and that they would not be able to rent downstairs if children lived upstairs.

7. The Complainants deny that their grandchildren make excessive noise when they visit.

THEREFORE, the Complainants allege that the Respondents have ordered them to vacate because of familial status, visits by minor grandchildren.

All of the alleged acts relate solely to familial status. The Flenorys' original complaint contained absolutely no intimation of race discrimination. Each fact alleged relates directly and exclusively to a familial status claim and in no way alerts either the PHRC or the Respondents to a race-based claim.

When the untimely amendment was filed, the Complainants added the following phrase to the opening portion of paragraph 3 of their complaint: *"and due to our race, African American."* Additionally, a new number 2 was added which asserts, *"The Complainants and their grandchildren are African Americans."* Finally, the amended complaint adds a paragraph 3(B) which alleges as follows:

B.1 The Complainants believe the Respondents wanted them out due to the difficulty they had renting the second floor with an African American family living on the first floor. Numerous white families looked at the second floor apartment but decided not to rent.

2. The Respondent had never rented to African Americans prior to the Complainants.

THEREFORE, the Complainants allege that the Respondents have ordered them to vacate because of familial status, visits by minor grand-children and their race, African American.

Under these circumstances, the Flenorys' amended complaint not only added a new charge basis, they also added facts which are independent of the allegations in their original complaint. Accordingly, the amended complaint does not properly relate back to the original complaint and is therefore untimely.

Even assuming *arguendo* that the Flenorys' amended race-based claim is not time-barred, their evidence on the race aspect of their claim amounts to nothing more than their conclusive "feelings" that race was the motivation for being told to vacate their apartment. When Tallulah Flenory

was asked if she had evidence regarding her race-based claim, she stated that it was "[s]omething that I felt." (NT 150.) Similarly, Charles Flenory's asserted basis for the race-based allegation was essentially his "gut feeling." (NT 191.) Without substantive evidence, one's subjective "feelings" are insufficient proof of a discriminatory motive.

Even more problematic for the Flenorys is their amended complaint allegation at paragraph 3(B)(2) which asserts that the Respondents never rented to African Americans prior to the Complainants. On this point, the tenants which had immediately preceded the Flenorys in the first floor apartment had been a mixed couple. (NT 168.) Further, unrebutted evidence revealed that the Respondents had numerous long-term African American tenants over the years. Accordingly, the Flenorys could not prove their race claim even if it had been timely filed.

We thus turn to the Flenorys' familial status claim. First, the Respondents' post-hearing brief attempts once again to raise the issue of the Flenorys' standing to bring a familial status claim. This issue had been raised in a pre-hearing motion and rejected by Interlocutory Order dated August 12, 1998. The reasoning of that Interlocutory Order is hereby incorporated, thereby again rejecting the Respondents' standing argument.

Generally, two analytical approaches can govern a disparate treatment allegation. See, *Holmes v. Bevilacgwa*, 794 F.2d 142 (4th Cir. 1986). The first model is most often used and involves cases in which complainants rely on a judicially created inference to support their claim of discrimination. Normally, under this model a complainant must first make a *prima facie* showing. Once established, a respondent is afforded an opportunity to articulate a legitimate, non-discriminatory reason for its action. If the respondent meets this production burden, in order to prevail a complainant must show that the entire body of evidence produced demonstrates by a preponderance of the evidence that the complainant was the victim of intentional discrimination. See, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Allegheny Housing Rehabilitation Corp. v. PHRC*, 516 Pa. 124, 532 A.2d 315 (1987); and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The second model involves cases in which complainants argue there is direct evidence of discrimination. See, *Allison v. PHRC*, 716 A.2d 689 (Pa.Cmwlth.Ct. 1998); *Blalock v. Metal Traders, Inc.*, 775 F.2d 703, 39 FEP 140 (6th Cir. 1985); *Lujan v. Franklin County Board of Education*, 766 F.2d 917, 929 n.16, 38 FEP 9 (6th Cir. 1985); and *Miles v. MNC Corp*, 750 F.2d 867, 875, 37 FEP 8 (11th Cir. 1985). These cases progress without the aid of rebuttable presumptions because a complainant's *prima facie* case consists of evidence of overt discrimination. The burden of persuasion (not merely production) then shifts to the respondent to prove either that (1) the respondent had legitimate reasons for its action; or (2) its overt discrimination can be otherwise justified. See, generally, *Smallwood v. United Airlines*, 728 F.2d 614, 34 FEP 217 (4th Cir. 1984). When the direct evidence model is used, the *prima facie* route becomes unnecessary. See, *Cline v. Roadway Express*, 29 FEP 1365 (4th Cir. 1982).

The brief on behalf of the complaint generally argues that the proper legal framework to be applied to the facts of this case is the direct evidence model. In the alternative, the brief on behalf of the complaint asserts that a *prima facie* case has been shown.

On the issue of direct evidence, the brief on behalf of the complaint points to the testimony of Karen Stephens and Tallulah Flenory and submits that direct evidence can be found. The purported

direct evidence by Karen Stephens was her testimony given in response to the question, "Did you have any belief or information regarding whether the children were living there at the time?" Karen Stephens responded, "Well, I felt that Carmen — well, with how many times the children had been there and the noise that had been heard, yes, I believe that they were living there and also that their mother was living there."

A portion of Tallulah Flenory's testimony was also offered as direct evidence. The brief on behalf of the complaint does point to what could, in fact, constitute direct evidence of a violation of Sections 5(h)(3) and (5). However, the brief submits only a portion of Tallulah Flenory's answer to a question about what Karen Stephens said when she came to her on January 27, 1992 to tell her she had to move. The following is Tallulah Flenory's full answer to the question:

> *Yes. I was hanging drapes in the afternoon and a knock came on the door and it was Karen. She said, hi. I have some good news for you and some bad news. The bad news is you have to move. The good news is, I'll give you an excellent reference. And I said, why, you know, what did I do? She said, too much noise for the people that was moved back — moved in downstairs and I'll have a hard time renting it. And I said, well, why, Karen, and she said, Mike said that he doesn't want any children upstairs because there would be too much noise for anybody to live under. And I said, well, where am I going to go, I just moved up here? And she said, well, I'll give you a very good recommendation. And I said, okay.*

Frankly, Karen Stephens' extracted testimony is simply not direct evidence of a discriminatory motive. However, the alleged statement "Mike said he doesn't want any children upstairs because there would be too much noise for anybody to live under" could amount to direct evidence.

As an initial matter it must be specifically stated whether or not the direct evidence is believed. *Blalock v. Metal Trades, Inc.*, 39 FEP 140 (6th Cir. 1985), *citing Thompkins v. Morris Brown College*, 752 F.2d 558, 37 FEP 24 (11th Cir. 1985). Without a doubt, the evidence sharply conflicts. Under all of the circumstances of this case the Respondents' testimony is found to more accurately reflect the substance of Karen Stephens' conversation with Tallulah Flenory on January 27, 1992.

On numerous occasions Tallulah Flenory's testimony contradicted itself on relevant issues, was neither clear nor positive with respect to certain details, was evasive at times and certainly vague and equivocal. Additionally, it has already been shown that the Flenorys verified their amended complaint which alleged the Respondents had never before rented to African Americans. It is clear that the Flenorys had difficulty distinguishing between facts within their knowledge and those whose existence they were willing to take for granted and verify were accurate.

Several instances of testimony which reveals Tallulah Flenory's testimony is less credible than the Respondents' follow. First, Tallulah Flenory testified that when Karen Stephens told her to leave, she was the only one working. (NT 93.) She later confirmed that Charles Flenory worked part-time. (NT 180.) Both Pack and Charles Flenory later testified that Charles Flenory worked. (NT 195, 264.)

Next, Tallulah Flenory first testified that when she moved out there were no tenants on the first floor. (NT 55.) Clearly, there were tenants in the first floor apartment when the Flenorys moved out. In combination with this point, Tallulah Flenory was asked, "Did you and your husband

decide to leave, no longer rent an apartment from Karen Stephens or did Ms. Stephens ask you?" She answered, "Ms. Stephens asked me to move." (NT 59-60.) As the testimony developed, it became clear that Tallulah Flenory chose to move in April 1992. She had told her husband he had to get her out of there. (NT 69.) A report from her doctor indicates that Tallulah Flenory was going to move because the two tenants below her were driving her crazy. (NT 112; CE 4.) And her own testimony indicated that when the two men moved in downstairs she chose to move out. (NT 120.)

Karen Stephens first approached Tallulah Flenory on January 27, 1992 about a noise issue. On February 2, 1992, Karen Stephens filed a landlord/tenant complaint and served it on the Flenorys. This complaint listed two reasons for the attempted eviction. The magistrate's February 20, 1992 hearing resulted in a finding for the Flenorys. Subsequently, the Flenorys did not move until late-April 1992, only after Tallulah Flenory became concerned and frightened of her downstairs neighbors. Clearly, the facts sharply contrast with Tallulah Flenory's version which suggests that the only reason she moved was because Karen Stephens told her to. At best, Tallulah Flenory's memory of events is porous and greatly undermines her credibility.

Taken as a whole, Karen Stephens' version of what was said on January 27, 1992 is more credible. Accordingly, the direct evidence offered is not believed. Therefore, the Flenorys are unable to establish a case by direct evidence.

This brings us to the *prima facie* analytical model which would be applicable to the Flenorys' Sections 5(h)(1) and (3) claims. Under this model we find that, in this case, the 5(h)(1) and (3) claims were fully tried on their merits. When this occurs, it is appropriate to move to the ultimate issue of whether the Flenorys have met their ultimate burden of persuasion that the January 27, 1992 order to vacate their apartment was discriminatory within the meaning of Sections 5(h)(1) and (3) of the PHRA. *See U.S. Postal Service Board of Governors v. Aikens*, 31 FEP 609 (U.S. Supreme Court 1983) ("*Aikens*").

In this case, the Respondents responded to the Flenorys' allegation by offering evidence of two reasons for ordering the Flenorys to vacate. *Aikens* indicates that once a respondent does this, the presumption arising from a *prima facie* showing drops from the case, and the factual inquiry proceeds to a new level of specificity. *Aikens* further states that the *prima facie* case method was never intended to be rigid, mechanized, or ritualistic. Rather it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. *Aikens, citing Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978).

> *Where the [respondent] has done everything that would be required of [it] if the [complainant] had properly made out a prima facie case, whether the [complainant] really did so is no longer relevant. The [trier of fact] has before it all the evidence it needs to decide whether "the [respondent] intentionally discriminated against the [complainant]." Aikens* at 611.

In short, we simply must decide which party's explanation of the Respondents' motivation to believe. Here, the Respondents contend that they were motivated to order the Flenorys to vacate their apartment because of excessive noise and a belief that Pack and her three children were living there in violation of the lease. Either separately or in combination, these reasons are legitimate, non-discriminatory reasons to ask a tenant to vacate a rental property. *See, i.e. Soules et al. v. HUD et al.*, 967 F.2d 817 (2nd Cir. 1992); and *Simmons et al. v. Drew et al.*, 716 F.2d 1160 (7th Cir. 1983).

The evidence reflects that Mike Stephens provided Charles Flenory with an opportunity to correct the excessive noise problem, but the noise levels remained the same. Further, the Flenorys concur that the circumstances made it reasonable for the Stephens to have formed a belief that the Flenorys' apartment was being shared with more people than were on the lease.

The Flenorys retain the ultimate burden of persuading the fact-finder that the Respondents' articulated non-discriminatory reasons were pretextual. Upon analysis of the stated reasons, they are not found to have been a pretext for familial status discrimination.

First, the second floor apartment tenant immediately preceding the Flenorys had a young daughter. This fact is certainly probative of the Respondents' motive. Also, as described by both Mike Stephens and Berkoben, the noise levels at all hours was indeed excessive. Finally, everyone agrees that Karen Stephens sincerely believed there were more people living in the apartment than were permitted under the lease.

In summary, pretext has not been established. Accordingly, the Sections 5(h)(1) and (3) allegations have not been established.

Turning to the 5(h)(5) allegation, it is clear that on January 27, 1992, Karen Stephens went to the Flenorys' apartment and spoke with Tallulah Flenory. The precise conversation between them is disputed, however, it is clear that Karen Stephens requested that the Flenorys vacate the apartment. The question presented by the Flenorys' allegation is, was anything Karen Stephens said a statement which indicated a preference, limitation, specification, or discrimination based upon familial status in violation of Section 5(h)(5)?

Determining the question of discriminatory intent requires a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp*, 429 U.S. 252 (1977). Here, a totality of the relevant facts lead to the inescapable conclusion that Karen Stephens' statements did not violate Section 5(h)(5).

In effect, Karen Stephens merely told Tallulah Flenory that there had been excessive noise which was a sufficiently continuing problem. Because of this, the Flenorys would have to move.

As reviewed earlier, Tallulah Flenory testified that Karen Stephens did say something which would be violative of Section 5(h)(5). Specifically, Tallulah Flenory reported that Karen Stephens had said that Mike Stephens stated that he doesn't want any children upstairs because there would be too much noise for anybody to live under. (NT 60-61.) This version of the event was found less credible than Karen Stephens' version.

A careful review of the record reveals that Charles Flenory testified that his wife reported to him that Karen Stephens told her that Mike Stephens had heard noise the night before. (NT 188-189.) Tallulah Flenory's daughter testified that her mother indicated to her simply that Karen Stephens told her to leave because the children were too noisy. (NT 251.) Neither version repeated the claim that Mike Stephens said he didn't want children upstairs.

One additional significant factor further illustrates that Karen Stephens' intention was not to discriminate because of familial status. The fact is that the tenant who lived there before the Flenorys had a child, and the Respondents rented apartments to other families with children.

Here, Karen Stephens' statements to Tallulah Flenory on January 27, 1992 were motivated by a combination of excessive noise and a reasonable belief that too many people were living in the apartment. Accordingly, a Section 5(h)(5) violation has not been proven.

An order dismissing the Flenorys' allegations follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

CHARLES FLENORY and TALLULAH FLENORY, Complainants
v.
KAREN STEPHENS and MIKE STEPHENS, Respondents

DOCKET NO. H5293

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Complainants have failed to prove discrimination in violation of Sections 5(h)(1), (3), and (5) of the Pennsylvania Human Relations Act.

It is, therefore, the Permanent Hearing Examiner's recommendation that the attached 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.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

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FINAL ORDER

AND NOW, this 30th day of March, 1999, 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 Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law, and Opinion as its own findings 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

that the complaint in this case be, and the same hereby is, dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION