

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

HERMAN L. HARRIS, II, Complainant

v.

LORETTA CUPANI and JOSEPH TOMALONIS, Respondents

DOCKET NO. H6571

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. Herman L. Harris, II (hereinafter "Harris"), is an African American male who, in May 1994, was a prospective tenant of an apartment located at 612 West Penn Avenue, Reading, Pennsylvania. (Complaint; PHRC Order dated March 26, 1996.)
2. Loretta Cupani (hereinafter "Cupani") is the owner of the apartment building located at 612 West Penn Avenue. (Complaint; PHRC Order dated March 26, 1996.)
3. Joseph Tomalonis (hereinafter "Tomalonis") is Cupani's husband and agent. (Complaint; PHRC Order dated March 26, 1996.)
4. On or about May 2, 1994, Cupani, by and through her agent Tomalonis, refused to negotiate for the rental of the housing accommodation at 612 West Penn Avenue, refused to make the property available, and denied Harris an opportunity to rent the property because of Harris's race, black. (PHRC Order dated March 26, 1996.)
5. Tomalonis intentionally attempted to mislead Harris and misrepresented the availability of a rental unit. (NT 26-28.)

* 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 abbreviation will be utilized throughout these Findings of Fact for reference purposes:

NT Notes of Testimony

6. Tomalonis's actions upset Harris. (NT 17.)
7. The discrimination embarrassed Harris, and since the incident Harris's suspicion of others has increased, he is more cautious when approaching different people, and has experienced reduced enthusiasm. (NT 17, 18, 42, 43.)
8. Harris also experienced anger regarding the incident of discrimination. (NT 34, 42.)

CONCLUSIONS OF LAW

1. A combination of Section 9(b)(3) of the PHRA and 16 Pa. Code §42.31(c) requires Respondents to file a written, verified answer to a complaint within thirty days of service of the complaint.
2. 16 Pa. Code §42.31(d) declares that a failure of a respondent to timely answer a complaint places a respondent in default.
3. Under 16 Pa. Code §42.33, when a respondent has not answered a complaint, a Rule to Show Cause may be issued.
4. Under 16 Pa. Code §42.33(d)(4), when a respondent does not respond to a Rule to Show Cause, the PHRC may make a finding of probable cause and enter a judgment for a complainant on the issue of liability, to be followed by a public hearing on the issue of damages.
5. In this matter, the Respondents' failure to answer or respond to a Rule to Show Cause resulted in the entry of a judgment for the Complainant on the issue of liability.
6. In a matter such as this, filed under Section 5(h) of the PHRA, Section 9(f)(1) of the PHRA authorizes the PHRC to award damages for embarrassment and humiliation.
7. Section 9(f)(2) authorizes the assessment of a civil penalty.

OPINION

This case arose on a complaint filed by Herman L. Harris, II (hereinafter "Harris"), against Loretta Cupani (hereinafter "Cupani") and Joseph Tomalonis (hereinafter "Tomalonis"), which alleged a race-based refusal to negotiate for the rental of a housing accommodation, refused to make the rental property available to Harris, and represented to Harris that the housing accommodation was not available for rental. The alleged refusal to rent an apartment in Cupani's property located at 612 West Penn Avenue, Reading, Pennsylvania, occurred on or about May 2, 1994. Harris also alleged that Tomalonis was Cupani's agent. Harris's complaint states claims under Section 5(h)(1) and (3) of the Pennsylvania Human Relations Act (hereinafter "PHRA").

Harris's complaint was filed on or about October 6, 1994. By correspondence dated February 5, 1996, the Pennsylvania Human Relations Commission (hereinafter "PHRC") Housing Division petitioned Motions Commissioner Howell for a Rule to Show Cause, indicating that neither Cupani nor Tomalonis had answered Harris's complaint. The petition declared that Cupani and Tomalonis had been served with the complaint on December 2, 1994. The petition further indicated that, by correspondence dated June 2, 1995, Cupani and Tomalonis were notified that their failure to answer Harris's complaint could result in a judgment being entered for Harris.

On February 9, 1996, a Rule to Show Cause was issued, directing Cupani and Tomalonis to respond on or before March 4, 1996. After no response was filed, on March 5, 1996, Motions Commissioner Howell recommended a finding of liability to the full PHRC. On March 26, 1996, the full PHRC determined that on or about May 2, 1994, Cupani, owner of a rental property located at 612 West Penn Avenue, Reading, Pennsylvania, by and through Cupani's agent, Tomalonis, refused to negotiate for the rental of the property, refused to make the property available, and denied Harris an opportunity to rent the property because of Harris's race, black. After the finding of liability, conciliation efforts were unsuccessfully attempted. Subsequently, this matter was approved for a public hearing on the issue of appropriate damages.

The public hearing on the issue of appropriate damages was held on December 12, 1996 in Reading, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. Harris was represented by F. Paul Laubner, Esquire. The state's interest in the complaint was overseen by E. Ralph Godfrey, Esquire. Tomalonis appeared *pro se*, and Cupani did not attend. Harris's post-hearing brief was received on December 27, 1996. By letter dated December 30, 1996, Joseph T. Bambrick, Esquire, filed an entry of appearance for Tomalonis. The PHRC brief on behalf of the complaint was received on February 4, 1997. Finally, on February 5, 1997, Harris filed a revised brief.

Since liability had been found after Cupani and Tomalonis failed to file an answer, the only question at public hearing was what damages Harris could establish.

Section 2(b) of the PHRA declares that it shall be the policy of the Commonwealth of Pennsylvania to safe-guard an individual's right to secure housing accommodation regardless of race. Section 3 of the PHRA further declares that it is an individual's civil right to have the opportunity to obtain any housing accommodation without racial discrimination. This civil right is to be enforceable as further set forth in the PHRA.

In this regard, Section 5(h)(1) of the PHRA declares 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 person. . . or user of such housing accommodation. . ." Section 5(h)(3) declares in pertinent part that: "It shall be an unlawful discriminatory practice. . . [f]or any person to. . . [d]iscriminate against any person in. . . leasing any housing accommodation. . . because of the race. . . of any person. . ."

A damage award is principally intended to make the victim of discrimination whole, to restore rights which were denied, and to compensate a victim for the suffering caused by an act of discrimination. A secondary portion of a damage award is not only designed to compensate a victim, but also serves as a deterrent to other potential violators. Section 9(f)(1) of the PHRA declares in pertinent part that, ". . . 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 the Act. . .” Section 9(f)(2) also allows for a civil penalty and Section 9(f.1) permits an award of attorney fees to prevailing complainants.

Here, during the public hearing, the Complainant specifically declared that the only damages he seeks are those which are injuries to his dignity caused by humiliation and embarrassment. In his post-hearing brief he later also generally asks for an award of attorney fees.

It is worth noting that the first time the Complainant specified a particular dollar amount was in his post-hearing brief. An earlier specification of the size of the claim would do several things. First, an earlier declaration would afford a Respondent with an opportunity to attempt to mount an appropriate defense. Second, it would place a Complainant’s public hearing evidence in some perspective. Here, the postponement of the announcement of the size of the Complainant’s claim frustrated both of these factors.

Injuries in the form of embarrassment and humiliation represent an intangible harm. When considering intangible injuries, there is no small amount of difficulty quantifying such injuries. See, *Hobson v. George Humphreys, Inc.*, 563 F.Supp. 344, 353 (WD Tenn. 1982). Here, determining an appropriate award is made even more difficult because the amount of evidence submitted is considered minimal. This makes a careful analysis of inherently qualitative information difficult to transform into quantitative relief. In this case the final assessment and recommendation of appropriate damages is a synthesis of an understanding of precedent, together with the weight of the evidence which was presented.

Since emotional damages are by their nature subjective, we do not look for the impossible: proof of an exact monetary value for the psychic injury. See, *Block v. P. H. Macy & Co. Inc.*, 712 F.2d 1241 (8th Cir. 1983). Here, we infer the existence of embarrassment and humiliation from the circumstances surrounding the incident of discrimination, and from the testimony offered by the Complainant and his mother. See, *Littlefield v. McGuffey*, 954 F.2d 1337 (7th Cir. 1992); and *Johnson v. Hale*, 940 F.2d 1192 (9th Cir. 1991); *Seaton v. Sky Realty Co. Inc.*, 491 F.2d 634 (7th Cir. 1974). These damages can be established even in the absence of evidence of financial loss or medical evidence of mental or emotional impairment. See, *HUD v. Kelly*, 2 FHFL ¶25,034, 25,362 (HUD A.L.J. Aug. 24, 1992).

The decision regarding an appropriate award is fact-specific. Analysis of precedent varies widely, depending on an extreme range of circumstances. Simply referring to the size of awards in other cases alone is considered an unreliable standard of measurement. The amount of the award should compensate for the injury suffered so as to attempt to make the injured Complainant whole, and should avoid providing a windfall. See, *HUD v. Blackwell*, 2 FHFL ¶25,001 (HUD A.L.J. Dec. 21, 1989, *aff’d*. 908 F.2d 864 (11th Cir. 1990)). The award should rest on factors demonstrated by the evidence. The testimony of the Complainant and his reaction to the discrimination are the most important factors in attempting to determine an award for intangible injuries.

Considering the record as a whole, we note that the overall impact of the discrimination minimally affected Harris’s daily living. Harris’s testimony reflected no eating or sleeping problems, no nervousness, indigestion, nausea or impotence. In fact, there were no physical symptoms of mental distress expressed. Harris spoke of experiencing an increased distrust, and some loss of enthusiasm in his pursuit of personal responsibilities. However, in describing how these factors affected his daily life, Harris cited a degree of insecurity regarding which type of song to sing at a

karaoke bar. With regard to his work selling cars, Harris indicated he is able to shrug off and look beyond his suspicions of others and is able to act in a very outgoing manner.

While testifying, Harris's demeanor reflected no indication of a defeated attitude. Harris's shoulders were not slumped, his speech was fluid and consistent, and he made continual eye contact. Harris appeared to be an individual who is still quite capable of enjoying his life, although he feels an understandable degree of anger, frustration, and resentment over the incident. Harris's mother's testimony enhances the concept of resultant anger and frustration more than any impact of embarrassment or humiliation on Harris or his relationship with others. Although the Complainant did experience a degree of intangible injuries, they are not extreme.

The Complainant appeared more offended and angry than humiliated or embarrassed by the discrimination visited upon him. While a victim's testimony will unavoidably have a self-serving aura, his testimony appeared more than somewhat hyperbolized and was presented with little emotional display. This caused some doubt regarding the severity of the claimed injuries. The overall impression the Complainant conveyed is that he is an outgoing, resourceful person whose resilience will prevent him from suffering any long-term emotional scars from this singular episode he experienced. Further, the evidence suggests that the Complainant was not profoundly affected.

While emotional injury is compensable in the absence of egregious conduct, the discriminator's temperate conduct may be considered as a mitigating circumstance. See, *Littlefield v. McGuffey*, 954 F.2d 1337 (7th Cir. 1992), and *Steele v. Title Realty*, 478 F.2d 380 (10th Cir. 1973). While Tomalonis's actions were certainly discriminatory, the actions were neither public nor maliciously intended to flagrantly injure Harris emotionally. It would appear that Tomalonis's attempt to mislead Harris, while circumspectly egregious, was polite and without rancor. Tomalonis attempted to deny Harris a housing accommodation, but his actions in doing so were not committed in a manner intended to result in a public embarrassment of Harris. Here, Tomalonis's attempted subtle deception and hidden motive was exposed, versus having been thrust upon Harris.

Considering the record as a whole, an award of Two Thousand Five Hundred Dollars (\$2,500.00) will adequately compensate Harris for his embarrassment and humiliation.

CIVIL PENALTY

To vindicate the public interest, the PHRA authorizes the imposition of a civil penalty upon a respondent who violates the PHRA. (Section 9(f)(2).) The PHRC Housing Division counsel requests imposition of a maximum civil penalty in the amount of Ten Thousand Dollars (\$10,000.00).

When considering the appropriate amount of a civil penalty, consideration of the following five factors is appropriate:

1. the nature and circumstances of the violation;
2. the goal of deterrence;
3. any history of prior violations;
4. the Respondent's financial resources; and
5. the degree of the Respondent's culpability.

Here, the factors which support the imposition of a civil penalty are the intentional nature of

the attempted denial of a housing accommodation, and the goal of deterrence. There is no evidence of any history of a previous violation, and the Respondent asserted he could neither afford an attorney nor did he have “two cents to rub together.” These factors militate against a large civil penalty.

Upon consideration of the relevant factors, Cupani and Tomalonis should be jointly assessed a civil penalty of One Thousand Five Hundred Dollars (\$1,500.00).

ATTORNEY FEES

In Harris’s post-hearing brief, attorney fees have been requested. In the event the parties are unable to reach an agreement regarding an amount for attorney fees, Harris must file, within ten days of the date of this order, absent an extension for cause shown in writing, a fee application with sufficient information upon which to assess an appropriate award. Such information shall be submitted to the Permanent Hearing Examiner by affidavit or certification. Cupani and Tomalonis shall have ten days from the filing of the fee application to file counter-affidavits or certifications as to their version of the facts of the fee award.

Unless adequate supporting evidence is submitted, an attorney fee award will not be made. Consideration will be given to time and labor required; the difficulty of the questions involved in this case; the requisite skill to perform the legal services rendered; Harris’s attorney’s customary fee; the hourly rate for legal services in the community; the amount of the claim involved and the results obtained; the experience, reputation, and ability of an attorney; whether a contingency arrangement was in place; and the size of awards in similar cases.

The burden of persuasion is upon Harris to show all hours claimed were reasonably necessary to perform the legal services, while Cupani and Tomalonis must show any rates requested are unreasonable. Upon receipt of a fee application and any counter-information, a recommendation shall be submitted to the full PHRC for their consideration.

Accordingly, relief is ordered as described with specificity in the Final Order which follows.

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v.

LORETTA CUPANI and JOSEPH TOMALONIS, Respondents

DOCKET NO. H6571

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Harris suffered intangible damages and incurred attorney fees. 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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DOCKET NO. H6571

FINAL ORDER

AND NOW, this 25th day of March, 1997, 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 into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

1. That, Cupani and Tomalonis shall cease and desist from discriminating against any prospective tenant with respect to a housing accommodation because of the race of a prospective tenant.
2. That, within thirty days of the date of this order, Cupani and Tomalonis shall pay Harris a total of Two Thousand Five Hundred Dollars (\$2,500.00) which amount represents a remedy for Harris's embarrassment.
3. That, within thirty days of the effective date of this order, Cupani and Tomalonis shall deliver to PHRC Housing Division Counsel, a check payable to the Commonwealth of Pennsylvania in the amount of One Thousand Five Hundred Dollars (\$1,500.00), which amount represents an assessment of a civil penalty pursuant to Section 9(f)(2)(i) of the Pennsylvania Human Relations Act.
4. That, within thirty days of the effective date of this order, Cupani and Tomalonis shall report to the PHRC on the manner of their compliance with the terms of this order by letter addressed to Assistant Chief Counsel, PHRC Housing Division, PO Box 3145, Harrisburg, PA 17105-3145.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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DOCKET NO. H6571

SUPPLEMENTAL FINAL ORDER

AND NOW, this 25th day of March, 1997, upon consideration of the Complainant's Fee Application, and the Respondents' failure to respond to such Application, it is hereby

ORDERED

pursuant to Section 9(f.2) of the Pennsylvania Human Relations Act, that:

1. Within thirty days of the date of this order, Cupani and Tomalonis shall pay Harris a total of Three Thousand Five Hundred and Nine and 5/100 Dollars (\$3,509.05), which amount represents out-of-pocket costs and attorney's fees incurred; and
2. Within thirty days of the effective date of this supplemental order, Cupani and Tomalonis shall report to the Pennsylvania Human Relations Commission on the manner of their compliance with the terms of this order by letter addressed to Assistant Chief Counsel, PHRC Housing Division, PO Box 3145, Harrisburg, PA 17105-3145.

PENNSYLVANIA HUMAN RELATIONS COMMISSION