

**COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**SATURINA OLMEDO-FOREMAN, Complainant**

**v.**

**VILLAGE GREEN REALTY DEVELOPMENT CORPORATION AND JAMES  
McHALE, PROPRIETOR, Respondents**

**DOCKET NO. H-4667**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

**RECOMMENDATION OF PERMANENT HEARING EXAMINER**

**FINAL ORDER**

**FINDINGS OF FACT**

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 Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T. Notes of Testimony  
C.E. Complainant's Exhibit  
R.E. Respondent's Exhibit

1. The Complainant is Saturina Olmedo-Foreman, a Black female, (hereinafter "Olmedo-Foreman"). (N.T. 20)
2. The Respondents are Village Green Realty Development Corporation, (hereinafter "Village Green"), and James T. McHale, Proprietor, (hereinafter "McHale") (and collectively hereinafter referred to as "Respondents"). (N.T.43)

3. Village Green is composed of four residential rental properties located in the City of Scranton. (N.T. 43)
4. Each of the 4 separate properties is an apartment building composed of 5 rental units. (N.T.44)
5. One of Village Green's buildings is located at 439-441 Phelps Street (hereinafter the "Phelps Street Building"). (N.T. 44)
6. The Phelps Street Building is a three-story building with one apartment being a first floor apartment, one apartment a split level being on the first and second floor, one apartment a second floor apartment, and two third floor units. (N.T.44)
7. Olmedo-Foreman had been a tenant in the Phelps Street Building since 1981. (N.T. 23)
8. When Olmedo-Foreman first became a tenant her husband William Foreman rented the unit. (N.T. 36)
9. In July 1987, Olmedo-Foreman changed apartments and began paying \$235.00 a month rent for apartment number 439, the split level first and second floor apartment. (N.T. 44; C.E. 3)
10. All Village Green tenants rent on a month-to-month basis and do not have written leases. (N.T. 36; C.E. 4)
11. In August 1988, Olmedo-Foreman was living alone in unit number 439. (C.E. 3)
12. In July 1988, two of the five apartments in the Phelps Street Building were vacant. (N.T. 49, 63)
13. Minorities had been renting the remaining three apartments. (C.E. 2)
14. In the summer of 1988, McHale considered the sale of his rental properties. (N.T. 47)
15. McHale secured the services of a real estate consultant after he unsuccessfully attempted to market the properties. (N.T. 48; C.E. 4)
16. This consultant advised McHale that the Phelps Street Building had to be renovated before McHale should continue to attempt to sell the property. (N.T. 48; C.E. 4)
17. Prior to August 9, 1988, McHale made the decision to renovate the Phelps Street Building. (N.T. 48)
18. The planned renovations were to be major, including refurbishing walls, plumbing, electrical, heating, and extensive improvements to kitchens and bathrooms. (C.E. 4)
19. As a cost saving measure, McHale had planned that his maintenance man, a helper, and family members would do the actual renovations. (N.T. 43, 48)
20. The improvements which were made took approximately 1 year to complete at a total cost of approximately \$50,000: \$20,000 for material, and \$30,000 for labor. (N.T. 48, 53; R.E. 4)
21. The three remaining tenants of the Phelps Street Building, including Olmedo-Foreman received a notice to vacate dated August 9, 1988. (C.E. 1)
22. The August 9, 1988 notice advised Olmedo-Foreman that the rent for the apartment she was in would increase to \$400.00 per month because of increased costs and that Olmedo-Foreman should consider her lease terminated and vacate the apartment within 30 days. (C.E. 1)
23. The notice also advised Olmedo-Foreman that if she failed to vacate within 30 days, the renovations which were already under way would substantially inconvenience her. (N.T. 49; C.E. 1, 2)
24. After Olmedo-Foreman received the August 9, 1988 notice, she called McHale to ask for an exception to the notice to vacate. (N.T. 23, 49)

25. McHale told Olmedo-Foreman that he would consider her request and in effect would look into the feasibility of her request. (N.T. 50)
26. Olmedo-Foreman also wrote Village Green a letter dated August 16, 1988, in which she expressed a variety of concerns. (C.E. 2)
27. These concerns included:
  - a. Olmedo-Foreman's stated position that the timing of the notice of the proposed rent increase was not only unfair but illegal;
  - b. Olmedo-Foreman's expressed perception that other area landlords were unwilling to rent to minorities;
  - c. That the new rental would be out of line with comparable apartments in the area;
  - d. That it was illogical to have her unit empty instead of allowing her to remain because McHale would at least be getting rent from her;
  - e. That although Olmedo-Foreman recognized McHale "had tons of aggravation in the past" from some minority tenants, all tenants should not be judged by a few;
  - f. That Olmedo-Foreman had begun to form the opinion that maybe the rent increases were being done to force minorities from the building, therefore, "the matter is going to be examined by the Human Relations Commission in Harrisburg."
  - g. Since the renovations began, Olmedo-Foreman had seen two roaches and that she "[did] not intend to bear the expense of ridding [her]self of these roaches if they infest [her] furniture.. ."; and
  - h. Olmedo-Foreman's expressed belief that renovation workers had been in her apartment improperly, and had not properly locked her door. (C.E. 2)
28. Olmedo-Foreman's request for an exception was denied. (N.T. 40; C.E. 3)
29. The denial was communicated to Olmedo-Foreman in a letter dated August 16, 1988. (C.E.3)
30. In mid-October 1988, Olmedo-Foreman vacated her apartment. (N.T. 25)
31. On November 1, 1988, Olmedo-Foreman filed a complaint alleging a race-based eviction. This complaint was subsequently amended to add the charge of retaliation. (Stipulation of Fact)
32. The Respondents filed two answers to Olmedo-Foreman's complaint. (C.E. 4. 5)

### **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 Commission have fully complied with the procedural prerequisites to a Public Hearing in this case.
3. Respondents are "persons" within the meaning of the PHRA.
4. Olmedo-Foreman is an "individual" within the meaning of the PHRA.
5. Olmedo-Foreman has failed to show direct evidence of retaliation.
6. Olmedo-Foreman has met her burden of establishing a prima facie case by proving that:
  - a. she opposed a practice forbidden by the PHRA;
  - b. the Respondents were aware of the expression of opposition;
  - c. Olmedo-Foreman suffered an adverse consequence; and
  - d. the adverse action followed the expression of opposition within such a period time that a retaliatory motive can be inferred.

7. The Respondents have articulated a legitimate non-discriminatory reason for not allowing Olmedo-Foreman to remain in her unit.
8. Olmedo-Foreman failed to establish by a preponderance of the evidence that the reason articulated by the Respondents for not allowing her to remain in her apartment was pretextual.

### **OPINION**

This matter began on November 1, 1988, when Saturina Olmedo-Foreman, (hereinafter "Olmedo-Foreman"), filed a complaint which generally alleged that on August 9, 1988, Village Green Realty Development Company, (hereinafter "Village Green"), evicted Olmedo-Foreman because of her race, Black. More specifically, the November 1, 1988 complaint alleged that by letter dated August 9, 1988, Olmedo-Foreman was notified that her lease was terminated and she would have to move, that there would be a substantial increase in rent from \$235.00 per month to \$400.00, and there were to be renovations made to Olmedo-Foreman's apartment. The complaint states that Village Green's facility contained 5 units, all of which had been rented by racial minorities. The complaint further stated that in July 1988, two of the five apartments became vacant. The complaint alleged that on August 29, 1988, Olmedo-Foreman offered to pay the rent increase and put up with inconvenience during the renovation. However, this offer was allegedly refused. Finally, the November 1, 1988, complaint alleged that after Olmedo-Foreman left, Village Green rented one of the apartments to a White family for \$300.00 per month. These allegations allege violations of Sections 5(h)(1) and (3) of the Pennsylvania Human Relations Act of October 27 1955 P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA").

On February 27, 1989, Olmedo-Foreman amended her complaint by adding James T. McHale, Proprietor, (hereinafter "McHale"), as an additional Respondent, and by generally adding a retaliation allegation under Section 5(d) of the PHRA. Specifically, the amended complaint alleged that in an August 16, 1988 letter, Olmedo-Foreman had protested the alleged unlawful racially-based eviction notice of August 9, 1988. Olmedo-Foreman's amended complaint tends to acknowledge the act of eviction had already occurred as of August 9, 1988, although Olmedo-Foreman did not actually vacate the apartment until October 15, 1988. Here, the adding of an alleged retaliatory eviction was quite inartfully drafted as the PHRC housing division's argument in support of the complaint submits that the alleged act of retaliation was that McHale and Village Green (hereinafter collectively referred to as "Respondents") refused to allow Olmedo-Foreman to remain in her apartment during the renovation process and thereafter, and that McHale and Village Green had denied Olmedo-Foreman's request for reconsideration of the prior eviction notice.

PHRC staff investigated the allegations and found probable cause to credit Olmedo-Foreman's 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 McHale and Village Green that it had approved a Public Hearing.

During the Pre-Hearing Conference of this matter, the PHRC attorney on behalf of the complaint indicated that the matter would proceed to Public Hearing on the alleged retaliation charge only. All other allegations were being abandoned.

The Public Hearing on the remaining charge of retaliation was held on December 10, 1992, in Scranton, PA, before Permanent Hearing Examiner Carl H. Summerson. The case on behalf of the complaint was presented by PHRC staff attorney Nancy L. Gippert. Thomas L. Wenger, Esquire appeared on behalf of McHale and Village Green. Following the Public Hearing, the parties were afforded an opportunity to submit briefs. The post-hearing brief for McHale and Village Green was received on January 22, 1993, and the brief on behalf of the retaliation allegation was received on February 1, 1993.

Section 5(d) of the PHRA states:

It shall be an unlawful discriminatory practice...[f]or any person, employer, employment agency, or labor organization to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act.

This section contains two distinct parts. Here, as the briefs recognize, the applicable part is the first portion of Section 5(d) which protects the expression of opposition to forbidden practices. The brief on behalf of the complaint first argues that Olmedo-Foreman has shown direct evidence of retaliation. In the alternative, the brief on behalf of the complaint also reviews this matter under the analytical model in which a Complainant is first obligated to establish a prima facie case and if a Complainant can do so, the burden of production shifts to the Respondent to articulate a legitimate non-discriminatory reason for its actions. If a Respondent can meet this production burden the burden shifts back to the Complainant to prove that the Respondent's reason for its action is a pretext for discrimination. See Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987) .

These two models are different evidentiary paths by which to resolve the ultimate issue of what was the Respondent's intent. With direct evidence, a Respondent's motivation can be established simply by the introduction of sufficiently persuasive evidence, whereas, under the second analytical model once a prima facie case has been shown, a rebuttable inference of a discriminatory motive is judicially created.

We will first look to the argument that there is direct evidence of a retaliatory motive. The first question to be resolved is whether this record contains persuasive direct evidence that a retaliatory motive existed in this case. The brief on behalf of the complaint points briefly to a portion of Complainant Exhibit 5 and argues a statement found therein is direct evidence of McHale and Village Green's retaliatory motive. Complainant's Exhibit 5 is an answer filed by Village Green dated December 20, 1988. The brief on behalf of the complaint declares that this answer, "stated that Complainant's request was denied based upon the threat of suit."

Paragraph 3(a) of Village Green's answer of December 20, 1988 actually states:

It is admitted that the Petitioner did request to remain in the building during renovation. The request was denied based upon the threat of suit, should petitioner be inconvenienced by reason of the renovation and the fact that William Foreman was going to join her in

the said apartment. Tenancy by this individual was totally unacceptable and for this and the reasons set forth in the previously [sic] answer, petitioner was unacceptable as a prospective or continuing tenant.

The brief on behalf of the complaint did not pursue the direct evidence argument further than this. Instead, the brief on behalf of the complaint simply turned abruptly to the alternative proof model.

Perhaps little time was spent on the direct evidence argument because the evidence considered as a whole fails to amount to persuasive direct evidence of an unlawful retaliatory motive. The real question to be asked first is what does it appear Village Green meant when it referred to "The threat of suit." For the answer to this looming question we look to Olmedo-Foreman's August 16, 1988 letter. (C.E. 2)

Clearly, Olmedo-Foreman's letter mentions a number of concerns. In summary, Olmedo-Foreman's letter discussed the following areas: (a) the legality and adequacy of the notice of the raising of the rent; (b) an expression that Olmedo-Foreman perceived that other landlords in the surrounding area are unwilling to rent to minorities; (c) the proposed rent increase was noted to be in Olmedo-Foreman's opinion out of line with similar rentals in that area; (d) removal of a tenant in good standing was illogical and leaving an apartment empty during renovations meant no rental income for that period; (e) an observation by Olmedo-Foreman that the rent increases may be an effort to keep minorities out "which is why the matter is going to be examined by the Human Relations Commission in Harrisburg"; (f) notice to Village Green that Olmedo-Foreman had seen two roaches after the renovations in the building began and that Olmedo-Foreman "[did] not intend to bear the expense of ridding [her]self of these roaches if they infest [her] furniture..."; and (g) a final observation by Olmedo-Foreman that it appeared renovation workers had been in her apartment without reason and had not properly locked her door upon leaving.

Here, the statement in Village Green's December 20, 1988 answer which notes a "threat of suit" has not been shown to be specifically related to that portion of Olmedo-Foreman's letter which indicated her concern that the rental increases might be happening in an effort to keep minorities out and this is "why the matter is going to be examined by the [PHRC]." Instead, that portion of Olmedo-Foreman's letter which indicates in the form of a veiled threat that she did not intend to bear the expense if roaches infest her furniture appears to be the intended connection. The actual answer statement which mentions a threat of suit is immediately followed by the phrase "should petitioner be inconvenienced by reason of the renovation." We find that Village Green's expressed fear of suit was a fear of what might happen if Olmedo-Foreman were allowed to remain while the renovations were done and something of hers was either damaged or destroyed. Not that Olmedo-Foreman had suggested the PHRC would be examining the reason for the rental increases.

Finding no direct evidence of a retaliatory motive, we turn to the other model for analyzing the evidence. In order for Olmedo-Foreman to establish a prima facie case of retaliation, Olmedo-Foreman must prove:

1. That she opposed a practice forbidden by the PHRA;
2. That McHale and Village Green were aware of her expression of opposition;

3. That subsequent to her opposition, she was subjected to an adverse action by McHale and Village Green; and
4. That there is a causal connection between her opposition and the adverse action.

Wholey Co. v. PHRC, Pa. Commonwealth Ct., 606 A.2d 982 (1982), citing, Brown Transport Corp. v. PHRC, 133 Pa. Commonwealth Ct. 545, 578 A.2d 555 (1990).

In effect, the Respondents brief argues that Olmedo-Foreman cannot establish the first element of the requisite prima facie showing. The Respondents argue that the action Olmedo-Foreman opposed was not an act "forbidden by the [PHRA]." The Respondents submit that Olmedo-Foreman's opposition was to an entirely legal act - The termination of Olmedo-Foreman's lease. Here, Olmedo-Foreman's expressed opposition in her letter of August 16, 1988, was not merely to her receipt of notice of a rental increase but was an expression that Olmedo-Foreman was concerned that perhaps the rental increases were being made in an effort to keep minorities out. Clearly, such an alleged motivation is an unlawful discriminatory motivation under the PHRA. Accordingly, Olmedo-Foreman did express opposition to a practice forbidden by the PHRA. The Respondents are really suggesting that the evidence shows that Olmedo-Foreman's concern was unjustified.

Here we note that the validity of a retaliation claim does not depend upon the validity of a Complainant's objection to an act of a Respondent. PHRC v. Thorpe, Reed Armstrong, 24 Pa. Commonwealth Ct. 295, 361 A.2d 497 (1976). Here, Olmedo-Foreman had objected to a possible race-based rental increase. It does not even matter that this allegation once made, was withdrawn prior to Public Hearing. The near universal position taken on the question of whether the underlying objection must be valid is that the factual truth of the objection is not controlling.

Accordingly, Olmedo-Foreman successfully established the first element of her requisite prima facie showing. Regarding the second element, the Respondents readily concede they were aware of Olmedo-Foreman's position.

The third element is met if we consider this matter in a light beyond the scope of Olmedo-Foreman's actual amended complaint. As noted earlier, the amended complaint indicates that the eviction occurred on or about August 9, 1988 and that the alleged act of retaliation was also Olmedo-Foreman's eviction. Here, the evidence submitted and briefs of the parties deal with a different alleged act - failure to allow Olmedo-Foreman to remain in her apartment during renovations after Olmedo-Foreman requested reconsideration of the notice of eviction.

Since the parties both addressed the much broader issue, we find that Olmedo-Foreman was subjected to the adverse action of not being allowed to remain in her unit.

Finally, Olmedo-Foreman's opposition and the Respondents' notice that she would not be permitted to remain occurred very close in time to one another. Courts have noted that the timing of a Respondent's action could, standing alone, be enough to infer a retaliatory motive. See Rutherford v. American Bank of Commerce, 565 F.2d 1162, 16 FEP 26 (10th Cir. 1977); Minor v. Califano, 452 F. Supp. 36, 17 FEP 756 (D.D.C. 1978); Hochstadt v. Worcester Foundation, 425 F. Supp. 318, 11 FEP 1426 (D. Mass), aff'd 13 FEP 804 (1st Cir. 1976). In this case, not

even one day elapsed between the Respondents learning of Olmedo-Foreman's opposition and the refusal of her request. An inference of retaliatory motive is strengthened in direct proportion to how close in time the adverse action follows the Respondent's notice of a Complainant's objection.

Accordingly, Olmedo-Foreman has met the relatively light burden of establishing a prima facie case. Now, the burden of production shifts to McHale and Village Green to articulate some legitimate reason for not allowing Olmedo-Foreman to remain in her apartment. Clearly the Respondents have met this burden.

Principally, the Respondents argue that imminent renovations were anticipated to be of such a nature that the August 9, 1988, notice to vacate was firm and the subsequent written notice of August 16, 1988 merely reaffirmed the previously made decision to evict all tenants. The Respondent asserts that given the extensive nature of the renovations it would be impossible for Olmedo-Foreman to remain in her unit while the unit was being renovated.

The evidence clearly shows that the building was scheduled to be renovated and that the renovations were comprehensive. Plumbing and electrical systems were to be replaced necessitating the tearing out of entire walls and other structures. The renovations were so comprehensive that the units renovated were not relet until August, 1989, nearly one year later. The Respondents rest their case primarily upon this single factor which sufficiently articulates a legitimate non-discriminatory reason for refusing to allow Olmedo-Foreman to remain in her unit.

The Respondents' burden of production has therefore been met. The burden thus rests with Olmedo-Foreman to show that the Respondents' stated reason is either pretextual or not worthy of credence. Olmedo-Foreman's task in this regard is a proof burden she failed to carry.

Olmedo-Foreman's own words describe the expected renovations in terms which make it clear that the Respondents' principal motivation was their concern regarding the habitability of a unit while renovations were being done to a unit. Olmedo-Foreman's August 16, 1988 letter indicated things like the building was in the "midst of mass confusion", and "since they have started gutting." Additionally, Olmedo-Foreman described renovations already underway in the building as "gutting" a second time as she requested that the Respondents begin to work on other apartments in the building before hers so as to give her "more time to look."

Olmedo-Foreman's own letter makes it abundantly clear that she was well aware of the significant extent of the pending renovations. Add to the primary factor of the reality of the renovations news that her husband may soon join her and a threat to sue if she is inconvenienced by the renovations and the Respondents' articulated reasons for not allowing Olmedo-Foreman to stay becomes rock solid.

At the time of this action, Olmedo-Foreman's husband was in jail ostensibly for arson. McHale testified that the district attorney's office had told him William Foreman had been convicted of arson. McHale further testified that this alarmed him but that it did not change anything.



Due to the renovations, everyone in the building was asked to leave and did. Olmedo-Foreman was in no way singled out or more harshly treated.

In our opinion, the Respondents decision to terminate the leases of all residents of the building in which Olmedo-Foreman lived was firmly made prior to its notice of August 9, 1988, and the principal reason why Olmedo-Foreman's request to remain was denied was because the planned renovations would be far too dramatic for any resident to remain while renovations were made. Any fear of suit put into the Respondents mind was purely a fear that Olmedo-Foreman was not ready to tolerate the disruption of her living space which the renovations would surely entail.

Olmedo-Foreman being unable to prove pretext, this case should be dismissed. An appropriate Order follows.

**COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**SATURINA OLMEDO-FOREMAN, Complainant**

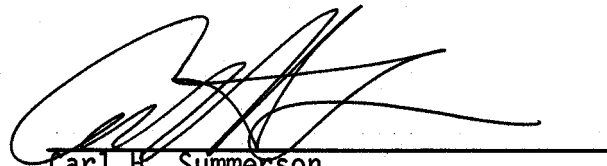
**v.**

**VILLAGE GREEN REALTY DEVELOPMENT CORPORATION AND JAMES  
McHALE, PROPRIETOR, Respondents**

**DOCKET NO. H-4667**

**RECOMMENDATION OF THE PERMANENT HEARING EXAMINER**

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Complainant has failed to prove discrimination in violation of Section 5(d) 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.  
Permanent Hearing Examiner



Carl H. Summerson  
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
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McHALE, PROPRIETOR, Respondents

DOCKET NO. H-4667

**FINAL ORDER**

AND NOW, this 7<sup>th</sup> day of April, 1993, 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 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**

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

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Robert Johnson Smith  
Robert Johnson Smith, Chairperson

ATTEST:

Russell S. Howell  
Russell S. Howell, Assistant Secretary