COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

GLENDA & RAYMOND BROWN, JR., and RAYMOND BROWN, III INDIVIDUALLY, and o/b/o VAUGHAN BROWN, Complainants	:	
v.	:	PHRC CASE NO. 200607552
EMANUEL HERTZLER, Respondent	:	

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. The Respondent in this case is Emanuel Hertzler, (hereinafter "Hertzler"), owner of two properties in New Britain, Pennsylvania. (N. T. 75, 77; CE 3).

2. Hertzler is Amish. (N. T. 110-111).

3. The Complainants in this case are Glenda and Raymond Brown, Jr., an African American couple who have been married 23 years, and their two sons, Raymond Brown, III, who was twenty years old in May 2007, and Vaughan Brown who was 17 years old in May 2007. (N. T. 13, 30, 44, 49, 60).

4. In the early to mid-1990's, the Brown family moved from Philadelphia in search of a better life. (N. T. 49).

5. In April 2007, the Browns were renting a three bedroom row home in the Wedgewood section of Coatesville, Pa. (N. T. 13).

6. The Brown's rental lease provided for rental payments of $880.00 per month with the lease term scheduled to expire on July 31, 2007. (N. T. 16 CE 1).

7. In April 2007, Vaughn Brown was attending his senior year of high school at Coatesville Area High School. (N. T. 60).

* 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 o f Testimony
C. E. Complainant's Exhibit
R. E. Respondent's Exhibit

8. In 2006 – 2007, Glenda Brown was the only African American educator working as a substitute teacher at the Unionville Chadds Ford School District. (N. T. 30; RE 1).

9. Considering the Wedgewood section of Coatesville less than asthetically pleasing and wanting to find a less expensive single family home to rent, in the spring of 2007, the Browns began to search for another place to live. (N. T. 16, 17, 29).

10. Hertzler had placed an ad in the Community Carrier seeking to rent one of the two homes he owned. (N. T. 17).

11. The home for rent was located at 150 Little Britain Road, Notting, Pa., and was advertised at $800.00 per month rent. (N. T. 17; RE 1).

12. Seeing Hertzler's ad, on May 2, 2007, Glenda Brown called and left a voice mail message for Hertzler. (N. T. 17, 18).

13. Hertzler returned Glenda Brown's call telling her the house was still available and arrangements were made to look at the property on Saturday, May 5, 2007. (N. T. 18).

14. Glenda Brown found Hertzler's property to be situated in an area of rolling hills and beautiful farmlands. (N. T. 25).

15. Glenda Brown also found the home to be asthetically pleasing to her. (N. T. 29).

16. On Saturday, May 5, 2007, when Glenda Brown arrived at the property, Hertzler was already there working. (N. T. 20).

17. Only Glenda Brown meet with Hertzler on May 5, 2007, as Raymond Brown, Jr., was unavailable. (N. T. 19).

18. As Hertzler walked Glenda Brown through the property, Glenda Brown formed the impression that Hertzler wanted to rent the property to her. (N. T. 21, 76).

19. Glenda Brown related that Hertzler was receptive to her and she felt she had a good rapport with Hertzler. (N. T. 29, 41).

20. During the walk-through, Hertzler asked Glenda Brown if her husband was "colored", to which she responded yes. (N. T. 21).

21. Glenda Brown testified that Hertzler's place was a home where she would love to have her boys grow up. (N. T. 25).

22. Glenda Brown indicated she was excited about the possibility of renting Hertzler's property and that while with Hertzler she had expressed her interest to Hertzler. (N. T. 21).

23. Glenda Brown testified that she completed a "rental agreement" that asked for basic information including: where she currently lived; who was her landlord; who was her husband's employer; and where she worked. (N. T. 19).

24. The form Glenda Brown was given to fill out was a rental application. (N. T. 113; RE 1).

25. Glenda Brown did not complete the entire application and left the partially completed application on a counter as she left. (N. T. 91; RE 1).

26. Several items Glenda Brown did not mention in her application was that the Browns had previously declared bankruptcy, and that in 2006,

they had owed rent in the amounts of $700.00 and $800.00. (N. T. 85, 121, 122; RE 1).

27. After Glenda Brown left, Hertzler had occasion to speak with the individual who rented his other property located next door. (N. T. 76, 88).

28. Hertzler's neighbor tenant told Hertzler he was very upset and angry when he saw Glenda Brown being shown the property. (N. T. 76, 88).

29. The neighbor that rented from Hertzler was not Amish and was known to be a trouble maker who had reportedly broken in area homes. (N. T. 88, 105).

30. Hertzler testified that he told the neighbor that the Browns are just as good as anybody else and if they want to rent the property, that is fine with him. (N. T. 76).

31. The neighbor then informed Hertzler that he did not want Hertzler to rent to the Browns. (N. T. 88).

32. Hertzler testified that while the neighbor did not say he would do something to the Browns, Hertzler feared that he might. (N. T. 88).

33. Later, around 9:00p.m., May 5, 2007, Hertzler placed a call to the Browns and left the following message on their answering machine:

> Mrs. Brown, this is Emanuel calling. We talked it over with the neighbors there, my other tenants right there in the house right beside you, and I'm sorry to tell you this. But they do not want a colored family living next door. They are very choosing. They said they would move and it would cost me lots to go looking for new people to move in, so I'm sorry. (N. T. 23, 82; CE 2).

34. Glenda and Raymond Brown, Jr., heard the tape and considered the call a rejection of their application. (N. T. 41, 116).

35. Glenda Brown testified that she and Raymond Brown, Jr., subsequently called Hertzler for clarification. (N. T. 24, 41, 42, 117).

36. The Browns and Hertzler did speak and Glenda Brown testified that the Browns did not tell Hertzler they wanted to rent the property despite what the neighbor said and that during the conversation all Hertzler did was apologize. (N. T. 24, 42, 117).

37. Subsequent to Hertzler and the Browns speaking, Hertzler wrote the Browns a letter in which he, in effect, conveyed his remorse, declared his belief that all are equal under God, stated that he initially had hopes of renting to them, and expressed a willingness to discuss with the Browns *his* reasons for not renting to them. (CE 3).

38. At some point, Hertzler had checked the financial background of the Browns because, at the Public Hearing, Hertzler was aware the Browns had filed bankruptcy, and had twice failed to timely pay rent in 2006. (N. T. 100, 101).

39. Approximately two weeks after his telephone call to the Browns, Hertzler rented the property to someone else. (N. T. 78).

40. The Browns searched for three months for another place to live and on August 15, 2007, they moved into a two bedroom apartment, situated in a five unit apartment building in Atglen, Pa. (N. T. 24-25, 26, 27).

41. The rent the Browns paid for the Atglen, Pa. apartment was $651.00 per month. (N. T. 24-25).

42. The Brown's Coatesville landlord extended their lease until August 15, 2007 without penalty. (N. T. 27).

43. Glenda Brown testified that she was horrified that in 2007, someone would have the audacity to leave such a message on a voice mail. (N. T. 27-28, 42).

44. Glenda Brown further offered that the comment both floored and annoyed her and the family was devastated and lot of their character was destroyed. (N. T. 28, 31, 35).

45. Glenda Brown also offered that going through this case has caused her stress, but she has been comfortable telling colleagues at work about it, and the event has prompted her to champion who she is. (N. T. 31, 33, 34).

46. Raymond Brown, Jr., testified that he became extremely upset and was angry that in 2007, he would have to go through this. (N. T. 51).

47. Raymond Brown, Jr., also offered that after hearing Hertzler's telephone message he has become more cautious regarding his relationships with others. (N. T. 58).

48. Vaughn Brown testified that the incident has made him more aware and wary of the way others treat him. (N. T. 64).

49. When asked specifically if he was embarrassed by others learning of the situation, Vaughn Brown responded by saying, "I found it hard to talk about because racism is always a rough subject to talk about, especially when it's happening to you. When it's just a subject by

itself, it's still hard, but when it's about yourself, it's still harder". (N. T. 63-64).

50. Glenda Brown offered that both her sons are very mature and that she was pleased at how they handled the situation. (N. T. 44).

51. Some days after Glenda and Raymond Brown, Jr., heard Hertzler's voice mail, they played the tape for their sons who are said to have been dumbfounded. (N. T. 60, 63, 44-45).

52. After the initial family discussion, Glenda Brown indicated she did not hear them speak about it again. (N. T. 44-45).

53. Raymond Brown also recommended that the family speak with their pastor to get counseling on how to handle the situation diplomatically. (N. T. 31).

54. Pastor Dan Williams testified that when the Brown family first came to him he observed they appeared hurt, frustrated, shocked and angered and were seeking advice on what to do next. (N. T. 68, 70).

55. Pastor Williams advised the Browns to go to the Pa. Human Relations Commission. (N. T. 31-32).

56. Each family member that testified indicated that this event was the first time in their lives that an act of racism had been visited directly on them. (N. T. 30, 51, 63).

57. Raymond Brown, III, did not testify.

58. Both, Glenda and Raymond Brown, Jr., offered testimony that acquaintances from work and church criticized them asking why they even considered looking for a rental in the location of Hertzler's

property because no African Americans are in that area. (N. T. 32, 43, 56).

59. Glenda Brown offered that it was damaging to have people ask why she would move to such an area if people did not want her there. (N. T. 33).

60. Hertzler offered three reputation witnesses to say he is not a racist: his friend, Tom Billings; his landlord, Ike Stolfus; and his Bishop, John Fisher. (N. T. 98, 108, 111).

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 Browns and Hertzler are persons within the meaning of the Pennsylvania Human Relations Act ("PHRA").

4. The property located at 150 Little Britain Road, Notting, Pa. was a housing accommodation within the meaning of the PHRA.

5. The Browns presented direct evidence of a 5(h)(1) violation of the Pa. Human Relations Act.

6. When unlawful discrimination has been found, the Commission has broad discretion in fashioning a remedy and may award actual damages, including damages caused by humiliation and embarrassment.

7. Such an order may also compel Hertzler to cease and desist from the discriminatory practice and to take such affirmative actions as justice requires.

OPINION

This case arises on a complaint initially filed by Glenda and Raymond Brown, Jr., against Emanuel Hertzler, (hereinafter "Hertzler"), at Pa. Human Relations Commission Case No. 200607552. In their original complaint, filed on or about May 31, 2007, the Browns alleged that on May 5, 2007, Hertzler denied the Browns an opportunity to rent Hertzler's rental property located at, 150 Little Britton Road, Notting, PA. The Brown's initial complaint alleged that Hertzler's action violates Section 5(h)(1) of the Pa. Human Relations Act.

On or about June 8, 2007, the Browns amended their initial complaint to add their two sons as additional named Complainants. An additional amendment had to be requested during the Public Hearing to correctly designate which of the Brown's two sons was under the age of 18 at the time of the alleged action. The amendment allowed at the Public Hearing property reflects the addition of Raymond Brown, III, as an individual, and pursuit of a claim "on behalf of" Vaughn Brown, a minor at the time of the alleged action.

The PHRC investigated the Brown's allegation and, at the conclusion of the investigation, Hertzler was informed that probable cause had been found to credit the Brown's allegation. Thereafter, the PHRC attempted to eliminate the alleged unlawful practice 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 January 10, 2008, in West Chester, Pa. before Permanent Hearing Examiner Carl H. Summerson. The Commission's

interest in the complaint was overseen by PHRC Philadelphia regional office, attorney Charles L. Nier, III, Michael Churchill, Esquire, generally presented evidence on purported damages on behalf of the Browns. Hertzler appeared without counsel.

Following the Public Hearing, the parties were offered an opportunity to submit post-hearing briefs. A letter from Hertzler addressed to the Permanent Hearing Examiner was received on February 8, 2008. On February 25, 2008, attorney Churchill's post-hearing brief was received. Subsequently, on February 27, 2008, the post-hearing brief on behalf of the complaint was received.

At issue in this case is the following provision of the PHRA that makes it an unlawful discriminatory practice for any person to:

> Refuse to... lease... or otherwise deny or withhold any housing... from any person because of the race... of any person... (PHRA, Section 5(h)(1)).

Fundamentally, where direct evidence of discrimination is presented, such evidence, if established by a preponderance of evidence, is sufficient to support a finding of discrimination. See Allison v. PHRC, 716 A.2d 689, 691 (Pa. Commonwealth Ct. 1998), citing Pinchback v. Armistead Homes Corp., 907 F.2d 1447, 1452 (4th Cir.), cert. denied 111 S. Ct. 515 (1990). In the present case, direct evidence of discrimination is found.

First, during a walk-around with Hertzler, Glenda Brown was asked whether her husband was "colored". Second, and far more significantly, on the same evening following Glenda Brown's tour of the property, Hertzler called the Browns leaving the following voice mail on their answering machine:

> Mrs. Brown, this is Emanuel calling. We talked it over with the neighbors there, my other tenants right there in the house right beside you, and I'm sorry to tell you this. But they do not want a colored family living next door. They are very choosing. They said they would move and it would cost me lots to go looking for new people to move in, so I'm sorry. (CE 2).

Two inter-related, yet distinct, features of Hertzler's telephone call to the Browns run afoul of the PHRA. First, the evidence shows that, initially, without regard to race, Hertzler had every intention of attempting to facilitate the Browns renting his home. Glenda Brown's version of her experience with Hertzler and her stated positive perception of him comports with Hertzler's declared acceptability of the Browns as potential tenants. One single factor changed between Hertzler's positive rapport with Glenda Brown and his telephone call to the Browns. That unfortunate factor was his conversation with his other tenant after Glenda Brown left that alerted Hertzler to his other tenant's anti-black attitude.

Hertzler testified that he told the neighboring tenant that the Browns are just as good as anybody else and if they want to rent his property that is fine with him. (N. T. 76). Had Hertzler comported his actions with this declaration, he would not have violated the PHRA. Instead, Hertzler allowed the stated racially-based concerns of his other tenant to cloud his decision. By doing so, his statement to the Browns that he was sorry became unlawful. He, in effect conveyed to the Browns his rejection of their application based on an unlawful racial consideration. See i.e. Cato v. Jilek, 799 F. Supp. 937 (N. D. Ill. 1991); Bishop v. Pecsok, 431 F. Supp. 34 (N. D. Ohio. 1976); and Grant v. Smith, 574 F.2d 252 (5th Cir. 1978).

It is simply wrong to allow the prejudices of a potential neighbor to trump the mandate to make rental decisions absent racial considerations. Here, Hertzler did just that.

Additionally, Hertzler's telephone call uncovers a second unlawful consideration. The second factor that we find to be in violation of the PHRA is Hertzler's declared personal concern about a possible financial hardship if he would rent to the Browns. Hertzler's telephone call clearly informed the Browns of his concern that if his other tenant moved should Hertzler rent to the Browns, it would cost Hertzler lots of money to seek a replacement tenant.

Fear of a white tenant moving if an African American family moves in is not a legal excuse for a landlord's fundamental legal obligation to afford everyone an equal opportunity to secure suitable housing of their choice. See Stewart v. Furton, 774 F. 2d 706 (6th Cir. 1985). Here, Hertzler stated such a fear was partially responsible for his telephone communication to the Browns.

In combination, the two factors indicated establish direct evidence of race-based discrimination. Having found direct evidence that race played a motivating part in the rejection of the Brown's application, Hertzler may still avoid a finding of liability by establishing by a preponderance of the evidence that he would have rejected the Brown's application even if their race had not been taken into account. This analytical step is imported from the employment law case of Price Waterhouse v. Hopkins, 490 U.S. 228 (989), which dealt with the proper analysis in a case where direct evidence has been shown.

In the fair housing arena, the Price Waterhouse approach has been extended to alleged violations of the Federal Fair Housing Act. See i.e.

Bachman v. St. Monica's Congregation, 902 F. 2d 1259, 1263 (7th Cir. 1990); and Cato v. Jilek, 779 F. Supp. 937 (N. D. Ill. 1991). We now elect to extend this analytical approach to a case under the PHRA that alleges a housing violation under Section 5(h)(1) and direct evidence has been shown.

Here, Hertzler generally submits that Glenda Brown's failure to fully complete his required rental application form affords Hertzler a separate justifiable reason not to have rented to the Browns. However, while it is clear that Glenda Brown failed to totally complete the application, it is equally clear that Hertzler's telephone message to the Browns left the Browns with the impression that any further attempt to seek to rent from Hertzler would have been futile.

Glenda Brown credibly testified that at the time she filled out the rental application, she informed Hertzler that there was information requested by the form that she did not have with her. (N. T. 76, 85, 86, 114, 119, 120-121). She further testified that Hertzler told her he would call her to say yes or no on the rental and if yes, she could supply any missing information at that time. (N. T. 114).

Clearly, neither Hertzler's telephone message nor his subsequent letter to the Browns, (CE 3), made any mention of problems with the application. Hertzler's letter only says he would "gladly discuss" with the Browns the reasons he did not rent to them. His telephone call declared his reasons: an expression of race-based concern by his other tenant, and a personal financial concern borne out of a fear his other tenant would move and this would cost him money.

Considering the entire record in this case, Hertzler fails to establish by a preponderance of the evidence that he would have rejected the Browns even if

race had not been a motivating factor. Accordingly, we move to consideration of an appropriate remedy.

Section 9(f)(1) of the PHRA provides that when a respondent is found to have engaged in an unlawful discriminatory practice, the Commission may issue an order which requires a respondent to cease and desist from unlawful discrimination. Such an order may also order "such affirmative action" and "actual damages, including damages caused by humiliation and embarrassment, as, in the judgment of the Commission will effectuate the purpose of [the PHRA],.." Also Section 9(f)(2) authorizes the assessment of a civil penalty "in an amount not exceeding ten thousand dollars..." Additionally, Section 9(f.1) permits the Commission to award attorney fees and costs to prevailing Complainants.

In the post-hearing brief on behalf of this complaint, the PHRC regional office attorney seeks a civil penalty and an award for each Complainant for embarrassment and humiliation only. The Complainant's private attorney does not seek a civil penalty, but also seeks an award for embarrassment and humiliation. The Complainant's private attorney also suggests the Complainants had out of pocket expenses and also suggests an award for the value of the lost rental opportunity. Further, for the first time, the Complainant's private attorney's post-hearing brief raises the question of attorney fees.

First, we address the Complainant's private attorney's contention that the Browns suffered $240.00 in out-of-pocket expenses. In paragraph 6 of the Conclusions of Law proposed by the Complainant's private attorney, he generally states the Complainants suffered additional rental payments. Apparently, the

Complainant's private attorney is referring the three month period of May 2007 through July 2007, when the Complainants had to continue to pay $880.00 per month for their rental unit in Coatesville rather than $800.00 per month had they rented Hertzler's property. The difference of $80.00 per month for this three month period is an appropriate amount of an award for out of pocket expenses.

Next, in the same paragraph the Complainant's private attorney submits that the Complainants lost $1,788.00 in "lost quality" of the housing they eventually found. The Complainants argue that had they rented Hertzler's property their quality of living would have been far better than the two bedroom apartment unit where they eventually moved.

The Complainant's cite no authority, that an award for "lost quality" of a housing unit is an appropriate remedy under the PHRA. Further, the PHRC regional office post-hearing brief makes no argument in this regard. Lost quality of living arrangements is properly a facet of the calculation for embarrassment and humiliation damages that are authorized by the PHRA.

Accordingly we turn to the question of a proper award for embarrassment and humiliation.

First, humiliation and embarrassment can be inferred from the circumstances as well as established by testimony. Seaton v. Sky Realty Co. Inc., et al., 491 F2d 634, 636 (7th Cir. 1974). See also HUD v. Blackwell, 2 FHFL ¶25,001 (HUD ALJ December 21, 1989). Aff'd. 908 F.2d 844 (11th Cir. 1990). Embarrassment and humiliation damages are generally regarded as being actual or compensatory in nature, and not vindictive or punitive. See Stevens v. Dobs, Inc., Inc. et. al, 373 F. Supp 618 (E.D. NC. 1974). The key factor in determining

the size of an award for humiliation and embarrassment is a victim's reaction to discriminatory conduct. HUD v. Banai, 2 FHFL ¶25,095 (HUD ALJ February 1995).

Here, we note that only three of the four Complainants testified. For reasons unspecified, Raymond Brown, III failed to testify. On the question of the reaction of those who did testify, the record does contain some general information regarding Glenda Brown's, Raymond Brown, Jr's, and Vaughn Brown's subjective reactions to Hertzler's telephone call.

However, before these reactions are reviewed, it is worthwhile to place what occurred in some perspective. First, Hertzler, being Amish, can best be described as naive. It is common knowledge that many from the Amish community lack sophistication regarding the laws of the Commonwealth. Hertzler's demeanor and testimony as well as his written correspondence in this case bespeaks of his naiveté and his lack of a fundamental understanding of why he was wrong to place his other tenant's concerns and his own financial concerns over the Brown's right to secure the rental of a home they desired.

Next, it is clear that in this case, Hertzler's motivation was not borne out of a personal ill will, malice, or a desire to harm the Brown family. Indeed, a misplaced paternalistic attitude contributed to his actions. Uncontraverted evidence suggests that Hertzler's bigoted tenant had been a menace to society in other ways as well. Hertzler offered that the neighbor had previously been arrested for breaking into homes. Another witness referred to the neighbor as a trouble maker. (N. T. 105). Here, Hertzler submits that he feared what the neighbor might do to the Browns if they moved next to this man.

Throughout this ordeal, Hertzler has been apologetic and polite. It is also clear that Hertzler does not harbor a personal bias against either the Browns specifically or African Americans generally. On this point, while politeness does not entirely negate the resultant humiliation and embarrassment, courts have considered such things as whether the act of discrimination was "perpetuated in a courteous manner". See Johnson v. Hale, 13 F. 3d 1351, 1353 (9th Cir. 1994), citing, Steele v. Title Realty Co., 478 F.2d 380, 384 (10th Cir. 1973). Accordingly, Hertzler's conduct will be taken into consideration as well as the degree of embarrassment and humiliation suffered that is rightfully attributable to him.

We begin by observing that there are a multitude of things none of the Browns claim. For example, no claim has been made that there have been any resultant physical ailments. Also, no evidence was presented by anyone of an impact on someone's daily life with respect to such fundamental things as changes in eating, sleeping or working. Indeed, little effort was expended to contrast anyone's emotional state before and after this event.

As we look at the reactions the members of the Brown family testified to, we are also mindful of the various sources of some of the reactions mentioned. One source that seemed to be the genesis of much of the negative reaction experienced by Glenda and Raymond Brown, Jr. came from members of the community following the incident. It appears that acquaintances from both work and their church had leveled unwarranted criticism on them by asking why the Browns even considered looking to rent a home in the location where Hertzler's property was located because there were no African Americans in the area. (N. T. 32, 43, 56). Clearly, the Browns have every right and prerogative to live

anywhere they choose. The criticisms of which they spoke is indeed unfortunate. Clearly, our society has a long way to go as people of good will seek increased racial harmony.

Next, while Hertzler improperly communicated unjust reasons to, in effect, reject the Brown's efforts to rent his property, it was the bigotry expressed by his other tenant that prompted Hertzler to react inappropriately. While the Complainants seem to submit that Hertzler never wanted to rent to them in the first place because of their race, this was not the case. For instance, Glenda Brown says she was horrified that in 2007 someone would have the audacity to leave such a voice mail. (N. T. 27-28). Perhaps what she is actually saying is she was horrified that in 2007 a prospective white neighbor would have blatantly expressed his bigotry. Glenda Brown described Hertzler's behavior and demeanor towards her as receptive and positive, (N. T. 22, 25) and that there had been a good rapport between herself and Hertzler. (N. T. 41). She went so far as to say she went home and shared the positive experience she felt with her husband. (N. T. 22).

Similarly, Raymond Brown, Jr., offered that he too became extremely upset that in 2007 he would have to go through this. (N. T. 51). What they were experiencing was a naïve Amish man misapplying the bigotry of his tenant, not Hertzler's bigotry. Frankly, it was not established that Hertzler is in anyway a bigot.

Interestingly, Glenda Brown offered that she was comfortable telling colleagues at work what had happened. (N. T. 31). Similarly, Vaughn Brown

indicated that he experienced support from others with respect to what the family had decided to do. (N. T. 64).

Without much explanation, all Glenda Brown really offered was that she and her family were "horrified" and "devastated" to have been victimized. (N. T. 27-28, 31). She also offered that both her sons are very mature and that she was pleased at how they handled the situation. (N. T. 44). She indicated that their initial reaction had been to be "dumbfounded". (N. T. 44-45). However, she also said that after the initial revelation to them of the event, she had not heard them speak of it again. (N. T. 44-45).

Vaughn Brown, when asked, in effect, if the incident caused him embarrassment, simply offered that it just made the subject of racism harder to talk about. He also offered a vague assessment that the event has made him warier of others. (N. T. 64). Similarly, Raymond Brown, Jr., vaguely offered that he too has become more cautions of others. (N. T. 58).

One thing the family did was to seek assistance from the pastor of their church. However, rather than evidence of seeking solace and counseling for any emotional difficulties anyone was having, the focus of the advice sought was what to do legally about what had happened. (N. T. 68, 70).

Fundamentally, it must be recognized that a damage award can never fully compensate a victim of discrimination and that, without question, it is inherently difficult to measure an amount which will ease a victim's hurt feelings and experience of embarrassment and humiliation. Our task is to seek to make an appropriate transformation of the Brown's general qualitative testimony into quantitative relief. Therefore, considering the record as a whole, it is reasonable

and fair to award Glenda Brown $2,000.00 and Raymond Brown, Jr., $2,000.00 for the embarrassment and humiliation they suffered. Further, it is reasonable and fair to award Vaughn Brown the sum of $1,000.00 for the embarrassment and humiliation he suffered. Since Raymond Brown, III failed to testify, no award is recommended.

After careful consideration of this record, an additional civil penalty will not be ordered.

This brings us to the Complainant's private attorney's request for attorney fees. At the conclusion of the receipt of testimony at the Public Hearing, with the exception of holding the record open for the limited purpose of the receipt of a copy of CE 2, the matter was closed. The failure to present any evidence on the issue of attorney fees results in there being no recommendation for attorney fees being awarded.

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

GLENDA & RAYMOND BROWN, JR., and RAYMOND BROWN, III INDIVIDUALLY, and o/b/o VAUGHAN BROWN, **Complainants**	:	
v.	:	**PHRC CASE NO. 200607552**
EMANUEL HERTZLER, **Respondent**	:	

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Browns have proven discrimination against Hertzler in violation of Section 5(h)(1) of the Pennsylvania Human Relations Act.

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

April 11, 08
Date

Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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v.	:	**PHRC CASE NO. 200607552**
EMANUEL HERTZLER, **Respondent**	:	

FINAL ORDER

AND NOW, this 22nd day of April, 2008, 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 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

ORDERS

1. That Hertzler shall permanently cease and desist from engaging in any acts or practices which have the purpose or effect of denying equal housing opportunities because of race. Prohibited acts include, but are not limited to:

    a. refusing or failing to rent a property, or refusing to negotiate for the rental of a property because of race;

b. otherwise making unavailable or denying a property to any person because of race;

c. making any inquiry or eliciting any information concerning the race of an applicant for a rental property; and

d. indicating in any way a discriminatory preference or limitation based on race.

2. That, Hertzler shall pay Glenda Brown the lump sum of $2,000.00 in compensatory damages for the embarrassment and humiliation she suffered.

3. That Hertzler shall pay Raymond Brown, Jr., the lump sum of $2,000.00 in compensatory damages for the embarrassment and humiliation he suffered.

4. That Hertzler shall pay Vaughn Brown the lump sum of $1,000.00 in compensatory damages for the embarrassment and humiliation he suffered.

5. That Hertzler shall pay the Browns the lump sum of $240.00 which amount represents out of pocket expenses incurred by the Browns.

6. Consistent with Section 5(j) of the PHRA. Hertzler shall prominently post and exhibit a "Fair Housing Practice" notice distributed by the PHRC Housing Division alongside any "for rent" signs posted in connection with any rental properties he owns. The Hertzler shall hereafter also include the fair housing "Equal Opportunity in Housing" symbol in any advertisement for any rental property owned by Hertzler.

7. On the last day of every third month, beginning thirty days after this decision becomes final (or four times per year), and continuing for two years from the date this Order becomes final, Hertzler shall submit reports containing the following information to the PHRC Housing Division, P.O. Box 3145, Harrisburg, PA 17105, provided that the Housing Division may modify this paragraph of this Order as that office deems necessary to make its requirements less, but not more, burdensome:

   a. A duplicate of every written application, and a log of all persons who applied for occupancy at any of the properties owned, operated, or otherwise controlled in whole or in part by Hertzler indicating the name and address of each applicant, the number of persons to reside in the unit, the number of bedrooms in the unit for which the applicant applied, whether the applicant was

rejected or accepted, the date on which the applicant was notified of acceptance or rejection, and if rejected, the reason for such rejection. Hertzler shall maintain the originals of all applications described in the log.

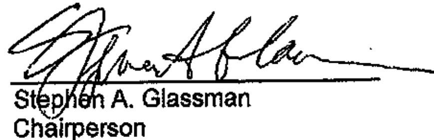
b. A list of vacancies at properties owned, operated, or otherwise controlled in whole or in part by Hertzler during the reporting period, including: the address of the unit, the number of bedrooms in the unit, the date the tenant gave notice of an intent to move out, the date the tenant moved out, the date the unit was rented again or committed to a new rental, and the date the new tenant moved in.

c. Sample copies of advertisements published during the reporting period, specifying the dates and media used or, if applicable, a statement that no advertisements have been published during the reporting period.

d. A list of all people who inquired, in writing, in person, or by telephone, about renting a property, including their names and addresses, the date of their inquiry, and the disposition of their inquiry.

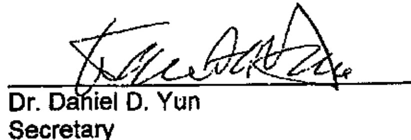
8. That, within thirty days of the effective date of this Order, Hertzler shall report to the PHRC on the manner of their compliance with the terms of this Order by letter addressed to Assistant Chief Counsel PHRC Charles L. Nier, III, Philadelphia Regional Office, 711 State Office Building, 1400 Spring Garden Street, Philadelphia, PA 19130-4088.

PENNSYLVANIA HUMAN RELATIONS COMMISSION



Stephen A. Glassman
Chairperson

Attest:



Dr. Daniel D. Yun
Secretary

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

GLENDA & RAYMOND BROWN, JR., and RAYMOND BROWN, III INDIVIDUALLY, and o/b/o VAUGHAN BROWN, Complainants	:	
v.	:	PHRC CASE NO. 200607552
EMANUEL HERTZLER, Respondent	:	

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. The Respondent in this case is Emanuel Hertzler, (hereinafter "Hertzler"), owner of two properties in New Britain, Pennsylvania. (N. T. 75, 77; CE 3).

2. Hertzler is Amish. (N. T. 110-111).

3. The Complainants in this case are Glenda and Raymond Brown, Jr., an African American couple who have been married 23 years, and their two sons, Raymond Brown, III, who was twenty years old in May 2007, and Vaughan Brown who was 17 years old in May 2007. (N. T. 13, 30, 44, 49, 60).

4. In the early to mid-1990's, the Brown family moved from Philadelphia in search of a better life. (N. T. 49).

5. In April 2007, the Browns were renting a three bedroom row home in the Wedgewood section of Coatesville, Pa. (N. T. 13).

6. The Brown's rental lease provided for rental payments of $880.00 per month with the lease term scheduled to expire on July 31, 2007. (N. T. 16 CE 1).

7. In April 2007, Vaughn Brown was attending his senior year of high school at Coatesville Area High School. (N. T. 60).

* 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 o f Testimony
C. E. Complainant's Exhibit
R. E. Respondent's Exhibit

8. In 2006 – 2007, Glenda Brown was the only African American educator working as a substitute teacher at the Unionville Chadds Ford School District. (N. T. 30; RE 1).

9. Considering the Wedgewood section of Coatesville less than asthetically pleasing and wanting to find a less expensive single family home to rent, in the spring of 2007, the Browns began to search for another place to live. (N. T. 16, 17, 29).

10. Hertzler had placed an ad in the Community Carrier seeking to rent one of the two homes he owned. (N. T. 17).

11. The home for rent was located at 150 Little Britain Road, Notting, Pa., and was advertised at $800.00 per month rent. (N. T. 17; RE 1).

12. Seeing Hertzler's ad, on May 2, 2007, Glenda Brown called and left a voice mail message for Hertzler. (N. T. 17, 18).

13. Hertzler returned Glenda Brown's call telling her the house was still available and arrangements were made to look at the property on Saturday, May 5, 2007. (N. T. 18).

14. Glenda Brown found Hertzler's property to be situated in an area of rolling hills and beautiful farmlands. (N. T. 25).

15. Glenda Brown also found the home to be asthetically pleasing to her. (N. T. 29).

16. On Saturday, May 5, 2007, when Glenda Brown arrived at the property, Hertzler was already there working. (N. T. 20).

17. Only Glenda Brown meet with Hertzler on May 5, 2007, as Raymond Brown, Jr., was unavailable. (N. T. 19).

18. As Hertzler walked Glenda Brown through the property, Glenda Brown formed the impression that Hertzler wanted to rent the property to her. (N. T. 21, 76).

19. Glenda Brown related that Hertzler was receptive to her and she felt she had a good rapport with Hertzler. (N. T. 29, 41).

20. During the walk-through, Hertzler asked Glenda Brown if her husband was "colored", to which she responded yes. (N. T. 21).

21. Glenda Brown testified that Hertzler's place was a home where she would love to have her boys grow up. (N. T. 25).

22. Glenda Brown indicated she was excited about the possibility of renting Hertzler's property and that while with Hertzler she had expressed her interest to Hertzler. (N. T. 21).

23. Glenda Brown testified that she completed a "rental agreement" that asked for basic information including: where she currently lived; who was her landlord; who was her husband's employer; and where she worked. (N. T. 19).

24. The form Glenda Brown was given to fill out was a rental application. (N. T. 113; RE 1).

25. Glenda Brown did not complete the entire application and left the partially completed application on a counter as she left. (N. T. 91; RE 1).

26. Several items Glenda Brown did not mention in her application was that the Browns had previously declared bankruptcy, and that in 2006,

they had owed rent in the amounts of $700.00 and $800.00. (N. T. 85, 121, 122; RE 1).

27. After Glenda Brown left, Hertzler had occasion to speak with the individual who rented his other property located next door. (N. T. 76, 88).

28. Hertzler's neighbor tenant told Hertzler he was very upset and angry when he saw Glenda Brown being shown the property. (N. T. 76, 88).

29. The neighbor that rented from Hertzler was not Amish and was known to be a trouble maker who had reportedly broken in area homes. (N. T. 88, 105).

30. Hertzler testified that he told the neighbor that the Browns are just as good as anybody else and if they want to rent the property, that is fine with him. (N. T. 76).

31. The neighbor then informed Hertzler that he did not want Hertzler to rent to the Browns. (N. T. 88).

32. Hertzler testified that while the neighbor did not say he would do something to the Browns, Hertzler feared that he might. (N. T. 88).

33. Later, around 9:00p.m., May 5, 2007, Hertzler placed a call to the Browns and left the following message on their answering machine:

> Mrs. Brown, this is Emanuel calling. We talked it over with the neighbors there, my other tenants right there in the house right beside you, and I'm sorry to tell you this. But they do not want a colored family living next door. They are very choosing. They said they would move and it would cost me lots to go looking for new people to move in, so I'm sorry. (N. T. 23, 82; CE 2).

34. Glenda and Raymond Brown, Jr., heard the tape and considered the call a rejection of their application. (N. T. 41, 116).

35. Glenda Brown testified that she and Raymond Brown, Jr., subsequently called Hertzler for clarification. (N. T. 24, 41, 42, 117).

36. The Browns and Hertzler did speak and Glenda Brown testified that the Browns did not tell Hertzler they wanted to rent the property despite what the neighbor said and that during the conversation all Hertzler did was apologize. (N. T. 24, 42, 117).

37. Subsequent to Hertzler and the Browns speaking, Hertzler wrote the Browns a letter in which he, in effect, conveyed his remorse, declared his belief that all are equal under God, stated that he initially had hopes of renting to them, and expressed a willingness to discuss with the Browns his reasons for not renting to them. (CE 3).

38. At some point, Hertzler had checked the financial background of the Browns because, at the Public Hearing, Hertzler was aware the Browns had filed bankruptcy, and had twice failed to timely pay rent in 2006. (N. T. 100, 101).

39. Approximately two weeks after his telephone call to the Browns, Hertzler rented the property to someone else. (N. T. 78).

40. The Browns searched for three months for another place to live and on August 15, 2007, they moved into a two bedroom apartment, situated in a five unit apartment building in Atglen, Pa. (N. T. 24-25, 26, 27).

41. The rent the Browns paid for the Atglen, Pa. apartment was $651.00 per month. (N. T. 24-25).

42. The Brown's Coatesville landlord extended their lease until August 15, 2007 without penalty. (N. T. 27).

43. Glenda Brown testified that she was horrified that in 2007, someone would have the audacity to leave such a message on a voice mail. (N. T. 27-28, 42).

44. Glenda Brown further offered that the comment both floored and annoyed her and the family was devastated and lot of their character was destroyed. (N. T. 28, 31, 35).

45. Glenda Brown also offered that going through this case has caused her stress, but she has been comfortable telling colleagues at work about it, and the event has prompted her to champion who she is. (N. T. 31, 33, 34).

46. Raymond Brown, Jr., testified that he became extremely upset and was angry that in 2007, he would have to go through this. (N. T. 51).

47. Raymond Brown, Jr., also offered that after hearing Hertzler's telephone message he has become more cautious regarding his relationships with others. (N. T. 58).

48. Vaughn Brown testified that the incident has made him more aware and wary of the way others treat him. (N. T. 64).

49. When asked specifically if he was embarrassed by others learning of the situation, Vaughn Brown responded by saying, "I found it hard to talk about because racism is always a rough subject to talk about, especially when it's happening to you. When it's just a subject by

itself, it's still hard, but when it's about yourself, it's still harder". (N. T. 63-64).

50. Glenda Brown offered that both her sons are very mature and that she was pleased at how they handled the situation. (N. T. 44).

51. Some days after Glenda and Raymond Brown, Jr., heard Hertzler's voice mail, they played the tape for their sons who are said to have been dumbfounded. (N. T. 60, 63, 44-45).

52. After the initial family discussion, Glenda Brown indicated she did not hear them speak about it again. (N. T. 44-45).

53. Raymond Brown also recommended that the family speak with their pastor to get counseling on how to handle the situation diplomatically. (N. T. 31).

54. Pastor Dan Williams testified that when the Brown family first came to him he observed they appeared hurt, frustrated, shocked and angered and were seeking advice on what to do next. (N. T. 68, 70).

55. Pastor Williams advised the Browns to go to the Pa. Human Relations Commission. (N. T. 31-32).

56. Each family member that testified indicated that this event was the first time in their lives that an act of racism had been visited directly on them. (N. T. 30, 51, 63).

57. Raymond Brown, III, did not testify.

58. Both, Glenda and Raymond Brown, Jr., offered testimony that acquaintances from work and church criticized them asking why they even considered looking for a rental in the location of Hertzler's

property because no African Americans are in that area. (N. T. 32, 43, 56).

59. Glenda Brown offered that it was damaging to have people ask why she would move to such an area if people did not want her there. (N. T. 33).

60. Hertzler offered three reputation witnesses to say he is not a racist: his friend, Tom Billings; his landlord, Ike Stolfus; and his Bishop, John Fisher. (N. T. 98, 108, 111).

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 Browns and Hertzler are persons within the meaning of the Pennsylvania Human Relations Act ("PHRA").
4. The property located at 150 Little Britain Road, Notting, Pa. was a housing accommodation within the meaning of the PHRA.
5. The Browns presented direct evidence of a 5(h)(1) violation of the Pa. Human Relations Act.
6. When unlawful discrimination has been found, the Commission has broad discretion in fashioning a remedy and may award actual damages, including damages caused by humiliation and embarrassment.
7. Such an order may also compel Hertzler to cease and desist from the discriminatory practice and to take such affirmative actions as justice requires.

OPINION

This case arises on a complaint initially filed by Glenda and Raymond Brown, Jr., against Emanuel Hertzler, (hereinafter "Hertzler"), at Pa. Human Relations Commission Case No. 200607552. In their original complaint, filed on or about May 31, 2007, the Browns alleged that on May 5, 2007, Hertzler denied the Browns an opportunity to rent Hertzler's rental property located at, 150 Little Britton Road, Notting, PA. The Brown's initial complaint alleged that Hertzler's action violates Section 5(h)(1) of the Pa. Human Relations Act.

On or about June 8, 2007, the Browns amended their initial complaint to add their two sons as additional named Complainants. An additional amendment had to be requested during the Public Hearing to correctly designate which of the Brown's two sons was under the age of 18 at the time of the alleged action. The amendment allowed at the Public Hearing property reflects the addition of Raymond Brown, III, as an individual, and pursuit of a claim "on behalf of" Vaughn Brown, a minor at the time of the alleged action.

The PHRC investigated the Brown's allegation and, at the conclusion of the investigation, Hertzler was informed that probable cause had been found to credit the Brown's allegation. Thereafter, the PHRC attempted to eliminate the alleged unlawful practice 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 January 10, 2008, in West Chester, Pa. before Permanent Hearing Examiner Carl H. Summerson. The Commission's

interest in the complaint was overseen by PHRC Philadelphia regional office, attorney Charles L. Nier, III, Michael Churchill, Esquire, generally presented evidence on purported damages on behalf of the Browns. Hertzler appeared without counsel.

Following the Public Hearing, the parties were offered an opportunity to submit post-hearing briefs. A letter from Hertzler addressed to the Permanent Hearing Examiner was received on February 8, 2008. On February 25, 2008, attorney Churchill's post-hearing brief was received. Subsequently, on February 27, 2008, the post-hearing brief on behalf of the complaint was received.

At issue in this case is the following provision of the PHRA that makes it an unlawful discriminatory practice for any person to:

> Refuse to... lease... or otherwise deny or withhold any housing... from any person because of the race... of any person... (PHRA, Section 5(h)(1)).

Fundamentally, where direct evidence of discrimination is presented, such evidence, if established by a preponderance of evidence, is sufficient to support a finding of discrimination. See Allison v. PHRC, 716 A.2d 689, 691 (Pa. Commonwealth Ct. 1998), citing Pinchback v. Armistead Homes Corp., 907 F.2d 1447, 1452 (4th Cir.), cert. denied 111 S. Ct. 515 (1990). In the present case, direct evidence of discrimination is found.

First, during a walk-around with Hertzler, Glenda Brown was asked whether her husband was "colored". Second, and far more significantly, on the same evening following Glenda Brown's tour of the property, Hertzler called the Browns leaving the following voice mail on their answering machine:

> Mrs. Brown, this is Emanuel calling. We talked it over with the neighbors there, my other tenants right there in the house right beside you, and I'm sorry to tell you this. But they do not want a colored family living next door. They are very choosing. They said they would move and it would cost me lots to go looking for new people to move in, so I'm sorry. (CE 2).

Two inter-related, yet distinct, features of Hertzler's telephone call to the Browns run afoul of the PHRA. First, the evidence shows that, initially, without regard to race, Hertzler had every intention of attempting to facilitate the Browns renting his home. Glenda Brown's version of her experience with Hertzler and her stated positive perception of him comports with Hertzler's declared acceptability of the Browns as potential tenants. One single factor changed between Hertzler's positive rapport with Glenda Brown and his telephone call to the Browns. That unfortunate factor was his conversation with his other tenant after Glenda Brown left that alerted Hertzler to his other tenant's anti-black attitude.

Hertzler testified that he told the neighboring tenant that the Browns are just as good as anybody else and if they want to rent his property that is fine with him. (N. T. 76). Had Hertzler comported his actions with this declaration, he would not have violated the PHRA. Instead, Hertzler allowed the stated racially-based concerns of his other tenant to cloud his decision. By doing so, his statement to the Browns that he was sorry became unlawful. He, in effect conveyed to the Browns his rejection of their application based on an unlawful racial consideration. See i.e. Cato v. Jilek, 799 F. Supp. 937 (N. D. Ill. 1991); Bishop v. Pecsok, 431 F. Supp. 34 (N. D. Ohio. 1976); and Grant v. Smith, 574 F.2d 252 (5th Cir. 1978).

It is simply wrong to allow the prejudices of a potential neighbor to trump the mandate to make rental decisions absent racial considerations. Here, Hertzler did just that.

Additionally, Hertzler's telephone call uncovers a second unlawful consideration. The second factor that we find to be in violation of the PHRA is Hertzler's declared personal concern about a possible financial hardship if he would rent to the Browns. Hertzler's telephone call clearly informed the Browns of his concern that if his other tenant moved should Hertzler rent to the Browns, it would cost Hertzler lots of money to seek a replacement tenant.

Fear of a white tenant moving if an African American family moves in is not a legal excuse for a landlord's fundamental legal obligation to afford everyone an equal opportunity to secure suitable housing of their choice. See Stewart v. Furton, 774 F. 2d 706 (6th Cir. 1985). Here, Hertzler stated such a fear was partially responsible for his telephone communication to the Browns.

In combination, the two factors indicated establish direct evidence of race-based discrimination. Having found direct evidence that race played a motivating part in the rejection of the Brown's application, Hertzler may still avoid a finding of liability by establishing by a preponderance of the evidence that he would have rejected the Brown's application even if their race had not been taken into account. This analytical step is imported from the employment law case of Price Waterhouse v. Hopkins, 490 U.S. 228 (989), which dealt with the proper analysis in a case where direct evidence has been shown.

In the fair housing arena, the Price Waterhouse approach has been extended to alleged violations of the Federal Fair Housing Act. See i.e.

Bachman v. St. Monica's Congregation, 902 F. 2d 1259, 1263 (7th Cir. 1990); and Cato v. Jilek, 779 F. Supp. 937 (N. D. Ill. 1991). We now elect to extend this analytical approach to a case under the PHRA that alleges a housing violation under Section 5(h)(1) and direct evidence has been shown.

Here, Hertzler generally submits that Glenda Brown's failure to fully complete his required rental application form affords Hertzler a separate justifiable reason not to have rented to the Browns. However, while it is clear that Glenda Brown failed to totally complete the application, it is equally clear that Hertzler's telephone message to the Browns left the Browns with the impression that any further attempt to seek to rent from Hertzler would have been futile.

Glenda Brown credibly testified that at the time she filled out the rental application, she informed Hertzler that there was information requested by the form that she did not have with her. (N. T. 76, 85, 86, 114, 119, 120-121). She further testified that Hertzler told her he would call her to say yes or no on the rental and if yes, she could supply any missing information at that time. (N. T. 114).

Clearly, neither Hertzler's telephone message nor his subsequent letter to the Browns, (CE 3), made any mention of problems with the application. Hertzler's letter only says he would "gladly discuss" with the Browns the reasons he did not rent to them. His telephone call declared his reasons: an expression of race-based concern by his other tenant, and a personal financial concern borne out of a fear his other tenant would move and this would cost him money.

Considering the entire record in this case, Hertzler fails to establish by a preponderance of the evidence that he would have rejected the Browns even if

race had not been a motivating factor. Accordingly, we move to consideration of an appropriate remedy.

Section 9(f)(1) of the PHRA provides that when a respondent is found to have engaged in an unlawful discriminatory practice, the Commission may issue an order which requires a respondent to cease and desist from unlawful discrimination. Such an order may also order "such affirmative action" and "actual damages, including damages caused by humiliation and embarrassment, as, in the judgment of the Commission will effectuate the purpose of [the PHRA]..." Also Section 9(f)(2) authorizes the assessment of a civil penalty "in an amount not exceeding ten thousand dollars..." Additionally, Section 9(f.1) permits the Commission to award attorney fees and costs to prevailing Complainants.

In the post-hearing brief on behalf of this complaint, the PHRC regional office attorney seeks a civil penalty and an award for each Complainant for embarrassment and humiliation only. The Complainant's private attorney does not seek a civil penalty, but also seeks an award for embarrassment and humiliation. The Complainant's private attorney also suggests the Complainants had out of pocket expenses and also suggests an award for the value of the lost rental opportunity. Further, for the first time, the Complainant's private attorney's post-hearing brief raises the question of attorney fees.

First, we address the Complainant's private attorney's contention that the Browns suffered $240.00 in out-of-pocket expenses. In paragraph 6 of the Conclusions of Law proposed by the Complainant's private attorney, he generally states the Complainants suffered additional rental payments. Apparently, the

Complainant's private attorney is referring the three month period of May 2007 through July 2007, when the Complainants had to continue to pay $880.00 per month for their rental unit in Coatesville rather than $800.00 per month had they rented Hertzler's property. The difference of $80.00 per month for this three month period is an appropriate amount of an award for out of pocket expenses.

Next, in the same paragraph the Complainant's private attorney submits that the Complainants lost $1,788.00 in "lost quality" of the housing they eventually found. The Complainants argue that had they rented Hertzler's property their quality of living would have been far better than the two bedroom apartment unit where they eventually moved.

The Complainant's cite no authority that an award for "lost quality" of a housing unit is an appropriate remedy under the PHRA. Further, the PHRC regional office post-hearing brief makes no argument in this regard. Lost quality of living arrangements is properly a facet of the calculation for embarrassment and humiliation damages that are authorized by the PHRA.

Accordingly we turn to the question of a proper award for embarrassment and humiliation.

First, humiliation and embarrassment can be inferred from the circumstances as well as established by testimony. Seaton v. Sky Realty Co. Inc., et al., 491 F2d 634, 636 (7th Cir. 1974). See also HUD v. Blackwell, 2 FHFL ¶25,001 (HUD ALJ December 21, 1989). Aff'd. 908 F.2d 844 (11th Cir. 1990). Embarrassment and humiliation damages are generally regarded as being actual or compensatory in nature, and not vindictive or punitive. See Stevens v. Dobs, Inc., Inc. et. al, 373 F. Supp 618 (E.D. NC. 1974). The key factor in determining

the size of an award for humiliation and embarrassment is a victim's reaction to discriminatory conduct. HUD v. Banai, 2 FHFL ¶25,095 (HUD ALJ February 1995).

Here, we note that only three of the four Complainants testified. For reasons unspecified, Raymond Brown, III failed to testify. On the question of the reaction of those who did testify, the record does contain some general information regarding Glenda Brown's, Raymond Brown, Jr's, and Vaughn Brown's subjective reactions to Hertzler's telephone call.

However, before these reactions are reviewed, it is worthwhile to place what occurred in some perspective. First, Hertzler, being Amish, can best be described as naive. It is common knowledge that many from the Amish community lack sophistication regarding the laws of the Commonwealth. Hertzler's demeanor and testimony as well as his written correspondence in this case bespeaks of his naiveté and his lack of a fundamental understanding of why he was wrong to place his other tenant's concerns and his own financial concerns over the Brown's right to secure the rental of a home they desired.

Next, it is clear that in this case, Hertzler's motivation was not borne out of a personal ill will, malice, or a desire to harm the Brown family. Indeed, a misplaced paternalistic attitude contributed to his actions. Uncontraverted evidence suggests that Hertzler's bigoted tenant had been a menace to society in other ways as well. Hertzler offered that the neighbor had previously been arrested for breaking into homes. Another witness referred to the neighbor as a trouble maker. (N. T. 105). Here, Hertzler submits that he feared what the neighbor might do to the Browns if they moved next to this man.

Throughout this ordeal, Hertzler has been apologetic and polite. It is also clear that Hertzler does not harbor a personal bias against either the Browns specifically or African Americans generally. On this point, while politeness does not entirely negate the resultant humiliation and embarrassment, courts have considered such things as whether the act of discrimination was "perpetuated in a courteous manner". See Johnson v. Hale, 13 F. 3d 1351, 1353 (9th Cir. 1994), citing, Steele v. Title Realty Co., 478 F.2d 380, 384 (10th Cir. 1973). Accordingly, Hertzler's conduct will be taken into consideration as well as the degree of embarrassment and humiliation suffered that is rightfully attributable to him.

We begin by observing that there are a multitude of things none of the Browns claim. For example, no claim has been made that there have been any resultant physical ailments. Also, no evidence was presented by anyone of an impact on someone's daily life with respect to such fundamental things as changes in eating, sleeping or working. Indeed, little effort was expended to contrast anyone's emotional state before and after this event.

As we look at the reactions the members of the Brown family testified to, we are also mindful of the various sources of some of the reactions mentioned. One source that seemed to be the genesis of much of the negative reaction experienced by Glenda and Raymond Brown, Jr. came from members of the community following the incident. It appears that acquaintances from both work and their church had leveled unwarranted criticism on them by asking why the Browns even considered looking to rent a home in the location where Hertzler's property was located because there were no African Americans in the area. (N. T. 32, 43, 56). Clearly, the Browns have every right and prerogative to live

anywhere they choose. The criticisms of which they spoke is indeed unfortunate. Clearly, our society has a long way to go as people of good will seek increased racial harmony.

Next, while Hertzler improperly communicated unjust reasons to, in effect, reject the Brown's efforts to rent his property, it was the bigotry expressed by his other tenant that prompted Hertzler to react inappropriately. While the Complainants seem to submit that Hertzler never wanted to rent to them in the first place because of their race, this was not the case. For instance, Glenda Brown says she was horrified that in 2007 someone would have the audacity to leave such a voice mail. (N. T. 27-28). Perhaps what she is actually saying is she was horrified that in 2007 a prospective white neighbor would have blatantly expressed his bigotry. Glenda Brown described Hertzler's behavior and demeanor towards her as receptive and positive, (N. T. 22, 25) and that there had been a good rapport between herself and Hertzler. (N. T. 41). She went so far as to say she went home and shared the positive experience she felt with her husband. (N. T. 22).

Similarly, Raymond Brown, Jr., offered that he too became extremely upset that in 2007 he would have to go through this. (N. T. 51). What they were experiencing was a naïve Amish man misapplying the bigotry of his tenant, not Hertzler's bigotry. Frankly, it was not established that Hertzler is in anyway a bigot.

Interestingly, Glenda Brown offered that she was comfortable telling colleagues at work what had happened. (N. T. 31). Similarly, Vaughn Brown

indicated that he experienced support from others with respect to what the family had decided to do. (N. T. 64).

Without much explanation, all Glenda Brown really offered was that she and her family were "horrified" and "devastated" to have been victimized. (N. T. 27-28, 31). She also offered that both her sons are very mature and that she was pleased at how they handled the situation. (N. T. 44). She indicated that their initial reaction had been to be "dumbfounded". (N. T. 44-45). However, she also said that after the initial revelation to them of the event, she had not heard them speak of it again. (N. T. 44-45).

Vaughn Brown, when asked, in effect, if the incident caused him embarrassment, simply offered that it just made the subject of racism harder to talk about. He also offered a vague assessment that the event has made him warier of others. (N. T. 64). Similarly, Raymond Brown, Jr., vaguely offered that he too has become more cautions of others. (N. T. 58).

One thing the family did was to seek assistance from the pastor of their church. However, rather than evidence of seeking solace and counseling for any emotional difficulties anyone was having, the focus of the advice sought was what to do legally about what had happened. (N. T. 68, 70).

Fundamentally, it must be recognized that a damage award can never fully compensate a victim of discrimination and that, without question, it is inherently difficult to measure an amount which will ease a victim's hurt feelings and experience of embarrassment and humiliation. Our task is to seek to make an appropriate transformation of the Brown's general qualitative testimony into quantitative relief. Therefore, considering the record as a whole, it is reasonable

and fair to award Glenda Brown $2,000.00 and Raymond Brown, Jr., $2,000.00 for the embarrassment and humiliation they suffered. Further, it is reasonable and fair to award Vaughn Brown the sum of $1,000.00 for the embarrassment and humiliation he suffered. Since Raymond Brown, III failed to testify, no award is recommended.

After careful consideration of this record, an additional civil penalty will not be ordered.

This brings us to the Complainant's private attorney's request for attorney fees. At the conclusion of the receipt of testimony at the Public Hearing, with the exception of holding the record open for the limited purpose of the receipt of a copy of CE 2, the matter was closed. The failure to present any evidence on the issue of attorney fees results in there being no recommendation for attorney fees being awarded.

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

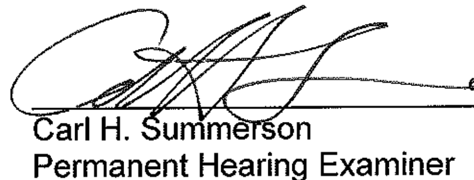
GLENDA & RAYMOND BROWN, JR., and RAYMOND BROWN, III INDIVIDUALLY, and o/b/o VAUGHAN BROWN, **Complainants**	:	
v.	:	**PHRC CASE NO. 200607552**
EMANUEL HERTZLER, **Respondent**	:	

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Browns have proven discrimination against Hertzler in violation of Section 5(h)(1) of the Pennsylvania Human Relations Act.

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

April 11, 08
Date



Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

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v.	:	**PHRC CASE NO. 200607552**
EMANUEL HERTZLER, **Respondent**	:	

FINAL ORDER

AND NOW, this 22nd day of April, 2008, 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 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 Hertzler shall permanently cease and desist from engaging in any acts or practices which have the purpose or effect of denying equal housing opportunities because of race. Prohibited acts include, but are not limited to:

   a. refusing or failing to rent a property, or refusing to negotiate for the rental of a property because of race;

b. otherwise making unavailable or denying a property to any person because of race;

c. making any inquiry or eliciting any information concerning the race of an applicant for a rental property; and

d. indicating in any way a discriminatory preference or limitation based on race.

2. That, Hertzler shall pay Glenda Brown the lump sum of $2,000.00 in compensatory damages for the embarrassment and humiliation she suffered.

3. That Hertzler shall pay Raymond Brown, Jr., the lump sum of $2,000.00 in compensatory damages for the embarrassment and humiliation he suffered.

4. That Hertzler shall pay Vaughn Brown the lump sum of $1,000.00 in compensatory damages for the embarrassment and humiliation he suffered.

5. That Hertzler shall pay the Browns the lump sum of $240.00 which amount represents out of pocket expenses incurred by the Browns.

6. Consistent with Section 5(j) of the PHRA. Hertzler shall prominently post and exhibit a "Fair Housing Practice" notice distributed by the PHRC Housing Division alongside any "for rent" signs posted in connection with any rental properties he owns. The Hertzler shall hereafter also include the fair housing "Equal Opportunity in Housing" symbol in any advertisement for any rental property owned by Hertzler.

7. On the last day of every third month, beginning thirty days after this decision becomes final (or four times per year), and continuing for two years from the date this Order becomes final, Hertzler shall submit reports containing the following information to the PHRC Housing Division, P.O. Box 3145, Harrisburg, PA 17105, provided that the Housing Division may modify this paragraph of this Order as that office deems necessary to make its requirements less, but not more, burdensome:

a. A duplicate of every written application, and a log of all persons who applied for occupancy at any of the properties owned, operated, or otherwise controlled in whole or in part by Hertzler indicating the name and address of each applicant, the number of persons to reside in the unit, the number of bedrooms in the unit for which the applicant applied, whether the applicant was

rejected or accepted, the date on which the applicant was notified of acceptance or rejection, and if rejected, the reason for such rejection. Hertzler shall maintain the originals of all applications described in the log.

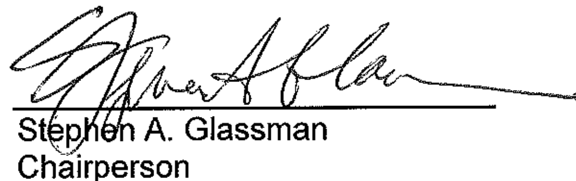
b. A list of vacancies at properties owned, operated, or otherwise controlled in whole or in part by Hertzler during the reporting period, including: the address of the unit, the number of bedrooms in the unit, the date the tenant gave notice of an intent to move out, the date the tenant moved out, the date the unit was rented again or committed to a new rental, and the date the new tenant moved in.

c. Sample copies of advertisements published during the reporting period, specifying the dates and media used or, if applicable, a statement that no advertisements have been published during the reporting period.

d. A list of all people who inquired, in writing, in person, or by telephone, about renting a property, including their names and addresses, the date of their inquiry, and the disposition of their inquiry.

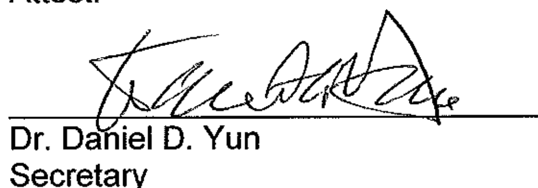
8. That, within thirty days of the effective date of this Order, Hertzler shall report to the PHRC on the manner of their compliance with the terms of this Order by letter addressed to Assistant Chief Counsel PHRC Charles L. Nier, III, Philadelphia Regional Office, 711 State Office Building, 1400 Spring Garden Street, Philadelphia, PA 19130-4088.

PENNSYLVANIA HUMAN RELATIONS COMMISSION



Stephen A. Glassman
Chairperson

Attest:



Dr. Daniel D. Yun
Secretary