COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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| JAMES LEGGETT,<br>Complainant | : | PHRC DOCKET NO. H-8017<br>PHRC CASE NO. 199927632 |
| and | : | |
| LINDA LEGGETT,<br>Complainant | : | PHRC DOCKET NO. H-8018<br>PHRC CASE NO. 199927633 |
| v. | : | |
| PHILADELPHIA MANAGEMENT,<br>Respondent | : | |

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

## FINDINGS OF FACT *

1. Complainants in these consolidated matters are husband and wife, James M. Leggett and Linda Leggett, (hereinafter collectively "Complainants"). (N.T. 15, 222)

2. The Respondent is Philadelphia Management, (hereinafter "Respondent"), a business concern that since 1996 has leased spaces in the seven story Empire Building located at 141 South 13th Street, Philadelphia, Pennsylvania. (N.T. 19, 184)

3. In 1988, Empire Building Associates owned the Empire Building. (N.T. 18-19; R.E. 1)

4. In 1991, Linda Leggett engaged the services of an attorney to draft a lease agreement between herself and Scotmar Property Management Corporation, agent for Empire Building Associates, for the rental of a space in the Empire Building in which to operate a beauty salon business that she called "Simply Beautiful". (N.T. 17-19, 120, 127, 153, 159, 222, 260; R.E. 1)

5. The lease that Linda Leggett's Attorney drafted and into which she entered with Scotmar Property Management Corporation (hereinafter "Scotmar") included the following pertinent provisions: (R.E.1)

   a. Paragraph 10a, Linda Leggett agreed to, at all reasonable times, allow the landlord and the landlord's agents to enter the leased premises at the landlord's option to make repairs;

* 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:

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| N.T. | Notes of Testimony |
| C.E. | Complainant Exhibit |
| R.E. | Respondent Exhibit |

b. Paragraph 10b, the landlord may discontinue any facility or service that is not expressly covenanted for in the lease because neither facilities nor services are a part of the consideration for the lease;

c. Paragraph 13a, "No contract entered into or that may be subsequently entered into by [landlord] with [Linda Leggett], relative to any alteration, additions, improvements or repairs, nor the failure of [landlord] to make such alterations, additions, improvements or repairs as required by any such contract, nor the making by [landlord] or his agents or contractors of such alterations, additions, improvements or repairs shall in any way affect the payment of the rent or said other charges at the time specified in this lease.";

d. Paragraph 14a, if Linda Leggett failed to pay in full when due the rent or other charges...then... there shall be deemed a breach of the lease;

e. Paragraph 3, the lease term was established as for three years beginning March 1, 1991, and ending February 28, 1994;

f. Addendum, Paragraph 33, Linda Leggett had the option of extending the lease term for three five-year periods. To extend the term of the lease, Linda Leggett was responsible to make a written request not less than 90 days before the end of either the initial three-year term or the end of a preceding 5 year lease term.

g. Paragraph 24, At the end of a lease term, a party has the option of terminating the lease by giving the other party 60 days notice. If a party fails to notify a party that it wishes to terminate the lease at the end of a lease term, the lease reverts to a month-to-month lease.

h. Paragraph 25, all notices given by Linda Leggett to the landlord "must" be given by registered mail, and as against the landlord, the only admissible evidence

that a notice has been given by Linda Leggett shall be by a registry return receipt signed by the landlord or an agent of the landlord;

i. Addendum, Paragraph 40, the landlord is to furnish heat to the premises between October 1st and April 15th. "In consideration of the fact that no extra charge is made for [heat], [landlord] shall not be held liable for the failure to supply [heat], for any reason whatsoever except gross negligence on [the part of landlord]. The [landlord] further reserves the right to shut off or diminish [heat], during the period required for repairs or alterations to the heating system or any part thereof.";

j. Addendum, Paragraph 43, Linda Leggett may install an air conditioning unit.

k. Addendum, Paragraph 44, The landlord assumes no liability of any kind concerning the air conditioning equipment nor for any repairs or replacement now or in the future required for the proper functioning of the air conditioning equipment;

l. Addendum, Paragraph 45, In addition to rent, Linda Leggett agreed to pay charges for the consumption of electricity. Electricity was to be purchased from the landlord and Linda Leggett would receive a monthly bill based on the reading of the meter servicing the area rented by Linda Leggett;

m. Addendum, Paragraph 49, Linda Leggett agreed that any and all repairs, improvements, alterations made at any time are to be made at Linda Leggett's sole expense. The landlord was to be solely responsible for all repairs, replacements, and improvements of a structural nature;

n. Lease Rider, Paragraph 4, All notices to either party shall be given in writing, sent by certified mail, return receipt requested.

6. The Simply Beautiful beauty salon began operations on the 7th floor. (N.T. 185)

7. In 1990, Simply Beautiful moved to the 1st floor of the Empire Building. (N.T. 188)

8. Prior to 1996, including Simply Beautiful, there were six commercial ventures on the first floor of the Empire Building. (N.T. 29, 190)

9. During a winter blizzard in 1996, the heat in the building had been accidentally turned off resulting in water pipes bursting and significant water damage throughout the entire building. (N.T. 25, 185-186)

10. Prior to the water damage, the building's heat system, located in the basement, serviced the entire building. (N.T. 186)

11. Scotmar initially intended on repairing the heating system, however, in or about April 1996, Scotmar sold the building to the Respondent who subsequently decided not to repair the damaged heat system. (N.T. 19, 21-22, 23, 186)

12. When the Respondent purchased the building, the Respondent approached Linda Leggett seeking to re-do the lease she had with Scotmar. (N.T. 20)

13. After consulting with her attorney, Linda Leggett advised the Respondent that she wanted to keep the lease she already had. (N.T. 20, 153)

14. After purchasing the building, the Respondent began converting office spaces, previously in operation on the second through the seventh floors, into luxury apartments. (N.T. 22, 188-189, 191)

15. The Respondent began installing central heat and central air conditioning units in the new apartments. (N.T. 23, 217)

16. When James Leggett inquired about the Respondent's plans, he was informed that the new heat and air conditioning units were only for the residential units and not for the commercial units on the ground floor. (N.T. 217)

17. James Leggett was told to purchase a heat and air conditioning unit and the Respondent would reimburse him. (N.T. 23, 193)

18. In the summer of 1996, James Leggett purchased a new, three-in-one unit, with air conditioning, heat, and hot water components. (N.T. 50, 192)

19. The unit he purchased was installed in a loft space in the back of Simply Beautiful. (N.T. 24, 56)

20. The unit James Leggett purchased was not efficient and, within a month, the hot water component did not work well. (194, 212, 214)

21. James Leggett installed a separate hot water heater to replace the hot water operation of the inefficient unit. (N.T. 218)

22. In the Summer of 1997, the cost of the unit James Leggett purchased was deducted from Simply Beautiful's electric bill. (N.T. 67)

23. Neither the heat nor the air conditioning components worked for very long and in the winter of 1996-1997, Simply Beautiful began to heat the area it occupied with kerosene heaters and small electric heaters. (N.T. 215, 231, 284, 313)

24. In the spring of 1997, Simply Beautiful began to be cooled with regular fans, a ceiling fan, and a small window air conditioning unit. (N.T. 79, 215)

25. In or about November 1997, the Complainants filed two PHRC claims against the Respondent alleging that the Respondent's failure to make repairs to the Complainants' three-in-one unit was race-based. (N.T. 33; R.E. 2)

26. In or about March 1998, the Respondent filed an action in the Court of Common Pleas of Philadelphia County against Linda Leggett to which Linda Leggett filed a counter claim, in effect, asserting that the Respondent had not repaired the Complainants' heating unit. (R.E. 2)

27. On August 6, 1999, the Respondent and the Complainants entered into a Settlement Agreement and Mutual Release resolving the two PHRC claims, the Respondent's Court of Common Pleas action, and Linda Leggett's counter claim to the Respondent's Court of Common Pleas Action. (N.T. 34, 330; R.E. 2)

28. In the Agreement, Paragraph 1, the Complainants agreed to pay the Respondent back rent owed, and amounts owed for unpaid electric bills through June 4, 1999. (R.E. 2)

29. Additionally, the Agreement provided that certain credits would be given to the Complainants for both repairs James Leggett had made and heating equipment he had purchased. (R. E. 2)

30. Paragraph 2 of the Agreement provided that, to take into account the Respondent's requirement to provide heat, the Complainants would receive a credit for electricity used in the months of November through March. (R.E. 2)

31. During those months, the Complainants were to be responsible for the first $165.00 of electricity used and for the remaining months of the year, the Complainants were to be responsible for 100% of the electricity used. (N.T. 131; R.E. 2)

32. According to the Agreement, Linda Leggett would be responsible to begin paying for electric used after June 4, 1999. (N.T. 129; R.E. 2)

33. Additionally, the Agreement provided that the Respondent was responsible to maintain the existing heat and/or hot water systems at Simply Beautiful. (R.E. 2)

34. The Respondent was also to have the option of either maintaining the existing heating and/or hot water systems or replacing the unit.

35. The Agreement also made the Respondent responsible to patch certain holes in the ceilings and walls created by an earlier installation of a sprinkler system. (R.E. 2)

36. Lastly, the Agreement indicated that the Respondent would install a thermostat on the heating system, if reasonably possible. (R.E. 2)

37. According to the Agreement, the Respondent did patch the walls and ceilings. (N.T. 205, 266)

38. After the Agreement was signed, the Complainants failed to pay the monthly electric charges for which they were responsible, beginning June 4, 1999. (N.T. 131, 138, 270)

39. After the Agreement, on several occasions, the Respondent sent service people to attempt to repair the three-in-one unit in Simply Beautiful. (N.T. 49, 51, 56, 73, 98, 135, 200)

40. An attempt was also made to install a thermostat. (N.T. 200)

41. On December 6, 1999, the Complainants directed a letter to the Respondent's attorney, Gary M. Freidland, Esquire, informing the Respondent that, in the Complainants' opinion, their unit had not been properly repaired and that the Complainants were going to seek the help of the courts and the PHRC. (C.E. 4)

42. By letter dated December 27, 1999, the Complainants again wrote to the Respondent's attorney to confirm an earlier conversation on December 23, 1999 regarding the operation of the unit at Simply Beautiful and the Complainants' continued opinion that repairs had still not been properly made. (C.E. 3)

43. The December 27, 1999 letter also reconfirmed that the Respondent's attorney had informed the Complainants that a mistake in their electric bill would be corrected as the Complainants continued to dispute an electric bill they had received on December 23, 1999, in the amount of $6,321.41. (C.E. 3)

44. The Respondent hired Energy Management Systems to prepare separate electric bill for customers in the Empire Building. (N.T. 336)

45. Energy Management Systems had improperly billed the Complainants in the electric bill sent to the Complainants, dated December 15, 1999. (N.T. 338)

46. Although, prior to the issuance of the incorrect electric bill of December 15, 1999, the Respondent's Chief Financial Officer, Robert Weinstein, had spoken to Energy Management Systems, advising them to properly credit the Complainants' account, Energy Management Systems had not yet properly credited the Complainants' account. (N.T. 338)

47. Upon learning of Energy Management Systems' issuance of an incorrect electric bill to the Complainants, the Respondent's Chief Financial Officer became upset and attempted to correct the error. (N.T. 340)

48. The December 15, 1999 electric bill advised Linda Leggett that she should contact Energy Management Systems as soon as possible if she felt that she had been improperly billed. (C.E. 6)

49. The December 15, 1999 electric bill also advised Linda Leggett that because of the failure to pay the electric bill, Energy Management Systems intended to terminate electric service to Simply Beautiful on December 29, 1999. (C.E. 6)

50. Despite realizing that credits had not yet been made to their account, the Complainants' response was to directly contact the Respondent rather than Energy Management Systems. (N.T. 168; C.E. 3)

51. On December 28, 1999, the Complainants verified individual PHRC complaints alleging that "since August 1999 and continuing to the present, the respondent refuses to make necessary corrections to the building in retaliation for our earlier

complaint of discrimination", and "We, the Complainants further allege that the Respondent(s) committed discriminatory practices...in that the Respondent refused to make necessary improvements to the building, as part of the settlement agreement to PHRC complaint docket numbers H-7525 & H-7526 which was signed during August 1999. In a letter dated December 27, 1999...to the respondent's attorney, we have summarized our concerns of this continued harassment." (N.T. 63; Complaints – Official Docket Entries 1 and 2)

52. When Energy Management Service agents came to turn off the electric on December 29, 1999, the Complainants called their attorney and the electric service was not turned off. (N.T. 63, 69, 70)

53. On January 17, 2000, Two Star Service Company, Inc. repaired the unit in Simply Beautiful and when the Respondent was billed, Two Star's invoice informed the Respondent that the system runs good, customer is satisfied and that the service person returned after three hours to check the repair and that the system was ok. (N.T. 343; R.E. 8)

54. When Linda Leggett failed to make a written request to activate the automatic five-year term extension of her lease, beginning March 1, 2000, her lease automatically reverted to a month to month lease. (R.E. 1)

55. Due to the failure to pay electric charges, in a letter dated February 16, 2000, the Respondent provided Linda Leggett with a 30 day notice of termination and non-renewal of her lease, advising her that she should surrender possession of the rental unit on or before March 31, 2000. (R.E. 4)

56. The Respondent's February 16, 2000 letter also stated, "[d]espite [the failure to pay electric bills], management remains willing and interested in resolving any disputes

and/or differences between the parties. As such, please feel free to contact either management, or this office, in an effort to amicable resolve this matter. Thank you for your kind attention and cooperation." (R.E. 4)

57. On April 17, 2000, the Respondent initiated a Landlord and Tenant Complaint in the Philadelphia Municipal Court for non-payment of electric bills. (N.T. 49, 341; R.E. 6)

58. Also, on April 17, 2000, Linda Leggett filed a counter claim in the Philadelphia Municipal Court, claiming that the Respondent had breached the terms of the earlier Settlement Agreement by failing to maintain the existing heating and/or hot water systems and seeking damages in the amount of $10,000.00. (R.E. 5)

59. The Respondent's action in the Philadelphia Municipal Court was successful and Linda Leggett appealed to the Court of Common Pleas of Philadelphia County. (N.T. 143-144; R.E. 7)

60. Once again, Linda Leggett lost and the Court of Common Pleas awarded the Respondent possession of the leased premises as of October 6, 2000; back rent in the amount of $9,390.00; attorney fees of $2,500.00; past due electric bills of $2,191.27; minus an escrow amount of $7,825.00; for a net award to the Respondent of $6,256.27. (N.T. 144, 149; R.E. 7)

## CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and the subject matter of these consolidated complaints.
2. The parties and the Commission have fully complied with the procedural prerequisites to a Public Hearing in these consolidated matters.
3. The Complainants are individuals within the meaning of Section 5(a) of the PHRA.
4. The Respondent leased Linda Leggett a commercial property within the meaning of Section 4(j) of the PHRA.
5. Section 5(d) of the PHRA, prohibits "any person" from unlawfully discriminating against any individual because such individual has made a charge under the PHRA.
6. To establish a *prima facie* case of retaliation under the participation clause of Section 5(d), the Complainants must establish:
    a. that they made a charge under the PHRA;
    b. that the Respondent took adverse action against the Complainants; and
    c. that a casual connection exists between the filing of a charge under the PHRA and the adverse action.
7. The Complainants failed to establish a *prima facie* case of retaliation.

## OPINION

This case arises on two separate complaints, one filed by James Leggett, on or about December 28, 1999, at PHRC Case No. 199927632, and another filed by his wife, Linda Leggett, also on or about December 28, 1999, at PHRC Case No. 199927633, both against Philadelphia Management, (hereinafter "Respondent"). Generally, the Complainants' complaints allege retaliation. More specifically the Complainants' complaints allege that since August 1999 and continuing to December 28, 1999, the Respondent refused to make necessary corrections to the Empire Building in retaliation for earlier PHRC complaints the Complainants filed against the Respondent. Further, the Complainants' complaints allege that the Respondent refused to make necessary improvements to the building as part of an August 1999 settlement agreement of the Complainants' earlier filed PHRC complaints. The Complainants' complaints allege a §5(d) violation of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§ 951 et.seq. (hereinafter "PHRA").

Pennsylvania Human Relations Commission (hereinafter "PHRC"), staff conducted an investigation and found probable cause to credit the Complainants' allegations of discrimination. The PHRC and the parties then attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. The efforts were unsuccessful, and these case were approved and consolidated for Public Hearing.

The consolidated Public Hearing was held in Philadelphia, Pennsylvania on November 20, 2003, before Permanent Hearing Examiner Carl H. Summerson. Kenneth L. Baritz, Esquire, appeared on behalf of the Respondent, and William R. Fewell, Esquire, represented the State's interest in these consolidated matters.

The Respondent's post-hearing brief was received on April 19, 2004, and the post-hearing brief on behalf of the state's interest in the consolidated complaints was received on March 29, 2004.

Section 5(d) of the PHRA is the provision which forbids retaliation against individuals who file charges or otherwise engage in protected activity. Section 5(d) states in pertinent part:

> " It shall be an unlawful discriminatory practice . . . [f]or any person . . . 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."

The anti-retaliation provision of the PHRA generally arms individuals who have denounced discrimination with a cause of action above and beyond the protections the act affords against any underlying actual discrimination. Such protection is necessary in order to enable individuals to engage in statutorily protected activities without fear of retaliation.

Section 5(d) of the PHRA addresses two different types of conduct which the Act's retaliation provision protects: (1) opposition to any practice forbidden by the PHRA; and (2) participation in a proceeding under the PHRA. In this case, the provision implicated is the participation clause.

To establish a *prima facie* claim of retaliation under the participation clause of Section 5(d), the Complainants must establish:

(1) That they filed a PHRC cause of action under the PHRA;

(2) That the Respondent took adverse action against them; and

(3) That there is a causal connection between the filing of a PHRC cause of action and the adverse action.

See i.e. Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778 (3rd Cir. 1998).

The Complainants may establish the requisite elements of a *prima facie* case by either offering direct evidence of retaliation or by using the familiar burden-shifting approach established by the U.S. Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Cases in which there is direct evidence of retaliation are few and far between. See e.g. Verprinsky v. Flour Daniel, Inc., 87 F.3d 881, 893 (7th Cir. 1996). The overwhelming majority of cases of alleged retaliation rely on the burden-shifting approach when reviewing retaliation claims.

Here, we find that the Complainants fail to present evidence that amounts to direct evidence of retaliation. Accordingly, the burden-shifting analysis is applicable here. Under this oft-used scheme, if a Complainant establishes a *prima facie* case of retaliation, the Respondent must articulate a legitimate non-discriminatory reason for its adverse action. Once a Respondent meets this burden of production, a Complainant must then show that the Respondent's non-discriminatory reasons are merely pretextual.

This is accomplished by proffering, what is essentially, a second showing of causation, though one with a higher threshold of proof than was initially required to establish the *prima facie* case. See EEOC v. Avery Dennison Corp., 104 F.3d 858 (6th Cir. 1997). This second showing requires evidence that the adverse action would not have occurred except for the fact that the Complainants filed PHRA claims. See Dwyer v. Smith, 867 F.2d 184 (4th Cir. 1989).

Under the participation clause, Complainants are provided nearly absolute protection. In other words, the earlier charge does not have to be shown to have been valid. Those who have filed a PHRC claim are protected from adverse actions irrespective

of the merits of the earlier filed claim. For this reason, it is not necessary to evaluate the virtue or lack thereof of the Complainants' December 28, 1999 PHRC complaints.

Returning to the Complainants' burden to establish a *prima facie* case, we find that the Complainants have failed to meet this first required showing. Although the Complainants have presented evidence that they had both previously filed PHRC complaints against the Respondent, they falter on establishing the requisite second and third elements of the required *prima facie* showing.

In their complaints, both Complainants alleged that the Respondent "refused to make necessary corrections to the building" in retaliation for past complaints, and "refused to make necessary improvements to the building, as part of the settlement agreement to [the earlier filed PHRC complaints]..." When specifically asked what was meant by the alleged refusal to make necessary improvements to the building as part of the settlement, James Leggett testified that the allegation was that the Respondent failed to repair or replace the heat and hot water system in the Simply Beautiful space. (N.T. 203, 204). With regard to the alleged refusal to make necessary improvements to the building, James Leggett generally referenced corrections to the electrical system. (N.T. 204) James Leggett offered unsupported testimony that the metered electrical box for which he had to pay electric bills served more than Simply Beautiful spaces. Additionally, James Leggett made a general reference to plaster having fallen off the wall and a sink in need of repair. (N.T. 205-206). Finally, James Leggett reiterated that the three-in-one unit had not been either adequately repaired or replaced by the Respondent. (N.T. 207)

The second element of the required *prima facie* showing requires proof that the Respondent took some adverse action against the Complainants. The Complainants complaints state that the only adverse action allegedly taken was the Respondent's failure

to make corrections and improvements that affected the Complainants. On this point, we begin with an observation that of the six commercial ventures on the first floor of the Empire Building, there was only limited testimony about the heat concerns of one other commercial space. Rather than attempt to compare the treatment allegedly visited on the Complainants with the treatment other commercial entities received at the hands of the Respondent, the evidence presented in this case focused almost solely on the alleged problems of the Complainants. Indeed, the only mention of another commercial entity's situation was brief testimony about another leased space that had been a restaurant prior to the water damage in 1996 and after 1996 became an eye glass store. It appears that when that transition occurred, central air and heat was installed in the newly renovated area. (N.T. 96-97, 211) In fact, James Leggett indicated that when central air and heat was installed in the transition area, this was the event that prompted considerable concern. (N.T. 211)

No effort was made to compare the remaining four commercial enterprises' experience with the Respondent after the Respondent's 1996 decision not to repair the main heating system that had previously serviced the entire building. As far as the eye glass store, it may well be that when this new occupant negotiated with the Respondent, in order to open their enterprise in the Empire Building, the Respondent was asked to provide central air and heat. Without reviewing more of the circumstances surrounding this one purported change, a meaningful comparison cannot be made. Interestingly, nothing was presented regarding the remaining four enterprises that appear to have occupied the same commercial spaces both prior to 1996 and after. In other words, the presentation of the Complainants' case failed to present meaningful evidence of comparison treatment

between the Complainants and other commercial enterprises on the first floor of the Empire Building.

Much of the Complainants' focus was on the allegation that the Respondent failed to repair the three-in-one unit they purchased after the 1996 water damage incident. Perhaps the main problem the Complainants had was the fact that, acting on the advise of their attorney, they chose not to re-negotiate the existing lease when the Respondent purchased the building. The lease declares that the landlord would only be responsible for furnishing heat from October 1st through April 15th of each year. We observe that originally, Linda Leggett's attorney drafted this lease. Under Paragraphs 43 and 44 of the Lease Addendum, Linda Leggett was permitted to install air conditioning in her space and the landlord would have no liability whatsoever for any air conditioning equipment or for any needed repairs or replacement of any air conditioning equipment she might install. It seems that the Complainants, even now, fail to understand this fundamental distinction. For much of the period after 1996, the Complainants clearly wanted the Respondent to be responsible to make repairs when the air conditioning component of the unit they purchased was either not working or working inefficiently. Understandably, the Respondent fell short of making any such repairs because, under the lease, the responsibility for such repairs clearly fell upon the Complainants.

The original lease did not specify any responsibility for furnishing hot water. In effect, the lease provided that unless a service was specifically covered by the terms of the lease, such services were not a part of the lease. Further if a landlord did provide any service not specifically covered by the lease, the landlord was free to discontinued any such a service at the landlord's option. Here, the record is not clear regarding how hot water was made available to Simply Beautiful prior to 1996. However, the record is clear

that the lease drafted by Linda Leggett's attorney does not cover the provision of hot water service. Accordingly, the Respondent never had an obligation to repair that part of the three-in-one unit that functioned as a hot water heater.

The only portion of the three-in-one unit the Complainants purchased that the Respondent had a responsibility to repair was the heat function of the unit during the period between October 1st and April 15th. On this point, the Complainants submit that there was an adverse action because the Respondent failed to make sufficient repairs to the heat function of this unit after August 6, 1999.

First, in their letter to the Respondent dated December 6, 1999, the Complainants note their displeasure that no attempt had been made until more than 61 days after August 6th to repair the unit's thermostat. This expressed concern once again reveals the Complainants' lack of a basic understanding of the provisions of their lease. The responsible time frame for the Respondent to address any repair issue with the heat unit would be at or about the beginning of each October. Here, in 1999, this is precisely when the Respondent sent in repair personnel to attempt to repair the heat component of the unit purchased in 1996. Further, while the lease clearly mandates that any concern the Complainants have should be in writing, the Complainants' first writing on the issue was not until December 6, 1999.

The credibility of the Complainants becomes an issue in this case because there is an apparent attempt to obfuscate the real issues present. For instance, Linda Leggett began her testimony by suggesting that the August 6, 1999 Agreement declared that the Respondent was obliged to come in and re-do her salon. (N.T. 223) In later testimony, Linda Leggett changed her testimony by suggesting that the re-doing of her salon had only been discussed prior to the Agreement of August 6, 1999. On another credibility issue,

Linda Leggett testified that she had paid her rent for all of the months she was a tenant. (N.T. 278) The October 6, 2000 Court of Common Pleas Order suggests otherwise. Clearly, the court in that matter awarded the Respondent unpaid rent.

Numerous times, James Leggett's testimony also reveals questionable credibility on his part. Perhaps the main area of attempted obfuscation came when James Leggett testified that one of the Respondent's agents came into Simply Beautiful and asked him if he knew who he was f...ing with? (N.T. 65) He testified that he thought this meant that he should not have opened his mouth and that because he had, the Respondent was going to get rid of him. (N.T. 65) When he initially testified about this, he attempted to make it appear that this all happened after he had filed his first PHRC complaints. However, later it became abundantly clear that the alleged comments, if made, were said to him in the summer of 1996 after he sought reimbursement for the three-in-one unit he purchased. Of course, this was long before the Complainants filed their first set of PHRC complaints. (N.T. 154).

At times, James Leggett testified that the Respondent had made no attempt to make repairs. (N.T. 73, 133) Clearly, over the years, numerous attempts had been made to fix both the heat element and air conditioning components of the unit he purchased. While such attempts may not have met with James Leggett's satisfaction, there were clearly numerous attempts to repair the unit made.

Another significant point came when James Leggett stated that, shortly after he purchased the unit and it began to have problems, he had secured a service person to fix the unit. James Leggett stated that this service person told him that he would not touch the unit because, if he did, the Complainants would lose any warranty they had with the Respondent. (N.T. 61-62) The unit James Leggett purchased in 1996 was bought from JR

& Co., not from the Respondent. (N.T. 192) Any warranty on the unit would inure to the seller not the Respondent. On this point, when challenged, James Leggett later testified that the Respondent installed the unit thereby creating a warranty. (N.T. 193) However, he also testified that he installed the unit himself. (N.T. 194) Often, James Leggett had a very difficult time keeping his story straight.

On another point, James Leggett testified that the Respondent did not respond to his December 27, 1999 letter. (N.T. 93) When presented with evidence that a repair person had worked on the unit on January 7, 2000 and that the repair person had made a notation on an invoice that the customer was satisfied, James Leggett testified that he had only told the repair person that he was satisfied that he came out to work on the unit. (N.T. 134-135)

Finally, James Leggett testified that he filed the second PHRC complaint after the Respondent "continuously" came into Simply Beautiful and tried to turn off the electricity. (N.T. 63) First of all, the only evidence that anyone came to Simply Beautiful to physically turn off the electricity reveals that such an incident occurred on December 29, 1999. The Complainants' complaints were verified on December 28, 1999, one day prior to the one instance where someone came into Simply Beautiful intending to turn off the electricity. Not only did no one "continuously" come to Simply Beautiful to turn off the electricity, the event of December 29, 1999 clearly could not have had anything to do with the Complainants' verification of their complaints the day before.

With regard to James Leggett's assertion that the readings from the metered electric box registered more than Simply Beautiful's usage of electricity, there was simply no credible evidence to substantiate this claim. Instead, it was clear that James Leggett's real concern had been that he felt the Respondent should install a separate electric meter

to separately register the electric usage of the three-in-one unit he purchased in 1996. Rather than install a separate meter, after August 1999, the Respondent agreed to appropriately adjust Simply Beautiful's electric bill during the winter months to reflect their obligation to provide heat. All Simply Beautiful would be obligated to pay for electricity in the relevant winter months would be $165.00, no matter how much electric they used. On the other hand, if the Respondent connected a separate electric meter to the three-in-one unit, the Respondent would wind up paying for the cost of electricity to run Simply Beautiful's air conditioning and hot water system. Quite simply, this was not what the lease between Simply Beautiful and the Respondent contemplated.

Finally, the Complainants submit that there was an adverse action by the Respondent in the form of plaster falling from the wall and a sink in need of repair. On these items, the Complainants' position is misplaced. The record in this case reveals that the only plaster issue that remained in 1999 was remedied following the signing of the August 1999 Agreement. Apparently, an earlier installation of a sprinkler system left holes in the wall and ceiling. Linda Leggett testified that the Respondent patched those holes. (N.T. 266) All earlier plaster damages after the 1996 water damage, had long been repaired. (N.T. 205) Similarly, the sink issue about which James Leggett testified had been fixed much earlier than the Complainants first PHRC complaints.

In summary, the Complainants have failed to establish that there was an adverse action following their first filing of PHRC complaints. The perceived problems they were having seem to stem from an unwise purchase of an inefficient replacement unit in 1996. The unit purchased at the time quite clearly was inadequate for the space intended. Further, the unit purchased should have been a separate heat unit. The Respondent's obligation to Linda Leggett under their lease was to furnish heat, not air conditioning and

hot water. The lease clearly provides that it was Linda Leggett's responsibility to provide air conditioning if she wanted it. Also, since the lease did not specifically address hot water, this too was the responsibility of Linda Leggett under the terms of the lease. By buying a three-in-one unit, the Complainants were, in effect, attempting to place several responsibilities on the Respondent that they did not otherwise have.

Turning to the remaining element of the requisite *prima facie* showing, the Complainants are also unable to establish a causal connection. Principally, there can be no causal connection because there has been no showing of any adverse action. Assuming arguendo that an adverse action could be shown, there still would be no adequate showing of a causal connection. To establish the causal link element requires merely showing that a protected activity and an adverse action are not wholly unrelated. See Simmons v. Camden County Board of Educ., 757 F.2d 1187, 1189 (11th Cir. 1985).

Central to showing a causal connection between protected activity and adverse actions is evidence that a Respondent knew of the protected activity. Here, of course, the Respondent was fully aware that the Complainants had previously filed PHRC cases.

An important factor to examine when determining whether a causal link can be established is the temporal proximity between the protected conduct and the adverse action. See i.e. Jalil v. Avdel Corp., 873 F.2d 701 (3rd Cir. 1989); and Krouse v. American Sterilizer Co., 126 F.3d 494 (3rd Cir. 1997). On this question we look for the timing of events being unusually suggestive of retaliation. Here, although the parties were requested to supplement the record with the date the Respondent was served with the Complainants' first PHRC complaints, they did not. (N.T. 391, 393) The first set of PHRC Complaints were filed with the PHRC in or about November 1997. Here, the alleged failures of the Respondent occurred between August 1999 and December 28, 1999, nearly

2 years after the filing of the Complainants' first PHRC complaints. In the Krouse employment case, the passage of 19 months between the filing of a charge and the alleged adverse action was found to be conclusive that there was no causal connection. Absent some other evidence of a retaliatory motive, the passage of a long period of time between the protected activity and the alleged adverse action weights heavily against a finding of a causal connection.

Under the circumstances present here, we find there was no causal connection between the filing of the Complainants' first set of PHRC complaints and the alleged adverse actions of the Respondent.

In these cases, the period between August 6, 1999 and December 28, 1999 is the limited range covered by the Complainants' complaints. However, it is noteworthy that there was considerable testimony regarding events subsequent to December 28, 1999. Given the express language of the complaints in these consolidated cases, there should be a corresponding limit on the evidentiary review made. However, we note that the post-hearing brief in support of the state's interest and the Respondent post-hearing brief discuss the termination of Linda Leggett's lease. Although neither complaint had been amended to cover this circumstance as an additional instance of alleged retaliation, since both post-hearing briefs mention the lease termination, we too will briefly comment on this aspect of the evidence.

Pursuant to the August 6, 1999 Settlement Agreement, the Complainants were credited with payment of their past due electric bills up to April 4, 1999. After that, they were to pay 100% of the electric used by Simply Beautiful during all periods with the exception of the months of November, December, January, February, and March. During those months, the Complainants were obliged to pay the first $165.00 of electricity used by

Simply Beautiful. The reduced electric rate during the winter was done to account for the provision of heat to Simply Beautiful.

The Respondent had hired Energy Management Systems to prepare electric bills for the Respondent. Both prior to and after August 1999, tenants in the Empire Building would receive a separate electric bill from Energy Management Systems. While there was no specific documentation to substantiate that the Complainants had continuously received electric bill after the August 1999 Agreement, it is apparent that they did. It is equally apparent that after entering the August 1999 Agreement, the Complainants never again paid anything towards electric charges.

Between August 1999 and December 15, 1999, it is apparent that the Complainants merely ignored electric bills from Energy Management Systems. What changed on December 23, 1999 was that the Complainants received a notice from Energy Management Systems advising them that due to their failure to pay their electric bills, Energy Management Systems intended to turn off their electricity on December 29, 1999. This caused the Complainants to finally pay attention to the electric bill issue.

What they did was to call the Respondent's Chief Financial Officer about their concern that there was a billing error. Although told that the matter would be corrected, the Complainants still did not pay any amount owed for electricity usage.

This failure to pay the electric bill eventually caused the Respondent to take action to gain possession of the space used by Simply Beautiful. At first, by letter dated February 16, 2000, the Respondent simply advised the Complainants that Linda Leggett's lease was being terminated and not renewed. This letter asked the Complainants several things. First, the February 16, 2000 letter asked the Complainants to surrender possession of the rental unit area on or before March 31, 2000. Second, the letter asked the Complainants

to feel free to contact the Respondent to attempt to resolve the differences between them. The Complainants still did not make an effort to bring the electric bill that had accrued since April 4, 1999 current. Instead, they suffered being taken to Landlord Tenant Court in the Philadelphia Municipal Court when the Respondent was left with no other option than to seek possession of the rental unit. At that court proceeding, the Complainants lost not only as against the Respondent's petition for possession, they also were unsuccessful with a counter claim which alleged virtually the same thing they attempt to allege in their present PHRC complaints.

On appeal, once again the Complainants were not successful in preventing the Respondent from regaining possession of the rental unit. Indeed, on October 6, 2000, the Court of Common Pleas of Philadelphia County ruled for the Respondent awarding back rent, attorney fees, and unpaid electric bills.

Although the Complainants never amended their present complaints to include an allegation that their lease was terminated in retaliation for having previously filed PHRC complaints, had they, such an allegation would also be without merit.

An order dismissing the Complainants' complaints follows.

**COMMONWEALTH OF PENSYLVANIA**

**GOVERNOR'S OFFICE**

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

| | | |
|---|---|---|
| **JAMES LEGGETT,** | : | **PHRC DOCKET NO. H-8017** |
| **Complainant** | : | **PHRC CASE NO. 199927632** |
| **and** | : | |
| **LINDA LEGGETT,** | : | **PHRC DOCKET NO. H-8018** |
| **Complainant** | : | **PHRC CASE NO. 199927633** |
| | : | |
| **v.** | : | |
| | : | |
| **PHILADELPHIA MANAGEMENT,** | : | |
| **Respondent** | : | |

## RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned consolidated matters, the Permanent Hearing Examiner finds that the Complainants have 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. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

**PENNSYLVANIA HUMAN RELAITONS COMMISSION**

October 6, 2004
Date

By: _____
Carl H. Summerson
Permanent Hearing Examiner

**COMMONWEALTH OF PENSYLVANIA**

**GOVERNOR'S OFFICE**

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

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| **Complainant** | : | **PHRC CASE NO. 199927633** |
| | : | |
| **v.** | : | |
| | : | |
| **PHILADELPHIA MANAGEMENT,** | : | |
| **Respondent** | : | |

**FINAL ORDER**

**AND NOW,** this 23rd day of November, 2004, after a review of the entire record in this matter, the full 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 full 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**

that the complaints in these consolidated cases be, and the same hereby are, dismissed.

By: Stephen A. Glassman
Stephen A. Glassman, Chairperson

Attest: Daniel D. Yun
Dr. Daniel D. Yun, Assistant Secretary