

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

BARBARA A.O'DAY,
Complainant

v.

PA DEPARTMENT OF CORRECTIONS,
Respondent

DOCKET NO. H-7422

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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Complainant

v.

PA DEPARTMENT OF CORRECTIONS
Respondent

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STIPULATIONS OF FACT

1. The Complainant herein is Barbara O'Day of 11 West Kirmar Avenue, Alden, Pennsylvania, 18634.
2. The Respondent herein is the Pennsylvania Department of Corrections.
3. On or about July 9, 1997, Complainant filed a timely Complaint which was served upon Respondent shortly thereafter alleging housing discrimination based on retaliation by the Respondent for Complainant's filing of a previous complaint, in violation of the following provisions of the Pennsylvania Human Relations Act: §§ 5(d), 5(h) (1), and 5(h) (3) of the Law. (J.E.40).
4. The Respondent filed a formal Answer on or about September 4, 1997, essentially denying all of the substantial allegations of the Complaint.
5. All attempts at conciliation have failed.
6. The property in question is located at R.R. 3, Box 500, at the Pennsylvania State Correctional Institution at Retreat in Hunlock Creek.
7. A Public Hearing was held before Carl Summerson, Permanent Hearing Examiner, on December 4, and 5, 2001, pursuant to Section 9 of the Pennsylvania Human Relations Act.

FINDINGS OF FACT *

1. The Complainant is Barbara O'Day, (hereinafter "O'Day"). (S.F.1).
2. The Respondent is the Pennsylvania Department of Corrections, (hereinafter the "DOC"). (S.F.2).
3. When it first opened in 1987, O'Day, a seventeen and a half year employee of the Commonwealth, transferred to the DOC's State Correctional Institute at Retreat, (hereinafter "SCI-Retreat"). (N.T.23).
4. At all times relevant to this case, O'Day was on the SCI-Retreat Administrative Staff and held the position of Business Manager. (N.T.24).
5. The SCI-Retreat Administrative Staff consisted of the facility Superintendent, two Deputies, the Personnel Manager, and the Business Manager. (N.T.24).
6. O'Day reports directly to the Superintendent. (N.T.24).
7. In 1993, O'Day filed a PHRC complaint alleging a sex-based promotion denial. (N.T.26).
8. O'Day's PHRC sex-based promotion denial complaint was dismissed because it was not timely filed. (N.T.26).

* The foregoing "Stipulations of Facts" are hereby incorporated herein as if fully set forth. To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T. Notes of Testimony
J.E. Joint Exhibit
R.E. Respondent's Exhibit
S.F. Stipulation of Fact

9. On September 28, 1995, O'Day sued the DOC in federal court alleging she was denied a promotion to the position of Deputy Corrections Superintendent for Treatment at the SCI-Retreat. (N.T.26, 157; J.E.4).
10. On March 27, 1997, a Summary Judgment was entered in O'Day's federal suit in favor of the DOC and against O'Day. (N.T.61, 164; J.E.13).
11. On numerous State Correctional Institute properties there are Commonwealth living facilities which DOC employees are permitted to rent. (N.T.201, 207, 314; J.E.2, 66, 68-72).
12. Paragraph 2 b. (4) of Commonwealth Management Directive 315.14 Amended states:

Employees living in Commonwealth facilities for personal convenience who are not required to do so by the responsibility of their jobs will be required to enter into leases through the Department of General Services, Bureau of Real Estate, Leasing Division. General Services' policy requires fair market rental payments. These payments will be processed as payroll deductions but will not be excluded from gross income for tax purposes.
13. DOC policy OM 024.01, regarding Employees Residing in Commonwealth Housing, establishes procedures consistent with Management Directive 315-14. (J.E.1).
14. Policy OM 024.01 generally indicates that, unless granted a written waiver, all Superintendents and Deputy Superintendents are expected to reside in SCI housing, if such housing is available. (J.E.1).
15. When an institution's residences exceed the requirement for Superintendents and Deputies, the DOC Commissioner may approve other employees to reside in an institutional residence. (J.E.1).

16. Under OM 024.01, any employee residing in an institutional residence is required to pay charges pursuant to Management Directive 315.14. (J.E.1)
17. According to Paragraph II, D 1 and 2, of OM 024.01, Superintendents and Deputy Superintendents and any other employee required to live in an institutional residence are to pay set maintenance charges, while other employees must enter into fair market value leases with the Department of General Services. (J.E.1).
18. Paragraph III B of OM 024.01 indicates that any employee who is not a Superintendent or a Deputy Superintendent who seeks to reside in an institutional residence first makes a request through an institution's Superintendent, and if the Superintendent agrees with a request, the request is forwarded to the DOC's Commissioner. "Occupancy is not permitted until written approval from the Commissioner has been received." (J.E.1).
19. Once a non-Superintendent or Deputy DOC employee is approved to reside in an institutional residence, the Land Management Division of the Department of General Services acts as the agent for the DOC with regard to the leasing process. (N.T.201, 205, 207, 216).
20. The DOC's Bureau of Operations sends a request to the Department of General Services which then negotiates directly with the person who will become the tenant. (N.T.201, 205, 206, 216).
21. The Department of General Services then determines the fair market value and prepares the lease. (N.T.202-204).
22. Normally, upon receipt of a request, the Department of General Services takes between one and two weeks to prepare a lease, but depending on staffing

levels, the preparation of a lease may take as much as a month or longer. (N.T.217).

23. It was common practice for the DOC to allow individuals who should have had fair market value leases, to live in institutional residences without leases and to instead pay much less monthly rent calculated with maintenance charges versus fair market values. (N.T.68, 69, 178, 314; J.E.66).
24. In 1987 when SCI-Retreat opened, Dennis Erhard, (hereinafter "Erhard"), became the Superintendent. (N.T.23, 25, 343).
25. Erhard remained SCI-Retreat's Superintendent until December, 1995. (N.T.45, 279).
26. While Superintendent at SCI-Retreat, Erhard resided in SCI-Retreat's only institutional residence. (N.T.45,342, 372).
27. The residence at SCI-Retreat is a four bedroom Tudor style house. (N.T.51).
28. When Erhard left SCI-Retreat, SCI-Retreat Deputy Superintendent Harry Wilson, (hereinafter "Wilson"), was promoted to the position of Superintendent of SCI-Retreat. (N.T.195, 34).
29. Since he already had a home approximately nine minutes from SCI-Retreat, Wilson requested and was granted a waiver from the requirement that Superintendents reside in an institutional residence. (N.T.45, 342).
30. Beginning in December 1995, Wilson began to announce the availability of the SCI-Retreat residence at Department Head meetings and Administrative Staff meetings saying living there would be a good deal financially. (N.T.45, 28, 293, 344-345).
31. The SCI-Retreat residence was vacant between December 1995 and August 1996. (N.T.51).

32. Until his death on February 29, 1996, O'Day had been residing with her Father at 11 West Kirmar Avenue, Alden, Pennsylvania. (N.T.44, 46, 156, 346).
33. O'Day's father died intestate which resulted in O'Day's five siblings requesting that the 11 West Kirmar Avenue property be sold and the proceeds divided. (N.T.46).
34. This circumstance left O'Day without a place to live, so O'Day approached Wilson expressing an interest in living in the SCI-Retreat residence. (N.T.47,374).
35. Wilson informed O'Day that he would seek permission from the DOC's central office and for O'Day to put her request in writing. (N.T.47).
36. By memorandum dated June 5, 1996, from O'Day to Wilson, O'Day indicated her intention to occupy the SCI-Retreat residence effective July 14, 1996. (N.T.47, J.E.7).
37. At that time, O'Day was aware of both Management Directive 315.14 and the DOC's OM 024.01. (N.T.47, 153, 155, J.E.7).
38. Wilson asked his supervisor, Deputy Commissioner, William Love, if it was all right for O'Day to move in while a lease was being developed. (N.T.344, 347, 368).
39. By memorandum dated July 11, 1996 from DOC's Director of Administration, Lee T. Bernard II, to DOC's Chief of the Support Services Division, Dave Garlinger, Garlinger was instructed to contact the Department of General Services to arrange for a lease of the SCI-Retreat residence, as O'Day would be occupying the residence. (R.E.1).
40. By memorandum dated August 1, 1996, from Garlinger to Wilson, Garlinger requested a list of items that were needed to present to the Department of

General Services to facilitate the creation of a lease for the SCI-Retreat residence. (R.E.2).

41. Wilson assigned the task of collecting the requisite information to SCI-Retreat's Facility Maintenance Manager, Anthony J. Valania, (Hereinafter "Valania"). (N.T.363).
42. The required information was to be provided to Garlinger by August 20, 1996. (N.T.363).
43. Despite a delay in approval from the DOC's central offices, on August 14, 1996, O'Day, her son, and her grandson, were allowed to move into the SCI-Retreat residence. (N.T.49, 50, 118).
44. When Erhard had lived in the SCI-Retreat residence, he experienced minor maintenance issues such as a leaky roof, broken windows, and furnace repairs. (N.T.240).
45. The SCI-Retreat residence's hot water was controlled by operation of the furnace. (N.T.52).
46. When O'Day moved in, she had no hot water for a day until repairs could be made to the furnace. (N.T.52, 240, 264).
47. SCI-Retreat maintenance recommended the installation of a hot water heater. (N.T.53, 241, 326).
48. A hot water heater was ordered and delivered to the residence but because it was a low level priority, the hot water heater was never installed. (N.T.53, 242, 326).
49. On July 12, 1996, a bi-weekly payroll deduction from O'Day's pay began for assessed state rate maintenance charges for the SCI-Retreat residence. (N.T.48-49; J.E.8).

50. The biweekly deduction included: Five unfurnished rooms @ \$16.50 per room/\$82.50; garage - \$10.50; and utilities - \$17.50 for a total bi-weekly deduction of \$110.50. (J.E.8).
51. Using state rate maintenance charges instead of a fair market value lease for the SCI-Retreat residence meant that O'Day's rent was approximately \$240 per month. (N.T.62; J.E.8).
52. By memorandum dated January 16, 1997, from Wilson to O'Day, Wilson advised O'Day that the Department of General Services, Bureau of Real Estate Leasing Division was in the process of finalizing a lease for the SCI-Retreat residence. (J.E.14).
53. O'Day was advised by Wilson's memorandum that the lease had two options: either \$750 per month with utilities; or \$550 per month without utilities, and O'Day was asked which option she wanted. (J.E.14).
54. On January 16, 1997, O'Day filed a Notice of Discriminatory Practice with the DOC's central office Affirmative Action Officer through the SCI-Retreat's Affirmative Action Officer. (N.T.63, 64, 71; J.E.15).
55. In her January 16, 1997 Notice of Discriminatory Practice, O'Day generally alleged subtle retaliation presented a hostile work environment, and that the DOC qualification process for paying state rate maintenance charges was being discriminatorily applied to her as an act of retaliation. (N.T.64, 72;J.E.15).
56. O'Day had telephoned approximately 21 other DOC SCI Business Managers to see if others in Commonwealth facilities had fair market value leasers or were paying lower rents under state rate maintenance charges. (N.T.65-68).

57. Suspecting retaliation, by a memorandum dated January 16, 1997, O'Day formally requested from Erhard, who was now the DOC's Deputy Commissioner for Administrative Services, a list of residence facilities, the class titles of those occupying each residence, the status of each occupancy (state rates or leases), the date the determinations had been reviewed by the Office of Administration; and who had the authority to determine whether state rates or a fair market value lease should apply. (N.T.66, 76-77; J.E.-17).
58. In a January 24, 1997 memorandum from O'Day to Wilson, O'Day responded to Wilson's January 16, 1997 memorandum advising Wilson that O'Day wanted to review whether the options being offered to her were fair and to review the terms of the proposed lease. (N.T.80; J.E.20).
59. On February 7, 1997, O'Day received a copy of the proposed lease agreement. (N.T.82; J.E.21, 25).
60. By letter dated February 4, 1997, Erhard responded to O'Day's January 16, 1997 request for information. (N.T.82; J.E.22).
61. Erhard's memorandum did not furnish the information O'Day had requested, but instead merely referenced Management Directive 315.14 and DOC OM 024.01 and indicated that "[T]here are currently several employees within the Department of Corrections who have current or pending fair market value leases." (J.E.22).
62. Erhard's memorandum also stated that employees who are neither Superintendents nor Deputies must make lease payments at fair market value and that the DOC "has followed the leasing schedules set forth in the policies." (J.E.22).
63. By memorandum dated February 7, 1997, from O'Day to Erhard, O'Day

requested under the Pennsylvania Right to Know Act the information she previously requested on January 16, 1997. (N.T.84; J.E.23).

64. By memorandum dated February 28, 1997, Erhard advised O'Day that her request had been referred to the Office of Chief Counsel for a response. (N.T.84, 157; J.E. 24).
65. O'Day never received a response to her request from the Office of Chief Counsel. (N.T.86, 177).
66. In the process of O'Day's inquiries, Wilson learned that the DOC allowed others to reside in Commonwealth facilities without fair market value leases. (N.T.369).
67. On March 3, 1997, O'Day directed a memorandum to Stephen J. Squibb, (hereinafter "Squibb"), Chief, Land Management Division, Bureau of Real Estate, requesting an extension in which to respond to the lease proposal until O'Day could review information she considered necessary to properly assess her position on the proposed lease terms. (N.T.88-89; J.E.25).
68. Squibb granted O'Day's extension request and extended the time for O'Day to respond to the lease proposal to March 26, 1997. (N.T.90; J.E.26).
69. On March 21, 1997, O'Day Spoke with Squibb on the telephone at which time Squibb asked O'Day to put her questions in writing. (N.T.91; J.E.27).
70. By memorandum dated March 24, 1997, from O'Day to Squibb, O'Day recommended consideration of additional factors in the calculation of a fair market value on the SCI-Retreat residence and suggested a site visit for a proper evaluation. (N.T.94, 98-99; J.E.27).
71. No site visit ever occurred. (N.T.100, 214).

72. In the fall of 1996 six inmates escaped from the DOC's Western Penitentiary tunneling out of the institution with tools from the institution. (N.T.243, 272, 351).
73. In addition to other security changes, the DOC created a new tool policy which generally required tools in SCI facilities to be removed to an area outside the institution. (N.T.243, 352; J.E.73).
74. In March, 1997 a first draft of the new tool policy was circulated to DOC SCI's seeking input from SCI Superintendents. (N.T.375).
75. On May 5, 1997, the DOC's new tool policy was issued with an effective date of July 1, 1997. (N.T.352; J.E.73).
76. At SCI Retreat, on or about March 1997, Wilson created a tool committee and charged them with finding the best location to relocate tools from inside the institution to another location outside the institution consistent with the DOC's new policy. (N.T.245, 319, 320, 354).
77. The tool committee inquired of other SCI's what actions they were taking. (N.T.325).
78. By memorandum dated March 31, 1997, Facility Maintenance Manager Valania conveyed to Wilson the tool committee's proposals to store tools outside the institution. (N.T.105, 197, 321; J.E.29).
79. Valania's memorandum listed several locations the committee considered to store tools as follows:
 - a. construct a shed in the parking area near the north entrance;
 - b. utilization of a garage next to the labor foreman's office;
 - c. utilize the sewage treatment plant office;

- d. use a truck trailer; or
 - e. construct a quonset building. (J.E. 29)
80. Valania's memorandum also addressed the two suggestions Wilson had made to the Committee to consider either the residence garage or the 10-block garage by indicating the Committee's opinion that since the residence was occupied using the garage would be a security risk and the 10-block garage area was too costly. (J.E.29).
81. Wilson selected the residence garage in which to relocate the tools. (N.T.324, 355, 371).
82. On April 18, 1997, Wilson informed O'Day that Valania had recommended use of the residence for tool storage and asked O'Day if 90 days was enough time for her to vacate the residence. (N.T.102, 162; J.E.31).
83. O'Day called Valania who informed O'Day that the decision to use the residence for tool storage was Wilson's. (N.T.101).
84. By memorandum dated April 21, 1997, Wilson provided O'Day with written confirmation of his decision to use the residence garage for tool storage and that he wanted O'Day to vacate the residence within 90 days. (N.T.106-107; J.E.32).
85. O'Day requested a meeting with Wilson's supervisor, Deputy Commissioner Love. (N.T.101).
86. Under cover memorandum dated April 21, 1997, from O'Day to the DOC central office Affirmative Action Officer, O'Day filed another Affirmative Action Discrimination complaint alleging Wilson's decision was retaliatory. (N.T.107-108; J.E.33-34).
87. On or about April 24, 1997, O'Day began to look for a new house and located

- one approximately May 10, 1997. (N.T.163-164).
88. On April 29, 1997, Love and Wilson meet with O'Day at which time Love advised O'Day that he supported Wilson's decision to use the residence garage for tool storage. (N.T.110-111; J.E.36).
 89. By letter dated May 20, 1997, the DOC central office Affirmative Action Officer informed O'Day that he was unable to associate her eviction with retaliation. (N.T.113; J.E.39).
 90. The central office Affirmative Action Officer had not contacted O'Day prior to his May 20, 1997 letter. (N.T.114).
 91. In July 1997, O'Day was still paying state rate maintenance charges for the SCI-Retreat residence. (N.T.115-116).
 92. On July 27, 1997, O'Day's maintenance charges were increased to \$122.00 bi-weekly. (N.T.116; J.E.42).
 93. By memorandum dated July 21, 1997, O'Day informed Wilson that 90 days was not sufficient time for O'Day to vacate the residence. (N.T.116; J.E.43).
 94. By memorandum dated July 24, 1997, Wilson established the deadline for O'Day to vacate as September 1, 1997, and asked that O'Day provide him with weekly updates. (J.E.44).
 95. By memorandum dated August 28, 1997, O'Day informed Wilson that she had been delayed and would be unable to vacate the residence by September 1, 1997. (J.E.48).
 96. By memorandum dated September 10, 1997, O'Day conveyed to Erhard the status of the release of the residence along with a chronological listing of O'Day's efforts to vacate the residence. (J.E.51).
 97. An October 28, 1997 memorandum from Wilson to O'Day again revised the

- vacating deadline to November 20, 1997. (N.T.128; J.E.52).
98. O'Day vacated the SCI-Retreat residence on November 17, 1997. (N.T.129, 148, 160, 162; J.E.53).
 99. On December 22, 1997 renovations to the residence garage began in order to create a space for tool storage. (N.T.190, 250).
 100. On February 13, 1998, Facility tools were relocated to the residence garage. (N.T. 231, 377).
 101. Wilson was aware that SCI-Retreat was not in compliance with the tool policy requirement that tool relocation was to be done by July 1, 1997. (N.T.377).
 102. On or about April 1998, Wilson was transferred to SCI Green and Ben Varner, (hereinafter "Varner"), was transferred to SCI-Retreat as the new Superintendent. (N.T.133-134, 165).
 103. On April 17, 1998, O'Day was informed that Varner would be living in the residence. (N.T.133; J.E.56)
 104. On April 20, 1998, Varner ordered the tools out of the garage. (N.T.252).
 105. The following day, the tools were transferred to the sewage treatment plant. (N.T.136, 198, 252-325).
 106. On June 28, 1998 Varner began occupancy of the SCI-Retreat residence. (N.T.139).
 107. As DOC policy required Varner to reside in the residence, effective April 1998 O'Day would have to have vacated the residence had she still been there. (N.T.166, 194).
 108. O'Day was off work a total of six days on business related to the filing of her PHRC complaint. (N.T.144-146).
 109. At all relevant times O'Day earned \$28.04 per hour. (N.T.142; J.E.76).

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 in this case.
3. O'Day and the DOC are persons within the meaning of the Pennsylvania Human Relations Act ("PHRA").
4. The DOC is an employer within the meaning of the PHRA.
5. O'Day is an employee within meaning of the PHRA.
6. O'Day has established a *prima facie* case of retaliation by showing:
 - a. O'Day opposed a practice made unlawful by the PHRA, and also made a charge under the PHRA.
 - b. The DOC knew of O'Day's opposition and charge.
 - c. O'Day was evicted from the SCI-Retreat residence.
 - d. There is a causal connection between O'Day's protected activity and the eviction.
7. The DOC articulated legitimate, non-discriminatory reasons for O'Day's eviction.
8. O'Day has met her burden of establishing by a preponderance of the evidence that the DOC's reasons are a pretext for retaliation in violation of Section 5(d) of the PHRA.
9. O'Day has established that she suffered out-of-pocket expenses at commuting to work, and missing time from work due to assisting to prepare her case.

10. Although O'Day's case alleged a violation of Section 5(d), the underlying complaint is not a violation of Section 5(h) or 5.3, thus the PHRC may not award damages caused by humiliation and embarrassment.
11. Since O'Day alleged that the DOC's actions were in retaliation for her claim that she was denied a promotion, O'Day is not afforded the protections of Section 5(h)(3) of the PHRA.

OPINION

This case arises on a complaint filed by Barbara A. O'Day (hereinafter "O'Day") on or about June 17, 1997, at Docket Number H-7422, against the Pennsylvania Department of Corrections, Martin E. Horn, Commissioner (hereinafter the "DOC"). Generally, O'Day's complaint alleged that the DOC discriminated against her in retaliation for having previously filed a complaint of discrimination by attempting to increase her rent, and by ultimately evicting her from a Commonwealth owned residence. O'Day's original complaint only alleged a 5(d) violation of the Pennsylvania Human Relations Act of October 27, 1995, 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 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 this case was approved for public hearing.

Following a pre-hearing conference held on August 16, 2001, O'Day filed an amended complaint dated September 14, 2001, in which she alleged that the DOC's actions also violated Sections 5(h)(1) and 5(h)(3) of the PHRA. Additionally, O'Day's amended complaint alleged that Martin E. Horn aided and abetted the DOC in violation of Section 5(e) of the PHRA.

By Interlocutory Order dated November 14, 2001, O'Day's 5(h)(1) allegation was dismissed and her Section 5(e) claim was also dismissed as having been untimely filed. Effectively, the November 14, 2001 order dismissed Martin E. Horn as a Respondent.

The public hearing was held on December 4, and 5, 2001, in Harrisburg Pennsylvania, before Carl H. Summerson, Permanent Hearing Examiner. Post-Hearing Briefs were submitted by the parties. Both the DOC's brief and the brief on behalf of the complaint were received on February 28, 2002.

Before addressing O'Day's Section 5(d) retaliation claim we note that O'Day's housing issue presents a problem. As was noted in the November 14, 2001 Interlocutory Order, O'Day's 5(h)(3) claim can be seen as simply an articulation of the manner of the alleged retaliation. However, O'Day's complaint fails to articulate a separate actionable 5(h)(3) claim.

Section 5(h)(3) states in pertinent part:

"It shall be an unlawful discriminatory practice . . . [f]or any person to . . . [d]iscriminate against any person in the terms or conditions of . . . leasing any housing accommodation . . . because of the race, color, familial status, age, religious creed, ancestry, sex, national origin, handicap or disability of any person, the use of a guide or support animal because of the blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals or because of the handicap or disability of an individual with whom the person is known to have a relationship or association."

Here, O'Day claims the basis of the alleged attempted rent increase and eviction was retaliation for having previously filed a sex-based failure to promote discrimination complaint. Under Section 5(h)(3) retaliation is not a protected category. To be actionable under Section 5(h)(3), the alleged discriminatory attempted rent increase and eviction would have to have been based on an enumerated protected group listed in 5(h)(3).

Since O'Day's allegation and all her evidence is that the DOC attempted to raise her rent and evicted her because she previously filed a sex-based failure to promote complaint, O'Day's only actionable claim is a Section 5(d)) retaliation claim. This opinion proceeds accordingly.

Section 5(d) of the PHRA states:

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

To establish a *prima facie* case of retaliation O'Day must establish:

- (1) That she engaged in protected activity;
- (2) That the DOC knew O'Day had engaged in a protected activity;
- (3) That subsequent to engaging in a protected activity, the DOC took negative action against O'Day; and
- (4) That there was a casual connection between O'Day's protected activity and the DOC's negative action.

Robert Wholey Company, Inc. v. PHRC, 146 Pa. Cmwlth 706, 606 A.2d 982 (1992) 146 Pa. Cmwlth 706, 606 A.2d 982 (1992) appeal denied 532 Pa. 659, 615 A.2d. 1314 (1992).

If a Complainant can establish a *prima facie* case of retaliation the burden of production shifts to the Respondent to produce a legitimate, nondiscriminatory explanation for its actions. If the Respondent meets this production burden, then the Complainant must prove, by a preponderance of the evidence, that the Respondent's articulated reasons are pretextual. Brown Transport Corp. v. PHRC, 133 Pa. Cmwlth 545, 578 A.2d 555 (1990).

A review of O'Day's complaint and amended complaint generally reveals three distinct instances O'Day claims are in retaliation for her engaging in protected activity. The three general circumstance to which O'Day points are: (1)

The DOC's failure to install a hot water heater; (2) the DOC's attempt to impose a fair market value lease on O'Day's rental of the SCI-Retreat residence; and (3) O'Day's eviction from the residence.

Beginning with O'Day's claim that the DOC failed to install a water heater in the SCI-Retreat residence in August 1996 and throughout her occupancy of the residence through November 17, 1998, O'Day easily meets the first requirement of the requisite *prima facie* showing. In 1993, O'Day filed a PHRC claim alleging a sex-based promotion denial. This claim was dismissed because it was not timely filed. On September 28, 1995, O'Day commenced a suit in federal court alleging she had been denied a promotion from Business Manager to Deputy Corrections Superintendent for Treatment at SCI-Retreat. Clearly, the DOC knew O'Day had filed these actions as the federal case had not concluded until a summary judgment was entered in favor of the DOC on March 27, 1997.

O'Day did establish that when she moved into the SCI-Retreat residence she had no hot water. As a remedy to the problem, the maintenance department recommended that a hot water heater be purchased. This purchase occurred, however, the water heater was never installed. Instead, the water heater was stored in the residence garage for the 15 month period of O'Day's residence.

O'Day's *prima facie* case falters with respect to the fourth element requirement. Generally, casual connection can be shown one of two ways. This requirement can be satisfied either by direct evidence of a discriminatory motivation or by creating an inference by showing the proximity in time between the protected activity and the employer's action.

Here, O'Day has presented no direct evidence of a retaliatory motive. Additionally, O'Day's PHRC claim was filed approximately three years earlier and her

federal action was filled 11 months earlier. Here, we look to the totality of the evidence to assess whether a sufficient casual connection has been shown.

In reviewing the circumstances surrounding O'Day's rental of the SCI-Retreat residence we find numerous factors which suggest a lack of a retaliatory motive in failing to install the hot water heater. First, pursuant to paragraph III B of OM 024.01, O'Day would not have been able to reside in the residence without Wilson's agreement with and endorsement of O'Day's request. Further, Wilson facilitated O'Day's move in before the DOC's Commissioner's approval had been received contrary to OM 024.01.

When O'Day discovered she had no hot water on the first day she moved in, maintenance promptly responded. When the previous Superintendent Erhard, occupied the residence, he too had minor maintenance issues. We note that the property was vacant between December 1995 and August 1996. Under this circumstance, some maintenance issues have to be expected.

The residence's hot water was controlled by a mechanical feature in the furnace, that once repaired, provided O'Day with hot water through the term of her occupancy. Periodically, the furnace's pilot light went out but, the evidence shows that these instances were remedied promptly.

As for the storage of the water heater for the duration of O'Day's occupancy, the evidence shows that as long as the residence had hot water, installation of a new water heater was assigned a low priority. For much of the time O'Day lived in the residence, SCI-Retreat was in the process of implementing newly created security measures after a prison break in Western Pennsylvania in the fall of 1996.

Here the question of causation tips heavily in favor of the DOC. Accordingly, O'Day fails to establish by a preponderance of the evidence that there was a retaliatory motive for the failure to install a hot water heater.

Turning to O'Day's second general allegation of retaliation, O'Day claims that on January 16, 1997, the DOC attempted to impose a fair market value lease on her while other DOC employees were permitted to reside in Commonwealth residences without leases at the much lower state rates. Here, the record is clear that O'Day never did have to enter a fair market value lease but instead continued to pay the lower state rates for the entirety of her tenancy. While there are questions surrounding the chronology of events with regard to O'Day's paying state rates or a fair market value lease, the simple fact remains, O'Day never did pay anything but the state rates.

Rather than wade through the full scope of an analysis of this issue, we turn to O'Day's third issue because the question of retaliatory motive is much clearer and the ultimate result of this case does not change by only analyzing the third allegation.

Generally, O'Day alleged that she was evicted from the SCI-Retreat residence because she had previously filed a PHRC claim and a federal lawsuit and had expressed opposition in January 16, 1997 to what she perceived as an attempted retaliatory rent increase because of her PHRC claim and federal lawsuit. Clearly, O'Day had engaged in protected activity that was known to the DOC. Equally clear is the fact that the DOC took actions beginning on April 18, 1997 which ultimately resulted in O'Day being required to vacate the SCI-Retreat residence on November 17, 1998.

As for the question of a causal connection between O'Day's protected activity and the DOC's actions leading to O'Day vacating the residence, we find that O'Day

has sufficiently established the existence of a causal connection. Again, looking at the totality of the circumstances, there are factors present which reveal Wilson's decision to utilize the residence garage for tool storage to have been retaliatory. Combined with such factors is the relatively short time period between O'Day's January 16, 1997 internal complaint and Wilson's decision to activate O'Day's eviction.

The DOC had no trouble meeting their production burden by articulating that SCI-Retreat, along with all DOC SCI's, had to remove tools from inside the institution, and that the selection of the residence garage for tool storage was made because among available alternatives this measure was both practical and fiscally responsible.

To prevail, O'Day must prove by a preponderance of evidence that the DOC's articulated reason was a pretext for retaliation. Here, after a careful review of the totality of the circumstances, O'Day has sufficiently shown that the selection of the SCI-Retreat residence garage for tool storage was collectively motivated by retaliation for her past PHRC complaint, her federal lawsuit, and her internal retaliation complaint filed on January 16, 1997.

First, the DOC tool control policy issued on May 5, 1997 had an effective date of July 1, 1997. By that date, tools within a DOC facility were to be placed in a safe and secure location outside each DOC facility. At SCI-Retreat, by Wilson's selection of the residence's garage, this important security measure was not completed until February 13, 1998. Wilson testified that he understood that SCI-Retreat was out of compliance with the new policy between July 1, 1997 and February 13, 1998. (N.T.377).

On or about March 24, 1997, as the DOC tool policy was being developed, a draft of the policy was sent to SCI Superintendents for their observations and suggestions. Only days after this occurred, Wilson wisely created a committee composed of approximately seven SCI-Retreat managers and charged them with identifying how and where to move the tools from inside the facility. (N.T.354). Subsequently, on March 31, 1997, Facility Maintenance Manager Valania conveyed to Wilson the committee's recommendations.

Clearly, time was of the essence. All Wilson had on March 24, 1997 was a draft of a policy which prompted him to expeditiously create a high level committee to submit options to assure compliance with a developing tool policy. By the time the actual tool policy was issued on May 5, 1997, Wilson already had the committee's recommendations for over a month.

Valania's testimony on the matter strongly supports the conclusion that the decision to use the residence garage was retaliatorily motivated. Valania testified that the committee had researched what actions were being contemplated by other SCI's. Valania indicated that, to his knowledge, no other SCI considered utilizing a residence. In fact, Valania offered his opinion as the Facility's Maintenance Manager that it was "ridiculous" to put the tools in the garage, and that other available options were more conducive. (N.T.322-323).

Even when O'Day vacated the residence, it took from December 22, 1997 until February 13, 1988 to complete the garage modifications and to relocate the tools there.

One of the committee recommendations was to put the tools in the sewage treatment plant office. In April, 1998 Wilson was transferred and Varner became the new SCI-Retreat Superintendent. On April 20, 1998, Varner ordered the tools out of

the garage. In a matter of several days, the tools were able to be relocated into the sewage treatment plant.

Since this April 1998 transition was seemingly so simple, it is likely that the simplicity of the change could have been the same in April 1997 when Wilson decided to use the garage. Considering the record as a whole, the decision to use the residence garage was motivated by a desire to retaliate against O'Day's past complaints.

Accordingly, we turn to consideration of an appropriate remedy.

A careful reading of the PHRA is imperative under the circumstances presented here. Section 9(f)(1) of the PHRA states in pertinent part:

If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the Commission shall . . . cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to reimbursement of certifiable travel expenses in matters involving the complaint, . . . compensation for loss of work in matters involving the complaint, and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice, provided that, in the cases alleging a violation of Section 5(d), (e) or (h) or 5.3 where the underlying complaint is a violation of Section 5(h) or 5.3, the Commission may award actual damages, including damages caused by humiliation and embarrassment, as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

Since retaliation was found, a cease and desist order is appropriate. Also, O'Day testified without contradiction that she lost six workdays in matters involving the complaint. O'Day further indicated that once she vacated the SCI-Retreat residence, she incurred out-of-pocket expenses in the form of driving an additional 22 miles each day to work. Since O'Day agrees that once Varner became the

superintendent she would have been required to move in April 1998, reimbursement of such travel expenses cease at that point. As for the requested moving expenses, O'Day would have had these expenses as early as April, 1998. Accordingly, such expenses are not recoverable.

The post-hearing brief on behalf of the complaint assumes this is a housing case and seeks damages for embarrassment and humiliation and a civil penalty case. However, this case does not activate the housing provisions of the PHRA. As indicated earlier, this case is solely a retaliation claim under Section 5(d) of the PHRA. In order to be eligible for consideration of damages for embarrassment and humiliation, the PHRA requires that a 5(d) complaint have an underlying 5(h) or 5.3 violation claim.

In Section 9(f)(1) the phrase "Section 5(d), (e) or (h) or 5.3" contains two main clauses: (5(d), (e) or (h)); and (5.3). The first main clause, 5(d), (e) or (h) is a series of three items which itself contains the coordinating conjunction "or". This first main clause is then connected to the second main clause "5.3" by another coordinating conjunction "or". The first main clause "5(d), (e) or (h)" is held together by the number "5". The PHRA has no Section (e) or (h) without a connection to the main Section "5".

Accordingly, Section 9(f)(1) must be read to mean that a case alleging a violation of Section 5(d) must have an underlying complaint which is a violation of Section 5(h) or 5.3 before the PHRC may award humiliation and embarrassment damages.

Here, O'Day's retaliation claims have the underlying complaint that O'Day was denied a promotion because she is a female. O'Day's alleged retaliation in the form of an eviction claim has an additional underlying claim, however, that underlying claim is also not a violation of Section 5(h) or 5.3. Along with the original sex-based

denial of promotion claim, O'Day's eviction claim also alleges retaliation for having claimed retaliation on January 16, 1997.

In O'Day's case, there was never a basis for alleging a 5(h) claim because Section 5(h) does not include "retaliation" as a protected category. To fall within Section 5(h) a claim has to be made that a Respondent discriminated against a Complainant because of membership in one of the listed protected groups.

What is happening in this case refers to the language found in Section 5(d) which makes it unlawful to "discriminate in any manner." The manner of discrimination found here was indeed a retaliatory eviction from a housing accommodation but an eviction which only lies under Section 5(d). A retaliatory eviction from housing accommodation would only expose a Respondent to embarrassment and humiliation damages if the claim underlying the retaliation was a violation of Section 5(h) or 5.3. For instance, an individual may claim that a landlord is charging them too much rent because of their sex, or race, or familial status, or disability, etc. If a retaliatory eviction followed, then that Complainant would be eligible for humiliation and embarrassment damages because the claim underlying the retaliation claim violates Section 5(h). In this matter, this is not the case. Accordingly, the PHRC is not authorized to award O'Day damages for humiliation and embarrassment. The same analysis applies to the requested civil penalty.

Given these circumstances O'Day's damages are as follows:

1. Lost wages – 6 days @ 28.04 per hour -- \$1,261.80.
2. Out-of pocket expenses –22 miles per day – approximately 115 days (November 17, 1997 to April 28, 1998), at 36.5 cents per mile -- \$923.45.

TOTAL AWARD - \$2,185.25

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BARBARA A. O'DAY,
Complainant

v.

PA DEPARTMENT OF CORRECTIONS
Respondent

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DOCKET NO. H-7422

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the DOC evicted O'Day in retaliation for having filed charges and opposing what she believed was retaliation. Accordingly, O'Day has proven 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 Stipulations of Fact, 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.

By:



Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BARBARA A. O'DAY
Complainant

v.

PA DEPARTMENT OF CORRECTIONS,
Respondent

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DOCKET NO. H-7422

FINAL ORDER

AND NOW, this 25th day of JUNE, 2002 after a review of

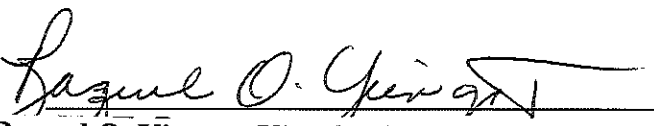
the entire record in this matter the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion as its own finding in this matter, and incorporates the Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

ORDERED


1. That the DOC cease and desist from retaliating against an employee who the DOC knows or has reason to know has either opposed any practice forbidden by the PHRA or has made a claim under the PHRA.

2. That the DOC shall pay to O'Day within 30 days of the effective date of this order, \$1,261.80, which sum represents compensation to O'Day for loss of work in matters involving O'Day's complaint.
3. That the DOC shall pay to O'Day, within 30 days of the effective date of this order, \$923.45, which sum represents out-of-pocket expenses O'Day had which were caused by the DOC retaliatory eviction of O'Day.
4. That the DOC shall pay additional interest of six percent per annum on the out-of-pocket award, calculated from May 1, 1998, until December 31, 1999, and interest at the rate of eight percent for calendar year 2000, and interest at the rate of nine percent thereafter.
5. That, within 30 days of the effective date of the Order, the DOC shall report to the Commission on the manner of its compliance with the terms of this Order by letter addressed to Lisa Jo-Fanelli-Greer, Esquire, in the Commission's Central Offices.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 
Raquel O. Yiengst, Vice Chairperson

ATTEST:


Gregory J. Celia, Jr., Secretary