

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

**DANIEL B. SHUTTS, APPLICANT, Complainant**

**v.**

**CAPONE REALTY COMPANY, Respondent**

**DOCKET NO. H6579**

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

FINAL ORDER

**FINDINGS OF FACT\***

1. The Complainant, Daniel B. Shutts (hereinafter "Shutts"), is an individual whose sex is male.
2. On October 24, 1994, the Respondent, Capone Realty Co. (hereinafter "Capone"), owned, rented, managed, and operated the Four Seasons Apartments located at 60 Center Road, Pittsburgh, PA 15238. (SF 9.)
3. The Four Seasons Apartments have 72 one- or two-bedroom apartments in three buildings. (NT 82.)
4. At all relevant times, Capone's resident manager at the Four Seasons Apartments was Josephine Pollock (hereinafter "Pollock"). (NT 77.)
5. In October 1994, Pollock was approximately seventy-two years old and has been Capone's resident manager for twenty-five years. (NT 76, 77.)
6. Capone had provided Pollock with both written materials and training on the Pennsylvania Human Relations Act (hereinafter "PHRA") and the Fair Housing Act. (NT 78, 79.)

\* The foregoing Stipulations of Fact are 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 Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

NT Notes of Testimony  
RE Respondent's Exhibit  
SF Stipulations of Fact

7. A prospective tenant would call Pollock who would schedule appointments to see available units, at which time a prospective tenant would be given an application. (NT 49, 81, 101.)

8. Normally, Pollock would get the name and address of a prospective tenant. (NT 44, 81.)

9. Pollock did not make final decisions on an applicant's qualifications to rent an apartment at the Four Seasons Apartments. (NT 43.)

10. Pollock reported directly to Bonnie Gavin, the broker at Capone. (NT 78.)

11. While on his way to work on October 24, 1994, Shutts drove into the Four Seasons Apartment complex and took down Pollock's phone number which he observed on a sign in the complex. (NT 27, 32.)

12. At the time, Shutts worked as a telemarketer for American Forever Dry Waterproofing. (NT 37.)

13. Later on October 24, 1994, during a break period at work, Shutts placed a telephone call to Pollock. (NT 27, 62.)

14. Present in Shutts' immediate vicinity were Shutts' boss, Barbara McNamara, and a co-worker. (NT 62, 72.)

15. McNamara was aware that Shutts was going to call about an apartment. (NT 71.)

16. The conversation between Shutts and Pollock began with Shutts inquiring about the price of one-bedroom apartments at the Four Seasons Apartments, and whether electric was included. (NT 28.)

17. Shutts then asked Pollock if there were any one-bedroom apartments available. (NT 28, 35-36.)

18. Pollock responded that there were one-bedroom apartments available and asked Shutts if it would just be Shutts in the apartment. (NT 28, 36.)

19. Shutts then informed Pollock that he would have a roommate, Vincent Beddick. (NT 35; Complaint ¶ 3A2.)

20. Pollock inquired if he meant "another guy" to which Shutts said yes. (NT 28.)

21. In effect Pollock then advised Shutts that she does not rent one-bedroom apartments to two men and asked Shutts where both men would stay. (NT 21-22, 28, 29.)

22. Shutts informed Pollock that they intended to sleep in the same bed. (Complaint ¶ 3A2.)
23. In effect, Pollock then informed Shutts that “we don’t allow that here.” (NT 29, 35-36.)
24. Shutts then asked Pollock if either a man and a woman or two women would be allowed to rent a one-bedroom apartment, to which Pollock said yes. (NT 29.)
25. The conversation between Shutts and Pollock ended with Shutts thanking Pollock and each hanging up. (NT 29, 34, 52, 63.)
26. Shutts was not asked for either his name or phone number. (NT 29.)
27. At the time of Shutts’ inquiry, there were women college students sharing one-bedroom apartments at Four Seasons Apartments. (NT 22.)
28. Immediately after speaking with Shutts, Pollock called Bonnie Gavin who told Pollock that she should have told Shutts to come and see whatever apartments were available, and that Pollock was to show apartments to anyone who inquired, whether two men or two women, and that everyone who wanted one should be given an application. (NT 46, 87, 88-89, 98.)
29. Since Pollock had not obtained Shutts’ name or phone number, there was no way to contact him to offer him an application. (NT 47.)
30. Approximately ten minutes after Shutts’ telephone conversation with Pollock ended, and after McNamara learned from Shutts what happened, McNamara called Pollock. (NT 39, 49, 60, 64, 67.)
31. McNamara was told by Pollock that one-bedroom apartments were available for rent by two women. (NT 60.)
32. After Shutts hung up with Pollock, he became “real upset,” he was nervous and shaking, and he felt nauseous. (NT 29, 30.)
33. Shutts’ work production was subsequently negatively impacted. (NT 30.)
34. By letter dated December 9, 1994, one day after Capone was served with Shutts’ PHRC complaint, Capone extended an opportunity to Shutts to apply for a one-bedroom apartment at Four Seasons Apartments. (RE 1.)
35. Shutts rejected Capone’s offer. (NT 31, 57.)

### **CONCLUSIONS OF LAW**

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this case.
2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing.

3. Shutts is an individual within the meaning of the Pennsylvania Human Relations Act.
4. The Four Seasons Apartments is a housing accommodation within the meaning of the Act.
5. Shutts presented direct evidence of a 5(h)(1) violation.
6. When discrimination has been found, the Commission has broad discretion in fashioning a remedy.

### **OPINION**

This case arises on a complaint filed by Daniel B. Shutts (hereinafter “Shutts”) and Vincent Beddick against Capone Realty Company (hereinafter “Capone”) at Pennsylvania Human Relations Commission (hereinafter “PHRC”) Docket No. H6579. At the public hearing, Vincent Beddick was withdrawn as a complainant. (NT 41.)

In his complaint Shutts alleges that on or about October 24, 1994, Capone denied him an opportunity to rent a one-bedroom apartment because of his sex, male. Shutts’ complaint alleges that Capone’s actions violate Sections 5(e), 5(h)(1) and (3) of the Pennsylvania Human Relations Act (hereinafter “PHRA”). At the pre-hearing conference held on January 6, 1999, the PHRC attorney on behalf of the complaint clarified that this matter would proceed to public hearing on a 5(h)(1) claim only.

The PHRC investigated Shutts’ allegations and, at the conclusion of the investigation, informed Capone that probable cause existed to credit Shutts’ allegation. Thereafter, the PHRC attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently the PHRC notified the parties that it had approved a public hearing.

The public hearing was held on July 30, 1999, in Pittsburgh, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The Commission’s interest in the complaint was overseen by the PHRC Housing Division’s Assistant Chief Counsel Nancy L. Gippert. Stephen F. Capone, Esquire, appeared on behalf of Capone. The parties were afforded an opportunity to submit post-hearing briefs. The post-hearing brief on behalf of the complaint was received on October 4, 1999. Capone’s post-hearing brief was received on October 13, 1999.

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

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

First, although issues of sexual orientation are implicated by the facts of this case, we initially limit our concern to Shutts’ sex-based allegation. More specifically, our focus is on whether Shutts was treated differently than females with respect to the rental of a one-bedroom apartment at the Four Seasons Apartments.

The analysis of Shutts' disparate treatment housing allegation under the PHRA will first look to Pennsylvania precedent, however, we do not hesitate to import principles of fair housing law which have emerged relative to the federal Fair Housing Act. See, *Kryeski v. Schott Glass Technologies*, 626 A.2d 595 (Pa.Super.Ct. 1993). Further, we often construe housing cases in light of concepts developed in the fair employment arena. See, *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447 (4th Cir.), *cert. denied* 111 S.Ct. 515 (1990). Additionally, in interpreting what constitutes a violation of Section 5(h)(1), we are specifically guided by a fundamental provision of the PHRA. Section 12(a) of the PHRA makes the pronouncement that the provisions of the PHRA “. . . shall be construed liberally for the accomplishment of the purposes thereof. . .” See, *Speare v. PHRC*, 328 A.2d 570, 573 (Pa.Cmwlth.Ct. 1974).

Generally, two analytical approaches govern disparate treatment allegations. The first model involves allegations in which a complainant relies on a judicially created inference to support the claim of intentional discrimination. See, *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this method of proof, a complainant must initially make out a *prima facie* case. If such a showing is made, a rebuttable presumption is created. At this point, the burden of production shifts to a respondent to articulate a legitimate, nondiscriminatory reason for its actions. Once this production burden is met, a complainant must demonstrate by a preponderance of evidence that the respondent's reasons are a pretext for discrimination. See, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The second proof model involves cases in which a complainant presents direct evidence of a respondent's discriminatory motive to support the claim of intentional discrimination. See, *Blalock v. Metal Traders, Inc.*, 775 F.2d 703 (6th Cir. 1985). In *Allison v. PHRC*, 716 A.2d 689, 691 (Pa.Cmwlth.Ct. 1998), *appeal denied* Pa. Lexis 541 (Pa. March 3, 1999), the Commonwealth Court of Pennsylvania found that direct evidence, if supported by a preponderance of the evidence, is sufficient to support a finding of discrimination. In fact, the United States Supreme Court has instructed that the McDonnell-Douglas tripartite proof model is inapplicable where a complainant presents direct evidence of discrimination. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. at 121; see also, *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 130 (3rd Cir. 1985).

When a case is proven by direct evidence, the ultimate issue does not rely upon an inference. In direct evidence cases, a respondent's burden is described as not merely a production burden, but rather, “*once [a discriminatory] motive is proved to have been a significant or substantial factor in [a housing] decision, [a respondent] can rebut only by proving by a preponderance of the evidence that the same decision would have been reached even absent the presence of that factor.*” *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977).

In this case, the brief on behalf of the state's interest in Shutts' allegation asserts there is direct evidence of a sex-based denial of a one-bedroom apartment to Shutts. We agree that, considered as a whole, statements attributed to Capone's resident manager constitute direct evidence of sex-based discrimination.

Shutts clearly established that when he informed Pollock that he and a male roommate would occupy an apartment at Four Seasons Apartments, Pollock unambiguously responded that she does not rent one-bedroom apartments to two men. Credible evidence also shows that Pollock further indicated that two women would be allowed to rent a one-bedroom apartment.

As an initial matter, we must state whether or not we believe Shutts' proffered direct evidence of discrimination. See, *Blalock v. Metal Traders, Inc.*, 775 F.2d 703 (6th Cir. 1985). In response to this fundamental requirement, we find Shutts' evidence credible and accordingly believe his version of the October 24, 1994 conversation between him and Pollock. Pollock's assertion, combined with the evidence that women were permitted to share one-bedroom apartments at the Four Seasons Apartments is more than highly probative of illegal sex-based discrimination. Such a situation is conclusive that Pollock out and out refused Shutts, while two females would not be rejected as tenants of one-bedroom apartments.

Of course, Shutts' PHRC complaint was against Capone, not Pollock. However, as resident manager, Pollock was Capone's agent. Fundamentally, in Pennsylvania, a principal is liable for the actions of an agent. *Aiello v. Ed Saxe Real Estate, Inc.*, 508 Pa. 553, 499 A.2d 282 (1985). Thus, in the fair housing area, liability of a principal exists when an agent commits a discriminatory practice. See, *City of Evanston v. Baird & Warner, Inc.*, PH Fair Housing Fair Lending Reports, ¶15,661 (N.D. Ill. 1989); *Marr v. Rife*, 503 F.2d 734 (1974). Capone is therefore liable for Pollock's behavior towards Shutts.

In an effort to counter the direct evidence offered, Capone generally submits that Shutts terminated the phone conversation with Pollock before an appointment could be made to show him a unit. Additionally, Capone argues that Shutts' combative and argumentative conduct towards Pollock affords justification for Pollock. (Respondent Brief at p.6.)

First, Capone suggests that the telephone conversation was abruptly terminated by Shutts. (Respondent Brief proposed finding of fact #13.) Capone points to Pollock's testimony as support for this proposed fact. However, Pollock's testimony was less than credible. On numerous instances, Pollock directly contradicted her own testimony. For example, Pollock originally testified that she never had inquiries from two women regarding the rental of a one-bedroom apartment. However, once reminded about McNamara's call, Pollock recollected that the call was indeed about two women renting a one-bedroom apartment. (NT 48.)

Pollock also indicated that she told her supervisor, Bonnie Gavin, that she told Shutts to come see whatever apartments were available. Pollock further indicated that she had indeed told Shutts that. (NT 88-89.) Taken as a whole, Pollock's testimony reveals that she never told Shutts to come see available apartments. Instead, Pollock would have us believe Shutts was very loud and rude and hung up on her before any arrangements could be made.

On the issue of who hung up on whom, Pollock herself was quite confused. She began by indicating that Shutts hung up on her (NT 85), then quickly reversed herself several times. Two times Pollock later indicated that she had hung up on Shutts. (NT 87, 97.) The second time Pollock indicated she hung up on Shutts, she even offered that after hanging up on Shutts, she picked up the phone and he was still on, screaming. (NT 97.) Clearly, Pollock could not avoid revealing her lack of credibility. Her lack of credibility was blatantly obvious.

Conversely, Shutts and McNamara's version of who hung up on whom was far more credible. Their combined testimony reveals that the conversation mutually ended. This brings us to the assertion that Pollock's actions were justified by Shutts' "rude," "loud," "negative and combative attitude."

Capone cites the case of *Soules v. U.S. Department of Housing and Urban Development*, 967 F.2d 817 (2nd Cir. 1992), for the proposition that courts have recognized an applicant's negative and combative attitude as legitimate reasons for denying housing. *Soules* involved a familial status case in which a realtor asked a prospective tenant how old her child was. Rather than answer the question, the prospective tenant demanded to know why the realtor needed to know the age of her child. The realtor reacted negatively and replied that an elderly person was in the apartment below the vacant unit and was concerned about noise upstairs. The realtor characterized the prospective tenant as having had "a very bad attitude."

In *Soules*, the court observed that the realtor's question was asked to determine whether a prospective tenant was noisy. Such an inquiry was deemed a legitimate question. Thus, if the prospective tenant exhibited a negative and combative attitude, this could be a legitimate reason to discount that person as a prospective tenant.

However, *Soules* also confirms that the question asked of a prospective tenant must be a permissible question. If the question is impermissible, the negative reaction by a prospective tenant can not work as a legitimate reason to not rent to that prospective tenant.

Clearly, the underlying facts of *Soules* and the facts of this matter are readily distinguishable. Any negative reaction, if any, by Shutts after Pollock told him she did not rent one-bedrooms to two men can not be a legitimate reason not to rent to Shutts. Capone's argument that it was justified by Shutts' attitude is thus rejected. While belligerent, aggressive behavior, *Washington v. Sherwin Real Estate, Inc., et al*, 694 F.2d 1081 (7th Cir. 1982), or aggressive and demanding attitude and mannerisms, *Hamilton v. Miller*, 477 F.2d 908 (10th Cir. 1973), are legitimate reasons not to rent an apartment, "belligerency" brought about by discriminatory actions can not be used as justification for denying a rental to an applicant. See, *Newbern v. Lake Lorelei, Inc.*, 308 F.Supp. 407 (S.D. Ohio 1968).

In this case, the credible evidence reveals that Shutts' reaction to Pollock's blatant discrimination was controlled and described as part of a "normal" conversation. Capone's attempt to justify Pollock's action is thus misplaced.

Having found Capone liable to Shutts for a sex-based discriminatory refusal to rent, we turn to consideration of an appropriate remedy.

## **Remedy**

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

In the post-hearing brief on behalf of this complaint, the PHRC housing attorney submits that a \$2,000 civil penalty and a \$5,000 damage award to Shutts is appropriate. Here, Shutts brought his PHRC complaint against Capone, an innocent and well-intentioned employer of a resident manager who was principally responsible for the sex-based discrimination. While it may seem harsh to punish Capone for Pollock's act, the duty not to discriminate is non-delegable. See, *Harrison v. Otto G. Heinzerth Mortgage Co.*, 430 F.Supp. 893 (N.D. Ohio 1977). While we find credible testimony about training and corrective actions taken, Capone still had a duty to ensure that its resident manager followed the goal of equal housing and complied with the PHRA. Capone failed in that duty and is therefore liable for the instant violation.

Humiliation and embarrassment can be inferred from the circumstances as well as established by testimony. *Seaton v. Sky Realty Co. Inc., et al.*, 491 F.2d 634, 636 (7th Cir. 1974). See also *HUD v. Blackwell*, 2 FHFL ¶25,001 (HUD ALJ Dec. 21, 1989), aff'd. 908 F.2d 844 (11th Cir. 1990). The key factor in determining the size of an award for humiliation and embarrassment is a victim's reaction to discriminatory conduct. *HUD v. Banai, supra* at ¶25,857.

Although the record is sparse regarding the precise degree of Shutts' subjective reaction to Pollock's insensitivity, it is clear that Shutts was the victim of a wrongful deprivation of valuable rights from which damages are presumed without the necessity for evidence of an economic loss. Here, Shutts not only lost his interest in seeking an apartment of his choice on the same terms as prospective female tenants, he argues he also lost his protection from a stigmatic injury of being made to feel inferior. With stigmatic injuries, there should be a strong presumption of damages because any reasonable person would naturally suffer intangible damages in such circumstances.

From Shutts' completely credible testimony we find that at the moment of Pollock's affront, Shutts was upset, nervous, and he began to shake. (NT 30.) While no real attempt was made to paint a detailed, fully developed picture of the degree of Shutts' humiliation, Shutts did generally describe his reaction. Shutts indicated that the experience continues to affect him. (NT 30.)

Shutts' testimony is enhanced by his contemporaneous communication of his reaction to his boss, who testified. McNamara confirms that immediately after Shutts spoke with Pollock, Shutts was a little shook up, shaking a little — not himself. (NT 64.) McNamara's corroboration of Shutts' reaction tends to dispel the unavoidable self-serving aura which surrounds a case where only a victim testifies about their reaction.

There are a multitude of things which Shutts did not claim. For example, Shutts claims that he has suffered only somewhat weakened relationships. Shutts made no claim that there were resultant physical ailments. No impact on Shutts' daily life with respect to changes in eating, sleeping or working were described. In fact, there was no attempt to contrast Shutts' emotional state before and after Pollock's discrimination.

One factor present in this case surrounding the circumstances can not be ignored as an appropriate award is considered. The evidence strongly suggests that Shutts' reaction to Pollock partially resulted from Pollock's perception regarding Shutts' sexual orientation, and her associated attitude. Here, it is apparent that a combination of sex-based and sexual orientation-based discrimination contributed to Shutts' humiliation.



It must be recognized that a damage award can never fully compensate a victim of discrimination and that it is inherently difficult to measure an amount which will ease one's hurt feelings and experience of humiliation. Our task is to make an appropriate transformation of Shutts' general qualitative testimony into quantitative relief. Further, we must distinguish between Shutts' humiliation over sex-based discrimination and his reaction to Pollock's perception about his sexual orientation. Therefore, considering the record as a whole, it is reasonable and fair to award Shutts \$500 for the humiliation associated with sex-based discrimination Shutts suffered. A compensatory award is not intended to be a windfall but, instead, to make Shutts whole for the sex-based psychic injury he suffered.

Turning to the issue of an appropriate civil damage, to vindicate the public interest the PHRA authorizes the imposition of a civil penalty upon a respondent who has violated the PHRA. Determining an appropriate penalty requires consideration of five factors: (1) the nature and circumstances of the violation; (2) the degree of the respondent's culpability; (3) the goal of deterrence; (4) whether a respondent has previously been found to have committed unlawful housing discrimination; and (5) a respondent's financial resources. See, *e.g.*, *HUD v. Jerrard*, 2 FHFL ¶25,005 (HUD ALJ Sept. 28, 1990); *HUD v. Blackwell*, 2 FHFL ¶25,001 (HUD ALJ Dec. 21, 1989).

When considering these factors we note that Capone's resident manager had received both written materials and training regarding fair housing, but nevertheless acted discriminatorily. We also note that almost immediately Gavin took measures to correct Pollock's discriminatory action. When Pollock called Gavin, Gavin clearly told Pollock what she had done was inappropriate and instructed Pollock not to deny anyone an opportunity to submit an application to rent an apartment at the Four Seasons Apartments.

Further, a day after Shutts' PHRC complaint was served on Capone, Capone offered Shutts the opportunity to apply to rent a one-bedroom apartment at the Four Seasons Apartments. Up until then, Capone could not get in touch with Shutts because Pollock had not taken either his name or phone number. Under these circumstances, the imposition of a civil penalty is not warranted.

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

**DANIEL B. SHUTTS, APPLICANT, Complainant**

**v.**

**CAPONE REALTY COMPANY, Respondent**

**DOCKET NO. H6579**

**FINAL ORDER**

**AND NOW**, this 29th day of February, 2000, 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. Further, the Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion, and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

**ORDER S**

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

- a. refusing or failing to rent an apartment, or refusing to negotiate for the rental of an apartment because of sex;
- b. otherwise making unavailable or denying an apartment to any person because of sex;
- c. indicating in any way a discriminatory preference or limitation based on sex.

2. That, within thirty days of the effective date of this Order, Capone shall pay Shutts the lump sum of \$500 in compensatory damages for the sex-based humiliation Shutts suffered.

3. That, consistent with Section 5(j) of the PHRA, Capone shall prominently post and exhibit a "Fair Housing Practice" notice distributed by the PHRC Housing Division alongside any "For Rent" signs posted in connection with any apartments they own. Capone shall hereafter also include the fair housing "Equal Opportunity in Housing" symbol in any advertisement for any apartment owned by Capone.

4. That, within thirty days of the effective date of this Order, Capone shall report to the PHRC on the manner of their compliance with the terms of this Order by letter addressed to Assistant Chief Counsel, PHRC Housing Division, PO Box 3145, Harrisburg, PA 17105.

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**