

STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION  
1321 Plaza East  
Room 104/106  
Charleston, WV 25301-1400

GASTON CAPERTON  
GOVERNOR

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8 August 1991

Quewanncoii C. Stephens  
Executive Director

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Post Office Box 1597  
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Arvel Bales  
109 Evergreen Place  
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711 1/2 Fifth Avenue  
Huntington, WV 25701

Walter Garnett  
624 - 17th Avenue  
Huntington, WV 25703

Mary Catherine Buchmelter  
Deputy Attorney General  
812 Quarrier Street, 5th Floor  
Charleston, WV 25301

Carolina J. Howard  
c/o Dwight J. Staples, Esquire  
711 1/2 Fifth Avenue  
Huntington, WV 25701

Re: Garnett & Howard v. Bales  
Docket Nos. HR-410-88 & HR-40-89

Dear Parties and Counsel:

Enclosed please find the Final Order of the West Virginia Human Rights Commission in the above-styled and numbered case. Pursuant to W. Va. Code § 5-11-11, amended and effective July 1, 1990, any party adversely affected by this Final Order may file a petition for review. Please refer to the attached "Notice of Right to Appeal" for more information regarding your right to petition a court for review of this Final Order.

Sincerely,

QUEWANNCOII C. STEPHENS  
EXECUTIVE DIRECTOR

QCS/jm  
Enclosures  
Certified Mail/Return  
Receipt Requested  
cc: The Honorable Ken Hechler  
Secretary of State

### NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this order, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the Clerk of the West Virginia Supreme Court naming the Human Rights Commission and the adverse party as respondents. The employer or the landlord, etc., against whom a complaint was filed is the adverse party if you are the complainant; and the complainant is the adverse party if you are the employer, landlord, etc., against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident may be required to file a bond with the Clerk of the Supreme Court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the Commission awards damages other than back pay exceeding \$5,000.00; (2) cases in which the Commission awards back pay exceeding \$30,000.00; and (3) cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this order.

For a more complete description of the appeal process see West Virginia Code § 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

WALTER R. GARNETT and  
CAROLINA J. HOWARD,

Complainants,

v.

DOCKET NO. HR-410-88  
HR-40-89

ARVEL BALES,

Respondent.

**FINAL ORDER**

On June 12, 1991, the West Virginia Human Rights Commission reviewed the Findings of Fact, Conclusions of Law and Order filed in the above-styled action by Hearing Examiner Richard M. Riffe. After consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, the Commission decided to, and does hereby, adopt said Findings of Fact, Conclusions of Law, and Order of the hearing examiner as set forth therein, without modification or amendment.

The Commission also having reviewed the subsequent Order of the hearing examiner relative to the issue of attorney fees, does hereby adopt said Order as its own without modification or amendment.

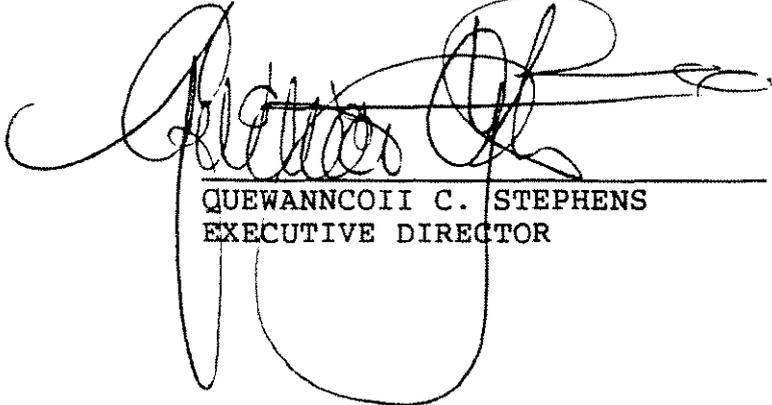
It is, therefore, ADJUDGED, ORDERED, and DECREED that the Findings of Fact, Conclusions of Law and Order of the Hearing Examiner, and the subsequent Order of the hearing examiner relative to the issue of attorney fees, be attached hereto as this Commission's Final Order.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State, the parties are hereby notified that they have ten (10) days from the date of receipt of this Final Order to request that the Human Rights Commission reconsider this Final Order, or they may seek judicial review as outlined in the "Notice of Right to Appeal" attached hereto.

It is so ORDERED.

WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 2<sup>nd</sup> day of August, 1991 in Charleston, Kanawha County, West Virginia.



QUEWANNCOII C. STEPHENS  
EXECUTIVE DIRECTOR

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

WALTER R. GARNETT  
& CAROLINA J. HOWARD

Complainants,

v.

DOCKET NOS: HR-410-88 &  
HR-40-89

ARVEL SALES

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A public hearing in the above-captioned matter was convened on 15 January 1991 in Raleigh County at the National Mine Academy. The complainants appeared in person and by counsel, Dwight J. Staples; the respondent appeared in person and by counsel, Warren A. Thornhill, III; the Commission did not appear as an Order had been entered finding that it had no independent interest in the claim.

The respondent brought on certain preliminary motions, particularly a motion to continue, a motion to dismiss due to untimeliness of the filing of Ms. Howard's complaint, and a motion to sequester witnesses. The complainant stood silent on the motion to continue, opposed the motion to dismiss, and joined in the motion to sequester. The hearing examiner then denied the motion to continue, deferred ruling on the motion to dismiss and granted the motion to sequester witnesses. The motion to dismiss for untimeliness is now hereby granted with respect to Ms. Howard's claim only for reasons which will be set out hereinafter. Complainant, Carolina J. Howard would have prevailed were it not for the late filing of her

T. and Larue S. Howard v. Arvel L. Bales, (the "previous action") before this tribunal.

3. The respondent claimed in his testimony that he could not remember whether race was an issue in the previous action before this Commission. He admitted having reviewed the transcript of the prior hearing but continued to maintain that he could not recall the prior ruling or whether he was found liable for racial discrimination.
4. In the Final Order in the previous action, which was entered on 30 January 1990 and of which this examiner takes judicial notice, the Human Rights Commission found that Mr. Bales had engaged in unlawful racial discrimination against Edward T. and Larue S. Howard with respect to the transactions that are the subject of this claim and awarded damages in favor of the Howards and against the respondent in an amount in excess of \$15,000.
5. The respondent offered proof that he is currently being sued by his insurance carrier in federal court in an action in which the carrier seeks to have a ruling entered declaring that it is not liable for the damages against Mr. Bales because the policy excludes acts of racial discrimination.
6. The respondent appeared alert and well oriented and he claimed to recall in detail the events of mid-September 1987.

13. When the complainants initially talked with Mr. Bales at the subdivision in person he indicated that the purchase price of the home would be about \$93,000.
14. There was also some initial discussion between Mr. Bales and the complainants about the complainants purchasing one of the vacant lots and constructing a home thereon.
15. Although the respondent initially seemed as if he would be willing to sell the home or the lots to the complainants when they first arrived at the subdivision, by the time they were ready to leave Mr. Bales had indicated that none of the properties were for sale stating as reasons alternatively that he might move into the home himself or that he did not want to sell any more property that year because it would put him into a higher tax bracket.
16. On the following day, 14 September 1987, white testers John Castlegrand and Judy Zickefoose contacted Mr. Bales about purchasing property from him at Evergreen Place. The respondent indicated to the white testers that the house he owned in Evergreen Place was immediately available for sale for \$92,600. The respondent never indicated that he intended to move into the house himself or that the house was not for sale.

pertinent part, "Any complaint filed pursuant to this article must be filed within one hundred eighty days after the alleged act of discrimination." Our Court has recognized "continuing violations" as tolling the statutory limitation on actions in certain circumstances. See, e.g. W.V. Tech v. H.R.C. and Zavareei, 383 S.E.2d 490 (W.V. 1990) (continuing salary disparity between protected class member vs. nonprotected class members); Greyhound vs. Geiger and H.R.C., 366 S.E.2d 135 (W.V. 1988) and H.R.C. v. United, 280 S.E.2d 653 (W.V. 1981) (prior discriminatory practices perpetuated by facially neutral seniority system are continuing violations).

Here the complainant relies on the Fourth Circuit's decision in Cole v. Havens Realty Corp., 633 F.2d 384 (4th Cir.1980) as authority for the proposition that the refusal of Mr. Bales to offer his property for sale constitutes a continuing violation and thereby tolls the period of limitations; I disagree. The Fourth Circuit's decision was reversed in Havens Realty Corp. v. Coles, 456 U.S. 363 (1982).

In Havens a variety of claims by a number of plaintiffs were assessed to determine whether they were continuing violations. Ms. Coleman alleged that she had been injured by Havens' unlawful racial

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(Footnote Continued)

the respondent's post-hearing memorandum; as such the challenge is waived. See, R.C.P. 12(b). Alternatively, I believe that our Act proscribes the providing of misinformation to testers under the same rationale as in Havens.

In my estimation our Supreme Court of Appeals will hold that, in this case, Ms. Howard was the victim of a discreet act of discrimination and that the mere addition of the word "continuing" to the complaint does not defeat the limitation on actions that expired 180 days after 13 September 1987. Accordingly, I find her claim time barred and, therefore, grant the motion to dismiss her complaint.

B.

West Virginia Code §5-11-9 places the burden on complainants to show that they are victims of illegal discrimination because they are members of a protected class. In general, a prima facie case of discrimination against a member of a protected class can be proven by direct or circumstantial evidence, or by inferential evidence, or by a combination of evidence, McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U. S. 248 (1981); State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., 329 S.E. 2d 77 (1985). Shepherdstown V.F.D. v. WV Human Rights Commission, W.Va., 309 S.E. 2d 342 (W.Va. 1983).

As the West Virginia Supreme Court of Appeals noted, the requirements of the McDonnell Douglas prima facie case are not inflexible and must be tailored to each factual situation. State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., supra. The task of proving a prima facie case is not intended to be onerous. Texas Dept. of Community Affairs v. Burdine, supra, 450 U.S. at 253.

West Virginia code Sec. 5-11-1 et seq. and judicial precedent interpreting the West Virginia Human Rights Act clearly establishes the authority of the West Virginia Human Rights Commission to enforce the civil rights of our citizens to be free from discrimination in housing. It shall "receive, investigate and pass upon...complaints alleging discrimination in the sale, purchase, lease, rental and financing of housing accommodations of real property..." Code, Sec-11-8(c). West Virginia Human Rights Commission v. Pearlman Realty Agency, 239 S.E.2d 145 (1977).

Robinson v. 12 Loft Realty, Inc., 610 F. 2d 1032 (2d. Cir. 1979), a case interpreting the Federal Fair Housing Act, sets forth one test for analyzing evidence in housing discrimination cases. A complainant can prove a prima facie case of discrimination by proving:

- a. That he is a member of a protected class;
- b. That he applied for a housing accommodation and was qualified to rent it;
- c. He was rejected; and
- d. The housing opportunity remained available.

Applying these factors to the case at bar, the complainants proved a prima facie case of race discrimination. The respondent, rather than attempting to articulate a legitimate nondiscriminatory reason for his refusal to offer to sell property to the respondents, simply challenged the veracity of the complainant's allegations. In my estimation his defense at this hearing was simply that the events

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

WALTER R. GARNETT

Complainant,

v.

DOCKET NUMBER(S): HR-410-88

ARVEL BALES

Respondent.

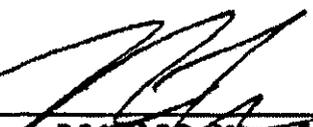
ORDER

I am in receipt of complainant's motion for attorney fees and respondent's objection thereto. I find the hours and rates reasonable and do accordingly overrule the objection and grant the motion. It is, therefore, ORDERED that the respondent pay the complainant attorney fees in the amount of \$1,785.50.

It is so ORDERED.

ENTER: 7 May 91

WV HUMAN RIGHTS COMMISSION

BY   
RICHARD M. RIFFE  
HEARING EXAMINER

JUN 11 31 10 49 HUMAN RIGHTS COMMISSION PMA 304-3407240 P. 2

In Re: Walter Garnett v. Arvel Bales

HR-410-88

<u>Date</u>	<u>Service</u>	<u>Rate</u>	<u>Time</u>
11/05/87	Research	\$85.00	1.0
01/09/88	Letter to Commission	\$95.00	.25
01/27/88	Letter to Client	\$95.00	.25
02/11/88	Conference with Client	\$95.00	.50
02/12/88	Letter to Commission	\$95.00	.25
02/22/88	Letter to Commission Re: Complaint	\$95.00	.25
02/28/88	Letter to Commission Re: client	\$95.00	.25
03/24/88	Conference with Client	\$95.00	.75
03/28/88	Reviewing Paper Re: Client	\$95.00	.25
04/04/88	Conference with Client	\$95.00	.25
04/20/88	Conference with Client	\$95.00	.25
05/25/88	Reviewed letter and Conference with Client	\$95.00	.25
05/26/88	Letter to Client	\$95.00	.25
09/07/88	Letter to Client	\$95.00	.25
03/08/88	Conference with Client	\$95.00	.25
06/30/89	Research, Preparation of letter, Notice of Motion and Motion for	\$95.00	1.0

Consolidation and Conference with Client			
07/14/89	Reviewed Answers to Interrogatories and drafted set of Interrogatories	\$95.00	.5
08/15/89	Reviewed Answers to Interrogatories, Letter to Client and Reviewed Interrogatories to Client	\$95.00	.5
01/07/91	Telephone conference with attorney and client	\$95.00	.25
01/08/91	Telephone conferences with Hearing Examiner - Client and other Attorney	\$95.00	.40
01/11/91	Telephone conference and and hearing preparation	\$95.00	1.0
01/11/91	Trial preparation, review- ing file, and preparation of subpoenas	\$95.00	1.0
01/14/91	Reviewed file, conferences with witnesses, client trial preparation and reviewing transcript	\$95.00	3.0
01/15/91	Travel to Beckley for trial, waiting, trial and return to Huntington	\$95.00	6.0

1.0 hour at \$85.00 per hour = \$ 85.00  
 17.9 hours at \$95.00 per hour = \$1,700.50  
 Total Attorney Fee = \$1,785.50