STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

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Quewanncoii C. Stephens
Executive Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

April 2, 1992

Darla Jeffrey & Lyle Sharp
General Delivery
Kistler, WV 25628

Browning & Cook Trailer Park
PO Box 163
Davin, WV 25617

Oval Adams, Sheriff
Logan County Sheriff's Dept.
Logan County Courthouse
300 Stratton St.
Logan, WV 25601

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Senior Asst. Attorney General
812 Quarrier St.
Charleston, WV 25301

Will W. Carter, Esq.
1116-B Kanawha Blvd. E.
Charleston, WV 25301

Re: Jeffrey & Sharp v. Ripple Browning, Joyce Browning and Oval D. Adams, Sheriff of Logan County
HR-236-90

Dear Parties:

Enclosed, please find the final decision of the undersigned hearing examiner in the above-captioned matter. Rule 77-2-10, of the recently promulgated Rules of Practice and Procedure Before the West Virginia Human Rights Commission, effective July 1, 1990, sets forth the appeal procedure governing a final decision as follows:

"§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the hearing examiner's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the examiner, the

relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the hearing examiner shall not operate as a stay of the decision of the hearing examiner unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the hearing examiner, or an order remanding the matter for further proceedings before a hearing examiner, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before a hearing examiner, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the examiner on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the hearing examiner's decision is:

10.8.1. In conformity with the Constitution and laws of the state and the United States;

10.8.2. Within the commission's statutory jurisdiction or authority;

10.8.3. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

10.8.4. Supported by substantial evidence on the whole record; or

10.8.5. Not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from a hearing examiner's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the examiner's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact the executive director of the commission at the above address.

Yours truly,

Gail Ferguson
Hearing Examiner

GF/mst

Enclosure

cc: Quewanncoii C. Stephens, Executive Director
Glenda S. Gooden, Legal Unit Manager
Mary C. Buchmelter, Deputy Attorney General

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

DARLA JEFFREY AND LYLE SHARP,

Complainants,

v. DOCKET NUMBER(S): HR-236-90A

RIPPLE BROWNING AND JOYCE BROWNING, OWNERS OF BROWNING AND COOK TRAILER PARK, AND OVAL ADAMS, SHERIFF OF LOGAN COUNTY,

Respondents.

HEARING EXAMINER'S FINAL DECISION

A public hearing, in the above-captioned matter, was convened on April 25, 1991, in Logan County, West Virginia, before Gail Ferguson, Hearing Examiner.

The complainants, Darla Jeffrey and Lyle Sharp, appeared in person and by counsel, William W. Carter, Esq. The West Virginia Human Rights Commission appeared by its counsel, Paul R. Sheridan, Assistant Attorney General. The respondents, Ripple and Joyce Browning, appeared in person and by counsel, Charles Bailey, Esq. The respondent, Oval Adams, Sheriff of Logan County, appeared on his own behalf without counsel.

All proposed findings submitted by the parties have been considered and reviewed in relation to the adjudicatory record developed in this matter. All proposed conclusions of law and argument of counsel have been considered and reviewed in relation to the aforementioned record, proposed findings of fact as well as to applicable law. To the extent that the proposed findings,

conclusions and argument advanced by the parties are in accordance with the findings, conclusions and legal analysis of the hearing examiner and are supported by substantial evidence, they have been adopted in their entirety. To the extent that the proposed findings, conclusions and argument are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or not necessary to a proper decision. To the extent that the testimony of various witnesses is not in accord with the findings as stated herein, it is not credited.

FINDINGS OF FACT

1. Complainant Darla Jeffrey, a white female, and complainant Lyle Sharp, an African-American male, live together as common law husband and wife, in Logan County, West Virginia. They have two children, Steven Lyle, age seven and Candice Leigh, age two.

2. Respondents Ripple and Joyce Browning operate and own Browning and Cook Trailer Park, a trailer park with approximately 22 separate trailer lots, which they rent to mobile home owners.

3. Respondent Oval Adams is the Sheriff of Logan County.

4. On or about January 17, 1990, complainant Darla Jeffrey visited Browning and Cook Trailer Park for purposes of looking at a mobile home owned by Ronald and Teresa Martin. Said home was for sale on a "rent-to-own" basis and was shown to Ms. Jeffrey by Betty Pennington, who lived in a neighboring trailer. Said mobile home was located on a lot in the Browning and Cook Trailer Park which rented

for $45.00 per month. The mobile home had been located on the lot since January, 1986.

5. Immediately after viewing the mobile home, Darla Jeffrey told Betty Pennington that she and Lyle Sharp would like to purchase said mobile home.

6. Upon learning of complainants' interest in acquiring the trailer, Betty Pennington called Joyce Browning to inform her of the complainants' plans to purchase said mobile home and to arrange for Ms. Jeffrey to pay lot rent to the Brownings.

(a) During the conversation between Mrs. Pennington and Mrs. Browning, Mrs. Browning asked if Ms. Jeffrey was the woman with "those two colored kids."

(b) Mrs. Browning also said she would have to check with "Ms. Cook," a co-owner of the trailer park, about the complainants' plans to move into the trailer. According to Mrs. Browning's testimony, she only contacted Ms. Cook about "big problems" at the park.

7. About a week later (on or about January 22, 1990), complainants met with Mrs. Martin at the site of the mobile home. Complainants orally confirmed their plans to purchase said mobile home from Mrs. Martin, and were told by Mrs. Martin that she would have a bill of sale prepared by her lawyer.

8. On this occasion, while the complainants and Mrs. Martin were discussing the terms of the sale in Betty Pennington's mobile home across the street, respondent Ripple Browning entered the Pennington trailer, and loudly informed Mrs. Martin that she could

not sell her trailer to the complainants, insisting "They're not living here."

9. When Mrs. Martin asked respondent Ripple Browning why he did not want her to sell her trailer to complainants, Mr. Browning pointed at Ms. Jeffrey and responded repeatedly, "You know what I mean," and insisted that Mrs. Martin remove her trailer from the trailer park in three days. Ms. Martin interpreted Mr. Browning's actions to indicate that he did not want a mixed raced couple living in his trailer park.

10. Prior to this incident, Betty Pennington had shown the Martins' mobile home to at least three other prospective buyers, all of whom were white, who had come to respondents' trailer park to view the mobile home. Respondent Browning had never interfered with or expressed any opinion regarding the proposed sale of the trailer to the parties.

11. Shortly after this incident but prior to signing the bill of sale, the complainants and their two children moved into the Martins' mobile home.

12. On January 24, Ms. Jeffrey tried to pay $45.00 lot rental to Mr. Browning for the month of February, but he refused to accept it, saying his wife took care of the contracts and that Ms. Jeffrey should come back the following day.

13. Also on January 24, Mr. and Mrs. Martin received a written eviction notice from the Brownings requiring the Martins to move their trailer off of the lot by March 1, 1990. Said notice did not state any basis for the eviction.

14. A couple of days after sending this eviction notice to the Martins, Mr. Browning contacted respondent Sheriff Oval Adams regarding the Brownings' desire to prevent complainants from residing in his mobile home park. Mr. Browning told the Sheriff that the complainants were not paying rent and were illegally subleasing. Mr. Browning was a political supporter and personal friend of Sheriff Adams, who knew that Lyle Sharp was an African-American.

15. Acting only on Mr. Browning's oral request for assistance and while Mr. Browning was present in his office, Sheriff Oval Adams contacted by telephone Sonya Sharp, the sister of Lyle Sharp. After asking Ms. Sharp "what kind of person" her brother Lyle Sharp was, the Sheriff warned Ms. Sharp that the complainants needed to be off the Brownings' property in "two or three days" in order to avoid "trouble" and that the complainants were "illegally" living in the trailer park. The Sheriff had not talked with the complainants or visited the trailer park at this time, but assured Ms. Sharp that the complainants' trailer would be involuntarily removed in three days, if the complainants failed to move out. Sheriff Adams also discussed Mr. Browning's desire to evict the complainants with local Circuit Court Judge Ned Grubb.

16. After receiving the call from the Sheriff, Ms. Sharp immediately sent a message to Darla Jeffrey to contact the Sheriff. When Ms. Jeffrey contacted the Sheriff, he repeated his statement that complainants must leave the Brownings' property in two or three days and told Ms. Jeffrey that he would take out a "warrant" for their arrest if they had not vacated the premises within that time.

17. On January 27, 1990, complainants signed a "Bill of Sale" with Mr. and Mrs. Martin to purchase the mobile home located on the Brownings' property. The complainants signed said bill of sale during daytime hours at the Bank of Man.

18. During the evening of January 27, 1990, Joyce Browning asked Ms. Jeffrey to sign a short-term lease, which included a handwritten addendum requiring complainants to leave the respondents' trailer park by March 1, 1990. Complainant Darla Jeffrey declined to sign this limited lease agreement. Respondents never offered complainants a chance to sign a lease agreement for an unlimited duration. The Brownings admitted that they had never required any other tenant to sign a lease with a fixed duration. All their previous lease agreements had been of unlimited duration and gave the Brownings the right to terminate a lease with 30 days notice.

19. In late February, complainants again offered to pay lot rent to the Brownings and again the Brownings refused to accept it. Again, Mr. Browning said he planned to talk to people at the "courthouse."

20. In April of 1991, the Brownings served a written notice of eviction upon complainants. Said notice stated that the Brownings needed access to the lot upon which complainants' trailer was situated in order to protect another trailer from danger from "a large tree." Subsequently, the Brownings filed a petition in the Magistrate Court of Logan County to evict the complainants.

21. In July 1990, complainants voluntarily relinquished possession and ownership of the mobile home in question. Said mobile home was removed by Mr. and Mrs. Martin from the Brownings'

trailer park in September, 1990. The lot upon which said mobile home was situated remained vacant for a period of several months after the Martins removed their mobile home.

22. During complainants' six-month residence on respondents' Brownings' trailer lot, no African-American people lived in the trailer park. The respondents have never leased a trailer lot to an African-American. The only African-American ever to live in the trailer park was a mixed race young girl, who lived with her single white mother for several months. There are no African-Americans living in the Huff Creek area surrounding the trailer park.

23. At different times since the complainants first moved into the mobile home in question, respondents Browning have offered varying reasons that they did not want complainants living in their trailer park. These reasons include:

(a) That complainants were behind in their rent;

(b) That respondents needed to move the complainants' mobile home off the trailer site to make space for another mobile home that was being damaged by a walnut tree;

(c) That respondents wanted to prevent the Martins from "subleasing" their trailer to complainants in violation of the general lease agreement used by the trailer park; and

(d) That respondents did not want to allow complainants to occupy the trailer lot unless complainants signed a lease agreement.

24. Each of these reasons are contradicted by the Brownings' own testimony.

25. In spite of the Brownings' allegation to Sheriff Adams around January 26 or 27 that they wanted complainants out because

they were delinquent in their rent, the following facts reveal that the Brownings' concern about rent was pretextual:

(a) The Brownings testified that lot rent had been paid by the Martins through January; and

(b) On two prior occasions the Brownings had refused to accept rent when tendered by Ms. Jeffrey.

26. In spite of the Brownings' allegations that a walnut tree presented limited potential danger to an adjacent mobile home by Mr. and Mrs. Gregory Williams, the following facts reveal that the Brownings' concern about the walnut tree was pretextual:

(a) The Williams had not expressed concern to the Brownings about the walnut tree since the summer of 1988, and the Brownings admitted that the Williams did not want to move their trailer once the lot was vacant;

(b) The Brownings admitted they never mentioned any problem about the walnut tree to the Griffins or the Martins until after it became apparent that the complainants planned to move into said mobile home;

(c) The Brownings admitted that even though the lot was empty for several months after the Martins moved the home off in September 1990 and there were other vacant lots in the park, the Williams' mobile home under the walnut tree was not relocated;

(d) The Brownings admitted that said walnut tree was ultimately trimmed and all danger eliminated while the Williams' mobile home was still located underneath it for a cost of only $100.00, while the cost of moving the Williams' mobile home to a vacant lot would have been over $400.00; and

(e) Mrs. Browning stated at the hearing that, in spite of the problem with the tree, the complainants could have stayed at the trailer park if they had signed a lease.

27. Respondents' alleged concern about the Martins "subleasing" their trailer lot to the complainants is based largely on their assertion that the Martins had previously "subleased" their lot to Mr. and Mrs. Griffin from March, 1988, until November 1989. However, the following facts reveal that the Brownings' concern about subleasing was pretextual:

(a) The Griffins had not subleased the trailer but were purchasing it pursuant to an oral "rent-to-own" arrangement with the Martins and a written lease agreement with the respondents, Mr. and Mrs. Browning. When by November, 1989, the Griffins had fallen several payments behind to the Martins, the Griffins had voluntarily relinquished possession of the mobile home to the Martins;

(b) In November, 1989, the Brownings became aware that Mr. and Mrs. Griffin were moving out of the mobile home. The Brownings took no steps to have the Martins remove the mobile home from their trailer park after the Griffins moved out, nor did Mr. and Mrs. Browning communicate in any manner whatsoever to the Martins or Betty Pennington that they were displeased with the Martins or their handling of their mobile home;

(c) The Brownings admitted that they never questioned the validity of the sale agreement between the Griffins and the Martins until after learning of the complainants' plans to move into the mobile home;

(d) Mrs. Browning admitted that she had seen the "Bill of Sale" defining the transaction between the Martins and complainants as a sale, not a lease; and

(e) Betty Pennington, who showed the Martins' trailer to prospective tenants in January, 1990, believed the Martins were selling, not leasing, their trailer.

(f) The Brownings did not make any allegations that subleasing was an issue in their handwritten eviction notices served on the Martins or complainants; and

(g) Mrs. Browning testified that subleasing was not really a problem and said the complainants could have stayed on the lot if they had signed a lease.

28. Contrary to respondents' allegation that they wanted to evict complainants because complainants had not signed a lease agreement, the following facts suggest that the Brownings' concern about the lack of a signed lease agreement was pretextual:

(a) Respondents' testimony establishes that Mr. Browning asked Sheriff Adams to help evict complainants before Mrs. Browning ever presented the limited lease agreement to the complainants;

(b) Respondents admitted they refused to accept rent from complainants prior to making any effort to provide complainants with a written lease agreement;

(c) The Brownings admitted that complainants were the only people the Brownings had ever asked to sign a limited, fixed-term lease agreement;

(d) The Brownings admitted that they had allowed the Martins to pay rent and keep their trailer on the property without a lease from November 1989 through January 1990; and

(e) None of the three eviction notices served on the Martins or the complainants ever mentioned that the Brownings sought to evict the complainants because they would not sign a lease.

29. The respondents' shifting and contradictory bases for wanting to evict complainants are not credible. The Brownings had never leased a mobile home to an African-American and no African-Americans live in the surrounding area.

30. The complainants and their children have suffered emotionally from respondents' actions, including but not limited to the following:

(a) Embarrassment and humiliation from the common knowledge in the community that complainants were being harassed by respondents on the basis of race;

(b) Annoyance and inconvenience from the respondents' general efforts to disrupt complainants' living situation; and

(c) Emotional distress of complainants' son due to respondents' actions.

31. Complainant is entitled to reasonable attorney fees.

32. The complainant's attorney reasonably expended 54.75 hours in litigation of this matter, as set forth in his itemized fee affidavit.

33. An hourly rate of $65.00 per hour is reasonable for the legal services rendered by complainant's attorney, as supported by the attached fee affidavit.

DISCUSSION

The complainants allege that respondents have committed unlawful discriminatory practices within the meaning of WV Code §5-11-9(a) in three respects. First, the complainants allege that the Brownings refused to lease their trailer lot to them because of Mr. Sharp's and their children's race in violation of WV Code §5-11-9(a)(7)(A). Second, the complainants allege that the Brownings discriminated against them on the basis of race in the terms, conditions, or privileges of a lease when the Brownings required the complainants to sign a limited term lease, in violation of WV Code §5-11-9(a)(7)(B). Finally, the complainants allege that the Brownings and Sheriff Adams conspired to commit acts or activities which were designed to harass, degrade, embarrass complainants and their children because of their race, in violation of WV Code §5-11-9(a)(9)(A).

Complainants established a prima facie case that they were denied an equal opportunity in the rental of residential accommodations on the basis of race. In Shepherdstown Volunteer Fire Dept. v. WV Human Rights Commission, 309 S.E.2d 342 (WV 1983), the West Virginia Supreme Court of Appeals, held that in an action under the West Virginia Human Rights Act to redress unlawful discriminatory practices, the initial burden is on the complainant to prove, by a preponderance of the evidence, a prima facie case of discrimination.

Though the elements of a prima facie case in an individual residential discrimination case brought under WV Code

§5-11-9(a)(7)(A)&(B) have not yet been articulated by a West Virginia court, federal courts interpreting the Fair Housing Act of 1986, 42 U.S.C. §3601 et seq., have found such a burden to consist of the following components:

(1) The complainant belongs to a protected class under the statute;

(2) The complainant applied for and was qualified to rent the housing accommodations in question;

(3) The complainant was rejected despite her qualifications; and

(4) After complainant's rejection, the housing opportunity remained available to other persons and was ultimately rented or sold. (See Robinson v. 12 Lofts Realty, 610 F.2d 1032 (2nd Cir. 1979); Hobson v. George Humphreys, Inc., 563 F. Supp. 344 (W.D. Tenn. 1981).

If the complainant meets the prima facie standard, a "rebuttable presumption of discrimination" is created, said the Shepherdstown Court, and "the burden then shifts to the respondent to offer some legitimate and nondiscriminatory reason" for rejecting complainant. 309 S.E.2d at 352.

Here, complainants clearly made out a prima facie case of discrimination. First, there is no question that the complainants' family, consisting of one African-American father and two mixed-race children, are protected by the Human Rights Act generally, and specifically from discrimination in a rental of residential accommodations.

Second, it is undisputed that the complainants attempted to rent the trailer space that the Brownings had previously made available to

the prior tenants in the same mobile home. The complainants were qualified in that they had sufficient funds to offer rent, and did so on two occasions, and in that the mobile home in question was the same mobile home that had been on that lot since January 1986.

Third, it is clear from the respondents' actions that the respondents did everything possible to prevent complainants from residing in the trailer park. Respondents refused to accept the rent from the complainants, tried to prevent the Martins from selling the trailer to the complainants, solicited and received the unlawful assistance of Sheriff Adams in attempting to remove the complainants from the property and only offering the complainants a thirty-day lease.

Fourth, by the respondents' own testimony, the Brownings have continued to make the trailer park rental lot available to other persons, and it is currently rented to another white individual.

Complainants, thus, have clearly established a prime facie case of discrimination against the Brownings in the rental of residential accommodation, in violation of WV Code §5-11-9(a)(9)(A)&(B).

Complainants have further alleged that the respondents Browning, along with the respondent Adams, also violated the West Virginia Human Rights Act by conspiring with each other or engaging in activities for the purposes of harassing the complainants on the basis of their race. WV Code §5-11-9(a)(9)(A). In this case it was undisputed that respondent Mr. Browning directly solicited and received the assistance of Sheriff Oval Adams in attempting to force the complainants to move out of the Brownings' trailer park. Similarly, the Sheriff has admitted that he told Ms. Jeffrey and Mr.

Sharp's sister that the complainants needed to be out of the trailer park in two or three days in order to avoid trouble. Furthermore, Sheriff Adams also discussed Mr. Browning's desire to evict the complainants with local Circuit Court Judge Ned Grubb.

Accordingly, complainants have established a prima facie case against the Brownings as well as Sheriff Adams, for violations of §5-11-9(a)(9)(A).

The reasons proffered by the respondent for refusing to accept complainants as tenants are pretext and unworthy of credence. Having established their prima facie case, the complainants have created a "presumption that the [respondents] unlawfully discriminated against" them. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed. 2d 207, 101 S.Ct. 1089 (1981); Shepherdstown, at 352.

To rebut the presumption, the respondent must articulate lawful reasons for the complainants' rejection. Though the burden on respondents is only one of production, to accomplish it they must "clearly set forth through the introduction of admissible evidence the reason for the [complainants'] rejection. The explanation provided must be legally sufficient to justify a judgement for the [respondents]." Burdine, at 254.

If respondent succeeds in rebutting the presumption of discrimination, "then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent[s] were merely a pretext for the unlawful discrimination." Shepherdstown, at 352. Pretext may be shown by proof that: (1) the reasons articulated by respondent have no basis

in fact; or (2) the reasons have a basis in fact but were not really factors motivating the action; or (3) the factors, even if true, were jointly insufficient to motivate the action. La Montagne v. American Convenience Products, 750 F.2d 1405 (7th Cir. 1984).

At different times since the complainants first moved into the mobile home in question, respondents Browning have offered varying reasons that they did not want complainants living in their trailer park. These reasons include: that complainants were behind in their rent; that respondents needed to move the complainants' mobile home off the trailer site to make space for another mobile home that was being damaged by a walnut tree; that respondents wanted to prevent the Martins from "subleasing" their trailer to complainants in violation of the general lease agreement used by the trailer park; and that respondents did not want to allow complainants to occupy the trailer lot unless complainants signed a lease agreement.

Each of these reasons are contradicted by the Brownings' own testimony.

In spite of the Brownings' allegation in late January to Sheriff Adams that they wanted complainants out because complainants were delinquent in their rent, the following facts suggest that the Brownings' concern about rent was pretextual: The Brownings testified that lot rent had been paid by the Martins through January. Further, the Brownings admitted that on two occasions they refused to accept rent when tendered by Ms. Jeffrey.

In spite of the Brownings' allegations that a walnut tree presented limited potential danger to an adjacent mobile home by Mr. and Mrs. Gregory Williams, the following facts suggest that the

Brownings' concern about the walnut tree was pretextual: The Williams had not expressed concern to the Brownings about the walnut tree since the summer of 1988, and the Brownings admitted that the Williams did not want to move their trailer once the lot was vacant. The Brownings admitted they never mentioned any problem about the walnut tree to the Griffins or the Martins until after it became apparent that complainants planned to move into said mobile home. Further, the Brownings admitted that even though the lot was empty for several months after the Martins moved the home off in September, 1990, and there were other vacant lots in the park, the Williams' mobile home under the walnut tree was not relocated. Instead, the Brownings admitted that said walnut tree was ultimately trimmed and all danger eliminated while the Williams' mobile home was still located underneath it for a cost of only $100.00, while the cost of moving the Williams' mobile home to a vacated lot would have been over $400.00. Finally, Mrs. Browning stated at the hearing that, in spite of the problem with the tree, the complainants could have stayed at the trailer park if they had signed a lease.

Respondents' alleged concern about the Martins "subleasing" their trailer lot to the complainants is based largely on their assertion that the Martins had, without the permission of the Brownings, previously "subleased" their lot to Mr. and Mrs. Griffin from March 1988, until November 1989. However, the various admissions by the Brownings reveal that their concern about subleasing was pretextual. Though insisting that their desire to prevent the Martins from "subleasing" the trailer to complainants was based on their belief that the Martins and the Griffins had illegally

subleased the trailer between March 1988 and November 1989, the Brownings admitted that they never questioned the validity of the arrangement between the Griffins and the Martins until after learning of the complainants' plans to move into the mobile home. Mrs. Browning also admitted that she had seen the "Bill of Sale" defining the transaction between the Martins and complainants as a sale, not a lease. Furthermore, the Brownings did not make any allegations that subleasing was an issue in their handwritten eviction notices served on the Martins or complainants. Mrs. Browning also testified that subleasing was not really a problem and said the complainants could have stayed on the lot if they had signed a lease. Finally, Betty Pennington, who showed the Martins' trailer to prospective tenants in January, 1990, believed the Martins were selling, not leasing, their trailer.

Similarly, respondents' own statements undermine their fourth excuse for wanting the complainants out; namely, that the complainants had not signed a lease agreement. Respondents' testimony clearly established that Mr. Browning asked Sheriff Adams to help evict complainants before Mrs. Browning ever presented the limited lease agreement to the complainants. Respondents also admitted they refused to accept rent from complainants prior to making any effort to provide complainants with a written lease agreement, that complainants were the only people the Brownings had ever asked to sign a limited, fixed-term lease agreement, and that the Brownings had allowed the Martins to keep their trailer on the property without a lease from November 1989 through January 1990.

Finally, respondents' actions during the dispute suggest that the concern about the lack of a lease is a recently contrived one. None of the three eviction notices served on the Martins or the complainants ever mentioned that the Brownings sought to evict the complainants because they would not sign a lease. This, too, shows that the reasons respondents have offered for wanting to evict the complainants were contrived after the fact.

The respondents' shifting and contradictory bases for wanting to evict complainants thus clearly reveal that these reasons were pretexts for an underlying racially discriminatory motivation. Courts have been extremely skeptical of stated reasons which are not asserted until the latter stages of a discrimination dispute. Foster v. Simon, 467 F. Supp. 533 (W.D. NC 1979); Johnson v. University of Pittsburgh, 359 F. Supp. 1002 (W.D. PA 1973). Similarly, shifting reasons or defenses between the time of the adverse action and the time of the hearing is strong evidence of pretext. Smith v. American Service Co., 611 F. Supp. 321, 35 FEP 1552 (N.D. GA 1984); Townsend v. Grey Line Bus Co., 597 F. Supp. 1287, 36 FEP 577 (D. Mass. 1984), aff'd, 767 F.2d 11, 38 FEP 463 (1st Cir. 1985). Respondents' various rationale for trying to evict complainants looks and feels like a hastily assembled product of hindsight. The Brownings, assisted by the Sheriff, simply did not want a mixed-raced couple and children in their trailer park.

After the complainants' showing of pretext, "it is incumbent upon the [factfinder] to make the ultimate determination whether there was intentional discrimination on the part of the respondents. Shepherdstown, 309 S.E.2d at 353. Intentional discrimination is

proved by directly convincing the factfinder that "a discriminatory reason more likely motivated the [respondent] or indirectly by showing that the [respondent's] proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256.

In short, the factfinder "must decide which party's explanation of the [respondent's] motivation she believes," U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 75 L. Ed. 2d 403, 103 S.Ct. 1478, 1482 (1983), and whether, if complainants' explanation is believed, it shows that respondents treated them less favorably than others on the basis of an unlawful discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 567, 57 L.Ed. 2d 957, 98 S.Ct. 2943 (1978). In determining which facts are true, the factfinder is free to believe certain witnesses and disbelieve others if he finds that their testimony lacked credibility. Reeves v. General Foods Corp., 682 F.2s 515 (5th Cir. 1982).

In this case, it is undisputed that the Brownings took a number of actions designed to prevent complainants from living in their trailer park -- namely, attempting to prevent the Martins from selling their trailer to complainants, soliciting assistance from Sheriff Adams to evict complainants, refusing to accept rent when offered by complainants, offering only a fixed-term, limited lease agreement to complainants, and by initiating eviction proceedings against complainants. Though the respondents offer varied nondiscriminatory reasons why they took these action, their own evidence undermines the credibility of those reasons. In addition, the commission should consider the testimony of two objective witnesses, Teresa Martin and Betty Pennington. Mrs. Martin was the

owner of the mobile home that the complainants wanted to buy and live in, in the Browning's trailer park. During the hearing in this case, Mrs. Martin testified that after Mr. Browning learned that the complainants planned to move onto the property, he confronted her and tried to prevent her from selling her trailer to complainants:

> Q: What did Mr. Browning say to you when he came into the trailer?
> A: He told me that I could not sell--he said my friend, they won't take no for an answer, and I could not sell my trailer to them.
>
> ***
>
> A: He said, 'You know what I'm talking about, they're not living here.'
>
> ***
>
> Q: Did he give you any other reasons why he didn't want you to sell the trailer at that point?
> A: No. He just told me I couldn't sell it to them.
>
> ***
>
> A: He just said, 'Those people ain't living here and you know what I mean by it.'
>
> (Transcript, 133-135)

When Mrs. Martin was asked why she felt Mr. Browning did not want the complainant to live in the trailer, she stated:

> My personal opinion was that where Lyle was a colored person and Darla was a white person. That's what I got from what he meant.
>
> (Tr. 135-136)

Mrs. Martin also confirmed that the Brownings did not raise any concerns to her about subleasing or walnut trees until after they learned the complainants planned to move into the trailer. In addition, Mrs. Martin confirmed that the rent had been paid through

the month of January and that she had been allowed to leave her trailer on the trailer lot without having signed a lease agreement with the Brownings. Though respondents attempted to discredit Mrs. Martin's testimony by suggesting that she and the Brownings testified that animosity existed between them. Furthermore, Mrs. Martin had testified that she had had to serve repossession papers on the complainants herself when they could not make the trailer payments, which suggests that she was not biased in favor of the complainants.

In addition, Mrs. Betty Pennington, who had shown the trailer to Mrs. Jeffrey, confirmed that Mrs. Browning raised the issue of race the first time she learned that the complainants were interested in buying the trailer:

> Q: Mrs. Pennington, did Mrs. Browning ask if Darla Jeffrey was the woman with two colored kids?
> A: As far back as I can remember.
>
> Q: Did she or didn't she? As far as you can recall, she did; is that right?
> A: Yes.
>
> Q: I'm sorry, you have to speak up.
> A: Right.
>
> Q: What did you tell her when she asked that?
> A: Yes, but she was telling me that she would have to talk with Ms. Cook.
>
> Q: Did she mention that she was going to have to get in touch with Ms. Cook before or after asking you that question?
> A: Before. She told me that before, and then she also told me that afterwards, before I hung up.
> (Transcript 86, 87)

According to Mrs. Browning, Ms. Cook, a co-owner of the trailer park, was only consulted when there was "a big problem."

Thus, the undisputed actions of the respondents, the four clearly pretextual reasons offered by respondents for those actions, and the testimony of unbiased observers establish that complainants were unlawfully discriminated against on the basis of race by respondents' violations of the West Virginia Human Rights Act.

CONCLUSIONS OF LAW

1. The complainants are citizens of the State of West Virginia who claim to be aggrieved by respondents' unlawful discriminatory practices, are proper complainants for purposes of the West Virginia Human Rights Act, WV Code §5-11 et seq., and are protected specifically from discrimination in the rental of residential accommodations, WV Code §5-11-9(a)(7)(A)&(B) and §5-11-9(a)(9)(A).

2. The respondents are proper respondents as defined by WV Code §5-11 et seq.

3. The race discrimination complaint filed on February 14, 1990, was timely filed pursuant to WV Code §5-11-10.

4. The West Virginia Human Rights Commission has proper jurisdiction over the parties and subject matter of the complaint.

5. The complainants have established a prima facie case of racial discrimination in housing by the respondents Browning, as they have proven the following:

(a) They belong to a protected class under the statute;

(b) The complainants attempted to rent a trailer lot from the respondents Browning and were qualified to rent the accommodations in question;

(c) Respondents Browning attempted to prevent complainants from residing at said accommodations despite the complainants' qualifications but did not do so to other similarly situated individuals; and

(d) After complainants' rejection, the housing opportunity remained available to other persons and was ultimately rented.

6. The respondent Sheriff Oval Adams discriminated against complainants under the color of law and with the mantle of his office, when he made a call to Sonya Sharp on behalf of Ripple Browning and threatened the complainants to move out of the trailer park.

7. The respondent Sheriff Oval Adams is a person who has conspired with others to commit acts and activities the purpose of which was to harass, degrade, embarrass and cause economic loss to the complainants, in violation of the West Virginia Human Rights Act, and aided and abetted the other respondents in their unlawful discriminatory practices.

8. The respondent Ripple Browning is a person who has conspired with others to commit acts and activities the purpose of which was to harass, degrade, embarrass and cause economic loss to the complainants, in violation of the West Virginia Human Rights Act, and incited the respondent Sheriff Oval Adams to engage in unlawful discriminatory practices.

9. Respondents Browning have articulated four nondiscriminatory reasons for their treatment of complainants. In turn, the complainants have demonstrated with a preponderance of the evidence that each of these proffered reasons is a pretext to obscure underlying racially discriminatory motivations.

10. Respondents Brownings' harassment of complainants was unlawfully motivated by the fact that complainant Lyle Sharp is black and the children of the parties are of mixed race. Such behavior constitutes an illegal discriminatory practice in violation of the West Virginia Human Rights Act, WV Code §5-11-9(a)(7)(A) & (B) and §5-11-9(a)(9)(A).

11. As a result of the illegal discriminatory actions of the respondents, each complainant is entitled to the following damages:

(a) Incidental damages in the amount of $2,500 from respondent Joyce Browning for her violation of WV Code §5-11-9(a)(7), $5,000 from respondent Ripple Browning for his violation of WV Code §5-11-9(a)(7) and §5-11-9(a)(9), and $2,500 from respondent Oval Adams for his violation of WV Code §5-11-9(a)(9); and

(b) A cease and desist order aimed at preventing respondents from continuing their illegal discriminatory practices.

RELIEF AND ORDER

Pursuant to the above findings of fact and conclusions of law, it is hereby **ORDERED** as follows:

1. The respondents shall cease and desist from engaging in unlawful discriminatory practices.

2. Within 31 days of receipt of this decision, the respondents shall pay to complainant incidental damages as set forth in Conclusion of Law 11(a) for humiliation, embarrassment, emotional distress and loss of personal dignity suffered as a result of respondents' unlawful discrimination.

3. Within 31 days of receipt of this decision, the respondents shall pay to the complainants attorney fees and costs in the amount of $3,558.75, as set forth in counsel's attached fee affidavit.

4. The respondents shall pay ten percent per annum interest on all monetary relief.

It is so **ORDERED**.

Entered this 1 day of April, 1992.

WV HUMAN RIGHTS COMMISSION

BY _____
GAIL FERGUSON
HEARING EXAMINER