STATE OF WEST VIRGINIA HUMAN RIGHTS COMMISSION

WV HUMAN RIGHTS COMMISSION
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GASTON CAPERTON
GOVERNOR

Quewanncoii C. Stephens
Executive Director

February 23, 1990

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Arvel L. Bales
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Mezzanine Suite
Raleigh County National Bank Bldg.
Beckley, WV 25802-1008

Re: Howard v. Arvel L. Bales
HR-178-88

Dear Parties:

Herewith, please find the final order of the WV Human Rights Commission in the above-styled and numbered case. Pursuant to WV Code, Chapter 5, Article 11, Section 11, amended and effective July 1, 1989, any party adversely affected by this final order may file a petition for review with the Kanawha County Circuit Court within 30 days of receipt of this final order.

Sincerely,

Quewanncoii C. Stephens
Executive Director

QCS/mst

Enclosures

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

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 advserse 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 non-resident of this state, the non-resident 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 Section 5-11-11, and the West Virginia Rules of Appellate Procedure.

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

EDWARD T. and LARUE S. HOWARD,

Complainants,

v. DOCKET NO: HR-178-88

ARVEL L. BALES,

Respondent.

ORDER

On 10 January 1990 the West Virginia Human Rights Commission reviewed and discussed the recommended decision of the hearing examiner, Gail Ferguson, rendered in the above-styled matter. Upon mature consideration of said recommended decision, the complete record herein and the argument of counsel, the Commission decided to, and does hereby, adopt the recommended findings of fact and conclusions of law as its own.

The section of the recommended decision entitled "Relief and Order" however, is not adopted as presented by the hearing examiner, but, for reasons set forth below, is modified as follows:

RELIEF and ORDER

In view of the foregoing, the West Virginia Human Rights Commission ADJUDGES, ORDERS and DECREES as follows:

1. The complaint of Edward T. and Larue S. Howard, Docket No. HR-178-88, is sustained.

2. The respondent shall cease and desist from engaging in unlawful discriminatory practices.

3. Respondent shall reimburse the complainants in the amount of $901.82 for travel expenses incurred as a result of respondent's discriminatory conduct.

4. Respondent shall reimburse complainant Edward Howard in the amount of $3,145.36 for the loss of vacation time suffered as a result of respondent's unlawful act.

5. Complainants are awarded prejudgment interest at the rate of ten (10%) percent per annum on their travel expenses and lost vacation time.

6. Respondent shall pay <u>each</u> complainant the sum of $2,500.00 as incidental damages for the humiliation, embarrassment, emotional and mental distress and loss of personal dignity caused to complainants as a result of respondent's unlawful discriminatory act.

7. Respondent shall pay complainants' reasonable attorney fees, as set forth in counsel's fee affidavit, in the

aggregate amount of $9,330.00.

8. Respondent shall provide to the West Virginia Human Rights Commission proof of compliance with this Order within thirty (30) days of service of said Order by copies of cancelled checks, affidavits or other means calculated to provide such proof.

Discussion on Modification of Order

1. Reimbursement of Travel Expenses and Lost Vacation Time: A victim of racial discrimination is entitled to compensatory damages upon proof of out-of-pocket monetary loss. State Human Rights Commission v. Pauley, 212 S.E.2d 77 (1975). Reimbursable out-of-pocket losses have been held to include "costs involved in searching for and moving into other residence," Woods-Drake v. Lundy, 667 F.2d 1198, 1203 (5th Cir. 1982); additional commuting expenses which would not have been incurred had it not been for the discriminatory act, Thomas v. Cooper Industries, Inc. 627 F. Supp. 655 (W.D. N.C. 1986) and Harkless v. Sweeny Ind. Sch. Dist, 466 F. Supp. 457 (S.D. Tx. 1978); additional travel to and from the housing site made necessary by virtue of the respondent's wrongful action, Seaton v. Sky Realty Co. Inc., 372 F. Supp. 1322 (N.D. Ill. 1972), aff'd 419 F.2d 634 (7th Cir. 1972); and lost wages, Lamb v. Sallee, 417 F. Supp. 282 (E.D. Ky. 1976).

Here, we award complainants their actual travel costs for additional trips from their home in New Hampshire to Beckley, and return, made necessary by respondent's discriminatory act. We also award complainant Edward Howard reimbursement for his lost vacation time, which, in West Virginia, is considered part and parcel of lost wages. See, W. Va. Code § 21-5-1(c) and (l).

We find no authority to support the reimbursement of complainants for their out-of-pocket expenditures to attend the hearing below and we decline to award the same. Additionally, the evidence did not show that the Howards would not have made at least one more trip to Beckley, regardless of respondent's act, in order to move and settle Mr. Howard's mother. For these reasons, we have deducted the August 1987 travel costs and vacation time from the amount recommended by the examiner.

2. Prejudgment Interest: An assessment of prejudgment interest, which reflects an appropriate exercise of the Commission's authority to fashion relief which makes the injured party whole, Pettway v. American Cast Iron Pipe Company, 494 F.2d 211 (5th Cir. 1974); Parsons v. Kaiser Aluminum and Chemical Corporation, 727 F.2d 473 (5th Cir. 1973), was approved in Frank's Shoe Store v. Human Rights Commission, 365 S.E.2d 251, 261 (1986).

The purpose of prejudgment interest is to "fully compensate the injured party for his losses." Kirk v. Pineville Mobile Homes, Inc., 310 S.E.2d 210 (1983). "Where there is an ascertainable pecuniary loss," said the Court in Bond v. City of Huntington, 276 S.E.2d 539, 548 (1981), prejudgment interest will "fully compensate the injured party for the loss of the use of funds. . ."

We award the Howards prejudgment interest at the rate of 10%, Bell v. Inland Mutual Insurance Co., 332 S.E.2d 127 (1985), on their travel expenses and lost vacation time.

3. Incidental Damages: Complainants have a right to incidental damages for the humiliation, embarrassment, emotional and mental distress and loss of personal dignity suffered by them as a result of the respondent's unlawful acts. Pearlman Realty Agency v. West Virginia Human Rights Commission, 239 S.E.2d 145 (1977). In accord with our Supreme Court's decisions in Bishop Coal Co. v. Salyers, 380 S.E.2d 238 (1989) and Board of Educ. v. Human Rights Commission, 385 S.E.2d 637 (1989), we award complainants damages in the amount of $2,500.00 each.

The award to Ms. Howard is based on her "injury in fact" and is not affected by her lack of privity to any contract entered into by Mr. Howard. Trafficante v. Metropolitan Life insurance Co., 409 U.S. 205, 209 (1972). According to the

credible evidence, respondent reneged on the proposed sale after discovering that the lot would be purchased by "the black couple from Connecticut (sic)." Clearly, when accompanying her husband in the process of purchasing property for his mother, Ms. Howard had "her own right to be free from injury generated by the [respondent's] racially motivated conduct." Gordon v. City of Cartersville, Georgia, 522 F. Supp. 753, 757 (N.D. Ga. 1981). Respondent should not escape liability for his wrongdoing simply because Ms. Howard did not intend to be a signatory to the purchase, a fact of which he was unaware at the time he committed the discriminatory act.

Moreover, certainly if white residents of a housing complex, Trafficante, supra, and testers, Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) may recover for injuries indirectly suffered as a result of discrimination against blacks, a black complainant who felt the personal sting of racial animus squarely directed at her must be similarly entitled to be compensated for her embarrassment and humiliation that are so evident in the record.

It is therefore, the ORDER of the Commission that the hearing examiner's recommended decision, encompassing findings of fact and conclusions of law, be attached hereto and made a part of the final order except as amended and modified by this final order.

By this final order, a copy of which shall be sent certified mail to the parties, the parties are hereby notified that they have ten (10) days to request a reconsideration of this final order and that they may seek judicial review.

It is so ORDERED.

WEST VIRGINIA HUMAN
RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 30th day of January 1990 in Charleston, Kanawha County, West Virginia.

QUEWANNCOTI C. STEPHENS
EXECUTIVE DIRECTOR/
SECRETARY TO THE COMMISSION

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

EDWARD T. AND LARUE S. HOWARD,

Complainants,

v. DOCKET NUMBER: HR-178-88

ARVEL L. BALES,

Respondent.

HEARING EXAMINER'S RECOMMENDED DECISION

A public hearing, in the above-captioned matter, was convened on April 27, 1988, in Raleigh County, at the Raleigh County Courthouse, County Commission's old hearing room, Beckley, West Virginia, before Gail Ferguson, Hearing Examiner. By stipulation, the presence of a Hearing Commissioner was waived by the parties.

The complainants, Edward T. and Larue S. Howard, appeared in person and by counsel, Dwight J. Staples. The respondent, Arvel L. Bales, appeared in person and by counsel, Warren A. Thornhill, III.

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.

ISSUES

1. Whether the respondent's refusal to sell certain real property he owned in Beckley, West Virginia, to the complainants was based on the race of the complainants, in violation of WV Code §5-11-1 et. seq.

2. If such illegal discrimination on the basis of race occurred, what should the remedy be?

FINDINGS OF FACT

1. The complainants, Edward T. and Larue S. Howard, are a black married couple who reside in Amherst, New Hampshire.

2. The respondent, Arvel Bales, resides in Beckley, West Virginia, and is the owner of certain property located at Evergreen Place also in Beckley, West Virginia.

4. As early as March, 1987, the complainants traveled to Beckley, West Virginia from New Hampshire looking for adequate

housing or a lot for Edward Howard's mother, Lettie Howard, who had recently undergone hip surgery, and who at that time resided in Beckley. The purpose of acquiring a lot was for construction of a new home for Lettie Howard, with limited stairs and with easy access to a medical facility and a shopping area.

5. On May 11, 1987, the complainant, Larue Howard, returned to Beckley, West Virginia and began working with Agnes Keatley, who at that time was employed by United Real Estate Services, and who assisted the complainants in attempting to locate high resale property; preferably a one story house which would meet the needs of Lettie Howard.

6. On May 14, 1987, the complainant, Edward T. Howard, met his wife in Beckley. After looking at numerous houses, none of which met their specifications, the complainants decided that they liked the lots located in the area called Evergreen Place.

7. Between May 11th and May 15th, 1987, the complainants met William Patton who was a real estate broker for United Real Estate Services, the same service which employed Agenes Keatley. William Patton was also a partner in Colony Construction Company, a small construction company which primarily builds homes which are sold through United Real Estate Services. During this period, the complainants were shown a house being constructed by Joseph Linville in Evergreen Place. At the time Joseph Linville was employed by Colony Construction Company as a building supervisor. The complainants, along with Joseph Linville and Agnes Keatley, looked at all the lots in Evergreen Place that had "For Sale" signs on them. The complainants selected as their primary

choice, lot number 8; however, the complainants were interested in purchasing any other available lot if, for some reason, lot number 8 was not available.

8. After giving Agnes Keatley and Patton the authority to draft a tentative contract so that they could build on an available lot in Evergreen Place, the complainants returned home on May 15, 1987. A sales agreement was drafted by Agnes Keatley of United Real Estate Services.

9. The respondent, Arvel Bales, had initially acquired the real property known as Evergreen Place from James Lilly, Incorporated. After acquiring that property, the respondent was responsible for clearing the land, having the street based and having the layout of the lots done. During May 1987, the respondent owned lot numbers: 2, 3, 8, 9, 10 and 11, in Evergreen Place. With the exception of lot number 9, all of the lots owned by respondent were available for sale during this period. On May 26, 1987, lot numbers 3, 8 and 11 had "For Sale" signs posted on them. Moreover, respondent's lots were advertised in the Register/Herald County-Wide Extra on May 30, 1987.

10. The complainants returned to Beckley, West Virginia on May 25, 1987, and drove to Evergreen Place again to view the area where they had decided to purchase the lot.

11. On May 26, 1987, the complainants, after discussing changes that they wanted in the construction of the new home to be built in Evergreen Place, directed Agnes Keatley to prepare for execution a new agreement. This new agreement, dated May 26, 1987, was signed by Edward Howard and his mother, Lettie Howard, in the offices of United Real Estate Services, May 26, 1987.

12. Although the Real Estate Purchase Agreement, dated May 26, 1987, indicated that the new construction was to be done on lot number 6, the manifest intention of the complainants was to purchase lot number 8. The fact that lot number 6 was typed on that agreement was an admitted error on the part of Agnes Keatley, employee of Real Estate Services.

13. Lot number 8 is located between lot number 9, on which, in May of 1987, a house was being built by respondent, Arvel Bales, and lot number 7, on which, in May of 1987, Colony Construction Company was building a house.

14. On May 26, 1987, the complainants tendered a check to William Patton made payble to Colony Construction Company for $10,000.00 as earnest money deposit to be used as a down payment on the house they wanted constructed and on acquiring the lot. That check was placed in the broker's escrow fund at United Real Estate Services.

15. After executing the contract to purchase lot number 8 in the offices of United Real Estate Services, the complainants went to Evergreen Place to look over the property that they intended to purchase. At this time, the complainants went into the house that the respondent had under construction. They were given a guided tour of the respondent's house by an individual doing carpeting work who explained what the various rooms were going to be. The complainants explained to this individual that they were from the New England area, that they were going to purchase the property next door and that they had thought about building a home substantially similar to the one respondent was

building for himself. Thereafter, the complainants returned to New Hampshire.

16. The complainants had given William Patton specific authority to purchase lots in Evergreen Place on their behalf.

17. William Patton contacted the respondent and entered into a verbal agreement with the respondent whereby he would purchase lot number 8 for the price of $14,500.00. Thereafter, William Patton informed the complainants of this verbal committ-ment between himself and the respondent

18. The next day, after learning that the respondent had agreed to accept the offer of William Patton to purchase lot number 8, Joseph Linville asked the respondent if lot number 8 could be cleared in preparation for building.

19. According to Joseph Linville, the respondent asked him if it was the black couple from Connecticut who were having the house built, and that when Joseph Linville replied affirmatively, the respondent stated: "Well, you are going to build today and you will be gone. I will have to stay here forever." Although the respondent's son testified that he was privy to the conversation between Joseph Linville and his father and that it was Joseph Linville who broached the subject of the race of the prospective house builders, based on the demeanor of the witnesses, the consistency of testimony and other corroborative evidence, the examiner finds credible the testimony of Joseph Linville as to his conversation with respondent.

20. The next morning the respondent flagged Joseph Linville down to tell him that he had decided not to sell lot number 8, but rather, that he was going to build on it himself.

21. Although the respondent alleges that the complainants' proposed house did not meet the protective covenants and square footage requirements, the conversation between Joseph Linville and the respondent, the previous day, never reached the point where these matters were discussed.

22. After Joseph Linville informed William Patton of the conversations he had had with the respondent regarding his refusal to sell lot number 8, Joseph Linville and William Patton again met with the respondent to inquire about purchasing lot number 8 or any other lots that respondent had available for sale. The respondent indicated that none of his lots in Evergreen Place were available, but rather, he was going to keep all the lots himself and build on them.

23. William Patton continued to inquire about purchasing lots in Evergreen place owned by the respondent who informed him of the following additional reasons as to why lots were not available:

a. That he had sold the house that he had under construction on lot number 9;

b. That he no longer needed the money; and

c. That future sales would cause him tax problems.

24. During this subsequent conversation with William Patton, the respondent continued to have "For Sale" signs posted on his property in Evergreen Place.

25. The complainants received telephone calls from William Patton and Agnes Keatley informing them that lot number 8 was no longer available for sale. Edward Howard was further informed that none of the lots were available for sale.

26. After learning that the lots were not available for sale, the complainants had to start over and was forced to make two additional trips to Beckley, West Virginia, that being: June 18th and 19th, 1987 and July 3rd through 8th, 1987. Each round trip is 1700 miles, and a drive one way takes two days.

27. On or about June 18, 1987, after looking through the house that Colony Construction Company had under construction in Evergreen Place, Edward Howard noticed that "For Sale" signs were still posted on the lots located in Evergreen Place. At that point, he asked Joseph Linville and William Patton if race played a role in him not being able to acquire any lots in Evergreen Place from respondent, Arvel Bales. Joseph Linville and Joseph Patton, after hesitating, responded that they believed race was a factor in the respondent's decision not to sell.

28. Edward Howard immediately called his wife upon being told by Joseph Linville and William Patton that race was a factor in respondent's decision not to sell them any lot in Evergreen Place. Both complainants were angry, embarrassed, humiliated and emotionally upset, and experienced a loss of human dignity because of respondent's activities.

29. Even during the public hearing, Larue Howard was visibly shaken, nervous and emotionally upset because of respondent's action.

30. Both complainants have been concerned about the safety of Edward Howard's mother since she now lives in the house that Colony Construction Company built in Evergreen Place.

31. On September 13, 1987, Walter Garnett and Carolina Jeanette Howard acted as black testers to inquire about purchasing the house and/or lots that the respondent had for sale in Evergreen Place located in Beckley, West Virginia. Walter Garnett and Carolina Jeanette Howard were credible witnesses.

32. On September 13, 1987, the house that the respondent owned had a "For Sale" sign posted on it.

33. The respondent initally quoted the black testers a price of $93,000.00 as a purchase price for the house, but once Walter Garnett showed an interest in purchasing the house, the respondent indicated that he was going to move into the house himself.

34. On September 13, 1987, several lots that the respondent owned in Evergreen Place had "For Sale" signs on them.

35. When the black testers inquired about purchasing lots that he owned in Evergreen Place, the respondent told the black testers that none of the lots that he owned in that area were for sale because to sell them would place him in a higher tax bracket and that he had taken the lots off of the market.

36. The respondent testified that in September, 1987, he sold a lot in Evergreen Place to a white couple, Douglas and Rebecca Mills. The respondent indicated that he had been talking about selling the lot to this white couple for a year.

37. On September 14, 1987, John Castlegrande and Judy Zickefoose acted as white testers to inquire about purchasing the house and/or lots that the respondent had for sale in Evergreen Place located in Beckley, West Virginia. John Castlegrande and Judy Zickefoose were credible witnesses.

38. The respondent indicated to the white testers that the house he owned in Evergreen Place was immediately available for sale for $92,600.00. The respondent never indicated to the white testers that he intended to move into the house himself, and that the house was not for sale.

39. The white testers asked the respondent about purchasing lots in case they decided to build in Evergreen Place. The respondent indicated that the lots were immediately available for sale.

40. The respondent informed the white testers that the lots on both sides of his house and the lots across the street were immediately available for sale.

41. Actual and estimated expenses incurred by the complainants for three compensable trips supported by testimony and complainant's post hearing Exhibit #13 are as follows:

a.	Date:	April 25-30, 1988 Travel to and from public hearing	
	Lodging:	$ 100.39	
	Gas:	98.88	
	Tolls:	1.30	
	Meals:	+ 118.67	(actual)
	TOTAL:	**$ 319.24**	
b.	Date:	June 18-20, 1987 (Edward Howard)	
	Rental Car:	$ 184.58	
	Airline Ticket:	+ 398.00	(actual)
	TOTAL:	$ 582.58	

c.	Date:	July 3-8, 1987	
	Lodging:	$ 100.39	
	Gas:	98.88	
	Tolls:	1.30	(estimated, based on April 1988
	Meals:	+ 118.67	trip)
	TOTAL:	**$ 319.24**	
		==========	
	GRAND TOTAL:	**$ 1,221.06**	

42. Complainant, Edward Howard, lost the following compensable vacation time as a result of respondent's refusal to sell a lot:

1987	-	June 18th & 19th
		July 3rd, 6th, 7th & 8th
1988	-	April 25th, 26th, 27th, 28th & 29th

Annual Salary:	$136,301.00	
	÷ 52	**weeks**
Weekly Salary:	2,621.17	
	÷ 5	**day work week**
Daily Rate:	524.23	
	x 11	**total loss days**
TOTAL	**$ 5,766.53**	

43. The respondent has never sold any property in Evergreen Place to black people.

44. On October 28, 1987, the respondent had actual knowledge that the Howards had filed a race discrimination

complaint against him. At that time, he resided at 527 N. Highland Drive, Beckley, West Virginia. Subsequent to the October 28, 1987 date, the respondent moved into the house that he owned in Evergreen Place.

45. The complainants' attorney reasonably expended 124.40 hours in litigation of this matter, as set forth in his itemized fee affidavit.

46. An hourly rate of $75.00 is reasonable for the legal services rendered by complainants' attorney, as supported by the fee affidavit.

DISCUSSION

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.

If the complainant establishes a prima facie case under McDonnell Douglas, the burden shifts to the employer to rebut the presumption of discrimination by articulating a legitimate non-discriminatory reason for its actions. The employer need not prove the legitimate nondiscriminatory reason but must only articulate it. It is sufficient if the respondent's evidence raises a genuine issue of fact as to whether or not it illegally discriminated against the complainant. Texas Dept. of Community Affairs v. Burdine, supra; Furnco Construction v. Waters, 438 U.S. 567, 98 S. Ct. 2943 (1978); Shepherdstown V.F.D. v. West Virginia Human Rights Commission, supra; State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., supra.

If the employer articulates a legitimate nondiscriminatory reason for its actions, the complainant may still prevail by persuading the trier of facts that a discriminatory reason more likely than not motivated the employer, or indirectly by showing that the employer's explanation is a pretext and unworthy of credence. The ultimate burden of proof always rests on the complainant. McDonnel Douglas Corp. v. Green, supra; Texas Dept. of Community Affairs v. Burdine, supra; United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983); State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc., supra.

West Virginia Code §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, §5-11-8(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), which is a federal case interpreting the Federal Fair Housing Act, sets forth one method of adaptation 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 aplied 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, in the present case, the complainants proved a prima facie case of race discrimination. It has been stipulated by the parties that the complainants are black; the record is replete with credible testimony, that the property was placed on the open market for sale by the respondent; and that the complainants were willing to purchase any available lot the respondent had for sale as communicated to the respondent by William Patton. The record also

establishes that, after the respondent discussed the race of the complainants with a third party, Joseph Linville, the respondent decided not to sell lot number 8 or any other lot in Evergreen Place to the complainants, and finally, the lots remained available. To be sure, the prima facie case proof schemes, as articulated in McDonnell Douglas Corp and Robinson, supra, point to separate, but not the only ways of establishing a legally sufficient prima facie case of illegal discrimination. Loeb v. Textron, Inc., 772 F. 2d 799, 801-802 (1985).

Alternatively, in Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir. 1974), it was established that:

> "where a Negro buyer meets the objective requirements of a real estate developer so that a sale would in all likelihood have been consummated were he white and where statistics show that all of a substantial number of lots in the development have been sold only to whites, a prima facie inference of discrimination arises as a matter of law if his offer of purchase is refused. If the inference is not satisfactorily explained away, the fact of discrimination becomes established. See Newbern v. Lake Lorelei, Inc., 308 F. Supp. 407, 417 (S.D. Ohio 1968)."

In the present case, complainants assert that the inference of discrimination arises and was not successfully explained away in that the complainants met the objective requirements of purchasers; the offer of purchase through their agent, William Patton, was ultimately refused; and the respondent continued to sell lots to white buyers only. Complainants have therefore established, through a separate methodology, a prima facie case of racial discrimination. The burden then shifts to the respondent to articulate some legitimate and nondiscriminatory reason for the rejection of them by the respondent as buyers.

Shepherdstown, supra and Robinson, supra. In the instant case, the respondent has rebutted the presumption of discrimination by articulating the following reasons for his refusal to sell the property he owned in Evergreen Place:

a. That the property had protective covenants which complainants' representatives did not intend to meet in building a house in the area;

b. That he had decided to move into the house on lot number 9 and retain the lots on both sides for privacy purposes;

c. That a power line was taken down on July 8, 1987, that affected lot numbers 2, 3, 10 and 11 during May, 1987; and

d. Future sales would cause him tax problems, and he accordingly took his lots off the market.

The respondent has thus succeeded in rebutting the presumption of discrimination based on the above stated reasons. However, the complainants have proven, by a preponderance of the evidence, that the reasons offered by the respondent were pretext for unlawful discrimination based on race. The complainants have credibly demonstrated that the respondent and Joseph Linville never got to the point in their conversation where they discussed protective covenants. Put another way, as soon as it was confirmed that the complainants were black, the respondent rescinded the deal. Notably, it was only after the respondent received notice of the complaint filed by the complainants with the West Virginia Human Rights commission that he moved into the house on

lot number 9. Moreover, when the white testers inquired about the property on September 14, 1987, the respondent indicated that that house was immediately available for sale and never indicated that the had intended to move into the house. The powerline that was removed on or about July 8, 1987, had no affect on his refusal to sell to the black testers who inquired about purchasing lots with "For Sale" signs on September 13, 1987. Nor did the tax problems related to selling his property preclude the respondent from selling property to white buyers in September 1987, "after taking the lots off the market." The record of evidence taken as a whole compels the conclusion that the respondent refused to sell real property to the complainants because they are black.

It should be pointed out that the respondent's argument, that the oral agreement entered into by the respondent and the agent of the complainants, William Patton, was not enforceable under the statute of frauds, is without merit, and will not be allowed as a defense to race discrimination, a violation of federal and state constitutional and statutory, laws. Judicial precendent has established that, when a prospective vendor and prospective purchaser enter into a verbal agreement for sale and purchase of realty, the vendor's subsequent refusal to sell realty because of the purchaser's race does not conflict with the statute of frauds, even if an order is entered requiring the vendor to reoffer the realty which was the subject of a sham transfer. Balfour v. Bergeren, 187, WV 2d 681 (1971). The complainants do not have to prove the existence and breach of a valid sales contract. Balfour, supra; Moore v. Townsend, 525 F.

2d 482 (7th Cir. 1975). The complainant must prove the existence of unlawful discrimination, this they have successfully done.

CONCLUSIONS OF LAW

1. At all times referred to herein, the respondent, Arvel L. Bales, is an owner of "real property" located in Evergreen Place, Beckley, West Virginia as those terms are defined by WV Code §5-11-3(p) and (1), as amended.

2. At all times referred to herein, the respondent, Arvel L. Bales, is and has been a resident of the State of West Virginia, and is a person within the meaning of WV Code §5-11-3(a).

3. At all times referred to herein, the complainants are individuals within the meaning of WV Code §5-11-1 et seq.

4. The complaint in this matter was properly and timely filed in accordance with WV Code §5-11-10.

5. The West Virginia Human Rights Commission has jurisdiction over the parties and subject matter of this action pursuant to WV Code §5-11-8, §5-11-9 and §5-11-10.

6. The complainants have established a prima facie case of race discrimination.

7. Respondent has articulated legitimate nondiscriminatory reasons for its actions toward the complainants.

8. Complainants have demonstrated by a preponderance of the evidence that the reasons articulated by the respondent for its actions toward the complainants were pretext for unlawful discrimination.

9. The respondent unlawfully discriminated against the complainants on the basis of race in violation of WV Code §5-11-1 et. seq.

RELIEF AND ORDER

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

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

2. Respondent shall reimburse the complainants $1,221.06 for travel expenses incurred as a result of respondent's discriminatory conduct, as set forth in Finding of Fact Number 41, plus statutory interest on said amount.

3. Respondent shall reimburse the complainant, Edward Howard, $5,766.53 for loss of vacation time, as set forth in Finding of Fact Number 42, plus statutory interest on said amount.

4. Respondent shall also pay the complainants reasonable attorney fees as set forth in counsel's fee affidavit in the aggregate amount of $9,330.00.

5. Further, should the West Virginia Supreme Court of Appeals reverse its prior ruling at Syl. p. 2 in Bishop Coal Company v. Brenda Salyers and West Virginia Human Rights Commission, Slip opinion 18138 (1989), the complainants would be entitled to incidental damages as compensation for humiliation, embarrassment, emotional and mental distress and loss of personal dignity in the following amounts:

a. Larue S. Howard - $5,000.00

b. Edward Howard - $5,000.00

It is finally **ORDERED** that respondent shall provide to the West Virginia Human Rights Commission proof of compliance with the hearing examiner's recommended decision within 35 days of service of said recommended decision by copies of cancelled checks, affidavits or other means calculated to provide such proof.

Entered this 17 day of April, 1989.

WV HUMAN RIGHTS COMMISSION

BY _____
GAIL FERGUSON
HEARING EXAMINER