Pittsburgh Commission on Human Relations

AGENDA
January 8, 2007

I. Call to Order

II. Adoption of Minutes

III. Staff & Committee Reports

A. Compliance Update

B. Director's Report

C. Housing Committee Report

IV. New Business

A. Mini-Training - Solicitor Kevin Trower

1. Why is the Commission divided into Compliance Review and Public Hearing Sections, with a Motions Commission who does not serve in either section?

The **LYNESS** Decision.

2. When the Public Hearing Commissioners hear a case, what standard do they use to determine liability?

The **McDonnell Douglas** decision as interpreted by the Pennsylvania Court in Allegheny Housing.

V. Announcements/Open Floor

VI. Adjournment

Please be considerate of others; turn off your cell phone.

PITTSBURGH COMMISSION ON HUMAN RELATIONS
Minutes of Meeting
January 8, 2007

Attendance: B. J. Samson, *Chair*

Rev. Tim Smith	Leah Williams-Duncan	Sister Eleanor Loftus
Adelaide Smith	Lynette Drawn-Williamson	Ann McCafferty
Elbert Gray, Jr.		

Called/Unable to attend:

Dr. Susan Hunt	Elizabeth Pittinger
Stephan Broadus	Curtis Smith
Christine Williams	David Engel

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Staff: Charles F. Morrison, *Director*
Kevin Trower, Solicitor
Connie Miskis Zatek

I. CALL TO ORDER

The meeting was called to order at 3:42 p.m. by the Chairperson, B. J. Samson.

II. ADOPTION OF MINUTES

A minor typo correction was noted by Commissioner Leah Williams-Duncan; otherwise, the Minutes of the December 2006 Commission meeting were unanimously adopted as circulated, upon by Commissioner McCafferty and second by the Reverend Smith. *(The typo will be corrected prior to further circulation of the Minutes.)*

III. STAFF & COMMITTEE REPORTS

A. Compliance Report

Director Morrison reported that 15 cases have been submitted to EEOC toward our contract of 100 cases, leaving nine months to process 85 additional cases. He stated that he will be meeting with staff in the near future to target cases for closure. The Director assured the Commissioners that while staff is working, the low closure rate is also dependent on other factors, including slow responses from respondents, complainants who are not always as cooperative as we would like and other "lose ends that must be tied" before the case is presented to the Compliance Review Section for disposition.

He briefly recapped 2005 and 2006 final numbers as follows:

	2005	**2006**
Employment	68	66
Housing	11	13
Public Accommodations	5	9
Total:	84	89

The Director reported that the number of cases filed with the Commission is consistent with low intake across the nation. Nationally, about 10,000 housing discrimination complaints were filed in 2006. The EEOC has also reported low intake nationally, and as a result money that was originally earmarked for case processing is being re-directed into staff training. Commission staff benefited from this additional training opportunity during the third Quarter of 2006. It is anticipated that once all FEPA staff have gone through training, it will be opened to Commissioners.

Jillane McKinley has completed all four of the HUD training weeks at the National Fair Housing Training Academy in Washington, DC. To date, Sheron Clark has completed three training weeks. This training, required by HUD under contract, is also funded by HUD through its contract with each agency. The Director noted that the costs for each week of training are approximately $2,000 for travel, lodging and meals. An additional $2,000 is covered by HUD directly for tuition expenses for each class week.

It is anticipated that the next training opportunity that will be open to Commissioners will occur in June or July 2007. The Chairperson encouraged Commissioners to seriously consider attending any training that may be provided by the EEOC or HUD. She stated that Director Morrison and she attended the annual HUD conference in California last year and she found it to be an excellent opportunity to learn what other agencies are doing, to discuss hot topics and to meet counterparts from other parts of the country.

B. Director's Report

Director Morrison highlighted information from the written report which was mailed to all Commissioners prior to today's meeting.

1. The Director reported that he had recently attended the periodic meeting of local FHIP/FHAPs. He explained that FHIPs are private, non-profit agencies that advocate for fair housing; FHAPs are governmental agencies like the Commission.

2. The Director met with Peter Harvey, Executive Director of the Fair Housing Partnership on December 13. Mr. Harvey has agreed to speak to the Commission at the February 5 meeting. The FHP is currently working on a project to determine the extent to which a person's source of income may be a barrier to their choice of housing. He explained that the last impediments to fair housing study conducted in 2000 recommended that this be investigated. He briefly explained that persons using Section 8 vouchers (now called Housing Choice Vouchers) may be experiencing discrimination in securing their housing of choice solely because of the vouchers. Many landlords do not accept vouchers for a number of legitimate non-discriminatory reasons; one

might be that the landlord is not willing to absorb the expense of bringing their rental property to the standard required by Section 8 for housing vouchers for items such as removing lead paint or installing a ground fault interrupter in the bathroom.

Commissioner Samson suggested scheduling a meeting to entertain this type of discussion, noting that Housing Choice Vouchers represent a very complex issue. She stated that she has noticed the trend for more Section 8 housing to be available in the suburbs, but then there is no transportation available to hold jobs in the city.

Director Morrison also reported that following the release of the impediments study in 2000, he wrote a proposal to the Maurice Falk Medical Fund to support a study into source of income discrimination. Initially, he received notification that the Fund was not interested then later they agreed to support a grant to a non-profit organization rather than a governmental agency. The Director asked the FHP to partner with the Commission in order to move forward with securing the grant and doing the study. The FHP agreed and then moved forward on their own developing the materials needed for the research, including a flier that presumes the need for an amendment to the City Code. Director Morrison explained to the Commissioners that in their haste, the FHP has "put the cart before the horse" as far as city protocol is concerned, but at least the data gathering has begun and the Commission can help wherever it can.

3. The Director met with Darlene Harris, Council representative for the North Side, to apprise her of the work of the Commission. He learned that she is very familiar with the Commission from her prior work with the School Board. He encouraged her to use the Commission as a resource as she meets with various issues in the neighborhoods she represents.

   Commissioner Samson agreed that it is important to keep the lines of communications open with City Council representatives, and insure they are aware of and understand the work of the Commission, particularly when they are recommending candidates to fill vacancies on the Commission.

4. The EEOC will soon begin sending cases to the Commission to investigate. Director Morrison has requested at least 25 cases be deferred. He reminded the Commissioners that the contract for FY2007 is for 100 cases. There were 66 employment cases filed during 2006. It is unlikely that this, plus our backlog from previous years, will be able to support 100 case dispositions. He noted that the Pittsburgh office of the EEOC receives between 1,400 and 1,500 cases throughout the Tri-State area.

5. The Director and staff recently met with the Government Technical Monitor from HUD, Phoebe Buchanan, regarding housing cases. She spent the better part of a whole day with staff reviewing cases and procedures and seemed pleased. More than 60% of the Commission's cases have been finalized within the 100-day requirement. She would like to see that improve. Director Morrison briefly explained this requirement and how cases are "clocked on the computer." Although staff moves on new cases immediately, by the time the complaint is served on the respondent and a response is received, 60 days could lapse. Therefore, keeping within the 100-day timeframe is largely dependent upon the cooperation of the parties. If case processing takes longer than 100 days, the GTM has discretion to release all or a portion of the payment for the case.

   Two cases identified as being over 100 days were complaints initiated by the Commission. In such cases, the Commission must be very careful in pulling together the necessary data for the investigation. If these cases should go to a hearing, it would not be before the Public Hearing Section, but before a judge in the Court of Common Pleas or in federal court. In addition, staff turnover contributed to further delays.

   HUD is continuing to stress the use of TEAPOTS, their automated paperless tracking system.

C. Housing Committee Report

Commissioner Adelaide Smith, committee chair, reported that she met with Director Morrison and Commissioner Samson on October 19, 2006, to discuss the charge of the Housing Committee. She stated that the primary job of the committee will be to encourage and implement outreach activities. She indicated that the Housing Committee will share ideas with the FHP with regard to their study regarding source of income and familial status and other impediments to housing choice. Commissioner Smith acknowledged that there are not enough units for large families and that many landlords do not pay attention to the needs of families with children. She asked Commissioners to feel free to share their ideas with the Housing Committee or to call Director Morrison or herself.

Director Morrison briefly recapped the meeting with Commissioners Smith and Samson to stress the importance of the Housing Committee's responsibilities under the HUD contract. He shared with Commissioner Smith and the committee members the Guidelines provided by HUD which outline the Commission's obligations.

The Director explained that the Analysis of Impediments to Fair Housing Choice Study was done in 2000 and is required to be updated every five years as a condition for the City to continue to receive federal money. Late in 2006, the consultant submitted a draft to the City which outlines a Fair Housing Plan over the next five years. Essentially, this is what the City agrees to do over a specified period of time. The Housing Committee may plug into the Plan wherever possible to *assist the City* with its contractual obligations. The Director stated that he hoped that the City may be able to underwrite some expenses for the Commission outreach programs, too, such as rental of a space for certain activities, light refreshments, etc. The Director stated that each member of the Housing Committee will receive a copy of the Analysis of Impediments to Fair Housing Choice Study when completed; it will be made available to other Commissioners for review upon request.

Commissioner Smith alerted the Commissioners to a workshop in Conflict Resolution presented by the Pittsburgh Mediation Center on February 17 and February 24, 2007. In order to receive certification, both all-day workshops must be completed. Commissioner Samson encouraged Commissioners to take advantage of this training and if interested, to contact Director Morrison as soon as possible so that arrangements can be made for tuition payment.

IV. NEW BUSINESS

Solicitor Kevin Trower stated that he recently met Don Barden, the developer for the proposed casino in Pittsburgh, and asked him to come to speak to the Commission sometime during the year. He gave Mr. Barden an overview of the work of the Commission and encouraged him to use the Commissioners as a resource in dealing with the community. Mr. Barton stated that he will be working full time in Pittsburgh as of May and asked that someone from the Commission contact him then to provide meeting details and finalize the arrangements.

A. Mini-Training Module – Presented by W. Kevin Trower, Solicitor

Why is the Commission divided into Compliance Review Section, Public Hearing Section and Motions Commissioner?

Solicitor Trower explained that this line was drawn by the Pennsylvania Supreme Court in the case of Lyness, a doctor who was being investigated by the State Licensing Board. Lyness questioned if there is an ethical breach for the Board as the fact finder in the investigation to also be the entity before which a hearing would be held. Lyness filed an appeal, which essentially states that the same people who investigate a complaint cannot also serve as judge and jury. As a result, the Commission, and other similar agencies, created a "firewall" so that the side that investigates is not the side that holds hearings and makes findings.

Solicitor Trower stated that the Commission tries hard to honor this division because failure to do so would give parties to a complaint a right to appeal any Commission decision. Therefore, what comes before the Compliance Review Section is not known by the Public Hearing Section until probable cause is upheld and the case moved over to the Public Hearing side. Once the case moves, the Compliance Review Section has no further involvement in the case.

According to this procedure, the Motions Commissioner can hear a motion on either side of the "firewall" and the Commission would not be in violation. Solicitor Trower briefly explained the nature of motions, noting that once a case begins either party can come to the Commission and request it to take specific action on the case. A motion is a request to take action on a case. If the motion comes when the case is still being investigated by the Compliance Review Section, it is a compliance motion; if it comes after a probable cause ruling by the Compliance Review Section, it is a public hearing motion. The Motions Commissioner does not take part in either Section of the Commission and can develop a lot of expertise in certain areas of the law.

The Solicitor stressed the fact that the Commission's procedures are fair to all parties, and that when a case proceeds to the public hearing section, the Public Hearing Commissioner(s) have not spoken with staff about any issues or details of the case and have no pre-conceived notions about the case. As a result, the parties are really getting a fair hearing.

Once a case moves to the Public Hearing side, the parties meet again for a "mandatory conciliation" – another attempt to settle the case. The Solicitor commented that Commissioners and staff are extremely good at bringing about settlements. For a period of more than a year a half, every single case on the public hearing track was settled prior to the actual public hearing. He explained that each Commissioner employs a different style – some use gentle nudging while others may hammer out a proposed settlement and work the parties toward mutual agreement.

What do the Commissioners look for during a public hearing?

The complainant always has the burden of proof. The respondent could "win" even if they do not attend the public hearing; there is no such thing as a default. If the complainant cannot prove his/her half of the case, the respondent can move for dismissal. The Solicitor went on to explain the foundation case of Allegheny Housing Rehabilitation Corporation. The Pennsylvania court interpretation of this case lays out the burdens of the complainant and respondent in order to prevail. In summary:

(1) The complainant must show that he/she is a member of a protected class (age, race, sex, etc.);

(2) The complainant must show that he/she was qualified for the position (housing, etc.); that applications were accepted; that the position (housing, etc) was available;

(3) The complainant must show that an adverse action occurred (harm) and that he/she was denied the position (housing, etc.).

If the case is not made here, the complainant can lose. If the complainant meets his/her initial burden of proof, the burden then shifts to the respondent, who must come forward with a legitimate, non-discriminatory reason for their action. The Solicitor stressed that hearing Commissioners must listen for that legitimate, non-discriminatory reason, noting that sometimes when credibility becomes an issue, it can boil down to what (or who) is more believable. If the hearing Commissioners find that there is no non-discriminatory reason, the complainant prevails.

Solicitor Trower related a recent situation where Commissioners felt that they could not believe the testimony presented by either party. In this case, the question became who did they believe less? Commissioners try to use their best judgment and apply the law to come up with a decision that is on the right side of all of the issues.

Commission decisions can be appealed to the Court of Common Pleas. The Solicitor noted that the Commission has not made a decision that has been reversed or remanded by the court in a "very, very, very long time" due to the diligence and care exercised by the Commission at its public hearings. As a result, Commission decisions can stand up in court.

Solicitor Trower briefly explained the procedure when a case is appealed to the Court of Common Pleas of Allegheny County. He stated that in the past, retired judges have been assigned Commission cases, which are considered "pleadings." These cases can be dismissed for a number of reasons, including failure of due process or that the finding is not supported by the evidence. However, this has never occurred because of the Commission's diligence in handling the case. He indicated that one time a Commission case on appeal was heard by a judge who claimed to have never heard of the Commission and did not know the law in the area of housing. This is yet another reason why the Commission works so hard to make a "tight" case, so that the facts of the case can stand on their own.

Appeals from the Common Pleas court are made to the Commonwealth Court of Pennsylvania. The Solicitor encouraged Commissioners that in the future if cases should proceed to the courts on appeal, to attend those hearings to get a better picture of what actually happens at the various levels of appeal.

Director Morrison explained that complaints are written in a way that outlines the alleged violation and moves the respondent to file an answer.

Commissioner Samson applauded Commissioners for the excellent work they do in their respective Sections, noting that this is a working Commission with serious duties and responsibilities. "It is not a luxury – to just have your name on the letterhead." She encouraged Commissioners who may feel that they cannot handle the duties required of their Section to speak with her, stating that this Commission may the wrong place for them to volunteer. She stressed the need for each and every Commissioner to participate fully, stating that when Commissioners are absent, it creates a greater burden on the other Commissioners. She asked Commissioners to do a self-examination of their role and participation on the Commission.

V. ANNOUNCEMENTS

Commissioner Adelaide Smith stated that the League of Women Voters is sponsoring a workshop entitled, "How to Run for Public Office" on Saturday, January 27, 2007 at Point Park College.

A public hearing is scheduled for January 29, 30 and 31, 2007 at 10:00 a.m. in the housing case of Gandee v. Policicchio. This case is based on race and familial status. Director Morrison stated that a settlement proposal is on the table, and as such, is hoping that it will be settled soon. He suggested that Commissioners interested in attending the public hearing call first.

Commissioner Drawn-Williamson asked that some consideration for a future training module be given to "Strategies on How to Conciliate a Case."

Commissioners continued to express interest in meeting with the Mark Roosevelt, Superintendent of Schools. Mr. Roosevelt was previously invited to attend a future Commission meeting, but staff learned that "Mondays are never good" for him. It was suggested that staff pursue this by accommodating whatever date Mr. Roosevelt may be available. In the alternative, it was suggested that contact be made with the new Deputy Superintendent of Schools.

With no further business to address, Commissioner Drawn-Williamson moved to adjourn the meeting at 5:14 p.m. The motion was seconded by Commissioner Adelaide Smith and carried unanimously.

/cmz

Pittsburgh Commission on Human Relations

Director's Report

December 29, 2006

Dec. 13, 2006	Director Morrison met with representatives of local FHIP/FHAP fair housing organizations in the greater Pittsburgh area. Items discussed included the Fair Housing Partnership's (FHP) study of the issue of discrimination on the basis of source of income. Also, discussed were the results of recent education and outreach efforts, planning for fair housing month programming, pending and on-going litigation, familial status discrimination with regard to the reasonableness of occupancy limits/restrictions placed by landlords, a landlord's obligation to accommodate tenants with disabilities, predatory lending, audits of new construction for compliance with the accessibility provisions of the Fair Housing Act, testing programs and more.
Dec. 15, 2006	Director Morrison, along with Commission Representatives Clark and McKinley, met with our HUD Government Technical Monitor, Phoebe Buchanan to review the status of all current fair housing investigations and to discuss issues of concern with regard to technical matters under the contract.
Dec. 19, 2006	Director Morrison met with the Intake staff at the U.S. Equal Employment Opportunity Commission (EEOC) to provide an overview of the work of the Pittsburgh Commission on Human Relations (PCHR), its investigative and hearing processes, and in particular, it's jurisdiction. Beginning in January of 2007, the EEOC will begin deferring complaints to the PCHR for processing.
Dec. 27, 2006	Director Morrison met with newly-elected City Council Representative Darlene Harris to explain our work and provide her with information about the programs and services of the PCHR. The Council Representative was encouraged to utilize the Commission as a resource.

*516 Pa. 124, *; 532 A.2d 315, **;*
*1987 Pa. LEXIS 792, ****

ALLEGHENY HOUSING REHABILITATION CORPORATION, Appellant, v. COMMONWEALTH of Pennsylvania, PENNSYLVANIA HUMAN RELATIONS COMMISSION, Appellee

No. 32 W.D. Appeal Docket 1986

Supreme Court of Pennsylvania

516 Pa. 124; 532 A.2d 315; 1987 Pa. LEXIS 792

March 11, 1987, Submitted
October 15, 1987, Decided

PRIOR HISTORY: [*1]**

Appeal from the Order of the Commonwealth Court of Pennsylvania dated March 29, 1985 at No. 2234 **C.D.** 1983 Affirming the Order of the Pennsylvania Human Relations Commission dated July 5, 1983 at E-14987.

88 Pa. Commw. 443; 489 A.2d 1001 (1985).

CASE SUMMARY

PROCEDURAL POSTURE: Appellant corporation sought review of the decision from the Commonwealth Court (Pennsylvania), which affirmed appellee commission's order finding that employee was discharged from her employment because of her sex.

OVERVIEW: Appellee commission found that employee was discharged from her employment because of her sex. Appellee commission awarded back pay and interest, entered a "cease and desist" order, imposed various notice requirements, and instituted a reporting system to monitor hiring practices. On appeal, the court stated that it was obvious that the employee was hired and discharged, and the evidence presented by employee was sufficient to put appellant in the position of offering a non-discriminatory reason for its action. The court held that the evidence was indisputably sufficient to raise a question of fact as to whether appellant intentionally discriminated against employee. However, because the record was woefully inaccurate, and because appellee erroneously subjected appellant's proof to a heightened level of scrutiny, the court could not be certain that its findings of fact were not influenced by its mistaken view of the law or that substantial evidence supported its conclusion. Thus, the court vacated the judgment of the court below and remanded the case to appellee for further proceedings.

OUTCOME: The court vacated the judgment of the court below, which affirmed appellee commission's order finding that employee was discharged from her employment because of her sex, and remanded the case to appellee for further proceedings. Appellee erroneously subjected appellant's proof to a heightened level of scrutiny.

CORE TERMS: prima facie case, non-discriminatory, trier of fact, hired, manager, discharged, discriminatory, qualification, resident, Human Relations Act, tribunal, credibility, substantial evidence, discriminated, preponderance, pretextual, guards, duties, employment discrimination, ultimate issue, intentionally, membership, female, motive, sex, burden of persuasion, articulation, credence, burden of production, sufficient evidence

LexisNexis(R) Headnotes • Hide Headnotes

Civil Rights Law > Practice & Procedure > Civil Rights Commissions > Complaints

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > Federal & State Interrelationships

HN1 See 43 Pa. Cons. Stat. § 955(a). *Shepardize:* Restrict By Headnote

Labor & Employment Law > Discrimination > Accommodation

Labor & Employment Law > Discrimination > Gender & Sex Discrimination > General Overview

Labor & Employment Law > Discrimination > Racial Discrimination > Proof > Burdens of Proof > Burden Shifting

HN2 The burden of establishing a prima facie case can be met by showing (i) that the plaintiff belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications. This standard is, to be sure, adaptable to accommodate differences in the nature of the discrimination alleged and in the action alleged to be improper. The form it takes, however, must be appropriate to its function, which is to eliminate the most common nondiscriminatory reasons for the employer's action. More Like This Headnote | *Shepardize:* Restrict By Headnote

Labor & Employment Law > Discrimination > Disparate Treatment > General Overview

HN3 The nature of the burden that "shifts" to the defendant when a prima facie case of employment discrimination is established is simply to produce evidence of a legitimate, non-discriminatory reason for the discharge. If such evidence is presented, the question for the Commission is whether, on all the evidence produced, the plaintiff has persuaded it by a preponderance of the evidence that the employer intentionally discriminated against her. Whether the plaintiff must eliminate a certain non-discriminatory reason as part of making a prima facie case, or discredit the evidence of that same reason produced by the employer after plaintiff's prima facie case has been made, the result is the same; the plaintiff must persuade the factfinder by a preponderance of the evidence. More Like This Headnote | *Shepardize:* Restrict By Headnote

Labor & Employment Law > Discrimination > Disparate Treatment > General Overview

HN4 If the employer rests without producing evidence, the plaintiff must prevail if he or she has produced sufficient evidence to make out a prima facie case of employment discrimination. If, however, the defendant offers a non-discriminatory explanation for the dismissal, the presumption drops from the case. As in any other civil litigation, the issue is joined, and the entire body of evidence produced by each side stands before the tribunal to be evaluated according to the preponderance standard: Has the plaintiff proven discrimination by a preponderance of the evidence? Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, the trier of fact must then decide which party's explanation of the employer's motivation it believes. More Like This Headnote | *Shepardize:* Restrict By Headnote

Labor & Employment Law > Discrimination > Disparate Treatment > General Overview

HN5 In an employment discrimination action, the plaintiff is, of course, free to present evidence and argument that the explanation offered by the employer is not worthy of belief or is otherwise inadequate in order to persuade the tribunal that her evidence does preponderate to prove

discrimination. She is not, however, entitled to be aided by a presumption of discrimination against which the employer's proof must "measure up." More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: Stanley M. Stein, Feldstein, Grinberg, Stein & McKee, Pittsburgh, for appellant.

Elisabeth S. Shuster, Gen. Counsel, William R. Fewell, Jr., Asst. Gen. Counsel, Pennsylvania Human Relations Com'n, Pittsburgh, for appellee.

JUDGES: Nix, C.J., and Larsen, Flaherty, McDermott, Hutchinson, Zappala and Papadakos, JJ. Nix, C.J., and Larsen, J., filed a dissenting opinion in which Papadakos, J., joined.

OPINION BY: ZAPPALA

OPINION: [*126] [316] OPINION**

This is an employment discrimination case brought under Section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. § 955(a). The Human Relations Commission found that Faith Hodge was discharged from her employment because of her sex. It awarded back pay and interest, entered a "cease and desist" order, imposed various notice requirements designed to apprise Hodge and other potential female applicants of positions, and instituted a reporting system to monitor hiring practices. **[***2]** Commonwealth Court held that the Commission's finding of discrimination was supported by substantial evidence and affirmed the order, 88 Pa.Cmwlth. 443, 489 A.2d 1001. We allowed the employer's appeal to examine the lower tribunals' method of applying the law in examining the evidence to reach a conclusion on the ultimate issue of discrimination.

In July of 1978, Faith Hodge took up residence at Second East Hills Park, a housing development in Pittsburgh. She had lived at Second East Hills until May of that year, when she left her employment as a City of Pittsburgh police officer in order to move to California. After her return, Hodge inquired of the resident manager of Second East Hills about a job as a security officer at the development. Hodge had known the manager from work with several community organizations around Pittsburgh. The resident manager, an employee of the defendant/appellant Allegheny Housing Rehabilitation Corporation, hired Hodge as a security officer in mid-August of 1978. Within a month he had assigned her additional duties and told her she was **[**317]** being designated "security manager" at Second East Hills. By letter dated November 2, 1978, slightly **[***3]** more than two months after Hodge had been hired, Allegheny Housing's Director of Management, the resident manager's superior, advised Hodge that her "services as Security Manager [had] been terminated due to the realignment of our security force."

[*127] Allegheny Housing Rehabilitation Corporation is a limited profit corporation that manages non-profit and low income housing developments. In August of 1977, Allegheny Housing was hired as management agent of Second East Hills by the owner, Action Housing, which was at the time attempting to arrange a sale of the development. In 1978, Action Housing defaulted on its mortgage, and the Department of Housing and Urban Development assumed operation of the development as mortgagee in possession. Allegheny Housing was retained as the management agent by HUD. Pursuant to regulations governing developments where HUD was mortgagee in possession, in the summer of 1978 Allegheny Housing undertook the task of providing security services for Second East Hills within a budget amount imposed by HUD. Bids from several security firms were rejected as too high. Eventually, Allegheny Housing hired individuals as independent contractors n1 **[***4]** to serve as security guards.

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n1 For purposes of this action under the Human Relations Act, Allegheny Housing concedes its status as "employer" and the guards' status as "employees".

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Hodge filed a complaint with the Human Relations Commission alleging that she was discharged from her job because of her sex. HN1 Section 5(a) of the Human Relations Act, 43 P.S. § 955(a) provides

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification . . . [f]or any employer because of the . . . sex . . . of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required.

The Human Relations Commission and the Commonwealth Court purported to follow the analytical model developed by the United States Supreme **[***5]** Court for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, **[*128]** 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), first approved by this Court for employment discrimination cases under the Human Relations Act in *General Electric Corp. v. Pennsylvania Human Relations Commission*, 469 Pa. 292, 365 A.2d 649 (1976). That model sets out the nature of the evidence needed for the plaintiff to establish a *prima facie* case, for the defendant to respond, and for the plaintiff to counter the defendant's response. In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), and again in *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983), the Supreme Court addressed itself to the proper application of this analytical model. In particular, the Court clarified the nature and the extent of the defendant's burden of production. This case presents us with an opportunity to give similar guidance to the lower tribunals in our state system. n2

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n2 Because it deals with comparative qualifications, which is not an issue in all cases, the "best able and most competent" language of our Human Relations Act has been the source of considerable confusion. *See Winn v. Trans World Airlines, Inc.*, 506 Pa. 138, 484 A.2d 392 (1984) (equally divided court). According to one view, this language operates primarily in "disparate impact" cases to establish a correlative of the "business necessity defense" found in Title VII cases. Its effect in "disparate treatment" cases, such as the present, is limited to allocating the burdens of proof in the same way as described in *McDonnell Douglas, Burdine*, and *Aikens*. *See id.*, 506 Pa. at 146, 484 A.2d at 396 (Opinion in Support of Affirmance, Nix, C.J., joined by Larsen, J.); *id.*, 506 Pa. at 157-58, 484 A.2d at 402-03 (Opinion in Support of Affirmance, Larsen, J., joined by Nix, C.J.). Another view treats the language as creating an element of *any* cause of action under the section, whether under the disparate impact or disparate treatment theory, and would assign the burden of proof as to that element to the plaintiff. *See id.*, 506 Pa. at 159, 484 A.2d at 403 (Opinion in Support of Reversal, Flaherty, J., joined by McDermott and Zappala, JJ.). *See also*, Note, The Burden of Proof in Employment Discrimination Cases Under the Human Relations Act: The "Best Able and Most Competent" Clause Revisited, 58 Temp.L.Q. 307, 332-33 (1985). Here, the parties and the lower tribunals proceeded as though the "best able and most competent" language had no effect on the *McDonnell Douglas* elements of either the employee's *prima facie* case or the employer's defense; the defendant has never contended that the plaintiff bore the burden of proving that she was "best able and most competent." The focus of our review is limited to whether the *McDonnell Douglas* model, whatever the elements, has been properly used.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***6]**

[*129] **[**318]** In *McDonnell Douglas*, the Court stated that HN2 the burden of establishing a *prima facie* case could be met by showing "(i) that [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [the plaintiff's] qualifications." 411 U.S. at 802, 93 S.Ct. at 1824. This standard is, to be sure, adaptable to accommodate differences in the nature of the discrimination alleged (e.g., sex rather than race) and in the action alleged to be improper (e.g., discharge rather than refusal to hire). The form it takes, however, must be appropriate to its function, which is to "eliminate[] the most common nondiscriminatory reasons" for the employer's action. *Burdine*, 450 U.S. at 254, 101 S.Ct. at 1094.

In the Opinion accompanying its order, the Commission expressed the view that Hodge could meet her burden of establishing a *prima facie* case "by proving that she was discharged for reasons not having **[***7]** to do with her performance, and that males were subsequently hired to perform essentially the same duties as she performed prior to her discharge." The Commonwealth Court offered a more specific statement of the elements: "(1) she is a member of a protected class (female), (2) that she was hired for a job for which she was qualified, (3) that she was discharged, and (4) that she was replaced with one or more males with equal or lesser qualifications." 88 Pa.Comwlth. at 448-49, 489 A.2d at 1004.

Each of these formulations in isolation might be considered flawed for failing to eliminate several common, non-discriminatory reasons for discharge, the Commission's moreso than the court's. This "flaw" would become harmless, however, if the remainder of the analysis were properly applied to the entire case. This is because HN3 the nature of the burden that "shifts" to the defendant when a *prima facie* case is established is simply to produce evidence of a "legitimate, non-discriminatory reason" for the discharge. **[*130]** *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; *see also Aikens*, 460 U.S. at 714, 103 S.Ct. at 1481; *Burdine*, 450 U.S. at 254-58, 101 S.Ct. at 1094-96; **[***8]** *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 24-25, 99 S.Ct. 295, 295-96, 58 L.Ed.2d 216 (1978) (per curiam); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578, 98 S.Ct. 2943, 2950, 57 L.Ed.2d 957 (1978). If such evidence is presented, the question for the Commission is whether, on *all* the evidence produced, the plaintiff has persuaded it by a preponderance of the evidence that the employer intentionally discriminated against her. Whether the plaintiff must eliminate a certain non-discriminatory reason as part of making a *prima facie* case, or discredit the evidence of that same reason produced by the employer after plaintiff's *prima facie* case has been made, the result is the same; the plaintiff must persuade the factfinder by a preponderance of the evidence.

There is bound to be confusion where, as here, part of the employer's explanation attacks the plaintiff's qualifications for the job. If a plaintiff must *prove* a *prima facie* case by producing the evidence of her qualifications before the defendant is obligated to proceed with a defense, there will almost of necessity be, at the close of the plaintiff's case in chief, evidence **[***9]** that she was qualified sufficient to avoid dismissal. At that point no evidence has been admitted on the other side. When the employer then produces evidence of disqualification, this could be understood either as an attack **[**319]** on the elements of the *prima facie* case, or as an attempt to meet the employer's burden of offering a legitimate, non-discriminatory reason. Regardless of its characterization, however, its impact is the same. The employer, understandably, would prefer not to have to offer a defense at all until a more substantial case had been presented against it. Nevertheless, in the interest of having the ultimate question of discrimination resolved on the merits rather than for procedural failings such as lack of specificity, given the importance of circumstantial proof in such cases, it is appropriate to the remedial purpose of the Act that the prima facie case not be an onerous one.

[*131] It was never intended, however, that the previously described analytical method would immunize members of "protected classes" from adverse employment decisions simply by dint of their class membership. Nothing about the Human Relations Act removes its operation **[***10]** from the bedrock concept of our jurisprudence that one who alleges wrongdoing must supply the proof. The stated analysis is no more than an aid to evaluating the proof. If the plaintiff produces sufficient evidence that, if believed and otherwise unexplained, indicates that more likely than not discrimination has occurred, the defendant must be heard in response. Absent a response, the "presumption" of discrimination arising from the

plaintiff's *prima facie* case stands determinative of the factual issue of the case. In other words, HN4 if the employer rests without producing evidence, the plaintiff must prevail if he or she has produced sufficient evidence to make out a *prima facie* case. If, however, the defendant offers a non-discriminatory explanation for the dismissal, the presumption drops from the case. As in any other civil litigation, the issue is joined, and the entire body of evidence produced by each side stands before the tribunal to be evaluated according to the preponderance standard: Has the plaintiff proven discrimination by a preponderance of the evidence? Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude **[***11]** that the decision was not discriminatorily motivated, the trier of fact must then "decide which party's explanation of the employer's motivation it believes." *Aikens*, 460 U.S. at 716, 103 S.Ct. at 1482. HN5 The plaintiff is, of course, free to present evidence and argument that the explanation offered by the employer is not worthy of belief or is otherwise inadequate in order to persuade the tribunal that her evidence does preponderate to prove discrimination. She is not, however, entitled to be aided by a presumption of discrimination against which the employer's proof must "measure up".

It is obvious that Hodge, female, was hired and discharged. She testified to her educational background **[*132]** and the training she had received in becoming a member of the Pittsburgh police force. Payroll records of Allegheny Housing security personnel were also admitted into evidence to show the number of people working and the number of hours worked during the relevant periods before and after Hodge's dismissal. This evidence was, we believe, sufficient to put the employer in the position of offering a non-discriminatory reason for its action.

Allegheny Housing, through the testimony **[***12]** of its vice president, supported by the deposition of the director of management, explained Hodge's dismissal as follows. While in the process of soliciting bids for security services for the development, Allegheny Housing was approached by certain residents of Second East Hills who were members of Certified Police Unit 644. C.P.U. 644 is a non-profit organization that functions as a hiring hall for individual security guards. Its members are all certified to carry firearms and have passed a psychological test administered by the state police. Unable to contract with a commercial security firm because of the HUD budget constraints, Allegheny Housing entered into an agreement with C.P.U. 644. Because HUD's involvement as mortgagee in possession was expected to be of short duration, perhaps several months, the agreement was not reduced to writing.

[320]** Under this agreement the security personnel hired as independent contractors by Allegheny Housing were to be drawn from the membership of C.P.U. 644. The actual hiring of individual guards was apparently delegated to the resident manager of the development. Despite the resident manager's awareness that only C.P.U. 644 members **[***13]** were to be considered, he hired Hodge, who was not a member, in mid-August, and later gave her supervisory duties over the other guards, who were all members of C.P.U. 644. n3 When this hiring in violation of the agreement was brought to the attention of the director of management by members of **[*133]** C.P.U. 644, he discharged her. Thereafter a maintenance manager, a long time employee of Allegheny Housing who oversaw operations at a number of developments, was assigned the task of co-ordinating security services as well, encompassing the "supervisory" duties the resident manager had taken it upon himself to give to Hodge. This was the "reorganization" referred to in Hodge's discharge letter.

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n3 Though she was approached about joining C.P.U. 644, Hodge never completed the forms or took the necessary test; she testified that she was not told membership was a condition of employment.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - -

If the allocation of proof analysis is properly understood, the foregoing must be considered sufficient evidence of a "legitimate, **[***14]** non-discriminatory reason" for Hodge's dismissal to meet Allegheny Housing's burden of production. Whether or not the evidence is ultimately deemed credible, and whether or not it ultimately withstands the weighing of all the evidence, it is indisputably sufficient to raise a question

of fact as to whether the employer intentionally discriminated against the employee.

Review of the Opinion of the Commission demonstrates that far from examining the evidence as a whole to decide the ultimate question of discrimination, the Commission, upon determining that a *prima facie* case had been made out, treated Hodge's evidence as established facts to be disproved, if possible, by Allegheny Housing. This approach is apparent in Conclusion of Law No. 8, where the Commission stated, "Respondent has failed to demonstrate that its conduct in terminating the Complainant did not violate the Act. Its explanations for the termination were pretextual." Again, in its Opinion, the Commission stated, "[i]f she makes this showing [of a *prima facie* case], Respondent may still prevail by showing that its conduct did not violate the Act."

The Commonwealth Court, having the benefit of *Aikens* **[***15]** and *Burdine*, recognized the error in this approach, characterizing it as coming "dangerously close to shifting the ultimate burden of persuading the trier of fact that the employer's motives were *not* discriminating upon the employer." 88 Pa.Cmwlth. at 447 n. 3, 489 A.2d at 1003 n. 3 (emphasis in original). Nevertheless, the court's opinion **[*134]** showed the same mistaken approach to analyzing the evidence when, in dismissing a hearsay question as unimportant, it stated that Allegheny Housing's "failure to articulate a *legitimate* non-discriminatory motive for discharging Complainant obviated the need for Complainant to proceed with the ultimate burden of proving [the] intent to discriminate against her." *Id.* at 451-52, 489 A.2d at 1006 (emphasis in original). The court's emphasis on the word "legitimate", coupled with its review of the Commission's findings that the evidence failed to disprove discrimination, betrays a hidden understanding that the probative value of the employer's explanatory evidence is to be independently weighed; if it is found to be somehow lacking, the explanation may be disregarded as "not legitimate", thus allowing the presumption arising **[***16]** from the *prima facie* case to stand as the only proof of the ultimate issue. As we have previously explained, this was error. Whatever additional information is imparted by adding the term "legitimate" to "non-discriminatory reason", the remainder of the Supreme Court's explanation of the employer's burden of production reveals over and over again that it cannot be given this effect. Especially where the prevailing principle is that non-contractual employment is "at **[**321]** will", permitting discharge for any reason or no reason at all subject only to the requirement that it not be discriminatory, the test of the "legitimacy" of an employer's reason cannot be made so onerous. To hold otherwise would be to grant safe haven to "protected classes" against adverse decisions *not* based on their class membership, protection not enjoyed by others and not intended by the Human Relations Act, whose purpose is "to foster the employment of all individuals in accordance with their fullest capacities regardless of their . . . sex . . . and to safeguard their right to obtain and hold employment without *such* discrimination . . . ." Act of October 27, 1955, P.L. 744, § 2 *as amended* **[***17]** , 43 P.S. § 952(b) (emphasis added).

The transcript of the hearing in this case displays a kind of gamesmanship played out between the parties (more precisely, their counsel), with a primary objective being the **[*135]** presentation of the bare minimum amount of evidence necessary to meet the burdens of proof as they were thought to exist under *McDonnell Douglas* and *General Electric*. Many witnesses whom it would be thought could offer important proof on behalf of both sides were not presented. Because the record is thus woefully inadequate and because the Commission erroneously subjected the employer's proof to a heightened level of scrutiny, we cannot be certain that its findings of fact were not influenced by its mistaken view of the law or that substantial evidence supports its conclusion. n4 We accordingly vacate the judgment of the Commonwealth Court and remand the case to the Commission for further proceedings consistent with this Opinion.

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n4 There is, for example, an obvious conflict in the Commission's reliance on a document titled "Security Force Policy", drafted after Hodge's discharge, to establish that the security supervisor's duties were identical to Hodge's duties, and thus discredit Allegheny Housing's contention that the resident manager had created the supervisory position and given it to Hodge without authorization. The same document contains an express statement that the employment criteria for security guards at Second East Hills were that they be "certified by the Pennsylvania State Police to carry a firearm, and have passed the psychological test administered by State Police." By her own testimony, Hodge met neither of these criteria

at the time she was hired at Second East Hills, although she had weapons certification while she was a police officer. If the document is given credence and considered relevant to conditions at the time of Hodge's employment, the Commission would have to disregard substantial evidence to find that Hodge was qualified.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***18]**

DISSENT BY: NIX; LARSEN

DISSENT: NIX, Chief Justice, dissenting.

As noted by Mr. Justice Larsen in his dissenting opinion, the issue in this appeal was one of credibility. There is no dispute as to the law applicable in this matter. The credibility of witnesses was assessed by the Human Relations Commission and their findings supported the award. The Commonwealth Court affirmed and I find no legitimate basis for this Court to disturb that order.

[*136] LARSEN, Justice, dissenting.

This is a case of employment discrimination under section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. § 955(a). The essence of this case is a question of credibility, a question which was clearly resolved by the trier of fact, the Pennsylvania Human Relations Commission (the HRC) against the employer, the appellant herein. The credibility of the witnesses (appellee-complainant and appellant's agents and officers) is a matter peculiarly within the province of the HRC as trier of fact. As that tribunal has resolved the crucial issue of credibility against the employer, as that finding is supported by substantial evidence, and as that finding is dispositive of the ultimate issue of employment **[***19]** discrimination in this case, I would affirm the Commonwealth Court's affirmance of the HRC's determination and award. Accordingly, I dissent.

Initially, appellee met her burden of establishing a prima facie case of employment **[**322]** discrimination under the *McDonnell Douglas/Burdine/Aikens* n1 evidentiary guidelines and standards. That burden of proof was met when appellee established that she was a member of a protected class (female), that she was qualified for the positions in question (she was, in fact, hired as a security officer and promoted promptly to security manager), that she was discharged, and that, after her discharge, non-members of the protected class (males) of equal or lesser qualifications replaced her. The HRC found that appellee established each of these elements of the prima facie case, and that finding is supported by substantial evidence of record. The majority concedes that appellee met this initial burden of proof, stating that her "evidence was . . . sufficient to put the employer in the position of offering a non-discriminatory reason for its action." Majority op. at 131.

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n1 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *United States Postal Service v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***20]**

[*137] The employer, appellant, proceeded to offer three non-discriminatory reasons for discharging appellee. The HRC specifically rejected those reasons, finding them to be unworthy of credence. Thus the HRC did not accept these stated reasons for discharge as "legitimate, non-discriminatory reasons," and found them to be "pretextual." This determination of credibility was based upon inferences raised by substantial record evidence, and was fully within the function and competency of the HRC. n2

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 The Commonwealth Court summarized the HRC's finding that the employer's proferred reasons for discharge were pretextual stating:

> The HRC in its adopted opinion, listed and disposed of three allegedly non-discriminatory reasons offered for Complainant's discharge at the hearing. In response to AHRCO's [the employer's] assertion that it was compelled to discharge Complainant from her position as Security Manager because there was no such position under the rules and regulations provided to AHRCO by the Federal Department of Housing and Urban Development, the HRC stated that such explanation ignores the plain language of Complainant's letter of termination which advised she was being terminated from the position of Security Manager and was mere pretext. Similarly, it rejected AHRCO's assertion that the "realignment" which it offered as explanation to Complainant in its letter to her informing her of her discharge was prompted by economic necessity as the "realignment" resulted in more rather than fewer security officers working at Second East Hills Park. Finally, it rejected, also as pretext, AHRCO's assertion that it was obligated to discharge Complainant because she was not a member of Certified Police Unit 644 (CPU 644) with whom AHRCO allegedly had an exclusive "hiring hall" arrangement with regard to its security staff. The HRC found as fact that Complainant had never been informed, either prior or subsequent to hire that membership in CPU 644 was a condition of employment and that if, indeed, there was such an exclusive relationship, no documentary evidence to support the assertion had been produced.

88 Pa.Comwlth. at 450-51, 489 A.2d at 1005.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***21]**

Because appellee established a prima facie case that her discharge was discriminatory and because the employer failed to advance any "legitimate, non-discriminatory" reasons for her discharge (i.e., the employer failed to advance any non-discriminatory reasons which the trier of fact, the HRC, found worthy of belief), appellee has sustained her burden of persuasion under the *McDonnell Douglas/Burdine/Aikens* standards. Those standards were summarized and clarified by the United States Supreme Court in *Aikens*:

> **[*138]** By establishing a prima facie case, the plaintiff in a Title VII action creates a rebuttable "presumption that the employer unlawfully discriminated against" him . . . To rebut this presumption, "the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." . . . In other words, the defendant must "produce evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." . . .
>
> But when the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering **[***22]** evidence of the reason for the plaintiff's **[**323]** rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption "drops from the case," . . . and "the factual inquiry proceeds to a new level of specificity." . . .
>
> The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." . . . As we stated in *Burdine: "The plaintiff retains the burden of persuasion. [H]e may succeed in this either directly by persuading the court that a*

> *discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.*" . . .

460 U.S. at 713-16, 103 S.Ct. at 1480-82 (citations omitted).

Here, the appellee's burden of persuasion was met by evidence which established a prima facie case of discrimination and which raised an inference that "a discriminatory motive more likely motivated the employer," n3 and by "indirectly **[*139]** showing that the employer's proffered explanation [was] unworthy of credence."

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 The majority seems to believe that, simply because the "presumption drops from the case" when an employer offers "legitimate, non-discriminatory reasons" for its actions, the mere articulation of non-discriminatory reasons (even if not believed) nullifies any *inference* of discrimination that could be raised by the evidence offered to demonstrate a prima facie case. It seems clear that, even though a complainant may not be entitled to rely on a "presumption" of discrimination once an employer advances *legitimate*, non-discriminatory reasons, nevertheless the evidence which complainant has offered to support a prima facie case may still support an *inference* of discrimination to be weighed along with all of the evidence.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***23]**

Despite substantial evidence on the record to support the HRC's determination that appellee's discharge was discriminatory, the majority vacates the Commonwealth Court's affirmance because of perceived "flaws" in the application of the *McDonnell Douglas/Burdine/Aikens* standards by these tribunals. It is true that the HRC's articulation of these standards was less than exact and left something to be desired. As the Commonwealth Court observed, that articulation came "dangerously close to shifting the ultimate burden of persuading the trier of fact that the employer's motives were *not* discriminatory upon the employer." 88 Pa.Comwlth. at 447, n. 3, 489 at 1003. n4 However, as the Commonwealth Court recognized, this erroneous articulation of the standards amounted to harmless error under the circumstances, in light of the HRC's explicit rejection of the employer's purported non-discriminatory explanations for appellee's discharge as not worthy of belief.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 This "danger" arose from the HRC's eighth conclusion of law, which reads: "Respondent has failed to demonstrate that its conduct in terminating Complainant did not violate the Act. Its explanations for the termination were pretextual."

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[***24]**

The majority formulates the ultimate issue regarding the burden of persuasion as follows:

> Has the plaintiff proven discrimination by a preponderance of the evidence? Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, *the trier of fact must then "decide which*

> *party's explanation of the employer's motivation it believes."* Aikens, 460 U.S. at 716, 103 S.Ct. at 1482.

Majority op. at 131. It is clear that the HRC, the trier of fact, has done exactly that, as it decided to believe the appellee's explanation of the employer's actions and to disbelieve the employer's purported non-discriminatory explanations, finding them pretextual. I reiterate that, as the **[*140]** United States Supreme Court stated in *Aikens*, the burden of persuasion may be met by the discrimination complainant by "indirectly showing that the employer's proferred explanation is unworthy of credence," as was done here. On this basis, I would affirm the Commonwealth Court's affirmance of the HRC's determination that appellant's discharge of appellee was discriminatory, even though **[***25]** the HRC's formulation of **[**324]** the evidentiary standards governing these cases was in error.

The majority also faults the Commonwealth Court's articulation of the governing standards, specifically that court's statement that the employer's "failure to articulate a *legitimate* non-discriminatory motive for discharging Complainant obviated the need for Complainant to proceed with the ultimate burden of proving the intent to discriminate against her." Majority op. at 134, citing Commonwealth Court opinion at 88 Pa.Comwlth. at 451-52, 489 A.2d at 1006 (emphasis in Commonwealth Court opinion). From this statement, the majority concludes:

> The court's emphasis on the word "legitimate", coupled with its review of the Commission's findings that the evidence failed to disprove discrimination, betrays a hidden understanding that the probative value of the employer's explanatory evidence is to be independently weighed; if it is found to be somehow lacking, the explanation may be disregarded as "not legitimate", thus allowing the presumption arising from the prima facie case to stand as the only proof of the ultimate issue. As we have previously explained, this was error.

[*26]**

Majority op. at 134.

The majority's concerns that the Commonwealth Court applied some "hidden understanding" of the party's respective burdens of production of evidence and of persuasion are unfounded. First, as the majority acknowledges, the "offending" passage is evaluated out of its context, which context was the rebuttal of appellant's argument that appellee had proven her case solely on certain hearsay evidence. Second, and more important, the Commonwealth Court explicitly **[*141]** and correctly demonstrated its understanding of the proper analysis to be applied in employment discrimination cases when it stated earlier in its opinion:

> First, as stated above, Complainant has the burden of proving by the preponderance of the evidence a *prima facie* case of discrimination. The essential elements of Complainant's *prima facie* case of discrimination on the basis of sex are that (1) she is a member of a protected class (female), (2) that she was hired for a job for which she was qualified, (3) that she was discharged, and (4) that she was replaced with one or more males with equal or lesser qualifications.
>
> If the Complainant, succeeds in proving the *prima facie* **[***27]** case, there is a rebuttable

> presumption of sex discrimination, and the burden shifts to the defendant to articulate a legitimate non-discriminatory reason for the employee's discharge. If the defendant succeeds in rebutting the presumption of discrimination, it is the Complainant's obligation to prove by a preponderance of the evidence that the reasons offered by the defendant were pretextual. *The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the Complainant is always the Complainant's*.

88 Pa.Comwlth. at 448-49, 489 A.2d at 1004 (emphasis added).

Finally, it seems to me that the majority improperly invades the province of the trier of fact and substitutes *its* evaluation of the credibility of the evidence in stating:

> If the allocation of proof analysis is properly understood, *the foregoing* [reasons for discharge proferred by the employer] *must be considered sufficient evidence* of a "legitimate, non-discriminatory reason" for [appellee's] dismissal to meet [the employer's] burden of production. Whether or not the evidence is ultimately deemed credible, and whether or not it ultimately withstands **[***28]** the weighing of all the evidence, it is indisputably sufficient **[*142]** to raise a question of fact as to whether the employer intentionally discriminated against the employee.

Majority op. at 133.

The employer's evidence in this case was *ultimately deemed incredible* by the HRC. The HRC, therefore, determined that such evidence was entitled to little or no weight, and the question of fact was *in fact resolved against the employer*. Simply because the employer is able to espouse some neutral explanation for an adverse employment **[**325]** decision does not automatically elevate that explanation to a "legitimate, non-discriminatory reason."

For the foregoing reasons, I would affirm the Commonwealth Court order affirming the order and award of the Pennsylvania Human Relations Commission.

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MEMORANDUM

TO: Charles F. Morrison, Director

FROM: Janice Burris
Clerk-Stenographer II

DATE: January 4, 2007

SUBJ: INTAKE REPORT - Fourth Quarter, 2006

Statistics for Fourth Quarter . . . . . Page 1

Bases of Discrimination . . . . . Page 2

Issues . . . . . Page 3

Respondent Type of Business . . . . . Page 4

CASES FILED, FOURTH QUARTER 2006

	OCT	NOV	DEC	TOTALS
COMMISSION INITIATED	0	0	0	0
EMPLOYMENT	3	5	3	11
HOUSING	1	3	0	4
PUBLIC ACCOMMODATIONS	0	0	0	0
COMMUNITY RELATIONS	1	0	1	2
CIVIL RIGHTS	0	0	0	0
TOTALS	5	8	4	17

BASES OF DISCRIMINATION: FOURTH QUARTER

I. EMPLOYMENT CASES

Basis	Number	Percentage
Race	2	18.18
Race, Sex	2	18.18
Race, Sex & Retaliation	1	9.09
Sex	1	9.09
Sex & Handicap/Disability	1	9.09
Sexual Orientation	1	9.09
National Origin	3	27.28
TOTAL	11	100.00

II. HOUSING CASES

Basis	Number	Percentage
Race	1	25.00
Handicap/Disability	2	50.00
Handicap/Disability, Retaliation	1	25.00
TOTAL	4	100.00

III. COMMUNITY RELATIONS CASES

Basis	Number	Percentage
Race	2	100.0
TOTAL	2	100.0

ISSUES OF COMPLAINTS

I. EMPLOYMENT CASES

Issue	Number	Percent
Discharge	5	45.45
Discipline	2	18.18
Failure to Represent	1	9.09
Failure to Hire	1	9.09
Other	2	18.18
TOTAL	11	100.00

II. HOUSING CASES

Issue	Number	Percent
Failure to Accommodate	2	100.0
TOTAL	2	100.0

III. COMMUNITY RELATIONS CASES

Issue	Number	Percent
Racist Flyers	1	50.0
Police draws gun on child	1	50.0
TOTAL	2	100.0

RESPONDENTS-TYPE OF BUSINESS: EMPLOYMENT CASES

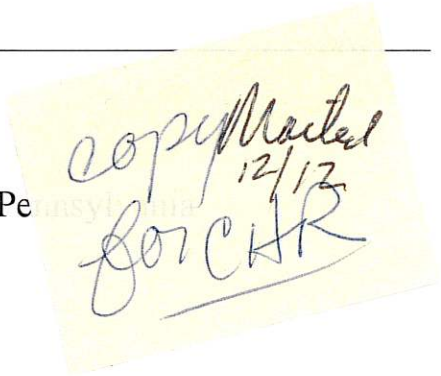
Business	Number	Percent
Hotels	3	27.28
Education	1	9.09
Union	1	9.09
Social Services	1	9.09
Nursing Homes	1	9.09
Amusement	2	18.18
Events Facility	1	9.09
Real Estate	1	9.09
TOTAL	11	100.0

Center on Race and Social Problems
School of Social Work
University of Pittsburgh

Reed Smith Spring 2007 Speaker Series

All lectures are in the School of Social Work Conference Center, 2017 Cathedral of Learning, from noon to 1.30 pm. Lunch is provided; registration is not required.

Monday, January 22
Doris Carson Williams
President, African American Chamber of Commerce of Western Pe
The Problem When Race Matters



Tuesday, February 13
Ariane Chebel d'Appollonia
Associate Senior Researcher, Center for the Study of Politics, Sciences Po Paris
Immigration and Racism in Europe: Old Prejudices, New Challenges

Wednesday, March 14
Kathryn Neckerman
Associate Director, Columbia University Institute for Social and Economic Research and Policy
The Time Tax: Race and Spatial Equity in New York City

Thursday, April 5
Elijah Anderson
Professor of the Social Sciences and Professor of Sociology, University of Pennsylvania
Poor, Young, Black, and Male: A Case for National Action?

The mission of the center is to conduct applied social science research on race, color, and ethnicity and their influence on the quality of life for all Americans. The lecture series provides and opportunity for faculty, students, and community members to engage in race-related discussions of mutual interest.

The law firm Reed Smith has generously sponsored this speaker series.

2001 Cathedral of Learning / 412-624-7382 / crsp@pitt.edu / crsp.pitt.edu

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Pursuing Insight, Harmony, and Justice

8:00 Registration and Continental Breakfast

8:30 Welcome: Dan Onorato, Chief Executive, Allegheny County
Why are county comprehensive plans essential to ensuring regional capacity for addressing equitable development?

8:40 Keynote: Professor john a. powell, Director of Ohio State University's Kirwan Institute for the Study of Race and Ethnicity
"Equitable Development: Challenges and Opportunities for Southwestern Pennsylvania"
A review of key trends of concern in the region and examples of best emerging practice around the nation.

9:10 Q & A

9:25 Economic Development and County Planning Directors Panel
Moderator – James Hassinger, Southwestern Pennsylvania Commission
Regional county leaders discuss key issues and viable solutions.

10:05 Allegheny Places Overview
Bill Robinson, Allegheny County Council
How Allegheny Places has been structured to ensure equity issues are a priority.

10:15 Report from Allegheny Places Resource Panels
*These three panels (**Economic Development, Transportation, and Equity and Diversity**) will share insights on chief equity issues identified and concrete ways to measure and address the issues through policy and practice.*

Panelists:

- Stephen Bland, Port Authority of Allegheny County
- Ruth Byrd-Smith, Allegheny County MWDBE
- Dan Cessna, PENNDOT
- Lynn DeLorenzo, Natl. Assoc. of Industrial & Office Properties
- Thomas Donatelli, Allegheny County Public Works
- Jane Downing, The Pittsburgh Foundation
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- Richard Taylor, Macedonia Development Corporation

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Suggestions for further developing an equity overlay for evaluating plans and investments.

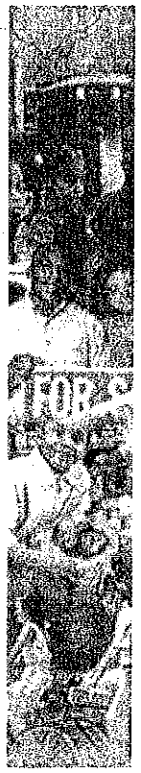
11:20 Equitable Development Opportunity
Cecile Springer, Springer Associates

11:30 Adjourn

Professor john a. powell is an internationally recognized authority in the areas of civil rights, civil liberties, and issues relating to race, ethnicity, poverty and the law. He is the executive director of the Kirwan Institute for the Study of Race and Ethnicity at Ohio State University. He also holds the Williams Chair in Civil Rights and Civil Liberties at the Moritz College of Law. He has written extensively on a number of issues including racial justice and regionalism, concentrated poverty and urban sprawl, the link between housing and school segregation, opportunity-based housing, gentrification, disparities in the criminal justice system, voting rights, affirmative action in the United States, South Africa and Brazil, racial and ethnic identity and current demographic trends.

Previously, Professor powell founded and directed the Institute on Race and Poverty at the University of Minnesota. He also served as the National Legal Director of the American Civil Liberties Union, where he was instrumental in developing educational adequacy theory. Prior to that, he served as the Director of Legal Services of Greater Miami.

Professor powell has taught at Columbia University School of Law, Harvard Law School, University of Miami School of Law, American University, the University of San Francisco School of Law, and the University of Minnesota Law School.



Register Today!

CHRs! For Your Info!

Friday, December 15, 2006
8:30 - 11:30 am (8:00 am registration)
Twentieth Century Club
4201 Bigelow Boulevard, Oakland
No fee to attend

Featuring:

Professor john a. powell
Director, Kirwan Institute for the Study of Race and Ethnicity, Ohio State University

Economic Development and County Planning Directors Panel
Dennis Davin, Allegheny County
Lynn Heckman, Allegheny County
Frank Mancini, Beaver County
David P. Johnston, Butler County
Amy McKinney, Lawrence County

County Comprehensive Planning for Equitable Development in Southwestern Pennsylvania

December 15, 2006

The 3rd Annual Regional Equitable Development Summit will feature Professor john a. powell, Director of Ohio State University's Kirwan Institute for the Study of Race and Ethnicity, speaking on equitable development in the Southwestern PA region and best emerging practices around the nation.

A formal public input session of Allegheny Places (Allegheny County's comprehensive land use plan that is now being developed), the Summit will explore equity in regional development by addressing the challenges and opportunities inherent in the quest to ensure individuals and families in all communities can participate and benefit from economic growth and activity.

With a purview of strategies among counties in the region, the Summit will examine how investments and land use planning can substantially reduce disparities in services and in social and economic conditions. Come learn how policies regarding investments in jobs, businesses, transportation access, and housing can be crafted to be truly inclusive of low income and communities of color.

The Summit will feature panels consisting of economic development and county planning directors from around the region, along with representatives from the Allegheny Places resource panels on Economic Development, Transportation, and Equity & Diversity. At the Summit, the public is invited to provide input on draft elements of the Allegheny County Comprehensive Plan and consider opportunities to advance the policy and practice of equitable development in our region.

Sustainable Pittsburgh
425 Sixth Ave. Suite 1335
Pittsburgh, PA 15219

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Presented by:

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University of Pittsburgh Johnson Institute for Responsible Leadership

The Greater Pittsburgh Diversity Festival

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The Twentieth Century Club is fully accessible and can be reached by the following bus lines:
54C, 61(A,B,C,D,F), 71(A,C,D), 500, 501, 59U, 67(A,F), 100
Parking is available beneath Soldiers & Sailors Memorial.

Printed with soy-based inks on recycled paper

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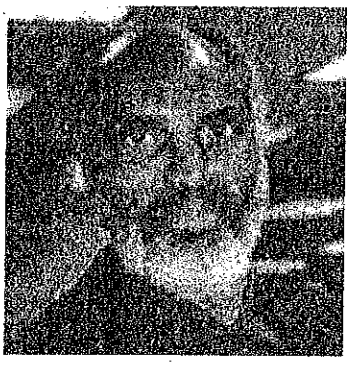

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