

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

Kimberly Byrd,
Complainant

V.

Eileen Sacco,
Respondent

:
:
:
: PHRC NO:200205077
:
:
:

STIPULATIONS OF FACT

The following facts are admitted by all parties to the above captioned case and no further proof thereof shall be required:

1. The Complainant herein is Kimberly Byrd.
2. The Respondent herein is Eileen Sacco.
3. ~~On or about November 19, 2002, Complainant timely filed a verified complaint against Respondent, with the Pennsylvania Human Relations Commission (hereinafter Commission).~~
4. The Complaint was served upon Respondent on ~~December 20, 2002.~~ *1/21/03* *WLC*
5. Respondent, on March ~~8,~~ 2003, answered the Complaint.
6. Following an investigation, a probable cause finding was approved by the legal division on May 1, 2003, and Respondent was notified of the finding.

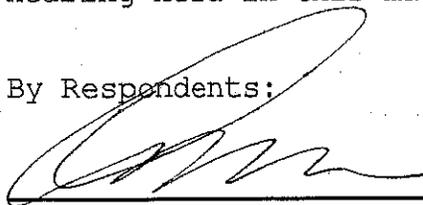
7. Attempts at conciliation have been attempted but have so far failed to resolve the matter.

8. The case was approved for Public Hearing by the Executive Director and was placed on the Public Hearing Docket by the Commission at its November 24, 2003 meeting.

9. At all times relevant to this complaint, Complainant Byrd and Respondent Sacco were next door neighbors, living at 15034 Poquessing Creek Lane, Philadelphia PA 19116 and 15036 Poquessing Creek Lane, respectively.

These Stipulations of Fact, together with the Witness List submitted by each party will become a part of the official record in this case and will be incorporated into the transcript prepared during the course of any subsequent Public Hearing held in this matter.

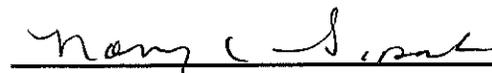
By Respondents:



062204

Andrew G. Gay, Esquire
1731 Spring Garden Street
Philadelphia, PA 19130

By: Pennsylvania Human Relations Commission:



062204

Nancy Gippert, Esquire
Assistant Chief counsel
Housing Division

Date

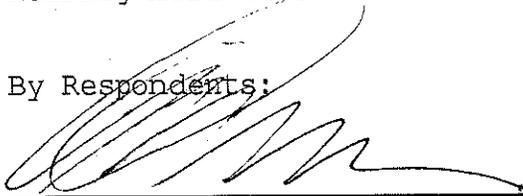
7. Attempts at conciliation have been attempted but have so far failed to resolve the matter.

8. The case was approved for Public Hearing by the Executive Director and was placed on the Public Hearing Docket by the Commission at its February 22, 2004 meeting.

9. At all times relevant to this complaint, Complainant Byrd and Respondent Sacco were next door neighbors, living at 15034 Poquessing Creek Lane, Philadelphia PA 19116 and 15036 Poquessing Creek Lane, respectively.

These Stipulations of Fact, together with the Witness List submitted by each party will become a part of the official record in this case and will be incorporated into the transcript prepared during the course of any subsequent Public Hearing held in this matter.

By Respondents:

 06/22/04

Andrew G. Gay, Esquire
1731 Spring Garden Street
Philadelphia, PA 19130

By: Pennsylvania Human Relations Commission:

 6/22/04

Nancy Gippert, Esquire
Assistant Chief counsel
Housing Division

Date

FINDINGS OF FACT*

1. The Complainant in these consolidated cases is Kimberly Byrd, (hereinafter "Byrd"), a police Sergeant employed by the City of Philadelphia, Police Department. (N.T. 12, 74)
2. The Respondent in PHRC Case No. 200205077 is Eileen Sacco.
3. The Respondents in PHRC Case No. 200302350 are Eileen Sacco and Edward Sacco.
4. Byrd's race is African American and Eileen and Edward Sacco are White.
5. In January 1999, Byrd and her daughter moved to 15034 Poquessing Creek Lane, Philadelphia, Pennsylvania. (N.T. 12-13, 147)
6. Byrd moved to the home on Poquessing Creek Lane because she found the neighborhood to be peaceful and quiet and there seemed to be a lot of children her daughter's age. (N.T. 13-14)
7. Eileen and Edward Sacco and their two children have lived at 15036 Poquessing Creek Lane since 1991. (N.T. 134, 136, 146-147)
8. Byrd's home and the Sacco home adjoin as part of a single building. (N.T. 16)
9. The Byrd and Sacco backyards are divided by a fence. (N.T. 16)
10. The front doors of the Byrd and Sacco homes appear to be less than 15 feet apart. (J.E. 1)
11. There is a small lawn area in front of both the Byrd and the Sacco residences. (J.E. 1)

* The foregoing "Stipulations of Fact" in both PHRC Case No. 200205077 and 200302350 hereby incorporated herein as if fully set forth. To the extent that the Opinion that follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T. Notes of Testimony
C.E. Complainant's Exhibit
R.E. Respondent Exhibit
J.E. Joint Exhibit

12. From the time Byrd moved in until November 17, 2001, approximately 2 years and 10 months, Byrd and the Sacco's had not met. (N.T. 89-90)
13. For the period between January 1999 and November 17, 2001, Byrd liked living at 15034 Poquessing Creek Lane and had experienced no problems in the neighborhood. (N.T. 16-17)
14. When passing, Edward Sacco would say hello to Byrd but that was the extent of the interaction between Byrd and the Saccos. (N.T. 90, 148)
15. On Saturday, November 17, 2001, Byrd was in her front yard area raking leaves. (N.T. 17)
16. Eileen Sacco's Sister, Denise Sees, had arrived at the Sacco residence to pick up Eileen Sacco. (N.T. 208-209)
17. When Eileen Sacco opened her front door to go out, the Sacco's dog, Buster, ran out and went into the leaves Byrd had been raking. (N.T. 17, 90, 209, 210, 212)
18. Normally, the Sacco's dog goes into the Sacco's backyard but occasionally he gets out the front door. (N.T. 140)
19. Byrd asked the Sacco's son, Eddie, to get the dog. (N.T. 17, 210)
20. A confrontation between Byrd and Eileen Sacco ensued. (N.T. 210)
21. On Sunday, November 18, 2001, Byrd was again in her front yard raking leaves. (N.T. 18)
22. Eddie was outside playing football and went onto Byrd's front yard. (N.T. 18)
23. When he did, Byrd asked Eddie not to play in her yard. (N.T. 18)
24. Eileen Sacco informed Byrd not to talk to Eddie and that she was tired of Byrd saying things to Eddie and that if Byrd has a problem with her son, Byrd should come speak with her. (N.T. 18)
25. Eileen Sacco testified that for several months, Byrd had threatened to call the police if Eddie's ball went in her yard. (N.T. 135)

26. At some point in the confrontation between Byrd and Eileen Sacco, Byrd called Eileen Sacco a "simple bitch." (N.T. 19, 179)
27. Eileen Sacco responded with racial epithets. (N.T. 19)
28. Byrd called the police and her office to report the incident. (N.T. 19)
29. Byrd is one of four officers working in the Philadelphia Police Commissioner's office. Byrd's position there was Office Supervisor/Driver. (N.T. 183)
30. The Police Commissioner is Sylvester Johnson, (hereinafter "Commissioner Johnson"). (N.T. 183)
31. When Byrd called her office she spoke with Lieutenant McCann who in turn called Commissioner Johnson. (N.T.19)
32. Three police cars and a supervisor arrived on the scene. (N.T. 149, 189)
33. The police on the scene told Byrd to put up a fence. (N.T. 20)
34. Commissioner Johnson also personally responded. (N.T. 19, 186)
35. Upon his arrival on the scene, Commissioner Johnson sent the 3 police cars away and went into the Sacco's home to speak with them. (N.T. 19, 21, 151, 184)
36. While speaking with the Saccos, Commissioner Johnson told the Saccos that he would resolve the situation and then exchanged telephone numbers with Edward Sacco. (N.T. 158, 188)
37. After speaking with the Saccos, Commissioner Johnson spoke with Byrd telling her, "[t]hey'll stay away from you. You stay away from them." (N.T. 21)
38. Commissioner Johnson instructed Byrd that she would need his permission before she had any further communication with the Saccos. (N.T. 23)
39. Byrd also called the Philadelphia Police Conflict Prevention Resolution Unit, a unit that specifically handles alleged racial bias incidents. (N.T. 39)
40. The CPR Unit responded and conducted interviews. (N.T. 39)

41. Byrd testified that the CPR Unit did not resolve the situation. (N.T. 39)
42. Within days, Byrd obtained a permit to install a fence in the front yard. (N.T. 21)
43. Byrd asked her friend of 20 years, Havrey Smallwood to help her install a fence. (N.T. 22, 104, 108-109)
44. The installation of the fence began on Friday November 23, 2001. (N.T. 21)
45. A neighbor, Milton Watson, observed Byrd and Smallwood attempting to dig post holes and offered to assist. (N.T. 22, 105, 113)
46. In the process of installing the fence, Byrd noted that there was a bush that was partly on her property and partly on the Sacco's property. (N.T. 23-24)
47. On Friday, November 23, 2001, Byrd called Commissioner Johnson seeking his permission to speak with the Saccos about the bush. (N.T. 23, 156)
48. Commissioner Johnson gave his permission to Byrd to ask the Saccos about cutting the bush. (N.T. 23)
49. On Friday, November 23, 2001, Commissioner Johnson called Edward Sacco at work regarding the bush issue. (N.T. 152-153)
50. Meanwhile, Mr. Watson knocked on the Sacco's door and Eileen Sacco answered the door. (N.T. 152)
51. Watson upset Eileen Sacco when he informed her that he intended to rip the bush out. (N.T. 152)
52. Eileen Sacco informed Watson that she did not want him to remove the bush but later agreed that the portion of the bush that was on Byrd's property could be removed. (N.T. 137)
53. On Saturday, November 24, 2001, after seeing Eileen Sacco leave her house, Byrd went to the Sacco's door to speak with Edward Sacco about the bush. (N.T. 23, 156)

54. While Edward Sacco was telling Byrd that he did not have a problem with her putting up a fence, Eileen Sacco returned home. (N.T. 23, 105)
55. Using racial epithets, Eileen Sacco yelled at Byrd to stay away from her husband. (N.T. 24)
56. Eileen Sacco became angry with Edward Sacco for speaking with Byrd and began arguing with him as they went into their home. (N.T. 24, 105)
57. A short while later, Eileen Sacco came out and in a raised voice used racial epithets towards Byrd calling her names like black baboon, black bitch N....., and psycho bitch. (N.T. 24, 105, 107, 113, 114, 115, 133)
58. On January 24, 2002, Edward Sacco spoke with Byrd expressing an interest in resolving the ongoing dispute between Byrd and Eileen Sacco. (N.T. 26)
59. Edward Sacco accused Byrd of having called Eileen Sacco a "white bitch". (N.T. 26)
60. Byrd denied that she had called Eileen Sacco that name. (N.T. 26)
61. Subsequently, things were peaceful for approximately one month until on February 2, 2002, Byrd observed the Sacco's dog off leash, urinating and defecating in her front yard. (N.T. 27)
62. Byrd called the police and asked that a copy of the dog leash ordinance be sent to the Saccos. (N.T. 27)
63. On March 22, 2002, at 5:45 a.m., while leaving for work, Byrd found a note on her front door that read, "Move piece of S..." (N.T. 31)
64. On November 9, 2002, the Police Department's Internal Affairs Division informed Byrd that Edward Sacco had filed an internal affairs complaint against Byrd alleging that Byrd had been harassing his family. (N.T. 41)
65. Edward Sacco testified that he gave Commissioner Johnson a chance to resolve the dispute between Byrd and Eileen Sacco and feeling that the matter had not been resolved, he filed an internal affairs complaint. (N.T. 157, 170)

64. Upon the advise of Commissioner Johnson, on November 19, 2002, Byrd verified a PHRC complaint in which she alleged race-based harassment. (N.T. 39)
65. In May 2003, Byrd installed surveillance equipment in the front and rear of her property. (C.E. 1)
66. In September 2003, and later in February 2004, Byrd upgraded the surveillance equipment she had installed. (N.T. 36; C.E. 1)
68. On Sunday March 23, 2003, Sergeant Roxanne Maddrey, also with the Philadelphia Police Department, visited Byrd's home. (N.T. 44, 194, 195; R.E. 1)
69. On that day, the Sacco's son, Eddie, was in his backyard playing ball. (N.T. 44, 159)
70. Byrd called the police when she noticed the ball that Eddie was playing with had come over the fence into Byrd's yard. (N.T. 160)
71. Sometime earlier, while the Sacco's were on vacation, Byrd removed the backyard fence that the Saccos had built in 1991 and replaced it with another fence. (N.T. 160)
72. Three police cars arrived and returned Eddie's ball to the Saccos. (N.T. 160)
73. Subsequently, Eddie was once again in his backyard and Byrd noticed that his ball was hitting the fence so she again called the police. (N.T. 161)
74. When the police arrived the second time, Edward Sacco answered the door and asked the officers for permission to tape their conversation. (N.T. 162, 195)
75. The officers denied Edward Sacco permission to tape their discussion. (N.T. 162, 195)
76. Edward Sacco asked the officers where his son was supposed to play and whether the police would leave his son alone if he were selling drugs. (N.T. 162-163)
77. Edward Sacco then used expletives directed at the officers and he was arrested and charged with disorderly conduct. (N.T. 203; R.E. 1)
78. The District Attorney elected not to prosecute the disorderly conduct charge against Edward Sacco. (N.T. 164)

79. Eileen Sacco became extremely upset at the arrest of her husband and cursed. (R.E. 1)
80. On April 26, 2003, Byrd's surveillance camera located on the front of her house taped several youths playing hockey in the street. (N.T. 56; C.E. 2, and 3)
81. One of the children came near Byrd's personal car. (C.E. 2 and 3)
82. Byrd filed a police report suggesting that the Sacco's son had damaged her car. (N.T. 50-51)
83. The Sacco's son was not at home at the time of the purported damage to Byrd's car. (N.T. 166)
84. Although Byrd alleged her car had been damaged on April 26, 2003, she did not obtain an estimate until June 30, 2003. (N.T. 96; C.E. 4)
85. The estimate Byrd submitted into evidence lists numerous repair items that have nothing to do with the location where a child can be seen near her car. (C.E. 4)
86. On October 10, 2003, Byrd filed a second PHRC complaint dated October 8, 2003, alleging that Edward and Eileen Sacco had retaliated against her because she had filed her earlier PHRC complaint. (N.T. 48)
87. Byrd's second complaint generally alleged the following: that on March 24, 2003 Edward Sacco filed a second Internal Affairs complaint against Byrd; that on March 27, 2003, Eileen Sacco told the Police Advisory Commission that Byrd was having a relationship with Commissioner Johnson; that on April 3, 2003, the Saccos contacted the press; and that on July 30, 2003, Edward Sacco filed another complaint with Internal Affairs alleging that Byrd had made false statements about purported damages to her car and that a police car had been in front of his house for 72 hours in late March 2003. (N.T. 46-47)
88. The Internal Affairs complaint filed by Edward Sacco on March 24, 2003 was directed at both Byrd's actions and the officers who arrested him on March 23, 2003. (N.T. 170)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and the subject matter of these consolidated cases.
2. The procedural prerequisites to a Public Hearing have all been met.
3. Both the Complainant and the Respondents are persons within the meaning of the PHRA.
4. Section 12(a) of the PHRA requires that the provisions of the PHRA be construed liberally for the accomplishment of the purposes of the PHRA.
5. When one neighbor disrupts the quiet enjoyment of another neighbor by reason of race, the disruptive neighbor violates Section 5(h)(3) of the PHRA by denying the harassed neighbor the privilege of living peacefully in their home.
6. Section 9(h) of the PHRA requires that a complaint must be filed within one hundred eighty days after the alleged act of discrimination.
7. To establish that a harassment claim falls within the continuing violation theory, a Complainant must do two things. First, the Complainant must demonstrate that at least one act occurred within the filing period. Next, the Complainant must establish that the harassment is more than the occurrence of isolated or sporadic acts of intentional discrimination.
8. Byrd failed to establish by a preponderance of the evidence either that Eileen Sacco's harassment was a persistent on-going pattern, or that at least one act occurred within the 180 day filing period.
9. Byrd's harassment claim was not timely filed.

10. To establish a *prima facie* case of retaliation a Complainant must show:
 - (a) That the Complainant engaged in protected activity;
 - (b) That the Respondent was aware of the protected activity;
 - (c) That subsequent to the protected activity, the Complainant was subjected to an adverse action; and
 - (d) That there is a casual connection between the protected activity and the adverse action.

11. Byrd failed to establish that Edward Sacco's motivation for filing Internal Affairs complaints was retaliatory.

OPINION

These consolidated cases arise on two complaints filed by Kimberly Byrd, (hereinafter "Byrd"). Byrd's initial complaint at PHRC Case No. 200205077 was filed against Eileen Sacco, and Byrd's subsequent complaint at PHRC Case No. 200302350 was filed against Eileen & Edward Sacco.

In her complaint at PHRC Case No. 200205077, Byrd generally alleges that Eileen Sacco harassed her because of her race, African American. This complaint alleges a violation of Section 5(h)(3) of the PHRA. In the complaint at PHRC Case No. 200302350, Byrd generally alleges that Eileen and Edward Sacco retaliated against her because she had filed the earlier PHRC complaint. This complaint alleges a violation of Section 5(d) of the PHRA.

The PHRC investigated both complaints and, at the conclusion of the investigations, informed Eileen and Edward Sacco that probable cause existed to credit Byrd's allegations. Thereafter, the PHRC attempted to eliminate the alleged unlawful practices through conference, conciliation, and persuasion, but such efforts proved unsuccessful. Subsequently, the PHRC notified the parties that it had approved a public hearing on both cases.

The consolidated public hearing was held on June 22, 2004, in Philadelphia, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. PHRC Assistant Chief Counsel Nancy Gippert oversaw the Commission's interest in the complaint. Andrew G. Gay, Esquire, represented Eileen and Edward Sacco. Following the public hearing, the parties were afforded the opportunity to submit post-hearing briefs. Subsequently, post-hearing briefs were received on August 17, 2004.

In her complaint at PHRC Case No. 200205077, verified on November 19, 2002, Byrd generally alleges race-based harassment in violation of Section 5(h) of the PHRA. Specifically, Byrd's complaint alleges that on November 18, 2001, Eileen Sacco screamed racial epithets at her and that over the next several months, Eileen Sacco and her children continued to yell racial slurs

at her. Further, Byrd's complaint submits that Byrd believes that on October 10, 2002, the Sacco's son intentionally damaged her fence and that on October 20, 2002, Eileen Sacco unleashed her dog and allowed it to come onto Byrd's property and defecate. Byrd alleged that Eileen Sacco had also unleashed her dog and allowed it to go onto Byrd's property several other times in 2002.

Responding to Byrd's Section 5(h) allegation, the Saccos' post-hearing brief generally argues that the conduct allegedly committed by Eileen Sacco is not proscribed by the PHRA. More specifically, the Saccos' post-hearing brief quotes portions of Section 5(h) of the PHRA and submits that Eileen Sacco is neither a seller, nor lender of a housing accommodation, nor one who finances or furnishes facilities, services or privileges in connection with the ownership, occupancy or use of any housing accommodation. The PHRC post-hearing brief on behalf of the complaint asserts that the alleged conduct is covered by two sub-sections of Section 5(h). The post-hearing brief on behalf of the complaint argues that sections 5(h)(1) and 5(h)(3) are implicated by Byrd's claim. Accordingly, the first fundamental question that must be answered is whether the harassment alleged by Byrd comes under the rubric of the PHRA.

Section 5(h)(1) states in pertinent part:

It shall be an unlawful discriminatory practice...[f]or any person to...[r]efuse to sell, lease, finance or otherwise to deny or withhold any housing accommodation...from any person because of the race...of any person...

Section 5(h)(3) states in pertinent part:

It shall be an unlawful discriminatory practice...[f]or any person to...[d]iscriminate against any person in the terms or conditions of selling or leasing any housing accommodation...or in furnishing facilities, services or privileges in connection with the ownership, occupancy or use of any housing accommodation...because of the race...of any person...

Supplementing the PHRA provisions, there are regulations that more specifically define the intent of the statutory sections. In this case, 16 Pa. Code §45.11(a)(2) states in pertinent part:

Coercion, threats and intimidation. It is an unlawful discriminatory activity to...[t]hreaten, intimidate or interfere with persons in their enjoyment of a housing accommodation...because of the protected class of the person...

When, as is the case here, one neighbor alleges that the quiet enjoyment of their housing accommodation has been disrupted by another neighbor's harassment, Section 5(h)(3) of the PHRA is implicated. While Byrd did not allege that Eileen Sacco discriminated against Byrd in the terms or conditions of selling or leasing any housing accommodation, reading this provision liberally, as mandated by Section 12(a) of the PHRA, Byrd has alleged that Eileen Sacco did discriminate against her in furnishing privileges in connection with Byrd's occupancy of a housing accommodation. The privilege allegedly denied is the quiet enjoyment of Byrd simply living in her home in peace. Section 5(h) as a whole is part of a broad statutory plan that seeks to eliminate all traces of discrimination in the Commonwealth. The PHRA, as a whole, in seeking to protect against alleged discriminatory conduct should be given generous construction. With this in mind, we find that an alleged interference with a neighbor's quiet enjoyment alleges a denial of the furnishing of a privilege in connection with occupancy of a housing accommodation.

The post-hearing brief on behalf of the complaint submits that section 5(h)(1) also applies, however, Byrd has not alleged that Eileen Sacco either denied or withheld a housing accommodation from Byrd. Clearly, there also has been no allegation of a denial to sell, lease or finance a housing accommodation. The thrust of Section 5(h)(1) addresses discrimination on the part of housing providers. Under the allegations of Byrd's complaint, the only portion of the PHRA that we find implicated is language found in section 5(h)(3).

Permeating this case is another fundamental issue. Irreconcilable conflict best describes much of the relevant testimony provided in this case. Accordingly, a determination of credibility of the witnesses must be made.

Judgment of credibility is a responsibility entrusted to the trier of fact. Carr v. Com., State Board of Pharmacy, 49 Pa. Comwlth. Ct. 330, 409 A.2d 941 (1980); Boughter v. Com., Dept. of Public Welfare, 55 Pa. Comwlth. Ct. 521, 423 A.2d 806 (1980); PHRC v. Hempfield Township, 23 Pa. Comwlth. Ct. 351, 352 A.2d 218 (1976). In assessing credibility, consideration was given to

each witness' motive and state of mind, strength of memory and demeanor while on the witness stand. Consideration was also given to whether a witness' testimony was contradicted, and the bias, prejudice, and interest, if any, of each witness. Recognition was also given to the premise that where resolution of a matter rests with a weighing and balancing of conflicting evidence, absolute certainty is rarely achieved.

Beginning with the parties to these consolidated cases, sadly, no party's testimony was either wholly convincing or entirely credible. For example, Eileen Sacco testified that she had only one confrontation with Byrd that occurred on November 18, 2001. (N.T. 135, 136, 138) That testimony was contradicted by credible portions of Havrey Smallwood's (hereinafter "Smallwood") testimony, and the credible testimony of Milton Watson (hereinafter "Watson"). The record considered as a whole reveals confrontations between Eileen Sacco and Byrd on November 18, 2001, and again on November 24, 2001. On at least two occasions, Eileen Sacco and Byrd exchanged words. Further, Eileen Sacco testified that she never uttered a racial slur at Byrd (N.T. 136, 138, 145). Once again, credible portions of the testimony of Watson and Smallwood contradicted Eileen Sacco's testimony. Both of these witnesses testified that while they assisted Byrd to build a fence in front of her home on November 23 and 24, 2001, each recalled Eileen Sacco using the "N" word and directing other expletives towards Byrd.

Regarding the credibility of Edward Sacco, one instance of less than credible testimony was noted. He testified that on March 23, 2003, the day of his arrest, he had not been disrespectful to the officers who had come to his door to return his son's ball. (N.T. 163) Sergeant Roxanne Maddrey (hereinafter "Maddrey") provided a statement to internal affairs on April 3, 2003 indicating that, indeed, Edward Sacco loudly swore at the officers just before his arrest. Maddrey's statement in this regard was found to more credible.

When the testimony offered by Byrd is carefully reviewed, numerous instances of less than credible testimony are found. For instance, Byrd initially testified that the fence she installed in

front of her house was six feet tall. (N.T. 16) She later admitted that the fence is only three feet tall and that perhaps she had her measurements wrong. (N.T. 88) Byrd further testified that the reason she wanted to install a fence in her front yard was in an effort to avoid confrontations with the Saccos. (N.T. 15) First, Smallwood testified that Byrd wanted to put up a fence because of the Sacco's dog. (N.T. 108) Just looking at the fence reveals that the way the fence was built would in no way avoid personal confrontations with the Saccos. The evidence shows that the Byrd and Sacco front doors appear to be less than 15 feet apart and that the fence was built at a height that did nothing to curtail contact. Additionally, while Byrd said that she wanted to avoid contact with both Eileen and Edward Sacco, clearly, the only person she wanted to avoid was Eileen Sacco. She had no reason to attempt to avoid contact with Edward Sacco, in fact, she initiated contact with him on an occasion when she knew Eileen Sacco was not home.

On another matter, Byrd's testimony suggested that she called the police on November 18, 2001 after Eileen Sacco ran up and down the street yelling racial slurs about Byrd and then threatening Byrd that she would get her family after Byrd. (N.T. 19) Interestingly, Byrd's own testimony tends to contradict why she called the police on November 18, 2001. Byrd testified that as the police were leaving the area, they told her to put up a fence. This suggests that the main reason she had called the police was to complain about the dog and Sacco's son on her front lawn. Further, despite hearing the testimony of several neighbors, no one corroborated Byrd's version of Eileen Sacco running up and down the street yelling racial slurs.

Byrd's overall testimony submitted that nearly everyday after November 18, 2001, Eileen Sacco either called her a name or did something to her property. (N.T.15, 24-25) It appeared that Byrd left for work at approximately 5:45 a.m. (N.T. 31), yet she offered that every morning when she would be leaving for work, Eileen Sacco would come out with her children and utter racial slurs. (N.T. 25) It is highly unlikely that Eileen Sacco and her children left their home before 6:00 a.m. each day. On this subject, it is worthy to note that the Philadelphia Police Department's

Conflict Prevention and Resolution Unit had been called early in the dispute. (N.T. 39) The CPR unit is a specialized unit that responds to racial incidents in an effort to reduce community tension. In this case, the CPR unit did respond and conducted interviews however no resolution appears to have been facilitated by the CPR unit. (N.T. 39) Added to this circumstance, Police Commissioner Johnson's testimony serves to further illustrate that perhaps after the November 18, 2001 incident of an exchange of insults between Byrd and Eileen Sacco and Eileen Sacco continuing with her insulting remarks on November 24, 2001, there were no further racial slurs uttered by Eileen Sacco to Byrd. Although Commissioner Johnson testified that he continued to speak with the Saccos and also visited their home on additional occasions after November 2001, he made no mention of the circumstances surrounding his visits. Being unable to recall the nature of the visits supports the inference that his visits were over mundane situations rather than continual racial harassment by Eileen Sacco. It is much more likely that his visits were prompted by Byrd's continually calling the police over the Saccos' dog and minor damage to her fence. Had he visited the Saccos to quell continual racial harassment, he would certainly have remembered that.

Had Byrd been subjected to almost daily racial slurs, surely a charge of ethnic intimidation would have been pursued by Byrd. One would normally expect that repeated instances of one neighbor calling another neighbor racial slurs would eventually result in criminal charges of harassment and ethnic intimidation. Instead, the record in this matter reveals that on January 24, 2002, Edward Sacco went to speak with Byrd in an effort to peacefully resolve the enmity between Eileen Sacco and Byrd. Byrd herself testified that things were calm for the next month until in February when another incident happened. The "incident" that Byrd says happened is that the Sacco's dog was off his leash and urinated and defecated on her lawn. Byrd testified that she called the police and asked that a copy of the applicable dog ordinance be forwarded to the Saccos. Byrd offered that she also called the police on Thursday January 8, 2003 because someone had removed a basketball court apparatus that had been in front of her house. As it

turned out, a person named Gerald Saladino had moved Byrd's equipment. Another instance in Byrd's testimony where the police were called dealt with the Saccos' son throwing a ball in his backyard that was hitting Byrd's fence. Circumstances surrounding this instance ultimately led to Edward Sacco's arrest. Next, Byrd related that she called the police to report that her car had been damaged. Both of these instances occurred in 2003. Finally, Byrd testified that on Sunday June 13, 2004, the Saccos' dog was again loose on her property. This instance is said to have resulted in the Saccos being cited.

One has to ask, where are the instances of Byrd calling the police about the purported racial harassment that she suggests was a regular event. Further, while police reports are made for each call officers make, no such reports were offered into evidence. Had police been called to respond to alleged racial harassment situations, there certainly would have been police reports available as evidence in this case. Again, none were offered as evidence. Further, when one looks at the allegations made in Byrd's second PHRC complaint, it is glaringly obvious that Byrd made no additional harassment allegations. Also, Byrd never amended her first complaint to allege any incident after she filed her first complaint. Indeed, her first PHRC complaint fails to articulate any specifics regarding a purported ongoing situation of race-based harassment.

Byrd's entire version about the nature of her contacts with Eileen Sacco are placed into question by Byrd's own testimony about when and why she called the police. It seems that Byrd's greatest concern was not that she was constantly being called racial names, but that the Sacco's dog would get out periodically, that the Sacco's son allowed his ball to come into her yard, and that her car had been damaged while parked in front of her house.

As a police officer, Byrd would certainly know the importance of accurately documenting an incident. As she testified at the Public Hearing, Byrd continually referred to and used hand-written notes she had with her. Numerous times during her testimony, Byrd made specific reference to dates, days of the week, and even precise times of day. However, the propriety of her record-

keeping must be questioned. Days and dates about which she testified were in conflict too frequently. Chronologically, we find Byrd testifying that Thanksgiving in 2001 was on November 25. Actually, Thanksgiving was on November 22, 2001. She also testified that she got the permit to build a fence on November 22, 2001. Once again, this date was Thanksgiving. It is highly unlikely that she could have obtained a permit on Thanksgiving Day.

While witnesses are often unable to provide precise testimony regarding the date something happened, Byrd attempted to give the impression that the dates she testified to were exact. Another interesting conflict regarding testimony about a date deals with her testimony about precisely when her fence was damaged. In her complaint, Byrd alleges that her fence was damaged on October 10, 2002. When she testified, Byrd referred to her hand written notes and stated that her fence was damaged on Friday, October 10. In 2002, October 10th fell on a Thursday. In 2003, October 10th was a Friday. Byrd's attempt to bolster her testimony with seeming precision actually reflects an attempt to fabricate details.

When a Complainant testifies about an event and says it was witnessed and that witness also testifies, one would expect the witness to corroborate the details testified to. In this case, Byrd testified that on Sunday, October 13, 2002, she and Smallwood were sitting on a bench in front of her home. On that date, Byrd testified that Eileen Sacco called Byrd a racially charged and insulting name while exiting her home. However, when Smallwood testified, he did not directly corroborate Byrd's version. Smallwood testified that Eileen Sacco would "taunt" Byrd and "look at her or do things to just to get her aroused." (N.T. 107) When asked to give specific incidents, Smallwood stated that Eileen Sacco would send her kids out or allow the dog out off leash. (N.T. 107-108) Smallwood also added that Eileen Sacco once took pictures of Byrd's house. Had Eileen Sacco said the things she is accused of on October 13, 2002, Smallwood would certainly have remembered such an event. However, he did not have any recollection at all. Added to this, Byrd testified that Eileen Sacco's name calling got worse after Byrd filed her first complaint. Byrd

then related the purported October 13, 2002 incident. The fundamental problem is that Byrd's first complaint was not even signed until November 19, 2002, over a month later. Confusion is one thing, intentional fabrication and distortion is another.

Perhaps individually, these discrepancies may seem innocent. However, collectively, they show that Byrd attempted to intentionally create the picture she wanted to portray, rather than reveal the picture that actually existed. Another example of Byrd intentionally attempting to create a picture can be seen in her testimony that the Saccos' son called her a vicious racial slur. (N.T. 32-33) Byrd testified that, "on Tuesday, October 7...[she] observed the Saccos' son playing hockey...in between both of the houses because the houses are adjoined..." Byrd testified that the ball seemed to be going more onto her property. She indicated that when she asked him to keep the ball off her property, he kicked the hockey net "over to his side" of the property and called her a vicious racial slur. (Id.) Byrd's version suggests that the Saccos' son was playing in the yard immediately in front of the two connected homes. Byrd said that the court was kicked over to the Saccos' side of the property. However, playing in the front yard area between the homes would not have been possible since Byrd had put up the fence nearly two years earlier. Additionally, in 2002, October 7 fell on a Monday. It was not until 2003 that October 7 fell on a Tuesday. Once again there is a glaring discrepancy with Byrd's dates. By every appearance, Byrd's version of this instance was entirely fabricated. Not only the date and day of week were incorrect, the story about playing hockey in the grass cannot be believed.

Next we turn to issues of credibility that grow out of Byrd's installation of surveillance equipment. Byrd testified that on November 18, 2001, Eileen Sacco had promised she would have her children play on Byrd's property and do things to her property. (N.T. 38) Byrd also testified that she installed surveillance equipment to get proof of Eileen Sacco's harassment. (N.T. 35, 37-38) Just looking where the camera is pointed in Complainant Exhibits 2 and 3 suggests that Byrd was actually looking to secure proof that either the Saccos' son or dog had been in her yard. The

timing of the installation of the equipment is also telling. While animosity between Byrd and Eileen Sacco was born on November 19, 2001, Byrd did not first install surveillance equipment until May 2003. It is more than apparent that Byrd's main concern was catching someone coming onto her property rather than attempting to get proof of personal harassment.

A final area that reveals Byrd to have been far less than credible involves her testimony about purported damage to her car on April 26, 2003. First, Byrd testified that she has a Volvo and that it dents if you so much as spit on it. (N.T. 83) She further testified that the Saccos' son and other children can be seen on her surveillance video "playing hockey on my vehicle." (N.T. 56) When viewing Complainant Exhibit 2 and the photographs of Complainant Exhibit 3, what appears to have occurred is that a young man is attempting to retrieve a ball that had gone under Byrd's vehicle. Certainly, children cannot be seen playing hockey on Byrd's car.

Byrd also testified that she obtained an estimate within a week of the purported damages to her vehicle. However, the estimate offered into evidence as Complainant Exhibit 4 is dated June 30, 2003, over 2 months later. When asked to explain the lapse, at first Byrd could not, (N.T. 95) but then she testified that there had been 2 estimates. (N.T. 96-97) Interestingly, Byrd did not offer another estimate into evidence.

On the question of whether the Saccos' son had been near Byrd's vehicle on April 26, 2003, Edward Sacco credibly testified that at the time of the alleged damage to Byrd's car, his son was attending an opening day hockey game at a hockey club where his son plays hockey. On this question, Edward Sacco's testimony is found to be more credible.

Finally, the nature of the damages listed on the estimate submitted into evidence reveals that there were damages listed that could not have been done by the children shown in either the video or the pictures in evidence. Indeed, under cross examination, Byrd finally admitted that the damages listed on the estimate which she had offered into evidence was not done by the children on the video. (N.T. 88)

Taken as a whole, Byrd's testimony has many points that cast serious doubt on the veracity of her version of events. Given the glaring contradictions and inaccuracies, Byrd's versions do not rise to the level of proof by a preponderance of the evidence. Indeed, much of what she said is simply not to be believed.

Other witnesses also gave less than credible testimony. For example, only Smallwood offered that soon after the fence was completed, Eileen Sacco sent her son and "her nephew or something" out to try "to push the fence or hit at it or destruct it." No one else suggested that this happened. It seems unlikely that this occurred.

Smallwood also provided some insight into the credibility of Byrd. He testified that when Byrd told him that Eileen Sacco had used a racial slur towards her, he, in effect, stated that he thought that Byrd was making it up and that it hadn't happened. (N.T. 105). Here, we have a 20-year friend of Byrd's saying that he thought she was making up a story about something of importance. We must ask ourselves why he would think she was making something up. As a friend of 20 years, he had to know her very well.

At the Public Hearing, Police Sergeant Maddrey testified as a rebuttal witness and stated that in March 2003, on the day Edward Sacco was arrested, she made her first-ever visit to Byrd's home. She testified that after his arrest, Eileen Sacco called Byrd a f..... black bitch, (N.T. 199) and black bitch (N.T. 203). When asked on cross examination why she did not include this information in an Internal Affairs statement she made approximately 10 days after the actual incident, Maddrey became somewhat evasive as she was walked through her prior statement. In the prior statement Maddrey had made no mention of a racial slur. Reading Maddrey's statement, it is clear that she provided significant detail regarding what had she had observed. (R.E. 1) However, she made no mention of a racial slur by Eileen Sacco. Given this circumstance, it is more likely that no racial slur had been made by Eileen Sacco, because if she had made racial slurs, this certainly would have been something that Sergeant Maddrey would have noted in her

statement to Internal Affairs. Additionally, it is noteworthy that Sergeant Maddrey was not asked to comment on whether Byrd had ever shared with her the purported frequency of racial slurs after November 2001. Had Byrd been suffering like she said, it is common experience that she would share information about such things with a police sergeant friend.

When one reads between the lines of Commissioner Johnson's testimony, you discover an interesting dynamic. First, Commissioner Johnson came to the scene of what was in effect a dispute between two neighbors. He testified that he feared someone could get hurt. (N.T. 184) He stated that he told the Saccos that he would do everything he could to try to solve the situation and that he could only try to control one side, and that he can't control that side. (N.T. 185) Of course, he was referring to Byrd. Later, he testified that he did not want to see any violence happen so he told Byrd "to handle this the correct way, do the correct things, don't become confrontational, don't become argumentative with anybody, the various procedures to go by, the things to do, and I also told her any incidents that's involving...contact the police department, make a report of it, but still do it the correct way..." (N.T. 187) The question to ask is why would the Commissioner tell Byrd these things? Did he know that her tendency would be to be confrontational, argumentative, and possibly even violent? If Byrd was told to make reports, where are all the reports of purported racial slurs by Eileen Sacco?

After giving consideration to the credibility of the witnesses that testified, weight and value were then assigned to the story each witness told. Prior to November 19, 2002, the date Byrd verified her first complaint, the likely series of events begin with the puzzling recognition that there had been minimal contact between Byrd and the Saccos for the first 2 years and 10 months that Byrd lived next to the Saccos. On Saturday, November 17, 2001, the Saccos' dog inadvertently darted out of the Saccos' front door and disturbed a pile of leaves Byrd had raked up on her front yard. The next day, Sunday November 18, 2001, the Saccos' son was playing near the front of the houses and went onto Byrd's side of the front lawn. When he did, Byrd asked him not to allow his

ball to come into her yard. Eileen Sacco overheard this and went up to speak with Byrd. Over the course of the previous several months, Eileen Sacco's son had come to her crying after being told by Byrd to stay off her lawn and that that police would be called if he didn't. Eileen Sacco requested that Byrd speak to her rather than her son in the event Byrd had any further problems. Eileen Sacco also advised Byrd that she needed to discontinue, what she characterized as, conduct that harassed and terrorized her son. In response, Byrd called Eileen Sacco a "simple bitch." Eileen Sacco then uttered racial slurs at Byrd.

At that point, Byrd called the police. Responding to Byrd's call, three police cars arrived along with a duty supervisor. A short while later, Police Commissioner Johnson also arrived on the scene. Upon his arrival he noted that the police response was excessive and instructed the responding police to leave. As they left, the responding officers told Byrd that she should simply build a fence in her front yard.

Commissioner Johnson then went into the Saccos' home to speak with the Saccos, whereupon he informed the Saccos that he would attempt to resolve the situation. Commissioner Johnson then exchanged telephone numbers with Edward Sacco. After speaking with the Saccos, Commissioner Johnson then spoke with Byrd. When he did, he, in effect, ordered her to stay away from the Saccos. He further told Byrd that she would need his permission before she could have any further interaction with the Saccos.

A very short time later, Byrd obtained a permit to construct a fence. She was assisted constructing of a 3-foot plastic fence in her front yard by a friend, Smallwood, and a neighbor, Watson. Construction of the fence began on Friday, November 23, 2001, the day after Thanksgiving.

Recognizing that a bush had been planted directly over the property line and in the way, Byrd asked Commissioner Johnson for permission to speak with Edward Sacco. Having the Commissioner's permission, Byrd waited for Eileen Sacco to leave and then approached Edward

Sacco. While she was speaking with Edward Sacco, Eileen Sacco came home and became angry with Edward Sacco because she found him speaking with Byrd. The Saccos exchanged words in their home and Eileen Sacco later came out and yelled racial slurs at Byrd.

At some point, Byrd contacted Philadelphia's special Conflict Prevention Resolution Team. The CPR team did an investigation and did not pursue criminal charges against anyone.

In January 2002, Edward Sacco approached Byrd seeking to resolve the animosity between her and his wife, Eileen Sacco. Subsequently, everything was calm until February, when Byrd became upset that the Saccos' dog had gotten loose and relieved himself in her yard. Byrd called the police and asked that a copy of the dog leash ordinance be forwarded to the Saccos.

The next incident supported by credible testimony occurred on October 10, 2002. On that date, Byrd's fence was slightly damaged. While Byrd claims that the damage was done intentionally by the Saccos' son, the damage was slight and could have been repaired with glue. Had the intent been to intentionally damage the fence, damage would likely have been far more extensive.

In her initial complaint, Byrd then claims that on October 20, 2002, the Saccos' dog again relieved itself on her lawn. It is likely that Byrd again called the police because on November 9, 2002, Byrd was notified that Edward Sacco had contacted the Internal Affairs Division. It appears that he filed a complaint alleging that Byrd's actions amounted to an abuse of her police powers and harassment to his family.

Only days later on November 19, 2002, Byrd verified her initial harassment complaint. The timing of her initial PHRC complaint has every appearance of being filed to counter Edward Sacco's complaint to the Internal Affairs Division.

The PHRC Housing and Commercial Property Division's post-hearing brief notes that a timeliness issue is presented by the circumstances of this case. Indeed, Section 9(h) of the PHRA

states: "Any complaint filed pursuant to this section must be so filed within one hundred eighty days after the alleged act of discrimination..."

The PHRC Housing and Commercial Property Division argues that a continuing violation is present here. Under the continuing violation theory, so long as at least one act of discrimination that is part of an ongoing practice or pattern, occurred within the 180 day filing period, all acts that are part of the pattern are considered timely even when some acts are outside the 180 day period. The argument suggest that the record supports incidents of harassment within 180 days of the date Byrd filed her PHRC claim. However, we disagree.

While Eileen Sacco's racial slurs directed to Byrd on November 18th and 24th, 2001 would constitute actionable harassment, the record does not support a finding that such acts continued. Indeed, the preponderance of evidence in the record considered as a whole supports a finding that intentional acts of harassment did not occur within 180 days of Byrd's filing of her initial complaint. Byrd's complaint makes specific reference to only two acts: (1) Byrd alleged that on October 10, 2002, the Saccos' son intentionally damaged her fence, and (2) that on October 20, 2002, the Saccos' dog was intentionally released without its leash to relieve itself on Byrd's yard. Other than these two specific acts, Byrd's initial complaint only makes general reference to alleged harassment.

As previously reviewed, Byrd's credibility was severely eroded in numerous ways. The fact that Byrd did not include specifics in her complaint simply adds to the idea that there had been no additional slurs after November 2001. Accordingly, we find that Byrd has not established that an act of intentional harassment occurred within 180 days of the filing of her initial complaint.

Given this situation, the Complainant's initial complaint was not timely filed and must be dismissed.

Before turning to Byrd's retaliation claims, we note that on November 18, 2001, Byrd initially responded to Eileen Sacco by calling her a "simple bitch". While such language is certainly

provocative, it is not even close to an excuse for Eileen Sacco's use of racial slurs. Eileen Sacco's conduct is simply unacceptable.

Additionally, it is quite apparent that both Byrd and the Saccos could benefit significantly from the services of a neighborhood mediation service. The parties are asked to give serious consideration to engaging such a program and committing themselves to resolving the regrettable chasm between Byrd and the Saccos.

Now we turn to Byrd's second complaint that alleges that both Eileen and Edward retaliated against Byrd because she had filed the initial PHRC harassment complaint. The PHRC Housing and Commercial Property Division's post-hearing brief correctly observes that a *prima facie* case of retaliation is established by proof that:

- (1) the Complainant engaged in protected activity;
- (2) the Respondent was aware of the protected activity;
- (3) subsequent to the protected activity, the Complainant was subjected to an adverse action; and
- (4) there is a casual connection between the protected activity and the adverse action.

Robert Wholey Company, Inc. v. PHRC, 606 A.2d 982 (1992); and Brown Transport Corp. v. PHRC, 578 A.2d 555 (1990).

In the present case, we apply a general principle that arises from the U.S. Supreme Court's observations in the case of U.S. Postal Service, Board of Governors v. Aikens, 460 U.S. 711 (1983). In that case, the U.S. Supreme Court noted that "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant."

In the present case, we have all the evidence we need to decide whether the Saccos retaliated against Byrd or not. Accordingly, we can proceed directly to the specific question of which party's explanation of the motivation for filing Internal Affairs complaints we believe.

Byrd's retaliation complaint at PHRC Case No. 200302350 alleges that the Saccos not only filed two additional Internal Affairs complaints, but Byrd's complaint also alleges that Eileen Sacco told the Police Advisory Commission that Byrd was having a relationship with Commissioner Johnson, and that the Saccos contacted the press. However, we will focus only on Edward Sacco's three Internal Affairs complaints because Byrd failed to present sufficient evidence regarding any other alleged act of retaliation. Interestingly, the presentation of Byrd's retaliation case and the PHRC post-hearing brief focused exclusively on the filing of Internal Affairs complaints.

While the precise date is not clear, the evidence reveals that Byrd was notified about Edward Sacco's first Internal Affairs complaint on November 9, 2002. However, the actual complaint filed by Edward Sacco was not introduced into evidence, but, we can see from Byrd's initial complaint that she had called the police about the Saccos on October 10th, 2002 and again on October 20, 2002. Byrd called the police on October 10th after discovering that a small piece of the fence in her front yard had been broken. She then called the police again on October 20, 2002 because the Saccos' dog relieved itself on her front yard.

Edward Sacco credibly testified that he filed the first Internal Affairs complaint after giving Commissioner Johnson a chance to resolve what he believed to be harassment against his family by Byrd. We note that as early as November 18, 2001, Byrd caused 3 police cars and a supervisor to respond to her call. Additionally, Commissioner Johnson himself responded and even went into the Saccos' home to speak with them.

As Commissioner Johnson noted, the police response on November 18, 2001 was excessive. Actually, if asked, a majority of the citizens of Philadelphia would agree that the response of November 18, 2001 was excessive. Then, adding that a police officer initiated the response would cause most to agree that an issue of abuse of power should arise.

We find that under the circumstances presented, Edward Sacco's initial Internal Affairs complaint was not filed out of retaliation, but out of frustration over having numerous police come to his home every time his dog got loose or when his son retrieved a ball from Byrd's property. Further, we know that during the period after November 18, 2001, Edward Sacco had been called by Commissioner Johnson as well as visited in his home by the Commissioner.

We also know that Byrd's first PHRC complaint was filed only 10 days after she was notified that Edward Sacco had filed an Internal Affairs complaint. By all appearances, what motivated Byrd's initial PHRC complaint was her reaction to Edward Sacco's Internal Affairs complaint.

The next time Edward Sacco filed an Internal Affairs complaint was the day after he was arrested. Once again, it is clear that the apparent circumstances of his arrest may well place a serious question of whether an abuse of police power occurred in the mind of a reasonable person. The evidence presented reveals that, although charged with disorderly conduct, the office of the District Attorney did not prosecute the matter against Edward Sacco. We are also mindful that this Internal Affairs complaint was directed at the arresting officers as well as Byrd.

Edward Sacco's motivation for filing this Internal Affairs complaint was solely the result of his frustration after having been arrested under circumstances which stemmed from the situation of his son playing ball in his back yard. We note that, although he requested to tape the conversation between himself and the arresting officers, he was denied that opportunity. The exchange between Edward Sacco and the responding officers depicts Edward Sacco as becoming extremely frustrated to the point where he insulted the officers. The filing of this Internal Affairs complaint was not connected to Byrd's participation in activity protected by the PHRA.

Finally, Edward Sacco again filed a third Internal Affairs complaint when he believed that Byrd falsely accused his son of damaging her vehicle. We credit Edward Sacco's testimony that this was his motivation for the filing of a third Internal Affairs complaint, primarily because we discredit Byrd's testimony that the Saccos' son had anything to do with any damage to her car.

Additionally, what caused the damages to Byrd's car listed in the estimate she provided was not sufficiently established. In effect, Byrd testified that she did not know what caused the damages listed on the estimate she provided. A father who perceives that, intentionally, his son has been wrongly accused of damaging a vehicle would rightfully want to inform a neutral authority over the accuser of his concern that the accusation was false. Here, Edward Sacco's third Internal Affairs complaint is found to be a reasonable response to Byrd's accusations.

In summary, Byrd has not proven by a preponderance of the evidence that the Saccos retaliated against her. For this reason, Byrd's complaint at PHRC Case No. 20302350 should also be dismissed.

An appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

KIMBERLY BYRD,
Complainant

v.

EILEEN SACCO,
Respondent

PHRC Case No. 200205077

KIMBERLY BYRD,
Complainant

v.

EILEEN & EDWARD SACCO,
Respondents

PHRC Case No. 200302350

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned consolidated matters, the Permanent Hearing Examiner finds that the Complainant has failed to prove discrimination in violation of Sections 5(d) and 5(h)(3) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Stipulation of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

February 2, 2005
Date

By: 
Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

KIMBERLY BYRD,
Complainant

v.

EILEEN SACCO,
Respondent

PHRC Case No. 200205077

KIMBERLY BYRD,
Complainant

v.

EILEEN & EDWARD SACCO,
Respondents

PHRC Case No. 200302350

FINAL ORDER

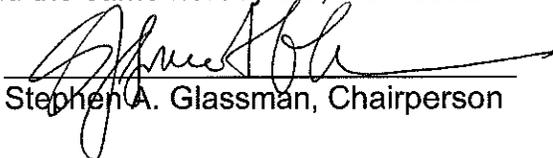
AND NOW, this 1st day of MARCH, 2005, after a review of

the entire record in this matter, the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the full Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion as its own finding in this matter and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

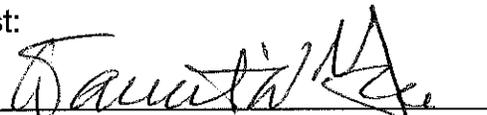
ORDERS

that the complaints in these consolidated cases be, and the same hereby are, dismissed.

By:


Stephen A. Glassman, Chairperson

Attest:


Dr. Daniel D. Yun, Secretary

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

Kimberly Byrd, :
Complainant :
 :
V. : PHRC NO:200205077
 :
Eileen Sacco, :
Respondent :

STIPULATIONS OF FACT

The following facts are admitted by all parties to the above captioned case and no further proof thereof shall be required:

1. The Complainant herein is Kimberly Byrd.
2. The Respondent herein is Eileen Sacco.
3. ~~On or about November 19, 2002, Complainant timely filed a verified complaint against Respondent, with the Pennsylvania Human Relations Commission (hereinafter Commission.~~
4. The Complaint was served upon Respondent on ~~December 20, 2002.~~ *11/21/03* *WLC*
5. Respondent, on March ~~6,~~ 2003, answered the Complaint.
6. Following an investigation, a probable cause finding was approved by the legal division on May 1, 2003, and Respondent was notified of the finding.

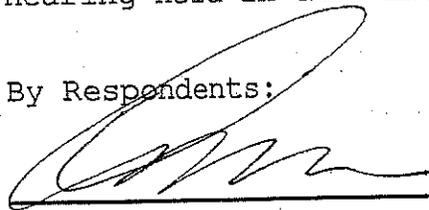
7. Attempts at conciliation have been attempted but have so far failed to resolve the matter.

8. The case was approved for Public Hearing by the Executive Director and was placed on the Public Hearing Docket by the Commission at its November 24, 2003 meeting.

9. At all times relevant to this complaint, Complainant Byrd and Respondent Sacco were next door neighbors, living at 15034 Poquessing Creek Lane, Philadelphia PA 19116 and 15036 Poquessing Creek Lane, respectively.

These Stipulations of Fact, together with the Witness List submitted by each party will become a part of the official record in this case and will be incorporated into the transcript prepared during the course of any subsequent Public Hearing held in this matter.

By Respondents:



062204

Andrew G. Gay, Esquire
1731 Spring Garden Street
Philadelphia, PA 19130

By: Pennsylvania Human Relations Commission:



062204

Nancy Gippert, Esquire
Assistant Chief counsel
Housing Division

Date

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

Kimberly Byrd, :
Complainant :
VII. : PHRC NO:200302350
Eileen & Edward Sacco, :
Respondent :

STIPULATIONS OF FACT

The following facts are admitted by all parties to the above captioned case and no further proof thereof shall be required:

1. The Complainant herein is Kimberly Byrd.
2. The Respondents herein are Eileen and Edward Sacco.
3. On or about October 8, 2003, Complainant timely filed a verified complaint against Respondent, with the Pennsylvania Human Relations Commission (hereinafter Commission).
4. The Complaint was served upon Respondent on December 20, 2003.
5. Respondent answered the Complaint.
6. Following an investigation, a probable cause finding was approved by the legal division on Feb. 4, 2004, and Respondent was notified of the finding.

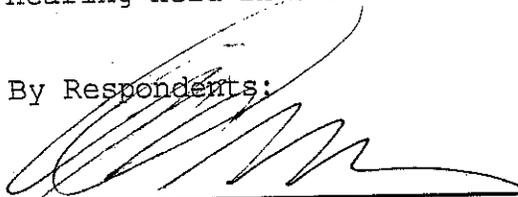
7. Attempts at conciliation have been attempted but have so far failed to resolve the matter.

8. The case was approved for Public Hearing by the Executive Director and was placed on the Public Hearing Docket by the Commission at its February 22, 2004 meeting.

9. At all times relevant to this complaint, Complainant Byrd and Respondent Sacco were next door neighbors, living at 15034 Poquessing Creek Lane, Philadelphia PA 19116 and 15036 Poquessing Creek Lane, respectively.

These Stipulations of Fact, together with the Witness List submitted by each party will become a part of the official record in this case and will be incorporated into the transcript prepared during the course of any subsequent Public Hearing held in this matter.

By Respondents:

 06/22/04

Andrew G. Gay, Esquire
1731 Spring Garden Street
Philadelphia, PA 19130

By: Pennsylvania Human Relations Commission:

 6/22/04

Nancy Gippert, Esquire
Assistant Chief counsel
Housing Division

Date

FINDINGS OF FACT*

1. The Complainant in these consolidated cases is Kimberly Byrd, (hereinafter "Byrd"), a police Sergeant employed by the City of Philadelphia, Police Department. (N.T. 12, 74)
2. The Respondent in PHRC Case No. 200205077 is Eileen Sacco.
3. The Respondents in PHRC Case No. 200302350 are Eileen Sacco and Edward Sacco.
4. Byrd's race is African American and Eileen and Edward Sacco are White.
5. In January 1999, Byrd and her daughter moved to 15034 Poquessing Creek Lane, Philadelphia, Pennsylvania. (N.T. 12-13, 147)
6. Byrd moved to the home on Poquessing Creek Lane because she found the neighborhood to be peaceful and quiet and there seemed to be a lot of children her daughter's age. (N.T. 13-14)
7. Eileen and Edward Sacco and their two children have lived at 15036 Poquessing Creek Lane since 1991. (N.T. 134, 136, 146-147)
8. Byrd's home and the Sacco home adjoin as part of a single building. (N.T. 16)
9. The Byrd and Sacco backyards are divided by a fence. (N.T. 16)
10. The front doors of the Byrd and Sacco homes appear to be less than 15 feet apart. (J.E. 1)
11. There is a small lawn area in front of both the Byrd and the Sacco residences. (J.E. 1)

* The foregoing "Stipulations of Fact" in both PHRC Case No. 200205077 and 200302350 hereby incorporated herein as if fully set forth. To the extent that the Opinion that follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T. Notes of Testimony
C.E. Complainant's Exhibit
R.E. Respondent Exhibit
J.E. Joint Exhibit

12. From the time Byrd moved in until November 17, 2001, approximately 2 years and 10 months, Byrd and the Sacco's had not met. (N.T. 89-90)
13. For the period between January 1999 and November 17, 2001, Byrd liked living at 15034 Poquessing Creek Lane and had experienced no problems in the neighborhood. (N.T. 16-17)
14. When passing, Edward Sacco would say hello to Byrd but that was the extent of the interaction between Byrd and the Saccos. (N.T. 90, 148)
15. On Saturday, November 17, 2001, Byrd was in her front yard area raking leaves. (N.T. 17)
16. Eileen Sacco's Sister, Denise Sees, had arrived at the Sacco residence to pick up Eileen Sacco. (N.T. 208-209)
17. When Eileen Sacco opened her front door to go out, the Sacco's dog, Buster, ran out and went into the leaves Byrd had been raking. (N.T. 17, 90, 209, 210, 212)
18. Normally, the Sacco's dog goes into the Sacco's backyard but occasionally he gets out the front door. (N.T. 140)
19. Byrd asked the Sacco's son, Eddie, to get the dog. (N.T. 17, 210)
20. A confrontation between Byrd and Eileen Sacco ensued. (N.T. 210)
21. On Sunday, November 18, 2001, Byrd was again in her front yard raking leaves. (N.T. 18)
22. Eddie was outside playing football and went onto Byrd's front yard. (N.T. 18)
23. When he did, Byrd asked Eddie not to play in her yard. (N.T. 18)
24. Eileen Sacco informed Byrd not to talk to Eddie and that she was tired of Byrd saying things to Eddie and that if Byrd has a problem with her son, Byrd should come speak with her. (N.T. 18)
25. Eileen Sacco testified that for several months, Byrd had threatened to call the police if Eddie's ball went in her yard. (N.T. 135)

26. At some point in the confrontation between Byrd and Eileen Sacco, Byrd called Eileen Sacco a "simple bitch." (N.T. 19, 179)
27. Eileen Sacco responded with racial epithets. (N.T. 19)
28. Byrd called the police and her office to report the incident. (N.T. 19)
29. Byrd is one of four officers working in the Philadelphia Police Commissioner's office. Byrd's position there was Office Supervisor/Driver. (N.T. 183)
30. The Police Commissioner is Sylvester Johnson, (hereinafter "Commissioner Johnson"). (N.T. 183)
31. When Byrd called her office she spoke with Lieutenant McCann who in turn called Commissioner Johnson. (N.T.19)
32. Three police cars and a supervisor arrived on the scene. (N.T. 149, 189)
33. The police on the scene told Byrd to put up a fence. (N.T. 20)
34. Commissioner Johnson also personally responded. (N.T. 19, 186)
35. Upon his arrival on the scene, Commissioner Johnson sent the 3 police cars away and went into the Sacco's home to speak with them. (N.T. 19, 21, 151, 184)
36. While speaking with the Saccos, Commissioner Johnson told the Saccos that he would resolve the situation and then exchanged telephone numbers with Edward Sacco. (N.T. 158, 188)
37. After speaking with the Saccos, Commissioner Johnson spoke with Byrd telling her, "[t]hey'll stay away from you. You stay away from them." (N.T. 21)
38. Commissioner Johnson instructed Byrd that she would need his permission before she had any further communication with the Saccos. (N.T. 23)
39. Byrd also called the Philadelphia Police Conflict Prevention Resolution Unit, a unit that specifically handles alleged racial bias incidents. (N.T. 39)
40. The CPR Unit responded and conducted interviews. (N.T. 39)

41. Byrd testified that the CPR Unit did not resolve the situation. (N.T. 39)
42. Within days, Byrd obtained a permit to install a fence in the front yard. (N.T. 21)
43. Byrd asked her friend of 20 years, Havrey Smallwood to help her install a fence. (N.T. 22, 104, 108-109)
44. The installation of the fence began on Friday November 23, 2001. (N.T. 21)
45. A neighbor, Milton Watson, observed Byrd and Smallwood attempting to dig post holes and offered to assist. (N.T. 22, 105, 113)
46. In the process of installing the fence, Byrd noted that there was a bush that was partly on her property and partly on the Sacco's property. (N.T. 23-24)
47. On Friday, November 23, 2001, Byrd called Commissioner Johnson seeking his permission to speak with the Saccos about the bush. (N.T. 23, 156)
48. Commissioner Johnson gave his permission to Byrd to ask the Saccos about cutting the bush. (N.T. 23)
49. On Friday, November 23, 2001, Commissioner Johnson called Edward Sacco at work regarding the bush issue. (N.T. 152-153)
50. Meanwhile, Mr. Watson knocked on the Sacco's door and Eileen Sacco answered the door. (N.T. 152)
51. Watson upset Eileen Sacco when he informed her that he intended to rip the bush out. (N.T. 152)
52. Eileen Sacco informed Watson that she did not want him to remove the bush but later agreed that the portion of the bush that was on Byrd's property could be removed. (N.T. 137)
53. On Saturday, November 24, 2001, after seeing Eileen Sacco leave her house, Byrd went to the Sacco's door to speak with Edward Sacco about the bush. (N.T. 23, 156)

54. While Edward Sacco was telling Byrd that he did not have a problem with her putting up a fence, Eileen Sacco returned home. (N.T. 23, 105)
55. Using racial epithets, Eileen Sacco yelled at Byrd to stay away from her husband. (N.T. 24)
56. Eileen Sacco became angry with Edward Sacco for speaking with Byrd and began arguing with him as they went into their home. (N.T. 24, 105)
57. A short while later, Eileen Sacco came out and in a raised voice used racial epithets towards Byrd calling her names like black baboon, black bitch N....., and psycho bitch. (N.T. 24, 105, 107, 113, 114, 115, 133)
58. On January 24, 2002, Edward Sacco spoke with Byrd expressing an interest in resolving the ongoing dispute between Byrd and Eileen Sacco. (N.T. 26)
59. Edward Sacco accused Byrd of having called Eileen Sacco a "white bitch". (N.T. 26)
60. Byrd denied that she had called Eileen Sacco that name. (N.T. 26)
61. Subsequently, things were peaceful for approximately one month until on February 2, 2002, Byrd observed the Sacco's dog off leash, urinating and defecating in her front yard. (N.T. 27)
62. Byrd called the police and asked that a copy of the dog leash ordinance be sent to the Saccos. (N.T. 27)
63. On March 22, 2002, at 5:45 a.m., while leaving for work, Byrd found a note on her front door that read, "Move piece of S..." (N.T. 31)
64. On November 9, 2002, the Police Department's Internal Affairs Division informed Byrd that Edward Sacco had filed an internal affairs complaint against Byrd alleging that Byrd had been harassing his family. (N.T. 41)
65. Edward Sacco testified that he gave Commissioner Johnson a chance to resolve the dispute between Byrd and Eileen Sacco and feeling that the matter had not been resolved, he filed an internal affairs complaint. (N.T. 157, 170)

64. Upon the advise of Commissioner Johnson, on November 19, 2002, Byrd verified a PHRC complaint in which she alleged race-based harassment. (N.T. 39)
65. In May 2003, Byrd installed surveillance equipment in the front and rear of her property. (C.E. 1)
66. In September 2003, and later in February 2004, Byrd upgraded the surveillance equipment she had installed. (N.T. 36; C.E. 1)
68. On Sunday March 23, 2003, Sergeant Roxanne Maddrey, also with the Philadelphia Police Department, visited Byrd's home. (N.T. 44, 194, 195; R.E. 1)
69. On that day, the Sacco's son, Eddie, was in his backyard playing ball. (N.T. 44, 159)
70. Byrd called the police when she noticed the ball that Eddie was playing with had come over the fence into Byrd's yard. (N.T. 160)
71. Sometime earlier, while the Sacco's were on vacation, Byrd removed the backyard fence that the Saccos had built in 1991 and replaced it with another fence. (N.T. 160)
72. Three police cars arrived and returned Eddie's ball to the Saccos. (N.T. 160)
73. Subsequently, Eddie was once again in his backyard and Byrd noticed that his ball was hitting the fence so she again called the police. (N.T. 161)
74. When the police arrived the second time, Edward Sacco answered the door and asked the officers for permission to tape their conversation. (N.T. 162, 195)
75. The officers denied Edward Sacco permission to tape their discussion. (N.T. 162, 195)
76. Edward Sacco asked the officers where his son was supposed to play and whether the police would leave his son alone if he were selling drugs. (N.T. 162-163)
77. Edward Sacco then used expletives directed at the officers and he was arrested and charged with disorderly conduct. (N.T. 203; R.E. 1)
78. The District Attorney elected not to prosecute the disorderly conduct charge against Edward Sacco. (N.T. 164)

79. Eileen Sacco became extremely upset at the arrest of her husband and cursed. (R.E. 1)
80. On April 26, 2003, Byrd's surveillance camera located on the front of her house taped several youths playing hockey in the street. (N.T. 56; C.E. 2, and 3)
81. One of the children came near Byrd's personal car. (C.E. 2 and 3)
82. Byrd filed a police report suggesting that the Sacco's son had damaged her car. (N.T. 50-51)
83. The Sacco's son was not at home at the time of the purported damage to Byrd's car. (N.T. 166)
84. Although Byrd alleged her car had been damaged on April 26, 2003, she did not obtain an estimate until June 30, 2003. (N.T. 96; C.E. 4)
85. The estimate Byrd submitted into evidence lists numerous repair items that have nothing to do with the location where a child can be seen near her car. (C.E. 4)
86. On October 10, 2003, Byrd filed a second PHRC complaint dated October 8, 2003, alleging that Edward and Eileen Sacco had retaliated against her because she had filed her earlier PHRC complaint. (N.T. 48)
87. Byrd's second complaint generally alleged the following: that on March 24, 2003 Edward Sacco filed a second Internal Affairs complaint against Byrd; that on March 27, 2003, Eileen Sacco told the Police Advisory Commission that Byrd was having a relationship with Commissioner Johnson; that on April 3, 2003, the Saccos contacted the press; and that on July 30, 2003, Edward Sacco filed another complaint with Internal Affairs alleging that Byrd had made false statements about purported damages to her car and that a police car had been in front of his house for 72 hours in late March 2003. (N.T. 46-47)
88. The Internal Affairs complaint filed by Edward Sacco on March 24, 2003 was directed at both Byrd's actions and the officers who arrested him on March 23, 2003. (N.T. 170)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and the subject matter of these consolidated cases.
2. The procedural prerequisites to a Public Hearing have all been met.
3. Both the Complainant and the Respondents are persons within the meaning of the PHRA.
4. Section 12(a) of the PHRA requires that the provisions of the PHRA be construed liberally for the accomplishment of the purposes of the PHRA.
5. When one neighbor disrupts the quiet enjoyment of another neighbor by reason of race, the disruptive neighbor violates Section 5(h)(3) of the PHRA by denying the harassed neighbor the privilege of living peacefully in their home.
6. Section 9(h) of the PHRA requires that a complaint must be filed within one hundred eighty days after the alleged act of discrimination.
7. To establish that a harassment claim falls within the continuing violation theory, a Complainant must do two things. First, the Complainant must demonstrate that at least one act occurred within the filing period. Next, the Complainant must establish that the harassment is more than the occurrence of isolated or sporadic acts of intentional discrimination.
8. Byrd failed to establish by a preponderance of the evidence either that Eileen Sacco's harassment was a persistent on-going pattern, or that at least one act occurred within the 180 day filing period.
9. Byrd's harassment claim was not timely filed.

10. To establish a *prima facie* case of retaliation a Complainant must show:

- (a) That the Complainant engaged in protected activity;
- (b) That the Respondent was aware of the protected activity;
- (c) That subsequent to the protected activity, the Complainant was subjected to an adverse action; and
- (d) That there is a casual connection between the protected activity and the adverse action.

11. Byrd failed to establish that Edward Sacco's motivation for filing Internal Affairs complaints was retaliatory.

OPINION

These consolidated cases arise on two complaints filed by Kimberly Byrd, (hereinafter "Byrd"). Byrd's initial complaint at PHRC Case No. 200205077 was filed against Eileen Sacco, and Byrd's subsequent complaint at PHRC Case No. 200302350 was filed against Eileen & Edward Sacco.

In her complaint at PHRC Case No. 200205077, Byrd generally alleges that Eileen Sacco harassed her because of her race, African American. This complaint alleges a violation of Section 5(h)(3) of the PHRA. In the complaint at PHRC Case No. 200302350, Byrd generally alleges that Eileen and Edward Sacco retaliated against her because she had filed the earlier PHRC complaint. This complaint alleges a violation of Section 5(d) of the PHRA.

The PHRC investigated both complaints and, at the conclusion of the investigations, informed Eileen and Edward Sacco that probable cause existed to credit Byrd's allegations. Thereafter, the PHRC attempted to eliminate the alleged unlawful practices through conference, conciliation, and persuasion, but such efforts proved unsuccessful. Subsequently, the PHRC notified the parties that it had approved a public hearing on both cases.

The consolidated public hearing was held on June 22, 2004, in Philadelphia, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. PHRC Assistant Chief Counsel Nancy Gippert oversaw the Commission's interest in the complaint. Andrew G. Gay, Esquire, represented Eileen and Edward Sacco. Following the public hearing, the parties were afforded the opportunity to submit post-hearing briefs. Subsequently, post-hearing briefs were received on August 17, 2004.

In her complaint at PHRC Case No. 200205077, verified on November 19, 2002, Byrd generally alleges race-based harassment in violation of Section 5(h) of the PHRA. Specifically, Byrd's complaint alleges that on November 18, 2001, Eileen Sacco screamed racial epithets at her and that over the next several months, Eileen Sacco and her children continued to yell racial slurs

at her. Further, Byrd's complaint submits that Byrd believes that on October 10, 2002, the Sacco's son intentionally damaged her fence and that on October 20, 2002, Eileen Sacco unleashed her dog and allowed it to come onto Byrd's property and defecate. Byrd alleged that Eileen Sacco had also unleashed her dog and allowed it to go onto Byrd's property several other times in 2002.

Responding to Byrd's Section 5(h) allegation, the Saccos' post-hearing brief generally argues that the conduct allegedly committed by Eileen Sacco is not proscribed by the PHRA. More specifically, the Saccos' post-hearing brief quotes portions of Section 5(h) of the PHRA and submits that Eileen Sacco is neither a seller, nor lender of a housing accommodation, nor one who finances or furnishes facilities, services or privileges in connection with the ownership, occupancy or use of any housing accommodation. The PHRC post-hearing brief on behalf of the complaint asserts that the alleged conduct is covered by two sub-sections of Section 5(h). The post-hearing brief on behalf of the complaint argues that sections 5(h)(1) and 5(h)(3) are implicated by Byrd's claim. Accordingly, the first fundamental question that must be answered is whether the harassment alleged by Byrd comes under the rubric of the PHRA.

Section 5(h)(1) states in pertinent part:

It shall be an unlawful discriminatory practice...[f]or any person to...[r]efuse to sell, lease, finance or otherwise to deny or withhold any housing accommodation...from any person because of the race...of any person...

Section 5(h)(3) states in pertinent part:

It shall be an unlawful discriminatory practice...[f]or any person to...[d]iscriminate against any person in the terms or conditions of selling or leasing any housing accommodation...or in furnishing facilities, services or privileges in connection with the ownership, occupancy or use of any housing accommodation...because of the race...of any person...

Supplementing the PHRA provisions, there are regulations that more specifically define the intent of the statutory sections. In this case, 16 Pa. Code §45.11(a)(2) states in pertinent part:

Coercion, threats and intimidation. It is an unlawful discriminatory activity to...[t]hreaten, intimidate or interfere with persons in their enjoyment of a housing accommodation...because of the protected class of the person...

When, as is the case here, one neighbor alleges that the quiet enjoyment of their housing accommodation has been disrupted by another neighbor's harassment, Section 5(h)(3) of the PHRA is implicated. While Byrd did not allege that Eileen Sacco discriminated against Byrd in the terms or conditions of selling or leasing any housing accommodation, reading this provision liberally, as mandated by Section 12(a) of the PHRA, Byrd has alleged that Eileen Sacco did discriminate against her in furnishing privileges in connection with Byrd's occupancy of a housing accommodation. The privilege allegedly denied is the quiet enjoyment of Byrd simply living in her home in peace. Section 5(h) as a whole is part of a broad statutory plan that seeks to eliminate all traces of discrimination in the Commonwealth. The PHRA, as a whole, in seeking to protect against alleged discriminatory conduct should be given generous construction. With this in mind, we find that an alleged interference with a neighbor's quiet enjoyment alleges a denial of the furnishing of a privilege in connection with occupancy of a housing accommodation.

The post-hearing brief on behalf of the complaint submits that section 5(h)(1) also applies, however, Byrd has not alleged that Eileen Sacco either denied or withheld a housing accommodation from Byrd. Clearly, there also has been no allegation of a denial to sell, lease or finance a housing accommodation. The thrust of Section 5(h)(1) addresses discrimination on the part of housing providers. Under the allegations of Byrd's complaint, the only portion of the PHRA that we find implicated is language found in section 5(h)(3).

Permeating this case is another fundamental issue. Irreconcilable conflict best describes much of the relevant testimony provided in this case. Accordingly, a determination of credibility of the witnesses must be made.

Judgment of credibility is a responsibility entrusted to the trier of fact. Carr v. Com., State Board of Pharmacy, 49 Pa. Comwlth. Ct. 330, 409 A.2d 941 (1980); Boughter v. Com., Dept. of Public Welfare, 55 Pa. Comwlth. Ct. 521, 423 A.2d 806 (1980); PHRC v. Hempfield Township, 23 Pa. Comwlth. Ct. 351, 352 A.2d 218 (1976). In assessing credibility, consideration was given to

each witness' motive and state of mind, strength of memory and demeanor while on the witness stand. Consideration was also given to whether a witness' testimony was contradicted, and the bias, prejudice, and interest, if any, of each witness. Recognition was also given to the premise that where resolution of a matter rests with a weighing and balancing of conflicting evidence, absolute certainty is rarely achieved.

Beginning with the parties to these consolidated cases, sadly, no party's testimony was either wholly convincing or entirely credible. For example, Eileen Sacco testified that she had only one confrontation with Byrd that occurred on November 18, 2001.(N.T. 135, 136, 138) That testimony was contradicted by credible portions of Havrey Smallwood's (hereinafter "Smallwood") testimony, and the credible testimony of Milton Watson (hereinafter "Watson"). The record considered as a whole reveals confrontations between Eileen Sacco and Byrd on November 18, 2001, and again on November 24, 2001. On at least two occasions, Eileen Sacco and Byrd exchanged words. Further, Eileen Sacco testified that she never uttered a racial slur at Byrd (N.T. 136, 138, 145). Once again, credible portions of the testimony of Watson and Smallwood contradicted Eileen Sacco's testimony. Both of these witnesses testified that while they assisted Byrd to build a fence in front of her home on November 23 and 24, 2001, each recalled Eileen Sacco using the "N" word and directing other expletives towards Byrd.

Regarding the credibility of Edward Sacco, one instance of less than credible testimony was noted. He testified that on March 23, 2003, the day of his arrest, he had not been disrespectful to the officers who had come to his door to return his son's ball. (N.T. 163) Sergeant Roxanne Maddrey (hereinafter "Maddrey") provided a statement to internal affairs on April 3, 2003 indicating that, indeed, Edward Sacco loudly swore at the officers just before his arrest. Maddrey's statement in this regard was found to more credible.

When the testimony offered by Byrd is carefully reviewed, numerous instances of less than credible testimony are found. For instance, Byrd initially testified that the fence she installed in

front of her house was six feet tall. (N.T. 16) She later admitted that the fence is only three feet tall and that perhaps she had her measurements wrong. (N.T. 88) Byrd further testified that the reason she wanted to install a fence in her front yard was in an effort to avoid confrontations with the Saccos. (N.T. 15) First, Smallwood testified that Byrd wanted to put up a fence because of the Sacco's dog. (N.T. 108) Just looking at the fence reveals that the way the fence was built would in no way avoid personal confrontations with the Saccos. The evidence shows that the Byrd and Sacco front doors appear to be less than 15 feet apart and that the fence was built at a height that did nothing to curtail contact. Additionally, while Byrd said that she wanted to avoid contact with both Eileen and Edward Sacco, clearly, the only person she wanted to avoid was Eileen Sacco. She had no reason to attempt to avoid contact with Edward Sacco, in fact, she initiated contact with him on an occasion when she knew Eileen Sacco was not home.

On another matter, Byrd's testimony suggested that she called the police on November 18, 2001 after Eileen Sacco ran up and down the street yelling racial slurs about Byrd and then threatening Byrd that she would get her family after Byrd. (N.T. 19) Interestingly, Byrd's own testimony tends to contradict why she called the police on November 18, 2001. Byrd testified that as the police were leaving the area, they told her to put up a fence. This suggests that the main reason she had called the police was to complain about the dog and Sacco's son on her front lawn. Further, despite hearing the testimony of several neighbors, no one corroborated Byrd's version of Eileen Sacco running up and down the street yelling racial slurs.

Byrd's overall testimony submitted that nearly everyday after November 18, 2001, Eileen Sacco either called her a name or did something to her property. (N.T.15, 24-25) It appeared that Byrd left for work at approximately 5:45 a.m. (N.T. 31), yet she offered that every morning when she would be leaving for work, Eileen Sacco would come out with her children and utter racial slurs. (N.T. 25) It is highly unlikely that Eileen Sacco and her children left their home before 6:00 a.m. each day. On this subject, it is worthy to note that the Philadelphia Police Department's

Conflict Prevention and Resolution Unit had been called early in the dispute. (N.T. 39) The CPR unit is a specialized unit that responds to racial incidents in an effort to reduce community tension. In this case, the CPR unit did respond and conducted interviews however no resolution appears to have been facilitated by the CPR unit. (N.T. 39) Added to this circumstance, Police Commissioner Johnson's testimony serves to further illustrate that perhaps after the November 18, 2001 incident of an exchange of insults between Byrd and Eileen Sacco and Eileen Sacco continuing with her insulting remarks on November 24, 2001, there were no further racial slurs uttered by Eileen Sacco to Byrd. Although Commissioner Johnson testified that he continued to speak with the Saccos and also visited their home on additional occasions after November 2001, he made no mention of the circumstances surrounding his visits. Being unable to recall the nature of the visits supports the inference that his visits were over mundane situations rather than continual racial harassment by Eileen Sacco. It is much more likely that his visits were prompted by Byrd's continually calling the police over the Saccos' dog and minor damage to her fence. Had he visited the Saccos to quell continual racial harassment, he would certainly have remembered that.

Had Byrd been subjected to almost daily racial slurs, surely a charge of ethnic intimidation would have been pursued by Byrd. One would normally expect that repeated instances of one neighbor calling another neighbor racial slurs would eventually result in criminal charges of harassment and ethnic intimidation. Instead, the record in this matter reveals that on January 24, 2002, Edward Sacco went to speak with Byrd in an effort to peacefully resolve the enmity between Eileen Sacco and Byrd. Byrd herself testified that things were calm for the next month until in February when another incident happened. The "incident" that Byrd says happened is that the Sacco's dog was off his leash and urinated and defecated on her lawn. Byrd testified that she called the police and asked that a copy of the applicable dog ordinance be forwarded to the Saccos. Byrd offered that she also called the police on Thursday January 8, 2003 because someone had removed a basketball court apparatus that had been in front of her house. As it

turned out, a person named Gerald Saladino had moved Byrd's equipment. Another instance in Byrd's testimony where the police were called dealt with the Saccos' son throwing a ball in his backyard that was hitting Byrd's fence. Circumstances surrounding this instance ultimately led to Edward Sacco's arrest. Next, Byrd related that she called the police to report that her car had been damaged. Both of these instances occurred in 2003. Finally, Byrd testified that on Sunday June 13, 2004, the Saccos' dog was again loose on her property. This instance is said to have resulted in the Saccos being cited.

One has to ask, where are the instances of Byrd calling the police about the purported racial harassment that she suggests was a regular event. Further, while police reports are made for each call officers make, no such reports were offered into evidence. Had police been called to respond to alleged racial harassment situations, there certainly would have been police reports available as evidence in this case. Again, none were offered as evidence. Further, when one looks at the allegations made in Byrd's second PHRC complaint, it is glaringly obvious that Byrd made no additional harassment allegations. Also, Byrd never amended her first complaint to allege any incident after she filed her first complaint. Indeed, her first PHRC complaint fails to articulate any specifics regarding a purported ongoing situation of race-based harassment.

Byrd's entire version about the nature of her contacts with Eileen Sacco are placed into question by Byrd's own testimony about when and why she called the police. It seems that Byrd's greatest concern was not that she was constantly being called racial names, but that the Sacco's dog would get out periodically, that the Sacco's son allowed his ball to come into her yard, and that her car had been damaged while parked in front of her house.

As a police officer, Byrd would certainly know the importance of accurately documenting an incident. As she testified at the Public Hearing, Byrd continually referred to and used hand-written notes she had with her. Numerous times during her testimony, Byrd made specific reference to dates, days of the week, and even precise times of day. However, the propriety of her record-

keeping must be questioned. Days and dates about which she testified were in conflict too frequently. Chronologically, we find Byrd testifying that Thanksgiving in 2001 was on November 25. Actually, Thanksgiving was on November 22, 2001. She also testified that she got the permit to build a fence on November 22, 2001. Once again, this date was Thanksgiving. It is highly unlikely that she could have obtained a permit on Thanksgiving Day.

While witnesses are often unable to provide precise testimony regarding the date something happened, Byrd attempted to give the impression that the dates she testified to were exact. Another interesting conflict regarding testimony about a date deals with her testimony about precisely when her fence was damaged. In her complaint, Byrd alleges that her fence was damaged on October 10, 2002. When she testified, Byrd referred to her hand written notes and stated that her fence was damaged on Friday, October 10. In 2002, October 10th fell on a Thursday. In 2003, October 10th was a Friday. Byrd's attempt to bolster her testimony with seeming precision actually reflects an attempt to fabricate details.

When a Complainant testifies about an event and says it was witnessed and that witness also testifies, one would expect the witness to corroborate the details testified to. In this case, Byrd testified that on Sunday, October 13, 2002, she and Smallwood were sitting on a bench in front of her home. On that date, Byrd testified that Eileen Sacco called Byrd a racially charged and insulting name while exiting her home. However, when Smallwood testified, he did not directly corroborate Byrd's version. Smallwood testified that Eileen Sacco would "taunt" Byrd and "look at her or do things to just to get her aroused." (N.T. 107) When asked to give specific incidents, Smallwood stated that Eileen Sacco would send her kids out or allow the dog out off leash. (N.T. 107-108) Smallwood also added that Eileen Sacco once took pictures of Byrd's house. Had Eileen Sacco said the things she is accused of on October 13, 2002, Smallwood would certainly have remembered such an event. However, he did not have any recollection at all. Added to this, Byrd testified that Eileen Sacco's name calling got worse after Byrd filed her first complaint. Byrd

then related the purported October 13, 2002 incident. The fundamental problem is that Byrd's first complaint was not even signed until November 19, 2002, over a month later. Confusion is one thing, intentional fabrication and distortion is another.

Perhaps individually, these discrepancies may seem innocent. However, collectively, they show that Byrd attempted to intentionally create the picture she wanted to portray, rather than reveal the picture that actually existed. Another example of Byrd intentionally attempting to create a picture can be seen in her testimony that the Saccos' son called her a vicious racial slur. (N.T. 32-33) Byrd testified that, "on Tuesday, October 7...[she] observed the Saccos' son playing hockey...in between both of the houses because the houses are adjoined..." Byrd testified that the ball seemed to be going more onto her property. She indicated that when she asked him to keep the ball off her property, he kicked the hockey net "over to his side" of the property and called her a vicious racial slur. (Id.) Byrd's version suggests that the Saccos' son was playing in the yard immediately in front of the two connected homes. Byrd said that the court was kicked over to the Saccos' side of the property. However, playing in the front yard area between the homes would not have been possible since Byrd had put up the fence nearly two years earlier. Additionally, in 2002, October 7 fell on a Monday. It was not until 2003 that October 7 fell on a Tuesday. Once again there is a glaring discrepancy with Byrd's dates. By every appearance, Byrd's version of this instance was entirely fabricated. Not only the date and day of week were incorrect, the story about playing hockey in the grass cannot be believed.

Next we turn to issues of credibility that grow out of Byrd's installation of surveillance equipment. Byrd testified that on November 18, 2001, Eileen Sacco had promised she would have her children play on Byrd's property and do things to her property. (N.T. 38) Byrd also testified that she installed surveillance equipment to get proof of Eileen Sacco's harassment. (N.T. 35, 37-38) Just looking where the camera is pointed in Complainant Exhibits 2 and 3 suggests that Byrd was actually looking to secure proof that either the Saccos' son or dog had been in her yard. The

timing of the installation of the equipment is also telling. While animosity between Byrd and Eileen Sacco was born on November 19, 2001, Byrd did not first install surveillance equipment until May 2003. It is more than apparent that Byrd's main concern was catching someone coming onto her property rather than attempting to get proof of personal harassment.

A final area that reveals Byrd to have been far less than credible involves her testimony about purported damage to her car on April 26, 2003. First, Byrd testified that she has a Volvo and that it dents if you so much as spit on it. (N.T. 83) She further testified that the Saccos' son and other children can be seen on her surveillance video "playing hockey on my vehicle." (N.T. 56) When viewing Complainant Exhibit 2 and the photographs of Complainant Exhibit 3, what appears to have occurred is that a young man is attempting to retrieve a ball that had gone under Byrd's vehicle. Certainly, children cannot be seen playing hockey on Byrd's car.

Byrd also testified that she obtained an estimate within a week of the purported damages to her vehicle. However, the estimate offered into evidence as Complainant Exhibit 4 is dated June 30, 2003, over 2 months later. When asked to explain the lapse, at first Byrd could not, (N.T. 95) but then she testified that there had been 2 estimates. (N.T. 96-97) Interestingly, Byrd did not offer another estimate into evidence.

On the question of whether the Saccos' son had been near Byrd's vehicle on April 26, 2003, Edward Sacco credibly testified that at the time of the alleged damage to Byrd's car, his son was attending an opening day hockey game at a hockey club where his son plays hockey. On this question, Edward Sacco's testimony is found to be more credible.

Finally, the nature of the damages listed on the estimate submitted into evidence reveals that there were damages listed that could not have been done by the children shown in either the video or the pictures in evidence. Indeed, under cross examination, Byrd finally admitted that the damages listed on the estimate which she had offered into evidence was not done by the children on the video. (N.T. 88)

Taken as a whole, Byrd's testimony has many points that cast serious doubt on the veracity of her version of events. Given the glaring contradictions and inaccuracies, Byrd's versions do not rise to the level of proof by a preponderance of the evidence. Indeed, much of what she said is simply not to be believed.

Other witnesses also gave less than credible testimony. For example, only Smallwood offered that soon after the fence was completed, Eileen Sacco sent her son and "her nephew or something" out to try "to push the fence or hit at it or destruct it." No one else suggested that this happened. It seems unlikely that this occurred.

Smallwood also provided some insight into the credibility of Byrd. He testified that when Byrd told him that Eileen Sacco had used a racial slur towards her, he, in effect, stated that he thought that Byrd was making it up and that it hadn't happened. (N.T. 105). Here, we have a 20-year friend of Byrd's saying that he thought she was making up a story about something of importance. We must ask ourselves why he would think she was making something up. As a friend of 20 years, he had to know her very well.

At the Public Hearing, Police Sergeant Maddrey testified as a rebuttal witness and stated that in March 2003, on the day Edward Sacco was arrested, she made her first-ever visit to Byrd's home. She testified that after his arrest, Eileen Sacco called Byrd a f..... black bitch, (N.T. 199) and black bitch (N.T. 203). When asked on cross examination why she did not include this information in an Internal Affairs statement she made approximately 10 days after the actual incident, Maddrey became somewhat evasive as she was walked through her prior statement. In the prior statement Maddrey had made no mention of a racial slur. Reading Maddrey's statement, it is clear that she provided significant detail regarding what had she had observed. (R.E. 1) However, she made no mention of a racial slur by Eileen Sacco. Given this circumstance, it is more likely that no racial slur had been made by Eileen Sacco, because if she had made racial slurs, this certainly would have been something that Sergeant Maddrey would have noted in her

statement to Internal Affairs. Additionally, it is noteworthy that Sergeant Maddrey was not asked to comment on whether Byrd had ever shared with her the purported frequency of racial slurs after November 2001. Had Byrd been suffering like she said, it is common experience that she would share information about such things with a police sergeant friend.

When one reads between the lines of Commissioner Johnson's testimony, you discover an interesting dynamic. First, Commissioner Johnson came to the scene of what was in effect a dispute between two neighbors. He testified that he feared someone could get hurt. (N.T. 184) He stated that he told the Saccos that he would do everything he could to try to solve the situation and that he could only try to control one side, and that he can't control that side. (N.T. 185) Of course, he was referring to Byrd. Later, he testified that he did not want to see any violence happen so he told Byrd "to handle this the correct way, do the correct things, don't become confrontational, don't become argumentative with anybody, the various procedures to go by, the things to do, and I also told her any incidents that's involving...contact the police department, make a report of it, but still do it the correct way..." (N.T. 187) The question to ask is why would the Commissioner tell Byrd these things? Did he know that her tendency would be to be confrontational, argumentative, and possibly even violent? If Byrd was told to make reports, where are all the reports of purported racial slurs by Eileen Sacco?

After giving consideration to the credibility of the witnesses that testified, weight and value were then assigned to the story each witness told. Prior to November 19, 2002, the date Byrd verified her first complaint, the likely series of events begin with the puzzling recognition that there had been minimal contact between Byrd and the Saccos for the first 2 years and 10 months that Byrd lived next to the Saccos. On Saturday, November 17, 2001, the Saccos' dog inadvertently darted out of the Saccos' front door and disturbed a pile of leaves Byrd had raked up on her front yard. The next day, Sunday November 18, 2001, the Saccos' son was playing near the front of the houses and went onto Byrd's side of the front lawn. When he did, Byrd asked him not to allow his

ball to come into her yard. Eileen Sacco overheard this and went up to speak with Byrd. Over the course of the previous several months, Eileen Sacco's son had come to her crying after being told by Byrd to stay off her lawn and that that police would be called if he didn't. Eileen Sacco requested that Byrd speak to her rather than her son in the event Byrd had any further problems. Eileen Sacco also advised Byrd that she needed to discontinue, what she characterized as, conduct that harassed and terrorized her son. In response, Byrd called Eileen Sacco a "simple bitch." Eileen Sacco then uttered racial slurs at Byrd.

At that point, Byrd called the police. Responding to Byrd's call, three police cars arrived along with a duty supervisor. A short while later, Police Commissioner Johnson also arrived on the scene. Upon his arrival he noted that the police response was excessive and instructed the responding police to leave. As they left, the responding officers told Byrd that she should simply build a fence in her front yard.

Commissioner Johnson then went into the Saccos' home to speak with the Saccos, whereupon he informed the Saccos that he would attempt to resolve the situation. Commissioner Johnson then exchanged telephone numbers with Edward Sacco. After speaking with the Saccos, Commissioner Johnson then spoke with Byrd. When he did, he, in effect, ordered her to stay away from the Saccos. He further told Byrd that she would need his permission before she could have any further interaction with the Saccos.

A very short time later, Byrd obtained a permit to construct a fence. She was assisted constructing of a 3-foot plastic fence in her front yard by a friend, Smallwood, and a neighbor, Watson. Construction of the fence began on Friday, November 23, 2001, the day after Thanksgiving.

Recognizing that a bush had been planted directly over the property line and in the way, Byrd asked Commissioner Johnson for permission to speak with Edward Sacco. Having the Commissioner's permission, Byrd waited for Eileen Sacco to leave and then approached Edward

Sacco. While she was speaking with Edward Sacco, Eileen Sacco came home and became angry with Edward Sacco because she found him speaking with Byrd. The Saccos exchanged words in their home and Eileen Sacco later came out and yelled racial slurs at Byrd.

At some point, Byrd contacted Philadelphia's special Conflict Prevention Resolution Team. The CPR team did an investigation and did not pursue criminal charges against anyone.

In January 2002, Edward Sacco approached Byrd seeking to resolve the animosity between her and his wife, Eileen Sacco. Subsequently, everything was calm until February, when Byrd became upset that the Saccos' dog had gotten loose and relieved himself in her yard. Byrd called the police and asked that a copy of the dog leash ordinance be forwarded to the Saccos.

The next incident supported by credible testimony occurred on October 10, 2002. On that date, Byrd's fence was slightly damaged. While Byrd claims that the damage was done intentionally by the Saccos' son, the damage was slight and could have been repaired with glue. Had the intent been to intentionally damage the fence, damage would likely have been far more extensive.

In her initial complaint, Byrd then claims that on October 20, 2002, the Saccos' dog again relieved itself on her lawn. It is likely that Byrd again called the police because on November 9, 2002, Byrd was notified that Edward Sacco had contacted the Internal Affairs Division. It appears that he filed a complaint alleging that Byrd's actions amounted to an abuse of her police powers and harassment to his family.

Only days later on November 19, 2002, Byrd verified her initial harassment complaint. The timing of her initial PHRC complaint has every appearance of being filed to counter Edward Sacco's complaint to the Internal Affairs Division.

The PHRC Housing and Commercial Property Division's post-hearing brief notes that a timeliness issue is presented by the circumstances of this case. Indeed, Section 9(h) of the PHRA

states: "Any complaint filed pursuant to this section must be so filed within one hundred eighty days after the alleged act of discrimination..."

The PHRC Housing and Commercial Property Division argues that a continuing violation is present here. Under the continuing violation theory, so long as at least one act of discrimination that is part of an ongoing practice or pattern, occurred within the 180 day filing period, all acts that are part of the pattern are considered timely even when some acts are outside the 180 day period. The argument suggest that the record supports incidents of harassment within 180 days of the date Byrd filed her PHRC claim. However, we disagree.

While Eileen Sacco's racial slurs directed to Byrd on November 18th and 24th, 2001 would constitute actionable harassment, the record does not support a finding that such acts continued. Indeed, the preponderance of evidence in the record considered as a whole supports a finding that intentional acts of harassment did not occur within 180 days of Byrd's filing of her initial complaint. Byrd's complaint makes specific reference to only two acts: (1) Byrd alleged that on October 10, 2002, the Saccos' son intentionally damaged her fence, and (2) that on October 20, 2002, the Saccos' dog was intentionally released without its leash to relieve itself on Byrd's yard. Other than these two specific acts, Byrd's initial complaint only makes general reference to alleged harassment.

As previously reviewed, Byrd's credibility was severely eroded in numerous ways. The fact that Byrd did not include specifics in her complaint simply adds to the idea that there had been no additional slurs after November 2001. Accordingly, we find that Byrd has not established that an act of intentional harassment occurred within 180 days of the filing of her initial complaint.

Given this situation, the Complainant's initial complaint was not timely filed and must be dismissed.

Before turning to Byrd's retaliation claims, we note that on November 18, 2001, Byrd initially responded to Eileen Sacco by calling her a "simple bitch". While such language is certainly

provocative, it is not even close to an excuse for Eileen Sacco's use of racial slurs. Eileen Sacco's conduct is simply unacceptable.

Additionally, it is quite apparent that both Byrd and the Saccos could benefit significantly from the services of a neighborhood mediation service. The parties are asked to give serious consideration to engaging such a program and committing themselves to resolving the regrettable chasm between Byrd and the Saccos.

Now we turn to Byrd's second complaint that alleges that both Eileen and Edward retaliated against Byrd because she had filed the initial PHRC harassment complaint. The PHRC Housing and Commercial Property Division's post-hearing brief correctly observes that a *prima facie* case of retaliation is established by proof that:

- (1) the Complainant engaged in protected activity;
- (2) the Respondent was aware of the protected activity;
- (3) subsequent to the protected activity, the Complainant was subjected to an adverse action; and
- (4) there is a casual connection between the protected activity and the adverse action.

Robert Wholey Company, Inc. v. PHRC, 606 A.2d 982 (1992); and Brown Transport Corp. v. PHRC, 578 A.2d 555 (1990).

In the present case, we apply a general principle that arises from the U.S. Supreme Court's observations in the case of U.S. Postal Service, Board of Governors v. Aikens, 460 U.S. 711 (1983). In that case, the U.S. Supreme Court noted that "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant."

In the present case, we have all the evidence we need to decide whether the Saccos retaliated against Byrd or not. Accordingly, we can proceed directly to the specific question of which party's explanation of the motivation for filing Internal Affairs complaints we believe.

Byrd's retaliation complaint at PHRC Case No. 200302350 alleges that the Saccos not only filed two additional Internal Affairs complaints, but Byrd's complaint also alleges that Eileen Sacco told the Police Advisory Commission that Byrd was having a relationship with Commissioner Johnson, and that the Saccos contacted the press. However, we will focus only on Edward Sacco's three Internal Affairs complaints because Byrd failed to present sufficient evidence regarding any other alleged act of retaliation. Interestingly, the presentation of Byrd's retaliation case and the PHRC post-hearing brief focused exclusively on the filing of Internal Affairs complaints.

While the precise date is not clear, the evidence reveals that Byrd was notified about Edward Sacco's first Internal Affairs complaint on November 9, 2002. However, the actual complaint filed by Edward Sacco was not introduced into evidence, but, we can see from Byrd's initial complaint that she had called the police about the Saccos on October 10th, 2002 and again on October 20, 2002. Byrd called the police on October 10th after discovering that a small piece of the fence in her front yard had been broken. She then called the police again on October 20, 2002 because the Saccos' dog relieved itself on her front yard.

Edward Sacco credibly testified that he filed the first Internal Affairs complaint after giving Commissioner Johnson a chance to resolve what he believed to be harassment against his family by Byrd. We note that as early as November 18, 2001, Byrd caused 3 police cars and a supervisor to respond to her call. Additionally, Commissioner Johnson himself responded and even went into the Saccos' home to speak with them.

As Commissioner Johnson noted, the police response on November 18, 2001 was excessive. Actually, if asked, a majority of the citizens of Philadelphia would agree that the response of November 18, 2001 was excessive. Then, adding that a police officer initiated the response would cause most to agree that an issue of abuse of power should arise.

We find that under the circumstances presented, Edward Sacco's initial Internal Affairs complaint was not filed out of retaliation, but out of frustration over having numerous police come to his home every time his dog got loose or when his son retrieved a ball from Byrd's property. Further, we know that during the period after November 18, 2001, Edward Sacco had been called by Commissioner Johnson as well as visited in his home by the Commissioner.

We also know that Byrd's first PHRC complaint was filed only 10 days after she was notified that Edward Sacco had filed an Internal Affairs complaint. By all appearances, what motivated Byrd's initial PHRC complaint was her reaction to Edward Sacco's Internal Affairs complaint.

The next time Edward Sacco filed an Internal Affairs complaint was the day after he was arrested. Once again, it is clear that the apparent circumstances of his arrest may well place a serious question of whether an abuse of police power occurred in the mind of a reasonable person. The evidence presented reveals that, although charged with disorderly conduct, the office of the District Attorney did not prosecute the matter against Edward Sacco. We are also mindful that this Internal Affairs complaint was directed at the arresting officers as well as Byrd.

Edward Sacco's motivation for filing this Internal Affairs complaint was solely the result of his frustration after having been arrested under circumstances which stemmed from the situation of his son playing ball in his back yard. We note that, although he requested to tape the conversation between himself and the arresting officers, he was denied that opportunity. The exchange between Edward Sacco and the responding officers depicts Edward Sacco as becoming extremely frustrated to the point where he insulted the officers. The filing of this Internal Affairs complaint was not connected to Byrd's participation in activity protected by the PHRA.

Finally, Edward Sacco again filed a third Internal Affairs complaint when he believed that Byrd falsely accused his son of damaging her vehicle. We credit Edward Sacco's testimony that this was his motivation for the filing of a third Internal Affairs complaint, primarily because we discredit Byrd's testimony that the Saccos' son had anything to do with any damage to her car.

Additionally, what caused the damages to Byrd's car listed in the estimate she provided was not sufficiently established. In effect, Byrd testified that she did not know what caused the damages listed on the estimate she provided. A father who perceives that, intentionally, his son has been wrongly accused of damaging a vehicle would rightfully want to inform a neutral authority over the accuser of his concern that the accusation was false. Here, Edward Sacco's third Internal Affairs complaint is found to be a reasonable response to Byrd's accusations.

In summary, Byrd has not proven by a preponderance of the evidence that the Saccos retaliated against her. For this reason, Byrd's complaint at PHRC Case No. 20302350 should also be dismissed.

An appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KIMBERLY BYRD,
Complainant

v.

PHRC Case No. 200205077

EILEEN SACCO,
Respondent

KIMBERLY BYRD,
Complainant

v.

PHRC Case No. 200302350

EILEEN & EDWARD SACCO,
Respondents

RECOMMENDATION OF PERMANENT HEARING EXAMINER

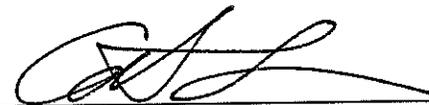
Upon consideration of the entire record in the above-captioned consolidated matters, the Permanent Hearing Examiner finds that the Complainant has failed to prove discrimination in violation of Sections 5(d) and 5(h)(3) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Stipulation of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

Date

February 2, 2005

By:



Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

KIMBERLY BYRD,
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v.

EILEEN SACCO,
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PHRC Case No. 200205077

PHRC Case No. 200302350

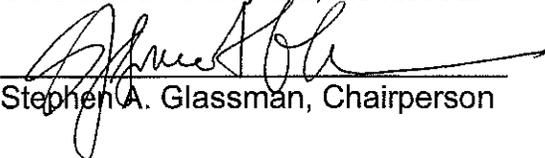
FINAL ORDER

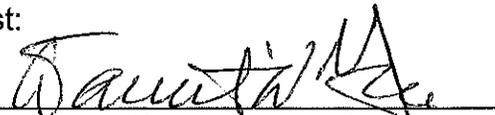
AND NOW, this 1st day of MARCH, 2005, after a review of

the entire record in this matter, the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the full Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion as its own finding in this matter and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

that the complaints in these consolidated cases be, and the same hereby are, dismissed.

By: 
Stephen A. Glassman, Chairperson

Attest:

Dr. Daniel D. Yun, Assistant Secretary