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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF CLIFTON PARK APTS,

Appellant,

-against-

NO. 2

DHR,

Respondent.

20 Eagle Street
Albany, New York
January 9, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: The next case on the
2 calendar is Matter of Clifton Park Apartments v. DHR.

3 MS. HOLLIFIELD: May it please the court. I'm
4 Toni Ann Hollifield for the Division Of Human Rights. I'd
5 request to reserve three minutes for rebuttal, please.

6 CHIEF JUDGE WILSON: Yes.

7 MS. HOLLIFIELD: As a matter of public policy, in
8 order for the human rights law to be effective,
9 complainants must be able to file good faith discrimination
10 complaints without fear that they could be sued for the
11 contents of those complaints. Finding otherwise would be
12 against the public interest recognized by the legislature
13 when they enacted the law and would have a chilling effect
14 on those seeking to assert their rights under the statute.

15 JUDGE RIVERA: So if I could just - - - just to
16 be clear on this, what I think is a threshold question for
17 me, the Division interprets the statute and the case law to
18 require a good faith complaint, even though those words are
19 not in the statute?

20 MS. HOLLIFIELD: Yes.

21 JUDGE RIVERA: Okay. Do we actually have to
22 decide that now?

23 MS. HOLLIFIELD: Well, the commissioner found
24 that in - - - in this - - - in the instant case, there was
25 the underlying original complaint filed by CityVision was

1 made in good faith.

2 JUDGE RIVERA: Uh-huh.

3 MS. HOLLIFIELD: The - - - after the initial
4 investigation, the Division dismissed that complaint for
5 lack of probable cause. But there - - - the - - - in this
6 succeeding retaliation complaint, the commissioner did find
7 that the initial complaint was made in good faith - - -

8 JUDGE RIVERA: Done in good faith. So why has
9 the Division come to this interpretation since good faith,
10 those words are not found in the section on retaliation?

11 MS. HOLLIFIELD: Well, there's - - - there's case
12 law to that effect.

13 JUDGE RIVERA: Uh-huh.

14 JUDGE TROUTMAN: Whose burden? Whose burden was
15 it supposed to be to establish the good faith? Was it
16 CityVision or was it the owner to establish that they
17 didn't have good faith?

18 MS. HOLLIFIELD: It - - - it's the complainant's
19 burden - - - the initial burden to show that the complaint
20 was made in good faith and then the burden shifts.

21 JUDGE TROUTMAN: And below was that done at - -

22 MS. HOLLIFIELD: At the divi - - - at the
23 Division?

24 JUDGE TROUTMAN: At the Division?

25 MS. HOLLIFIELD: In this case, the commissioner

1 did not make a number of finding of fact to the effect that
2 there was a good faith initial complaint. However, he did
3 find that the complaint was made in good faith, and that is
4 the final order at page 5, which is page 73 of the record.

5 JUDGE RIVERA: But that's a fact find - - - is
6 that not a factual finding?

7 MS. HOLLIFIELD: It's - - - it's - - - is - - -

8 JUDGE RIVERA: You're saying that's not a factual
9 finding?

10 MS. HOLLIFIELD: - - - a factual finding - -

11 JUDGE RIVERA: Okay.

12 MS. HOLLIFIELD: - - - but it's not a numbered
13 finding of fact at - - - as part of the final order.

14 JUDGE RIVERA: Oh, I see. Oh, I'm sorry. Now I
15 understand it. Is that in part - - - well, let me ask it
16 this way. Could the Division have relied on the
17 proceedings or its assessment - - - I guess I should put it
18 that way - - - its investigation with respect to the
19 initial complaint?

20 When you're making this determination - - - let
21 me - - - let's try it this way. When you're making this
22 determination about whether or not it was filed in good
23 faith, are you - - - is the Division limited only to
24 whatever is presented in that proceeding - - - the - - -
25 the retaliation petition proceeding?

1 MS. HOLLIFIELD: Yes, we - -

2 JUDGE RIVERA: Well, can it rely - - - can it
3 take internal notice of the prior proceeding?

4 MS. HOLLIFIELD: No. The - - - the Division is
5 limited to the evidence that was presented at the hearing -
6 -

7 JUDGE RIVERA: Uh-huh.

8 MS. HOLLIFIELD: - - - when - - - in - - - when
9 determining a final order after hearing.

10 JUDGE CANNATARO: So back to Judge Troutman's
11 question. Does the burden shift when you go from the
12 original complaint to the retaliation claim? Is it now - -
13 - I'm sorry - - - New Vision? I forgot their name.

14 MS. HOLLIFIELD: CityVision.

15 JUDGE CANNATARO: CityVision. Is it now their
16 burden to show that the complaint was made in good faith?

17 MS. HOLLIFIELD: It's - - - it's always the
18 complainants - - - and - - - burden to show that the
19 complaint was made in good faith.

20 JUDGE CANNATARO: Okay.

21 JUDGE GARCIA: And so the Appellate Division said
22 that that wasn't - - - that that burden was improperly
23 shifted or that there was no analysis as to that statement
24 that it was in good faith. So do you dispute that finding
25 by the Appellate Division?

1 MS. HOLLIFIELD: We do. We - - - while we
2 understand that generally there are numbered findings of
3 fact and that this was not in that portion of the order,
4 there was a very direct statement from the commissioner
5 that the initial complaint was made in good faith. And - -
6 -

7 JUDGE RIVERA: And what - - - what would have
8 been the basis for that determination? If you're saying
9 that you're limited only to the record before the ALJ
10 hearing based on this petition?

11 MS. HOLLIFIELD: I - - - it would have been the
12 testimony - - -

13 JUDGE RIVERA: Is it some testimony? What would
14 you say?

15 MS. HOLLIFIELD: Yes - -

16 JUDGE GARCIA: But there's - - - is there any
17 indication in this finding? I mean, you can say something,
18 but how do you review it if there's no indication, or I
19 think, as the Appellate Division says, no analysis of why
20 they reached that conclusion. Right. If this - - - is - -
21 - was made in good faith. But there's nothing else, so how
22 is court supposed to review that finding for any support in
23 the record?

24 MS. HOLLIFIELD: Well, we understand that the - -
25 - the third department felt that there was not sufficient

1 analysis. And they did mention in their order that,
2 generally, that would mean the matter would be remitted to
3 the Division for further analysis.

4 JUDGE SINGAS: But can you point to anything in
5 the record that was analysis?

6 MS. HOLLIFIELD: No, the - - - the order itself
7 simply says the initial complaint was made in good faith.
8 There was no analysis in the order.

9 JUDGE HALLIGAN: Counsel, on the material adverse
10 effect, where in the record can you point us to something
11 that shows a material adverse effect? Maybe you can start
12 by telling me what exactly are you claiming is the material
13 adverse effect.

14 MS. HOLLIFIELD: Yes, Your Honor. The adverse
15 effect was the threatening letter. The letter itself - -

16 JUDGE HALLIGAN: But doesn't - - - doesn't the
17 letter have to have - - - even if we were to agree with you
18 that a letter could have some material adverse effect, is
19 your argument that it is, per se, sufficient or - - - and -
20 - - and there doesn't need to be anything in the record
21 that shows that it, in fact, had some effect? Or is there
22 something in the record that demonstrates that effect that
23 you want us to look at?

24 MS. HOLLIFIELD: Well, Your Honor, the - - - the
25 threat itself was the adverse effect. The - - - it's clear

1 from CityVision's subsequent actions that they felt
2 threatened with - - -

3 JUDGE HALLIGAN: Okay. So where - - - on that
4 point, where in the record is that established that they
5 felt threatened?

6 MS. HOLLIFIELD: Well, within two weeks - - -
7 within two weeks of the date of the letter, CityVision
8 started drafting their retaliation complaints. Within - -
9 -

10 JUDGE HALLIGAN: But - - - but doesn't CityVision
11 need to show that the letter had some material effect,
12 aside from that they decided to file a retaliation action?
13 It seems to me maybe that's bootstrapping a little bit.

14 MS. HOLLIFIELD: It's Division's position that
15 the chilling effect of the threat of litigation for the
16 contents of a discrimination complaint is sufficient for a
17 finding of retaliation. As I said, in this case, it's
18 clear that CityVision felt threatened. It was less than a
19 month between the date of the letter and the filing of the
20 retaliation complaint.

21 JUDGE TROUTMAN: So is that because in order for
22 them to be able to fulfill their mission, they need to be
23 able to file a complaint in good faith?

24 MS. HOLLIFIELD: Yes. And it's not - - - it's
25 not just CityVision. It - - - i's all complainants. This

1 - - - this decision would not be specific to CityVision or
2 an advocacy organization. All complainants need to be free
3 to file discrimination complaints that they're making in
4 good faith without the fear that they can be sued for the
5 content of those complaints. The - - - it - - - the
6 majority of complainants are individuals.

7 JUDGE TROUTMAN: And would that result in one
8 being unable to challenge those that were not filed in good
9 faith?

10 MS. HOLLIFIELD: No. The - - - the threshold
11 issue that the underlying complaint had to have been in
12 good faith is necessary. If there is a complaint filed in
13 - - - for - - - in bad faith for some reason, that would
14 not be protected.

15 CHIEF JUDGE WILSON: But your argument sounds a
16 little - - - I'm sorry. Over here. It sounds a little
17 like you're saying, even if CityVision had said, this
18 didn't chill us at all, but we decided to file a lawsuit to
19 vindicate rights of others, that would be sufficient to - -
20 - for - - - to ward against the apartment building, right?

21 MS. HOLLIFIELD: Well, CityVision is an advocacy
22 organization, so they're always going to be filing
23 complaints on behalf of - - -

24 CHIEF JUDGE WILSON: Right. Well, what I'm
25 trying to get at is it sounded to me as if you were sort of

1 answering a question that Judge Halligan asked earlier,
2 which is whether you were saying this is really a per se
3 violation, and so you don't need to show any material
4 adverse impact to the particular party here?

5 MS. HOLLIFIELD: Well, their - - - the impact on
6 CityVision itself is the diversion of their resources.

7 CHIEF JUDGE WILSON: Yeah, but I'm - - - suppose
8 that they said we don't care about that or something like
9 that. Or is it - - - because you seem to be articulating a
10 policy reason that because there are many of the - - - of
11 the people in these circumstances are not testing companies
12 but they're individuals, it really kind of doesn't matter
13 that if - - - if an organization, the landlord is in the
14 business of sending threatening letters, that's going to
15 result in a sanction, even if the particular party wasn't
16 adversely impacted in any way. Is that your position or
17 no?

18 MS. HOLLIFIELD: No, but because we believe that
19 the adverse impact is the chilling effect that that threat
20 would have.

21 CHIEF JUDGE WILSON: But the chilling effect of
22 others, or the chilling effect of this particular this - -
23 -

24 MS. HOLLIFIELD: This particular person. Maybe
25 they - - - sometime down the line, something else occurred

1 - - -

2 CHIEF JUDGE WILSON: And - - - and so if they had
3 affirmatively said, we weren't chilled at all. In fact, we
4 were energized by this. Then what?

5 MS. HOLLIFIELD: I think that would be a fact
6 specific inquiry in that - - - in that situation - -

7 CHIEF JUDGE WILSON: Right. And I'm asking
8 hypothetical facts now and asking for the result.

9 MS. HOLLIFIELD: I - - - I'm not sure how the
10 Division would rule on that - - -

11 JUDGE GARCIA: I'm sorry. I - - - I thought your
12 - - - as the Chief Judge was getting at I think - - -
13 trying to explore - - - is that it isn't only the chilling
14 effect on the particular party here. So if a tenant gets a
15 letter like this for filing a complaint and this same thing
16 would have happened, it's the effect on other tenants in
17 the building, as well. The chilling effect on their coming
18 forward with similar complaints. Isn't that your argument,
19 or is it that the particular tenant involved in the
20 proceeding has to show they were somehow chilled in - - -
21 or suffered some adverse consequence here?

22 MS. HOLLIFIELD: I think it's both. I - - - if -
23 - - if it's the - - -

24 JUDGE GARCIA: Do you need both?

25 MS. HOLLIFIELD: No, I don't - - - I don't



1 believe you need both. The - - - I'm sorry - - - the fly -
2 - - the fly was distracting. But in this case, as Your
3 Honor said, if it's a building where one person filed a
4 complaint and was threatened with a lawsuit, or if it's an
5 employer where one employee filed a complaint - -

6 JUDGE GARCIA: Let's say that building and
7 someone files a complaint, one of the tenants, and it's
8 dismissed; same facts here. They send this letter. Would
9 - - - and that tenant in the proceeding says, no, I didn't
10 feel chilled at all. In fact, I - - - you know, I filed
11 another complaint the next week, but this still was an
12 adverse action. Do they recover or not? Do they win or
13 not? Based on the fact that other tenants might have been
14 chilled.

15 MS. HOLLIFIELD: Again, I believe that would be a
16 - - - a fact-specific inquiry that I - - - I can't answer -
17 - -

18 JUDGE GARCIA: But isn't, then, this just a fact-
19 specific inquiry too? So if you don't - - - as Judge
20 Halligan, I think, was getting at, if there isn't
21 sufficient information in this record about this particular
22 party, then you lose on the fact-specific inquiry.

23 MS. HOLLIFIELD: But in this particular case,
24 while CityVision was adversely affected, the - - - they
25 were threatened, they felt threatened - - -

1 JUDGE GARCIA: And I understand that argument.

2 MS. HOLLIFIELD: And in addition to that, there
3 was a diversion of resources that went into filing the - -
4 - the retaliation complaints and dealing with the
5 investigation. They hired counsel in - - - in that
6 instance in the retaliation complaint. So all of that goes
7 towards their adverse - - -

8 JUDGE HALLIGAN: So - - - so as a general matter,
9 when you're assessing - - - I'm over here - - - when you're
10 assessing a complaint, do you look to see if there is an
11 adverse effect that that particular complainant has
12 provided evidence of? Or instead, do you assume that if a
13 threat is established that that alone constitutes a
14 material adverse effect? I don't just mean in this case,
15 but more generally, what is your practice?

16 MS. HOLLIFIELD: Generally, there needs to be an
17 adverse effect on the individual or the - - - by individual
18 complainant, I mean the person or entity filing the
19 complaint.

20 JUDGE HALLIGAN: Okay. So what I'm grappling
21 with here is - - - is where that is in the record, because
22 it seems to me that - - - that one individual says, I think
23 the word he uses is that he was shocked.

24 MS. HOLLIFIELD: Uh-huh.

25 JUDGE HALLIGAN: And there is some expenditure of

1 resources. And correct me if I'm wrong, but it looked to
2 me like, although it was a little hard to tell, almost all
3 of those dollars were related to filing the retaliation
4 complaint itself as opposed to some effect, you know,
5 independent of the dollars spent to bring the - - - the
6 retaliation claim. Is there anything else in the record
7 I'm missing?

8 MS. HOLLIFIELD: No, that - - - that is - - -
9 that is - - - on this record, that is the extent of the - -
10 - of - - - for lack of a better term, damages suffered by
11 CityVision. But if you look at the dollars spent going
12 toward the retaliation complaint, that was filed in
13 response - - - direct response to the letter that
14 threatened to - - - that - - - the respondents at the
15 Division level would proceed accordingly, which certainly
16 seems, to the commissioner, as if a lawsuit was
17 forthcoming, and they filed that retaliation complaint to
18 get ahead of that forthcoming litigation.

19 JUDGE RIVERA: So does it - - - so if I'm
20 understanding you, you're arguing that they took the threat
21 seriously.

22 MS. HOLLIFIELD: Yes.

23 JUDGE RIVERA: And they were concerned they might
24 be liable. And they were trying to protect themselves; and
25 therefore, you have the adverse effect.



1 MS. HOLLIFIELD: Yes.

2 JUDGE RIVERA: Yeah. Well, it's really adverse
3 action, right? It's adverse action.

4 MS. HOLLIFIELD: Yes.

5 JUDGE RIVERA: Which you're calling it adverse
6 effect, but I understand the case is an adverse action.

7 MS. HOLLIFIELD: That's correct.

8 JUDGE RIVERA: Uh-huh.

9 MS. HOLLIFIELD: Thank you.

10 CHIEF JUDGE WILSON: Thank you.

11 MR. HUTTER: Good afternoon. May it please the
12 court.

13 The issue before the court is an interesting one.
14 It's something that the court has not fully addressed.
15 Namely, the - - - the basic framework of retaliation claim
16 was set forth by this court by Judge Kaye in the Ghost - -
17 - I forget the name of the case - - - but the fifth element
18 now that's being added is, what about now when the
19 complaint has been found to be totally meritless? Can
20 there be a retaliation claim based on that?

21 This court in the Mohawk - - - Matter of Mohawk,
22 left it open and decided there were two ways of going with
23 it. Decided that on the record we're not going to handle
24 it. But then the Appellate Division, starting with the
25 third department - - - we set this argument forth in our

1 brief at page 26 - - - in a Matter of OMRDD v. - - - Matter
2 OMRDD Staten Island said, we're going to adopt the federal
3 standard. And that federal standard is that when the
4 complaint has been dismissed - - - the alleged
5 discriminatory complaint has been dismissed, the plaintiff
6 must show - - - the complainant must show that they had a
7 reasonable basis to believe. I'm not sure this good faith
8 - - - I've been reading in good faith as meaning the
9 shorthand version of human rights is saying, that's the
10 reasonable basis, but the test is one of reasonable basis
11 and there is no proof of that. Now, they keep on talking
12 about a good faith basis in the order.

13 JUDGE RIVERA: So if I can - - - if I can just -
14 -

15 MR. HUTTER: Well, the order is set forth - - -

16 JUDGE RIVERA: Counsel, I'm sorry.

17 MR. HUTTER: I'm sorry.

18 JUDGE RIVERA: If I can just be - - - I'm over
19 here. If I can just clear - - -

20 MR. HUTTER: I thought it was over there - -

21 JUDGE RIVERA: No. No. That's fine. I can just
22 be clear, you're saying, we have left open the question
23 whether or not - - - whether you call it a reasonable basis
24 or good faith, there - - - there has to be something beyond
25 perhaps a malicious intent - - - or no grounds, let me put

1 it that way - - - for filing the complaint when the
2 petition - - - when, of course, the Division finds it lacks
3 proper probable - - - probable cause of actual
4 discrimination. And your position is we should now also
5 adopt this federal standard that the lower court has
6 adopted. Is that your position - - -

7 MR. HUTTER: Yes, I think that this standard has
8 been working very well. There's been no complaints with
9 it.

10 JUDGE RIVERA: So let me - - - so let me ask
11 this, since I don't see any of this in the statute, what
12 would be the basis for adopting this particular permutation
13 of the standard?

14 MR. HUTTER: I think the basis here is now trying
15 to do a workable - -

16 JUDGE RIVERA: Uh-huh.

17 MR. HUTTER: - - - standard, recognizing that we
18 do not want to abridge and deter people from filing
19 complaints.

20 JUDGE RIVERA: Uh-huh.

21 MR. HUTTER: But on the same point, we don't want
22 to encourage people to file bogus complaints.

23 JUDGE RIVERA: But isn't there already something
24 in the statute that deals with that, which was the
25 opportunity, of course - - - this includes your client - -

1 - to seek attorney's fees for basis when a frivolous
2 complaint - - -

3 MR. HUTTER: Yes, and I will address that, Your
4 Honor.

5 JUDGE RIVERA: So could not the legislature have
6 decided, we don't want to go about the business of having
7 courts figure out what is and is not a reasonable basis in
8 good faith. If it's frivolous, fine. Pay the attorney's
9 fees. And - - - and that will be what discourages that
10 kind of conduct, because the real problem is encouraging
11 people to file, not discouraging people to file who have no
12 basis.

13 MR. HUTTER: Right. No, I - - - I fully agree
14 that this court can - - - and it's a question really of
15 statutory interpretation, which this court is suited for.

16 JUDGE RIVERA: Uh-huh.

17 MR. HUTTER: You don't have to defer to human
18 rights. It's a matter of pure statutory interpretation.
19 And the - - - what the SD what the feds have done and the
20 lower courts have done is that this reasonable basis is
21 reason - - - is a - - - no pun intend - - - no, it's a
22 reasonable accommodation of everything.

23 JUDGE RIVERA: Uh-huh.

24 MR. HUTTER: But getting back to this. Now, they
25 keep on talking about the order at page 5. This is

1 repeated - - - reprinted in the record at page 73. This is
2 their finding of good faith. Accordingly, as complainants
3 ask - - - seeking a good faith basis claim.

4 JUDGE RIVERA: Uh-huh.

5 MR. HUTTER: But there's no proof of that. And
6 the reason why there's no proof of it, Your Honor, is that
7 the party who brought this case brought it on the theory
8 that all I have to do is show the letter was sent and
9 that's it. Relying upon Judge Hark's decision back in 1972
10 that that's enough. They never brought forth any evidence
11 to show reasonable basis. The - - - the witness list was
12 Mr. Pentkowski, the attorney, for Clifton Park, and their
13 own inside person who was going to talk about damages.
14 They never brought forth anything to show that they had a
15 reasonable basis for doing so. And then when you look at
16 the commissioner - - -

17 JUDGE RIVERA: And what would - - - what - - -
18 what would - - - I'm over here again. Sorry.

19 MR. HUTTER: I'm sorry. I keep - -

20 JUDGE RIVERA: No, I'm sorry.

21 MR. HUTTER: - - - it sounds like you're coming
22 from.

23 JUDGE RIVERA: My apologies.

24 MR. HUTTER: I'm not trying to ignore you, Judge.

25 JUDGE RIVERA: No. No. No. No worries. What -

1 - - from your perspective, given the standard that you're
2 advocating for, what is it that a complainant - - - your
3 client - - - I'm sorry - - - the complainant here - - -
4 excuse me - - - CityVision - - - would have had to have
5 done to avoid perhaps a - - - perhaps - - - to show that
6 they didn't - -

7 MR. HUTTER: They - - - they would have to show
8 that they - - -

9 JUDGE RIVERA: - - - they didn't have a
10 reasonable - -

11 MR. HUTTER: - - - they investigated reasonably.

12 JUDGE RIVERA: Okay.

13 MR. HUTTER: And again, if you look at the
14 initial - - -

15 JUDGE RIVERA: Does - - - does that - - - let me
16 just ask you, does that quote, unquote investigation have
17 to equate with the kind of investigation the Division does?

18 MR. HUTTER: No.

19 JUDGE RIVERA: Okay.

20 MR. HUTTER: Some basis. Now, all the record
21 shows is that they bought a directory - -

22 JUDGE RIVERA: Yeah.

23 MR. HUTTER: - - - of apartments in New York
24 State and made cold calls.

25 JUDGE RIVERA: Uh-huh.

1 MR. HUTTER: They did nothing further. If they -
2 - - or they just simply put on the internet, Clifton Park
3 Apartments.

4 JUDGE RIVERA: Yeah.

5 MR. HUTTER: Shenendehowa Schools.

6 JUDGE GARCIA: Counsel, I - - - I've - - - I'm
7 sorry to interrupt, but I have a question on this, the
8 standard on reasonable basis. In litigating this, did the
9 agency ever say you don't need to show reasonable basis?
10 Was that an issue here? I thought the issue here was, is
11 there a sufficient finding?

12 MR. HUTTER: No, the agency has never done that.
13 In fact, the agency has followed the reasonable basis
14 standard in all their other decisions. So I mean, they're
15 agreeing with it. But there's - - - the disagreement that
16 I have with the Division now is that there is no proof of
17 that.

18 JUDGE GARCIA: That - - - I understand that. So
19 in this case, there was not a dispute between the parties
20 over whether you needed to show a reasonable basis, it was
21 only whether it was shown or found - - -

22 MR. HUTTER: No dispute at this stage, Your
23 Honor. Like I said, I think a lot of the fault in this
24 case has to be given to the initial attorney for CityVision
25 who proceeded on a basis that was ignorant of New York law.

1 That's why the record is so bereft of any proof, not only
2 of reasonable basis, but adverse action.

3 CHIEF JUDGE WILSON: Can I ask you about the
4 impact of the attorney fee provision in the executive law
5 in Section 10? I think you said you were going to address
6 that. So it - - - it - - - does that - - - should that
7 inform in any way how we look at this? And let me ask it
8 the following way. As I read it, and there may be a
9 different way to read it, to - - - to be able to recover
10 attorney's fees, you need two things. One is you need to
11 demonstrate that the complaint was frivolous.

12 MR. HUTTER: Correct.

13 CHIEF JUDGE WILSON: But it also - - - and this
14 is a definition of frivolous - - - but it also says that it
15 has to be after a hearing of the kind in Section 4. So
16 there's a way to read it to say that if all that's happened
17 is a complaint is filed and it's thrown out before a
18 hearing, you can't get attorney's fees.

19 MR. HUTTER: Correct. You have to - - - to start
20 another proceeding before the Commission to seek reasonable
21 attorney's fees. You start another hearing. Now, that - -
22 - that backs into, Judge - - - and I don't mean to cut you
23 off, but that's why we say here that initially that adverse
24 action requires some adverse action. And the adverse
25 action here starts with that letter that Mr. Pentkowski

1 sent. And the letter says, we're going to look for you for
2 damages. We - - - let's sit down and talk. Let's try to
3 resolve this. If we don't hear from you, we will proceed
4 accordingly. Never said, I'm going to see you in federal
5 court tomorrow or whatever - - -

6 JUDGE RIVERA: So if the letter - - - if the
7 letter had said - - - if - - - if - - - Counsel, if the
8 letter had said, if I don't hear from you by such and such
9 date, we'll file an act - - - an action.

10 MR. HUTTER: That could have been - - -

11 JUDGE RIVERA: We did our lawsuit. Would that
12 have been enough?

13 MR. HUTTER: That - - - that could - - - could be
14 enough - - - could be enough.

15 JUDGE RIVERA: Okay.

16 MR. HUTTER: But again, even that, though, Your
17 Honor, here's the problem. If we say, see you in court - -
18 - but if they had said, we'll see you in the - - - back
19 before Division of Human Rights and get our attorney's
20 fees, that would have been proper. So what we're saying
21 here is that when you say here, we're going to proceed
22 accordingly - -

23 JUDGE RIVERA: So - - - so - - -

24 MR. HUTTER: - - - they had the right to proceed
25 before Division of Human Rights to get their attorney's

1 fees.

2 JUDGE RIVERA: - - - because when the complainant
3 knows that in advance, because that's a - -

4 MR. HUTTER: They - - -

5 JUDGE RIVERA: - - - that is a possibility,
6 right?

7 MR. HUTTER: Right. There's - - - they're - - -
8 they're saying - - - the right that they have to do. And
9 you can't say they - - - and what they're - - - what
10 they're trying to be done here is now, you can't do that.
11 Now - - - so what good is that attorney's fees application
12 for.

13 JUDGE RIVERA: That is different from saying
14 we're going to drag you into court and seek damages, not
15 just fees.

16 MR. HUTTER: Possibly.

17 JUDGE RIVERA: Ruin your name. You'll lose all
18 that funding. You're a not for profit.

19 MR. HUTTER: Well, again, not for profit. But
20 this really is a money-making operation, Your Honor. I
21 mean, I'm not trying to besmirch - - - I think they - - - I
22 think these testing agencies do God's work in ferreting out
23 discrimination.

24 JUDGE RIVERA: Uh-huh.

25 MR. HUTTER: They're a major adjunct to our



1 agencies that don't have the manpower. I mean, the Supreme
2 Court - - - the United States Supreme Court has endorsed
3 testers to working with the NAACP and other civil rights
4 organizations to find this out. But here, what this
5 testers agency did is really for commercial purposes.

6 And when you look at it, within two weeks after
7 the complaint was filed, they send a conciliation letter,
8 Oh, we'll take care of everything, pay us a couple of
9 thousand dollars, take our courses that we offer, and we'll
10 forget about it. We'll - - - we will tell - - - go to - -
11 - whether it's the HUD or SDR - - - to vacate everything.
12 And then when they - - - after they sent that, Mr.
13 Pentkowski kept on calling them, tell us what we did wrong.

14 JUDGE RIVERA: Uh-huh.

15 MR. HUTTER: And they never responded.

16 JUDGE RIVERA: I mean, can I - -

17 JUDGE HALLIGAN: Counsel - -

18 JUDGE RIVERA: - - - Counsel, can I follow up on
19 Judge Garcia's point here? I think I understood his point.
20 If both sides - - - or at least the Division and you - - -
21 agree that the standard is reasonable basis, good faith,
22 however you're calling it, can the court revisit that in
23 this case, since we've left the question open to determine
24 that, or do we have to accept that that's the standard
25 that's - - - that you're working with?

1 MR. HUTTER: This is the conundrum that I - - - I
2 had, Your Honor. In my last point, I - - - I go along with
3 what the Appellate Division said is that we have to give
4 the agency the first crack at applying the proper standard.

5 JUDGE RIVERA: Uh-huh.

6 MR. HUTTER: Now, I've - - - I would like to say
7 in that regard, if they apply the proper standard to this
8 record, there's no basis. There's no basis whatsoever to
9 conclude the reasonable basis is there because there's no
10 evidence. And I would have loved to have said that, but I
11 found no case that says that the Appellate - - - that a
12 court can - - - when the agency uses the wrong standard,
13 that they can use the standard. You always have to give
14 the agency the first crack.

15 Now, I would love this Court to say, unless
16 there's no basis for it, but I - - - I found no authority
17 to make that argument. I would have love to have found
18 authority for it. And I - - - I - - - trust me, I did a
19 lot of work looking at that. But I think here, what the
20 Appellate Division did is simply saying, that's - - -
21 that's normal course. But then they found that there's no
22 adverse action, which is the other point now, that adverse
23 action - - - obviously, when the tenant is now - - - files
24 a complaint and then he's thrown out of the apartment, or
25 the lease is terminated, the employee is fired when he



1 files - - - files the complaint. That's your classic
2 adverse action. But remember, this is being done in the
3 context now of a tester agency. And this tester agency - -
4 -

5 JUDGE SINGAS: Well, do you think the - - - do
6 you think the Appellate Division exceeded its review power
7 to find that the letter was retaliatory instead of
8 deferring to DHR in their findings. Like, what are we to
9 do with that?

10 MR. HUTTER: No, I - - - I think they are the - -
11 - the Appellate Division, that last part of the decision,
12 Judge Singas, acted properly, and the - - - the review said
13 substantial evidence. There is no substantial evidence
14 showing that that adverse action element was satisfied.

15 JUDGE SINGAS: But don't we have to defer to DHR
16 on that?

17 MR. HUTTER: No.

18 JUDGE SINGAS: On their findings? Why not?

19 MR. HUTTER: Because you have the substantial
20 evidence review power. And that's what - - - that's what
21 the issue is.

22 JUDGE CANNATARO: Well, what - - - what would - -
23 - over here - - - what would the substantial evidence be?
24 The - - - the DHCR looked at the letter and said, this is
25 retaliatory. This is adverse in some way. And the

1 Appellate Division simply disagreed with it. The evidence
2 is the letter itself and nothing more.

3 MR. HUTTER: Well, that's - - - it's two
4 different issues, Judge. I mean, certainly - - - and I
5 make this argument in my brief. My argument is that I
6 don't think that letter is a threat to sue. And I - - -

7 JUDGE CANNATARO: You're entitled to - -

8 MR. HUTTER: - - - but I also recognize that that
9 may be something that you would defer to the Appellate
10 Division, defer to human rights. But the impact, where's
11 the impact?

12 CHIEF JUDGE WILSON: Well, they say the impact is
13 the fees that they had to pay for counsel.

14 MR. HUTTER: There - - - there's - - -

15 CHIEF JUDGE WILSON: But that's their argument.

16 MR. HUTTER: - - - the only impact here is that
17 they went to now start a lawsuit.

18 CHIEF JUDGE WILSON: Right. And that's what they
19 claim.

20 MR. HUTTER: There - - - there's nothing
21 interrupted their business. There's nothing to show
22 anything like that.

23 JUDGE RIVERA: But that - - but isn't the
24 argument that I feel threatened. I've got to protect
25 myself. I took these actions and it - - - that cost me

1 resources and money.

2 MR. HUTTER: Well - - -

3 JUDGE RIVERA: If I hadn't gotten the letter, I
4 wouldn't have had to do any of those things.

5 MR. HUTTER: Again, Your Honor, that's one way of
6 looking at it. The other way of looking at it is take up
7 Mr. Pentowski's offer. Call - - - call them up. What
8 exactly are you looking at? What are you seeking? And
9 resolve it that way. But don't run out to get a lawyer to
10 bring an action without really thinking it through.

11 CHIEF JUDGE WILSON: Well, suppose we ch - - -
12 suppose we - -

13 MR. HUTTER: I see my time is up.

14 CHIEF JUDGE WILSON: - - - suppose we - - -
15 suppose we change the - - - the facts a little bit and give
16 you a hypothetical. Suppose instead of a testing company,
17 this had been an individual tenant, and the - - - the
18 landlord sent, or the landlord's lawyer sends a letter
19 saying, unless you vacate the apartment, we're going to
20 take all legal means necessary, or you know reserve our
21 rights to proceed accordingly. Whatever the letter says -
22 - - I think, proceed accordingly. Right. And the tenant
23 then goes to court to get a declaration or goes to human
24 rights to get a declaration that they can't be thrown out
25 and incurs some legal fees. Do those legal fees not count

1 as adverse - - - as a material effect adverse?

2 MR. HUTTER: In that situation, yes.

3 CHIEF JUDGE WILSON: So is the difference there
4 just that it's the testing company and not the individual
5 tenant?

6 MR. HUTTER: No, I - - - I think the difference
7 is, Your Honor, there, the legal fees were act - - - were
8 actually incurred to - - - as a direct result of the uncon
9 - - - of the wrongful conduct of the landlord. Here,
10 again, all he did is said, let's sit down and try to
11 resolve this. And they pushed the panic button.

12 JUDGE HALLIGAN: But - - - but doesn't that turn
13 on - - - doesn't that turn on how we read the letter? In
14 other words, if - - - if we disagree with the way you are
15 reading the letter and read it as a threat to sue, or think
16 that's a reasonable reading of it, as opposed to, let's sit
17 down and resolve it, then - - - then is your answer to the
18 Chief's question any different - - -

19 MR. HUTTER: No, I - - - well, I think, first of
20 all, you certainly can defer to HR on that - - - that
21 issue. You know, I've - - - I meant - - - I think that's
22 my point of my brief. I think, though, it may be a little
23 bit unreasonable to do so. But in response to the Chief, I
24 think it'd be the same answer.

25 But in - - - in conclusion, I'd say that, Judge,

1 as I said, we have an out-of-state company trolling New
2 York, making cold calls, trying to catch someone. And all
3 we're doing here now, we're not trying to deter them.
4 We're just saying, if you're going to do that, if you want
5 to make a lot of money out of it, be careful with what you
6 do. New York deserves better. Apartment owners deserve
7 better - - -

8 JUDGE RIVERA: And what - - - that was my point
9 before. I'm sorry. I'm not recalling getting an answer.
10 And if you've given me one, I'm just going to ask you to
11 repeat it. What steps should they have taken - - -

12 MR. HUTTER: Meaning, a CityVision?

13 JUDGE RIVERA: To determine that they had a
14 reasonable basis for the complaint.

15 MR. HUTTER: What they should have done is put in
16 evidence.

17 JUDGE RIVERA: Because they've done the tester,
18 right? And then what - - - what else should they do?

19 MR. HUTTER: They put in no evidence. The
20 evidence should have been in what we - - - what we did to
21 lead us to believe that there was - - -

22 JUDGE RIVERA: Yes, but that's what I'm saying.
23 What would that have been?

24 MR. HUTTER: Well, now there was a transcript
25 produced - - -

1 JUDGE RIVERA: What's the burden on them?

2 MR. HUTTER: The burden would now - - - to show
3 that - - - and again, that reasonableness test.

4 JUDGE RIVERA: No, no, no, not the burden of what
5 they have to show. What - - - what - - - what would they
6 have had to have done to determine for themselves that they
7 had a reasonable basis to - -

8 MR. HUTTER: Verify.

9 JUDGE RIVERA: - - - they had a basis?

10 MR. HUTTER: They -- - as - - - I think I'd go
11 back to the initial SD - - - DHR opinion.

12 JUDGE RIVERA: Okay.

13 MR. HUTTER: The decision said, if all they had
14 to do is put in - - - go to the website and see that they
15 advertise Shenendehowa schools, obviously they take
16 children. If they had visited the apartment complex, there
17 were children. And then the - - - the kicker here is that
18 they said that normally what testers do is they do
19 companion testing.

20 JUDGE RIVERA: Well, let me ask you this. If an
21 - - -

22 MR. HUTTER: And that was not done.

23 JUDGE RIVERA: - - - if an individual had
24 actually physically gone in, not just made the call, had
25 the same experience and concluded, they don't want me

1 because of my kids, would they have had to do the things
2 you just described?

3 MR. HUTTER: And they - - - I'm sorry. I didn't
4 catch that last part.

5 JUDGE RIVERA: They don't want me because of my
6 familial status, would - - - would they have had to have
7 done what you've just described? Let me go check the
8 website. Let me make sure I'm not wrong about this. Do
9 they have to do that - -

10 MR. HUTTER: I - - - I would think that - - -

11 JUDGE RIVERA: - - - before they file a
12 complaint?

13 MR. HUTTER: - - - I would think, yes.

14 JUDGE RIVERA: Okay.

15 MR. HUTTER: I - - - I would think, yes. I think
16 caution does this. Now, again, there's no basis - - - our
17 client does not want now to deter the work that testers do.
18 But again, when testers get sloppy and they pursue a bogus
19 claim, as the attorney for CityVision did initially - - -

20 JUDGE RIVERA: But you're saying the burden is
21 the same for an individual? Because my hypothetical was an
22 individual, someone who generally - - - not a tester - - -
23 someone who generally wants to go and rent.

24 MR. HUTTER: I - - - I think that we might want
25 to adjust it a little bit depending upon this - - - I hate

1 to use this statement - - - depending on the context, but I
2 - - - I think there that may be a bit - - - a open
3 argument, Your Honor.

4 JUDGE RIVERA: Uh-huh.

5 MR. HUTTER: And I wouldn't want to commit unless
6 I know a few more facts.

7 JUDGE RIVERA: Uh-huh.

8 CHIEF JUDGE WILSON: Thank you.

9 MR. HUTTER: Unless there are any further
10 questions.

11 CHIEF JUDGE WILSON: Thank you.

12 MS. HOLLIFIELD: I'd like to just address the
13 attorney's fees provision. So 297(10) specifies that the
14 commissioner may only award attorney's fees as part of a
15 final order after public hearing held pursuant to sub
16 division 4 of 297. That is not a separate hearing.
17 Attorney's fees would be available to a prevailing
18 respondent where they had made a motion during the hearing
19 on whatever complaint was being heard.

20 CHIEF JUDGE WILSON: Great. That's what I was
21 trying to ask, actually, is - - - is there a way to read
22 this which would inform what we do here to say that there's
23 been a legislative decision that you - - - if all that
24 happens is somebody files a complaint, and it's frivolous,
25 so it meets the frivolous part of it, but the commission

1 immediately sees that and tosses it out, you, the
2 respondent, can't get attorney's fees because there hasn't
3 been a hearing about it.

4 MS. HOLLIFIELD: That's correct.

5 CHIEF JUDGE WILSON: Only if the - - - the
6 respondent has been put to the test of having to go to a
7 hearing under - - - under the Executive Law could you get
8 fees?

9 MS. HOLLIFIELD: That's correct. Yes.

10 CHIEF JUDGE WILSON: And so then how does that,
11 if at all, affect our decision here?

12 MS. HOLLIFIELD: Well, the argument in
13 respondent's brief that Mr. Pentkowski was just seeking
14 attorney's fees is not in line with the attorney's fees
15 provision in the Human Rights Law. There - - - he - - - he
16 couldn't have been seeking something he wasn't entitled to.

17 JUDGE CANNATARO: But as I understand Judge
18 Wilson's question, it's - - - the court - - - or I'm sorry
19 - - - the hearing officer has just said, I'm - - - I'm
20 tossing this. I'm getting rid of it. No opportunity to
21 have that hearing. And now what else are you left with
22 besides this?

23 MS. HOLLIFIELD: No. The - - - in - - - in the
24 case of the in - - - the initial discrimination complaint -
25 - - the housing discrimination complaint - - - there was no

1 hearing officer. There was an investigation by the Housing
2 Investigations Unit. They determined after the
3 investigation stage that there was no probable cause to
4 proceed to hearing. So there was never any ALJ involved in
5 that - - - in that initial case.

6 JUDGE GARCIA: Can - - - can - - - can I ask - -
7 -

8 JUDGE CANNATARO: So is there an opportunity - -
9 - I'm sorry.

10 JUDGE GARCIA: I'm sorry. Sorry.

11 JUDGE CANNATARO: It's just a follow up. Is
12 there an opportunity to ask for fees in that context?

13 MS. HOLLIFIELD: No, there is not.

14 JUDGE GARCIA: So going back to Judge Rivera's
15 earlier question, then, on the intent of the legislature to
16 use attorney's fees as the remedy instead of looking at
17 this reasonable basis issue, if you have a completely
18 frivolous complaint that never gets to a hearing, right,
19 and it gets dismissed, that's similar to what was done
20 here, then you never have an opportunity to get attorney's
21 fees, you're saying, right?

22 MS. HOLLIFIELD: From the Division, yes, that's
23 correct.

24 JUDGE GARCIA: Right. So that is not a remedy,
25 attorney's fees, that is available to you if someone's

1 filed a bad faith complaint that's dismissed?

2 MS. HOLLIFIELD: Yes, that's correct.

3 JUDGE RIVERA: Well, dismissed without a hearing.

4 MS. HOLLIFIELD: Yes.

5 JUDGE RIVERA: Right.

6 MS. HOLLIFIELD: And - - - and we - - - we term
7 it NPC, not there was no finding of no probable cause.

8 JUDGE RIVERA: The - - - the - - - well, there
9 are complaints and there are complaints that are dismissed
10 without a hearing. But if it's so frivolous on its face,
11 there's not much cost and outlay on the other side. Or
12 what's the experience from the Division?

13 MS. HOLLIFIELD: I - - - I don't think I
14 understand the question.

15 JUDGE RIVERA: Well, I'm trying to figure out
16 what are you trying to remedy as the legislature if it's
17 really frivolous on papers. You're not even at a hearing.

18 JUDGE GARCIA: But do they have to respond to
19 you? Would the company submit documentation and try to
20 provide a - - -

21 JUDGE RIVERA: That's what I'm asking you.

22 JUDGE GARCIA: Yeah.

23 MS. HOLLIFIELD: Okay. So generally, the
24 complaint is filed. It's sent to the respondent. They
25 have an opportunity to answer it. And then there is an

1 investigation. Sometimes there's a two-party conference.
2 Sometimes there are one-party conferences. And then the
3 regional director makes a determination on whether or not
4 there's probable cause.

5 The finding of no probable cause is not the same
6 as a finding that the complaint was frivolous or in bad
7 faith.

8 JUDGE RIVERA: Frivolous. Yes. Correct.

9 MS. HOLLIFIELD: It - - - it's - - -

10 JUDGE RIVERA: No, understood. That's correct.

11 MS. HOLLIFIELD: - - - so when - - - then you
12 look to if that party then files a retaliation complaint
13 based on their participation in the first complaint, that's
14 when that reasonable basis standard becomes a question.

15 JUDGE RIVERA: Right. So to be clear, the - - -
16 he is correct that the Division has adopted this federal
17 standard?

18 MS. HOLLIFIELD: Yes, we've - - - we've used the
19 standard.

20 JUDGE RIVERA: Uh-huh. And probable cause is not
21 equal - - - let me put it that way - - - to the reasonable
22 basis standard?

23 MS. HOLLIFIELD: No, it's not.

24 JUDGE RIVERA: No. Okay.

25 MS. HOLLIFIELD: Just one other issue that I

1 wanted to address. The commissioner's findings of fact are
2 entitled to deference. And this court has - - - this court
3 has specified that where - - - the commissioner's decisions
4 are based on substantial evidence in the record, but where
5 the opposite decision is also reasonable based on that
6 record, it is the commissioner's decision that is entitled
7 to deference.

8 JUDGE CANNATARO: So the court, you would say,
9 substituted its judgment for that of the commissioner.

10 MS. HOLLIFIELD: Yes. It is the Division's
11 position that the Third Department assumed the
12 commissioner's fact-finding role when it looked at the
13 exact same record and merely reinterpreted the facts.

14 JUDGE CANNATARO: That would be the basis for a
15 reversal. Does there need to be a remittal as well?

16 MS. HOLLIFIELD: I believe if this court thinks
17 that the commissioner's determination, that the underlying
18 complaint was made in good faith is not supported, then
19 that does need to be remitted for further analysis on that
20 issue.

21 CHIEF JUDGE WILSON: Thank you, Counsel.

22 MS. HOLLIFIELD: Thank you.

23 CHIEF JUDGE WILSON: We're going to take a ten-
24 minute recess before we resume with the calendar.

25 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Clifton Park Apts v. DHR, No. 2 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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