OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

HOUSING RESEARCH & ADVOCACY CENTER AND CYNTHIA DEMBICKI

Complainants

v.

RONALD J. CULKAR

Respondent

Complaint No. 10102 (HRAC) (CLE) H4 101705 (36577) 102805 22A-2006-14245F

Complaint No. 10103 (Dembicki) (CLE) H4 101005 (36589) 110305 22A-2006-14247F 05-06-0331-8

CHIEF ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS

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ALJ'S REPORT BY:

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INTRODUCTION AND PROCEDURAL HISTORY

Cynthia Dembicki (Complainant Dembicki) and Housing Research & Advocacy Center (Complainant HRAC) (Complainants) filed sworn charge affidavits with the Ohio Civil Rights Commission (the Commission) on November 3, 2005 and October 26, 2005, respectively.

The Commission investigated and found probable cause that unlawful discriminatory practices had been engaged in by Ronald J. Culkar (Respondent) in violation of Revised Code Sections (R.C.) 4112.02(H)(1), (4), (7), and (8).

The Commission issued the Complaints, Notices of Hearing, and Notices of Right of Election on October 5, 2006.

The Commission subsequently attempted conciliation. The matter was scheduled for hearing after conciliation efforts failed.[1]

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[1] The Commission introduced credible evidence that an attempt to conciliate had been made through the testimony of Vera Boggs, Supervisor in the Cleveland Regional Office. (Tr. 14-21)

The Complaints allege that Respondent:

(1) subjected Complainant to unequal terms and conditions of renting because of her race and familial status, and;

(2) failed and refused to rent the subject housing accommodation to persons who are African Americans, and otherwise denied housing accommodations for reasons not applied equally to all persons without regard to their race, thereby thwarting Complainant HRAC's goals of providing nondiscriminatory housing, and causing it to divert resources to remedy the unlawful discriminatory acts of the Respondent.

Respondent, who participated in the pre-hearing and hearing process *pro-se*, failed to file an Answer, pursuant to Ohio Administrative Code (O.A.C.) 4112-3-06.[2]

A public hearing was held on April 30, 2008 at the Lausche State Office Building in Cleveland, Ohio.

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[2] Respondent filed a "response" to the Commission's Complaints, received by the Commission on May 19, 2006.

The Record consists of the previously described pleadings, a transcript consisting of 71 pages of testimony, exhibits admitted into evidence at the hearing, and a post-hearing brief filed by the Commission on April 27, 2009. Respondent did not file a brief.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the Administrative Law Judge's (ALJ) assessment of the credibility of the witnesses who testified before her in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. For example, she considered each witness's appearance and demeanor while testifying. She considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. She further considered the opportunity each witness had to observe and know the things discussed; each witness's strength of memory; frankness or the lack of frankness; and the bias, prejudice, and interest of each witness. Finally, the ALJ

considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainants filed sworn charge affidavits with the Commission on November 3, 2005 and October 26, 2005, respectively.

2. The Commission determined on August 6, 2006 it was probable that unlawful discriminatory practices had been engaged in by Respondent in violation of R.C. 4112.02(H)(1), (4), (7) and (8).

3. The Commission attempted and failed to eliminate the alleged unlawful discriminatory practices by informal methods of conciliation.

4. Respondent is a provider of housing accommodations. He owns housing accommodations at 6910 Ottawa Avenue, Cleveland, (Cuyahoga County), Ohio.

5. Complainant is Caucasian. Complainant is the custodial parent of a bi-racial daughter, Celeste. (Comm. Ex. 3)

6. In October 2005 Complainant was looking for an apartment that had one to two bedrooms at around $400.00 per month that was closer to her employer. (Tr. 24)

7. Complainant saw an advertisement in *The Plain Dealer* newspaper and called the number listed in the advertisement. (Tr. 25)

8. Complainant spoke to Respondent who asked her where she was employed, along with some other questions, after which they arranged to meet and view the apartment.

9. Complainant met Respondent at the apartment. Complainant was accompanied by her daughter, her friend Tina Wamser (Wamser) and Wamser's bi-racial step daughter who was twelve (12) years old. (Tr. 40)

10. Before Complainant was able to get out of the car, Respondent saw her daughter in the back seat and asked "if her father was in her life" to which Complainant replied, "yeah". (Tr. 26)

11. The property is a two-story duplex. Although Complainant noticed what she believed to be a "cat smell" in the apartment Respondent said that the property would be ready in two (2) weeks. Respondent also indicated he needed to fix the steps in the front of the property. (Tr. 27)

12. When Complainant and Respondent were walking away from the apartment toward her car Respondent stated:

> you could tell where the ethnic people live and where the Blacks live because Blacks don't take care of their property, their yard, while you know Polish people do clean up their yard, plant flowers, things like that.

(Tr. 28)

13. Both Complainant and Warnser took offense to the comments made by Respondent. Wamser encouraged Complainant to file a charge with Complainant HRAC. (Tr. 42-43)

14. Complainant HRAC's Director of Research and Investigations, Carrie Pleasants (Pleasants), followed up on and handled the complaint made by Complainant Dembicki. (Tr. 46)

15. On or around October 10, Pleasants drove by the property to see if there was a "For Rent" sign posted and there was.

16. Pleasants then dispatched the services of testers that Complainant HRAC employs.

17. An African-American and a White tester were assigned the tasks to go and pose as renters and called about the apartment. (Tr. 46)

18. The White tester called and left one (1) message and then received a call back the same day from Respondent.

19. An appointment was set and the White tester was shown the apartment two (2) days later.

20. The African-American tester called four (4) separate days and left four (4) separate voicemail messages with his name and contact information and never received a call back.

21. One of the days the African-American tester called was the same day the White tester called.

22. Complainant HRAC filed a charge with the Commission, as a result of the testing performed by the White and African-American testers. (Tr. 47)

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented.

1. The Commission alleges in the Complaint that Respondent subjected Complainant Dembicki to unequal terms and conditions of renting because of her race and familial status.

2. These allegations, if proven, would constitute a violation of R.C. 4112.02, which provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

(H) For any person to:

(1) Refuse to ... rent, lease, ..., refuse to negotiate for the ... rental of housing accommodations, or otherwise deny or make unavailable housing accommodations because of race, ... familial status, ...;

(4) Discriminate against any person in the terms or conditions ..., renting, ..., or use of any housing accommodations, including the sale of fire, extended coverage, or homeowners insurance, because of race, ..., familial status, ...;

(7) Print, publish, or circulate any statement or advertisement, or make or cause to be made any statement or advertisement, relating to the ... rental, ...any housing accommodations, ... that indicates any preference, limitation, specification, or discrimination based upon race, ..., familial status, ..., or an intention to make any such preference, limitation, specification, or discrimination;

(8) Except as otherwise provided in division (H)(8) or (17) of this section, make any inquiry, elicit any information, make or keep any record, or use any form of application containing questions or entries concerning ..., familial status, ... in connection with ... lease of any housing accommodations ...

3. R.C. 4112.01(A)(15) defines "familial status" as either:

(a) One or more individuals who are under eighteen years of age and who are domiciled with a parent or guardian having legal custody of the individual or domiciled, with the written permission of the parent or guardian having legal custody, with a designee of the parent or guardian;

4. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(H) by a preponderance of reliable, probative and substantial evidence. R.C. 4112.05(E) and (G).

5. Federal case law applies to alleged violations of R.C. Chapter 4112. *Little Forest Med. Ctr. of Akron v. Ohio Civil Rights Comm.*, (1991), 61 Ohio St.3d 607. Therefore, reliable, probative and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under the federal Fair Housing Act of 1968, as amended.[3]

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[3] The Fair Housing Amendments Act of 1988 amended the substantive provisions of the Fair Housing Act of 1968 (Title VIII) to prohibit housing discrimination against families with children. Section 3604(b) of the Fair Housing Act, as amended, makes it unlawful "[t]o discriminate against any person in the

6. The same standards of proof that apply to employment discrimination cases generally apply to housing discrimination cases.[4] Normally, these standards require the Commission to first prove a *prima facie* case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973). However, if the Commission presents direct evidence of unlawful discrimination and the fact-finder credits the direct evidence, the *McDonnell Douglas* evidentiary framework does not apply. *Terbovitz v. Fiscal Court of Adair County*, 44 FEP Cases 841, 844 (6th Cir. 1987).

7. In this case, there is direct evidence of race and familial status discrimination.[5]

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terms, conditions, or privileges of sale or rental of a dwelling, or in the provisions of services or facilities in connection therewith, because of ... familial status ...." 42 U.S.C. 3604(b).

[4] Although the Supreme Court has never addressed the issue, "... lower courts have generally assumed that ... precedents from the employment discrimination field should be followed in interpreting Title VIII." R. Schwemm, *Housing Disc.*, 1996 Ed. at 10-2.

[5] Direct evidence is "evidence which, if believed, proves the fact without inference or presumption." *Brown v. East Mississippi Electric Power Assn.*, 61 FEP Cases 1104, 1106 (5th Cir. 1993).

8. Respondent's reaction to seeing Complainant's bi-racial daughter was to question whether Complainant had a current relationship with her child's father. Although some bi-racial children of White and African-American mixed heritage do not have noticeable Negroid racial characteristics, it is obvious that Celeste is a bi-racial child.

9. Respondent's statements to Complainant left little to the imagination regarding Respondent's reasons for making the disparaging comments about African-Americans and what he stereotypically believed to be their deleterious effect on "ethnic" neighborhoods. "The standard for determining whether a given statement violates § 804(c) is whether the statement suggests a preference to the ordinary reader or listener." *U.S. v. Hunter*, 459 F.2d 205, 215 (4th Cir), cert. denied, 409 U.S. 934, 34 L.Ed. 2d 189, 93 S.Ct. 235 (1972), *Ragin v. New York Times Co.*, 923 F. 2d 995, 999-1000 (2d Cir.), cert. denied, 502 U.S. 821, 116 L.Ed. 2d 54, 112 S.Ct.

81 (1991). No discriminatory intent is required. *Janick v. HUD*, 44 F. 3d 553, 556 (7th Cir. 1995).

10. Complainant and Wamser correctly understood that Respondent's preference was not to rent to African-Americans or individuals who have a close association with African-Americans.

11. Further, Complainant HRAC's testing confirmed that Respondent preferred not to rent to African-Americans.

12. Respondent's justification for his not offering the apartment for rent to Complainant Dembicki was it was not ready to rent because he needed about two (2) months to do repairs. (Tr. 37)

13. His testimony was not credible and incredibly disingenuous based on the fact that Complainant HRAC's White tester was called immediately and shown the duplex – an opportunity not afforded the African-American tester.

14. Additionally, the rental application forms used by Respondent requested information regarding not only the "number of occupants" but the "number of children" asking for their sex and age. The solicitation of the information is illegal discriminatory conduct.

DAMAGES

15. When there is a violation of R.C. 4112.02(H), the statute requires an award of actual damages shown to have resulted from the discriminatory action, as well as reasonable attorney's fees. R.C. 4112.05(G)(1). The statute also provides that the Commission, in its discretion, may award punitive damages.

ACTUAL DAMAGES

16. The purpose of an award of actual damages in a fair housing case, as in employment discrimination cases, "is to put the plaintiff in the same position, so far as money can do it, as ... [the plaintiff] would have been had there been no injury or breach of duty ..." *Lee v.*

Southern Home Sites Corp., 429 F.2d 290, 293 (5th Cir. 1970) (citations omitted). To that end, victims of housing discrimination may recover damages for tangible injuries such as economic loss and intangible injuries such as humiliation, embarrassment, and emotional distress. *See Steele v. Title Realty Co.*, 478 F.2d 380 (10th Cir. 1973) (actual damages of $1,000 awarded to plaintiff consisting of $13.25 in telephone expense, $125.00 in moving and storage expenses, and $861.75 for emotional distress and humiliation). Damages for intangible injuries may be established by testimony or inferred from the circumstances.[6] *Johnson v. Hale*, 940 F.2d 1192 (9th Cir. 1991).

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[6] Although emotional injuries are difficult to quantify, "courts have awarded damages for emotional harm without requiring proof of the actual value of the injury." *Paradise Gardens, supra*, at 25,393, *citing Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1245 (8th Cir. 1983) (other citations omitted). The determination of actual damages from such injuries "lies in the sound discretion of the Court and is essentially intuitive." *Lauden v. Loos*, 694 F.Supp. 253, 255 (E.D. Mich. 1988).

17. Complainant's daughter is bi-racial, with an African-American father as part of her racial lineage. Complainant was humiliated by the racially disparaging remarks about African-Americans that Respondent communicated to her:

> Mr. Williams: After Mr. Culkar made the comments to you about the Blacks in the neighborhood um did you feel that you would be welcome to live in his apartment with your bi-racial child?
>
> Ms. Dembicki: Definitely not.
>
> Mr. Williams: Can you describe what kind of emotions you were feeling after that exchange?
>
> Ms. Dembicki: I was angry. I was upset. I couldn't believe I had to defend my daughter; she's six month's old and that people actually think like that out loud. I was very upset. Still am upset.
>
> (Tr. 29)

18. Complainant testified that she wanted to move to an apartment that was closer to downtown Cleveland where she worked. Because of Respondent's communication to Complainant which she

understood as an illegal preference, she chose to not consider the neighborhood that Respondent's apartment was located in.

19. She ended up moving in with her aunt in Brooklyn, Ohio, which is 15 minutes further from her job than where Respondent's apartment was located.

20. Damages for loss of housing opportunities have been awarded where the denied housing had a location, amenities, or other characteristics that make it particularly valuable to a complainant. *Pollitt v. Bramel*, 669 F. Supp. 172, 176-77 (S.D. Ohio 1987) (Awarding emotional distress damages for a couple who was forced to live in less desirable housing); *Banai v. HUD*, 012 F.3d 1203, 1208 (11th Cir. 1997) (Affirming HUD ALJ award for lost housing opportunities).

21. Complainant is awarded $3,000.00 for loss of housing opportunities and $8,000.00 for the emotional distress and humiliation she suffered as a consequence of Respondent's illegal discriminatory conduct.

22. Fair housing organizations can incur actual damages for diversion of resources and frustration of mission.

23. Diversion of resources damages are the harm caused by the diversion of resources away from other programs to address the defendant's discriminatory housing practices. *Havens Realty Corp v. Coleman*, 455 U.S. 363, 379 & n. 19, 102 S.Ct. 1124-25 & n. 19 (1982).

24. Frustration of mission is injury to "non-economic interest in encouraging open housing." *Havens*, 455 U.S. at 368 n. 20.

25. To recover (damages for frustration of mission) a fair housing organization must establish that expenditures in education, counseling or outreach are necessary to counteract the effects of the discrimination. *Spann v. Colonial Village*, 899 F.2d 24, 28-29 (D.C. Cir.), cert. denied 498 U.S. 980 (1990).

26. Complainant HRAC expended $2,635.00 on testers and personnel costs. (Comm. Ex. 2)

27. Complainant HRAC is awarded $2,635.00 for the diversion of its resources.

PUNITIVE DAMAGES

28. The purpose of an award of punitive damages pursuant to R.C. 4112.05(G) is to deter future illegal conduct. Admin. Code 4112-6-02. Thus, punitive damages are appropriate "as a deterrent measure" even when there is no proof of actual malice. *Schoenfelt v.*

Ohio Civil Right Comm., (1995), 105 Ohio App.3d 379, 385, *citing and quoting, Marr v. Rife*, 503 F.2d 735, 744 (6th Cir. 1974).

29. The amount of punitive damages depends on a number of factors, including:

- The nature of Respondent's conduct;
- Respondent's prior history of discrimination;
- Respondent's size and profitability;
- Respondent's cooperation or lack of cooperation during the investigation of the charge; and
- The effect Respondent's actions had upon Complainant.[7]

Ohio Administrative Code (O.A.C.) 4112-6-01.

30. Applying the foregoing criteria to this case:

- Respondent's conduct was intentional. It is reasonable to infer Respondent felt Complainant would not be offended by his derogatory statements about African-Americans because she is Caucasian, oblivious to the fact that her daughter is bi-racial;

[7] This criteria is more appropriately considered when determining actual damages.

- The Commission did not present any evidence that there have been previous findings of unlawful discrimination against Respondent; and

- Respondent owns three properties (doubles), one of which he lives in and rents the other side.

31. Based on the foregoing discussion, the ALJ recommends Respondent be assessed punitive damages in the amount of $7,000.00 for Complainant Dembicki and $3,000.00 for Complainant HRAC.

ATTORNEY'S FEES

32. The Commission is entitled to attorney's fees. R.C. 4112.05(G)(1); *Shoenfelt, supra,* at 386. If the parties cannot agree on the amount of attorney's fees, the parties shall present evidence in the form of affidavits.

33. In order to create a record regarding attorney's fees, the Commission's counsel should file affidavits from plaintiffs' attorneys in Cuyahoga County, Ohio regarding the reasonable and customary

hourly fees they charge in housing discrimination cases. Also, a detailed accounting of the time spent on this case must be provided and served upon the Respondent. Respondent may respond with counter-affidavits and other arguments regarding the amount of attorney's fees in this case.

34. If the Commission adopts the ALJ's Report and the parties cannot agree on the amount of attorney's fees, the Commission should file an Application for Attorney's Fees within 30 days after the ALJ's Report is adopted. Respondent may respond to the Commission's Application for Attorney's fees within 30 days from his receipt of the Commission's Application.

35. Meanwhile, any objections to this report should be filed pursuant to the Ohio Administrative Code. Any objections to the recommendation of attorney's fees can be filed after the ALJ makes her Supplemental Recommendation to the Commission regarding attorney's fees.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 10102 and Complaint No. 10103 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;

2. The Commission order Respondent to pay $11,000.00 to Complainant Dembecki in actual damages;

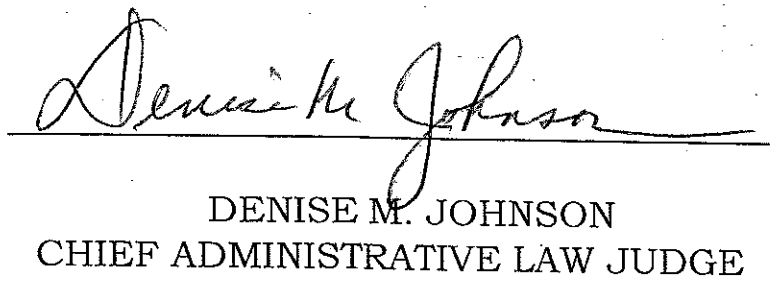
3. The Commission order Respondent to pay $2,635.00 to Complainant HRAC in actual damages;

4. The Commission order Respondent to pay Complainant Dembecki $7,000.00 in punitive damages;

5. The Commission order Respondent to pay Complainant HRAC $3,000.00 in punitive damages;

6. As proof of its participation in fair housing training, Respondent shall submit certification from the trainer or provider of services that Respondent has successfully completed the training; and

7. The Commission order Respondent, within seven (7) months of the Commission's Final Order, to submit its Letter of Certification of Training to the Commission's Compliance Department.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

June 8, 2012