

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

**FAIR HOUSING
CONTACT SERVICE, INC.**

Complainant

v.

STEVEN J. CARLSON

Respondent

Complaint No. 10-HOU-AKR-34708
COL H3 (34708) 11062009
05-10-0298-8 22A-2010-00903F

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

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Complainant

ALJ'S REPORT BY:

Denise M. Johnson
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Ohio Civil Rights Commission
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INTRODUCTION AND PROCEDURAL HISTORY

Fair Housing Contact Service, Inc. (Complainant FHCS) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on November 6, 2009.

The Commission investigated and found probable cause that unlawful discriminatory practices had been engaged in by Steven J. Carlson (Respondent) in violation of Section 4112.02(H).

The Commission issued a Complaint, Notice of Hearing, and Notice of Right of Election on February 18, 2010. The Commission subsequently attempted conciliation. The matter was scheduled for hearing after conciliation efforts failed.

The Complaint alleges that: (1) Respondent refused to waive his no pet policy and allow a service animal for a tenant with a disability, and (2) the actions of Respondent thwart the goals of Complainant

to provide non-discriminatory housing and the actions caused Complainant FHCS to divert resources to remedy the unlawful discriminatory acts of Respondent in violation of R.C. 4112.02 (H)(1), (4) and (19).

Respondent did not file an Answer. The Commission filed a Motion for Default on May 3, 2010.

A public hearing was held on October 6, 2010, at the Portage County Courthouse, 203 West Main Street, Ravenna, Ohio.

The record consists of the previously described pleading, a transcript consisting of 23 pages of testimony, exhibits admitted into evidence at the hearing, and the post-hearing brief filed by the Commission on February 1, 2011.¹

¹ The Commission's Motion for Default was granted during the public hearing. (Tr. 6-7)

FINDINGS OF FACT

The following findings 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.

DEFAULT JUDGMENT

Pursuant to Ohio Administrative Code (O.A.C.) 4112-3-12(B), the Civil Rules govern discovery. Accordingly, the Commission's Motion for Default was granted and sanctions were imposed, pursuant to Ohio R. Civ. P. 37((B)(2)(a) and (b):

- (2) If any party or an officer, director, or managing agent of a party or a person designated under Rule 30(B)(5) or Rule 31(A) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (A) of this rule and Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
 - (a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
 - (b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

Since a default judgment has been entered in this matter, the only remaining issue is to determine the appropriate amount of damages.

**FINDINGS OF FACT by
DEFAULT FROM THE COMMISSION'S COMPLAINT²**

1. Respondent is the owner of the property located at 324 Ivan Drive, Kent, Portage County, Ohio and rents housing accommodations at the property. (1.)

2. On or about October 1, 2009, Complainant FHCS initiated fair housing testing of the housing accommodations owned by Respondent. (3.A.)

3. The fair housing testing revealed Respondent would not allow a service animal for a tenant with a disability. (3.B.)

4. Complainant FHCS filed a charge with the Commission on November 6, 2009.

² Numbers correspond to allegations set forth in the Commission's Complaint and Notice of Hearing.

5. In a letter dated January 28, 2010, Respondent was notified of the Commission's probable cause finding that Respondent engaged in an unlawful discriminatory practice under R. C. 4112.02(H). (4.)

FINDINGS OF FACT FROM HEARING

6. Complainant FHCS is a non-profit advocacy organization and its mission is to prevent and eliminate and promote equal housing opportunity.

7. Complainant FHCS performs fair housing testing as one strategy to assist in the fulfillment of its mission. (Tr. 9)

8. Complainant FHCS's fair housing testing program is a process where the organization conducts investigations into the practices of housing providers to determine if their practices are discriminatory under state, federal and local laws. (*Id.*)

9. When Complainant FHCS identifies a matter that raises a concern regarding a potential fair housing violation, the organization's test co-coordinator assigns trained testers a systemic profile and the tester has the responsibility of contacting the housing provider. (Tr. 9-10)

10. The testers are not employees of Complainant FHCS but are contracted individuals.

11. Respondent was identified as a result of an ad that he placed in *The Akron Publisher*. (Tr. 10)

12. The ad stated that no pets were allowed.

13. Latresha Morgan (Morgan) was contracted by Complainant FHCS to perform a test of Respondent's property.

14. Morgan contacted Respondent by phone on September 30, 2009 and left a message. (Ex. 2)

15. Morgan went to view the property on October 1, 2009.

16. Respondent was the individual who showed Morgan the apartment. (Tr. 19)

17. Morgan's profile was that her husband, who would also be living in the apartment with her, has epilepsy, and he has a seizure alert dog.

18. Respondent said that because of the hardwood floors in the apartment, he could not allow Morgan's husband to have the animal in the apartment. (Ex. 2)

19. Complainant FHCS employees involved in the testing process were:

- Tamala Skipper, Executive Director
- Kris Keniray, Assistant Director
- Lauren Green, Program Coordinator, and
- Mohammed Parvez, Test Coordinator.

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 Complaint alleges that: (1) Respondent refused to waive his no pet policy and allow a service animal for a tenant with a disability, and (2) the actions of Respondent thwart the goals of Complainant FHCS to provide non-discriminatory housing and the actions caused Complainant FHCS to divert resources to remedy the unlawful discriminatory acts.

2. This allegation, if proven, would constitute a violation of R.C. 4112.02(H)(1), (4) and (19) which provides that it is an unlawful discriminatory practice for any person to:

- (1) Refuse to ,(...), rent, lease, sublease, (...), refuse to negotiate for (...)rental of housing accommodations, or otherwise deny or make unavailable housing accommodations because of (...), disability, (...);
- (4) Discriminate against any person in the terms or conditions of (...), renting, leasing, or subleasing any housing accommodations or in furnishing facilities, services, or privileges in connection with the (...) occupancy, or use of any housing accommodations, (...), disability, (...);
- (19) Refuse to make reasonable accommodations in rules, policies, practices, or services when necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling unit (...).

3. 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).

4. 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 (Title VIII), as amended. *See e.g. Howard v. City of Beavercreek*, 108 F. Supp. 2d 866, 876 S.D. Ohio 2000) (applying FHAA analysis to state-law fair housing claim where language of the relevant provisions of the two statutes was similar), *add'd*, 276 F.3d 802 (6th Cir. 2002).

5. 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).

6. The proof required to establish a *prima facie* case may vary on a case-by-case basis. *Id.*, at 802, 5 FEP Cases at 969, n.13. In this case, the Commission may establish a *prima facie* case of housing discrimination based on the individual's disability by proving that:

- (1) Complainant is disabled;
- (2) that the Respondent knew or should reasonably be expected to know of the disability;
- (3) that accommodation of the disability may be necessary to afford the disabled person an equal opportunity to use and enjoy the dwelling;
- (4) that the accommodation is reasonable; and
- (5) that Respondent refused to make the requested accommodation.

Dubois v. Ass'n. of Apt. Owners, 453 F.3d 1175, 1179 (9th Cir. 2006).

7. After the Commission establishes a *prima facie* case of housing discrimination based on Complainant's disability, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason to rebut the presumption of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792(1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).³

³ Respondent did not participate in the hearing and therefore did not put forward an affirmative defense.

8. Morgan advised Respondent that the support animal was medically necessary for her husband:

Ms. Morgan: Um, well my scenario was that I was [sic] my husband has epilepsy and we use a seizure alert dog and um I believe that he was saying that there was no pets allowed so –

Mr. Williams: So you made Mr. Carlson aware that [sic] there was a service dog?

Ms. Morgan: Right that it was a medically necessary and

Mr. Williams: What was his response to you?

Ms. Morgan: His response was that because of the floors he could not allow it and I asked him what if we trim the dog's nails and he said no or keep it in the basement- the basement had like a concrete flooring and he just said that he couldn't allow it.

(Tr. 20, Ex. 2)

9. The Commission presented direct evidence that Respondent denied Complainant FHCS's tester the housing accommodations because Respondent would not waive his no pet policy to accommodate a person with a disability who needed the assistance of a service animal.

10. Evidence that testers were treated disparately based on protected characteristics (disability) constitutes direct evidence sufficient to sustain a claim under R.C. 4112. *See, e.g., Walker v. Todd Village, LLC*, (D. Md. 2006), 419 F. Supp.2d 743, 748-49. Although the well-known "shifting burdens" scheme for proof of employment and other discrimination claims is often applied in the context of housing discrimination claims, *See, e.g., Asbury v. Brougham*, 866 F.2d 1276, 1279-80 (10th Cir. 1989), in the present case, plaintiffs have presented direct evidence of defendant's discriminatory motive and plaintiffs need not resort to that proof scheme. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 250 (9th Cir. 1997).

11. Respondent's refusal to provide an applicant for housing a reasonable accommodation for a service animal based on the disability of the applicant is illegal discriminatory conduct and Complainant FHCS is entitled to relief as a matter of law.

DAMAGES

12. 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

13. 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). A fair housing organization that has suffered an injury in fact to the organization's activities with a consequent drain on the organization's resources constitutes a setback to the organization's

goals and interests sufficient to establish standing. *Havens Realty Corp. v. Coleman*, (1982), 455 U.S. 363, 373-379. To that end, a fair housing organization's costs related to prelitigation investigation can form the basis for standing. *Fair Housing Council v. Village of Olde St. Andrews*, (6th Cir. 2006), 210 Fed. Appx. 460, 475. When a fair housing organization diverts its resources from other efforts to promote awareness of and compliance with federal and state laws, such evidence is sufficient to establish standing. *Smith v. Pacific Properties and Development Corp.*, 358 F.3d 1097 at 1105-1106 (citing *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002), cert. denied, 537 U.S. 1018, 123 S. Ct. 536, 154 L. Ed. 2d 425 (2002)).

14. In this case, the Commission presented evidence that Respondent's discriminatory actions caused Complainant FHCS to expend resources in prelitigation expenses and frustration of mission in the amount of \$2,215.00. (Ex. 1)

PUNITIVE DAMAGES

15. The purpose of an award of punitive damages pursuant to R.C. 4112.05(G) is to deter future illegal conduct. O.A.C. 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).

16. 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.⁴

O.A.C. 4112-6-01.

17. Applying the foregoing criteria to this case:

- Respondent did not hesitate in his refusal to accommodate a disabled individual who needed a service animal in order to enjoy the housing accommodations;
- The Commission did not present prior history of discrimination by Respondent;
- The Commission did not present any evidence regarding any other property units owned by Respondent; and
- The Commission introduced an e-mail from Respondent which reflects his attitude about the Commission and its mission:

⁴ This criteria is more appropriately considered when determining actual damages.

Hey Wayne baby,

Just read that pack of lies you filed with the judge of the kangaroo court of the black Ku Klux Klan of Ohio aka Ohio Civil Rights Commission. You see the Black Ku Klux Klan lacks any jurisdiction over me. The Judiciary of Ohio are set forth in the Ohio Constitution. And Denise (I can look in their eyes and see if they are telling the truth) Jackson ain't mentioned. And even if you could somehow twist the law to claim that farce somehow has some standing by being authorized by the legislature, the constitution specially states that any judiciary other than that enumerated in the Constitution only has jurisdiction over persons voluntarily submitting to that jurisdiction. I have state unequivocally and continually refused to be judged by the Black Ku Klux Klan of Ohio aka the Ohio Civil Rights Commission.

Mr. Williams you are aiding and abetting in an extortion attempt. You are intentionally defaming my good name and reputation. You are pursuing me based on my race and are engaging in a pattern of racial harassment of other Caucasians based on our race.

The assertion that the Ohio Civil Rights Commission ever pursued any form of reconciliation is laughable on the face of the matter. That organization exists solely for the purpose of fleecing white folks. That fact that 95% of their activities are conducted in secrecy speaks volumes.(...)"

(Ex. 3)

18. Based on the foregoing discussion, the ALJ recommends that Respondent be assessed punitive damages in the amount of \$10,000.00.

ATTORNEY'S FEES

19. The Commission is entitled to attorney's fees. R.C. 4112.05(G)(1); *Schoenfelt, 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.

20. In order to create a record regarding attorney's fees, the Commission's counsel should file affidavits from plaintiffs' attorneys in Portage 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 Respondent. Respondent may respond

with counter-affidavits and other arguments regarding the amount of attorney's fees in this case.

21. 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 for Attorney's Fees.

22. 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. 10-HOU-AKR-34708 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of Chapter 4112 of the Revised Code;
2. The Commission order Respondent to pay Complainant FHCS \$2,215.00 in actual damages;
3. The Commission order Respondent to pay Complainant FHCS \$10,000.00 in punitive damages;
4. The Commission order Respondent, within six (6) months of the date of the Commission's Final Order, to receive training regarding the anti-discrimination fair housing laws of the State of Ohio. 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

5. 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.

A handwritten signature in cursive script, reading "Denise M. Johnson", written over a horizontal line.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

June 14, 2012

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

FAIR HOUSING CONTACT SERVICE

Complainant

v.

Complaint No. 34708

(COL/AKR) H3 (34708) 11062009

STEVEN J. CARLSON (ESTATE OF)

Respondent

**ADDENDUM TO CHIEF ADMINISTRATIVE LAW JUDGE'S
RECOMMENDATIONS**

RE: SUBSTITUTION OF PARTIES

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ALJ'S REPORT BY:

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**FAIR HOUSING
CONTACT SERVICE**

Complainant

Complaint No. 34708

(COL/AKR) H3 (34708) 11062009

v.

STEVEN J. CARLSON

Respondent

**ADDENDUM TO CHIEF ADMINISTRATIVE LAW JUDGE'S
RECOMMENDATION**

The Commission issued Complaint No. 34708 on February 18, 2010. A public hearing was held pursuant to R.C. 4112.05 on October 6, 2010.

On July 18, 2012 the Commission filed a Motion to Substitute Jeannette E. Carlson, Executrix of the Estate of Steven J. Carlson, for Respondent Steven J. Carlson¹ based upon Civ. R. 25(A)(1) which states:

¹The ALJ issued a Report and Recommendation for Complaint No. 34708 on June 14, 2012. The Estate of Steven J. Carlson filed Objections to the Report and Recommendation on July 6, 2012. One of the basis for the Objections is that Respondent, Steven J. Carlson, is deceased. Respondent's date of death is recorded as December 24, 2011 with the Portage County Probate Court. The estate of Respondent asserts that the death of Respondent renders the issuance of the Report and Recommendation and any subsequent action by the Commission "null and void".

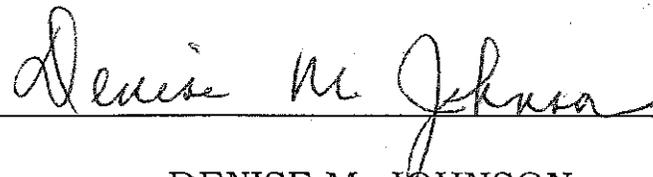
“If a party dies and the claim is not thereby extinguished, the court shall, upon motion, order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party (...) Unless the motion for substitution is made not later than ninety days after the death is suggested upon the record by service of a statement of the fact of death (...), the action shall be dismissed as to the deceased party. “

By allowing for the substitution of parties, the Civil Rules promote the resolution of cases “upon their merits, not upon pleading deficiencies.” *Peterson v. Teodosio*, 34 Ohio St. 2d. 161, 297 N.E. 3d 113 (1973).

Accordingly, Jeannette E. Carlson, Executrix of the Estate of Steven J. Carlson, is the legally responsible Party/Respondent in Complaint No. 34708.

RECOMMENDATION

For the foregoing reasons, it is recommended that Jeannette E. Carlson, Executrix of the Estate of Steven J. Carlson, be substituted as Respondent in Complaint No. 34708.

A handwritten signature in cursive script, reading "Denise M. Johnson", is written above a horizontal line.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

August 13, 2012