Ohio Civil Rights Commission

Memo

To: Desmon Martin, Director of Enforcement and Compliance

From: Denise M. Johnson, Chief Administrative Law Judge

Date: October 17, 2012

Re: ***Fair Housing Resource Center v. Gary & Helen Grybosky***
(CLE) H4 (39116) 09082008 Amended
Complaint No. 09-HOU-CLE-39116

Fair Housing Resource Center v. Gary & Helen Grybosky
(CLE) H4 (39125) 09082008
Complaint No. 09-HOU-CLE-39125

CONSIDERATION OF
ADMINISTRATIVE LAW JUDGE'S AMENDED REPORT

ALJ RECOMMENDS CEASE & DESIST ORDER

Report issued: October 17, 2012

Report mailed: October 17, 2012

** **Objections due: November 9, 2012**

DMJ:ru

Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners
Leonard J. Hubert, Chairman
William W. Patmon III
Stephanie M. Mercado, Esq.
Tom Roberts
Rashmi N. Yajnik

Hearings Division

G. Michael Payton, Executive Director

October 17, 2012

Patricia Kidd, Executive Director
Fair Housing Resource Center
70 West Erie Street, Suite 260
Painesville, OH 44077

Diane E. Citrino, Esq.
Thacker Martinsek, LPA
2330 One Cleveland Center
1375 East 9th Street
Cleveland, OH 44114-1794

Tarin S. Hale, Esq.
6085 Waterloo Road
Centerville, OH 45459

Re: *Fair Housing Resource Center v. Gary & Helen Grybosky*
(CLE) H4 (39116) 09082008 Amended; 05-08-1919-8; 22A-2009-00427F
Complaint No. 09-HOU-CLE-39116

Fair Housing Resource Center v. Gary & Helen Grybosky
(CLE) H4 (39125) 09082008; 05-08-1918-8; 22A-2009-00436F
Complaint No. 09-HOU-CLE-39125

Enclosed is a copy of the Amended Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation(s) (ALJ's Report). You may submit a Statement of Objections to the ALJ's Report within twenty (20) days from the mailing date of this report.

Pursuant to Ohio Admin. Code § 4112-1-02, your Statement of Objections must be **received** by the Commission no later than **November 9, 2012**. *No extensions of time will be granted.*

Any objections received after this date will be **untimely filed** and cannot be considered by the Ohio Civil Rights Commission.

Please send the original Statement of Objections to: **Desmon Martin, Director of Enforcement and Compliance, Ohio Civil Rights Commission, State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414**. *All parties and the Administrative Law Judge should receive copies of your Statement of Objections.*

FOR THE COMMISSION

Desmon Martin / ru

Desmon Martin
Director of Enforcement and Compliance

DM:ru

Enclosure

cc: Lori A. Anthony, Chief – Civil Rights Section – Marilyn Tobocman – Sharon D. Tassie, Esq.
Denise M. Johnson, Chief Administrative Law Judge

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Fair Housing Resource Center

Complainant

v.

Gary & Helen Grybosky

Respondent

Complaint No. 09–HOU–CLE–39116 (CLE) H4 (39116) 09082008 Amended 05-08-1919-8; 22A–2009–00427

Complaint No. 09–HOU–CLE–39125 (CLE) H4 (39125) 09082008 05-08-1918-8; 22A–2009–00436F

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

MIKE DeWINE
ATTORNEY GENERAL

Marilyn Tobocman
Principal Assistant Attorney General
Civil Rights Section
State Office Building, 11th Floor
615 West Superior Avenue
Cleveland, OH 44113-1899
216 – 787 – 3030

Counsel for the Commission

Patricia Kidd, Executive Director
Fair Housing Resource Center
70 West Erie Street, Suite 260
Painesville, OH 44077

Complainant

Tarin S. Hale, Esq.
6085 Waterloo Road
Centerville, OH 45459

Counsel for Respondent

Diane E. Citrino, Esq.
Thacker Martinsek, LPA
2330 One Cleveland Center
1375 East 9th Street
Cleveland, OH 44114-1794

Counsel for Complainant

ALJ'S REPORT BY:

Denise M. Johnson
Chief Administrative Law Judge
Ohio Civil Rights Commission
State Office Tower, 5th Floor
30 East Broad Street
Columbus, OH 43215-3414
614 – 466 – 6684

INTRODUCTION AND PROCEDURAL HISTORY

Fair Housing Resource Center (Complainant FHRC) filed two sworn charge affidavits with the Ohio Civil Rights Commission (the Commission) on September 8, 2008.

The Commission investigated and found probable cause that unlawful discriminatory practices had been engaged in by Gary Grybosky and Helen Grybosky (Respondents) in violation of Revised Code Section (R.C.) 4112.02(H).

The Commission attempted but failed to resolve these matters by informal methods of conciliation. The Commission issued the Complaints, Notices of Hearing, and Notices of Right of Election (Amended) on February 4, 2009.

The Complaints allege the following:

(A) Complaint No. 39125: (1) Complainant FHRC's testing revealed, of the two rental units available, Respondents refused applicants with children from renting the upstairs unit, limiting

them to the downstairs unit, requiring a higher monthly rent and a larger share of the cost of utilities. (2) Respondents' practices and policies regarding households with children violate R.C. 4112.02(H)(1), (4) and (7) based upon familial status.

(B) Complaint No. 39116: (1) On or about January 29, 2008, one of Complainant FHRC's "testers" viewed the residential property located at 779 Main Street, Conneaut, Ohio with Respondent Helen Grybosky; (2) While viewing the property, the "tester" told Respondent Helen Grybosky that the "tester" has a severe anxiety disorder and her doctor prescribed an assistance dog; (3) Respondent Helen Grybosky stated to the "tester" that a $100 security deposit would be required if the "tester" has a therapy animal; (4) On or about August 2, 2008, one of Complainant FHRC's "testers" spoke with Respondent Helen Grybosky on the telephone and informed her that the "tester" suffers from a severe anxiety disorder and a doctor prescribed an assistance dog; (5) Respondent Helen Grybosky told the "tester" she does not allow

pets; (6) Respondents' practice and policies regarding persons with disabilities violate R.C. 4112.02(H)(1), (4), (7), (15), and (16).

Complainant FHRC filed a Notice of Appearance and Intervention on September 1, 2009.[1]

Respondents filed their Amended Answers on October 13, 2009, admitting certain procedural allegations but denying that they had engaged in any unlawful discriminatory practices.

A public hearing was held on May 4th and 5th, 2010 at 25 West Jefferson Street, Jefferson, Ohio and on May 6, 2010 at The Legal Aid Society, 121 East Walnut Street, Jefferson, Ohio.

The record consists of the previously described pleadings; a transcript consisting of 532 pages of testimony; exhibits admitted

[1] R. C. 4112.05(D): The complainant shall be a party to a hearing under division (B) of this section (...) Any aggrieved person who has or claims an interest in the subject of the hearing and in obtaining or preventing relief against the unlawful discriminatory practices complained of, shall be permitted to appear only for the presentation of oral or written arguments, to present evidence, perform direct and cross-examination, and be represented by counsel (...).

into evidence at the hearing; and the post-hearing briefs filed by the Commission on December 30, 2010; by Complainant on January 19, 2011; by Respondent on January 21, 2011; and the Commission's reply brief filed February 1, 2011.[2]

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

[2] In their brief before the administrative forum, Respondents set forth arguments of jurisdictional and constitutional issues, arguing also that Complainant lacked standing due to lack of injury, citing Article III of the U.S. Constitution.

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. Complainant Fair Housing Resource Center is a non-profit advocacy organization and its mission is to prevent and eliminate housing discrimination and promote equal housing opportunity. (Tr. 342, Comm. Ex. 31)

2. Patricia Kidd (Kidd) is Executive Director of Complainant FRHC's organization.

3. Kidd is an attorney with a wide breadth of experience in working for fair housing organizations and training testers. (Tr. 329-332)

4. With the support of a grant by The Department of Housing and Urban Development (HUD), Complainant FHRC

conducted a study based upon an analysis of the probable cause findings filed with HUD in the region that Complainant FHRC serves.

5. As a result of that study, Kidd authored a report in 2004 entitled *"Nation Moving Toward a New Dual Society, One Abled and One Disabled---Separate and Unequal"*.

6. The study revealed that 66% of the probable cause determinations in Complainant FHRC's service area were based upon disability; exceeding the probable cause findings related to race discrimination for the first time.

7. Complainant FHRC then filed an application with HUD for funding to conduct systemic testing regarding disability. (Tr. 382-384)

8. Complainant FHRC performs fair housing testing as one strategy to assist in the fulfillment of its mission. (Comm. Ex. 31)

9. Complainant FHRC's fair housing testing program is a process wherein the organization conducts investigations into the practices of housing providers to determine if their practices are discriminatory under state, federal, and local laws. (Tr. 382-384)

10. When Complainant FHRC identifies a matter that raises concern of a potential fair housing violation, the organization's Test Co-Coordinator assigns trained testers systemic profiles and the testers have the responsibility of contacting the housing provider. (Tr. 164-165)

11. Respondents were identified as a result of an ad that was placed in *The Star Beacon.* (Tr. 10)

12. The ad was seeking rental applicants for 779 Main Street and stated no pets were allowed.

13. Complainant FRHC performed tests of the property using subject testers and control testers. A subject tester assumes the role of an applicant in a protected status as defined under R.C.

4112 and the control tester presents himself/herself as an applicant who has no protected status. (Tr. 180-181, Comm. Ex. 19)

14. The first round of tests conducted by Complainant FRHC for 779 Main Street is as follows:

- Tester Kellie Butler, who was seeking a unit for her visually impaired brother, Tester Matt Butler, who was prescribed a seeing-eye dog;
- Tester Cory Schimpf (Tester Schimpf), a single male with no limitations, seeking a unit; and
- Tester Jill Bainton (Tester Bainton), a single female with no limitations, seeking a unit.

(Tr. 180-181; Ex. 12, 13)

15. Tester Kellie Butler was told by Respondents that an exception would be made for her brother's assistance animal, but Respondents would require an additional security deposit of $100.00. (Tr. 182, Comm. Ex. 10)

16. Respondents told Tester Kellie Butler they would not rent the upstairs unit to a family that had more than two (2) children.

17. Tester Bainton was told about the "no pet policy" and was asked her family status.

18. Respondents asked Tester Schimpf if he had "kids' or "visitation rights". (Tr. 180-181; Ex. 12, 13)

19. As a result of the statements made by Respondents to the testers regarding familial status, Complainant FRHC conducted another round of tests for 779 Main Street.

20. Tester Kellie Butler presented as a single female seeking a unit for herself and her five years old son. Her contact with Respondents was via phone.

21. Respondents informed Tester Kellie Butler she could only rent the ground floor unit which had a higher rental amount and higher utility expenses. (Tr. 185, Comm. Ex. 22)

22. Because Complainant FHRC believed the testing results relating to accommodating persons with disabilities were unclear, they conducted another round of tests wherein the Respondent Helen Grybosky stated an unwillingness to accommodate a service animal. (Tr. 186-187, Comm. Ex. 26)

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) Respondents' practice and policies regarding households with children violate R.C. 4112.02(H)(1), (4) and (7) based upon familial status, and (2) Respondents' practice and policies regarding households with people with disabilities violate R.C. 4112.02(H)(1), (4), (7), (15), and (16).

2. These allegations, if proven, would constitute violations of R.C. 4112.02(H)(1), (4), (7), (15), and (16) 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, (...);

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

(15) Discriminate in the (...) rental of, or otherwise make unavailable or deny, housing accommodations to any buyer or renter because of a disability (...).

(16) Discriminate in the terms, conditions, or privileges of the (...) rental of housing accommodations to any person or in the provision of services or facilities to any person in connection with the housing accommodations because of disability (...).

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)(1), (4), (7), and (16) 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 claims where language of the relevant provisions of the two statues was similar).

5. The Commission presented direct evidence that Respondents treated Complainant FHRC's testers differently based upon the protected characteristics of disability and familial status.

> Direct evidence is "evidence" which if believed, requires the conclusion that unlawful discrimination [i.e., the unlawful characteristic] was at least a motivating factor in the [Respondents'] actions. *White v. Columbus Metropolitan Housing Authority*, 429 F.3d 232, 238 (6th Cir. 2005)
>
> Evidence that testers were treated disparately based upon protected characteristics (disability, familial status) constitutes direct evidence sufficient to sustain a claim under R.C. 4112. *Walker v. Todd Village, LLC,* (D. Md. 2006), 419 F. Supp.2d 743, 748-49.

6. The Commission need not prove malice or discriminatory animus of a Respondent to make out a case of intentional discrimination where the defendant expressly treats someone protected by the R.C. 4112.02(H)(1), (4), and (16) in a different manner than others. *Janick v. Department of Housing & Urban Dev.*, 44 F.3d 553, 556 (7th Cir. 1995)

> A statement does not have to be blatantly discriminatory to violate the law; it must simply "discourage" the ordinary listener of the protected class from pursuing the housing opportunity.
>
> Id, at 556.

8. Respondent Helen Grybosky executed a quitclaim deed for the property at 779 Main Street naming Respondent Gary Grybosky as the owner of the property while retaining a life estate for herself. (Comm. Ex. 37)

7. Both Respondents refused to answer questions asked by the Commission and Complainant FHRC, invoking the privilege of the 5th Amendment. (Tr. 479-512)

8. An adverse inference is made that Respondent Gary Grybosky participated in the management of 779 Main Street. (Tr. 507-512)

9. Respondent Helen Grybosky, in showing the units to applicants and communicating policy to potential renters, was acting as an agent for Respondent Gary Grybosky.

> If it is established that the agent of a defendant has engaged in discriminatory conduct in violation of the Fair Housing Act, the defendant will be held liable. *Chicago v. Matchmaker Real Estate Sales Center, Inc.* (7th Cir. 1992), 982 F.2d 1086, 1096.

10. Respondent Helen Grybosky made statements to potential applicants that she was reluctant to waive her "no pet policy", required additional security deposits, and also placed a limitation on which apartment families with children could rent.

11. Respondents have engaged in illegal conduct and Complainant FHRC is, therefore, entitled to relief.

DAMAGES

1. 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

1. 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 pre-litigation 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).

2. In this case, the Commission presented evidence that Respondents' discriminatory actions caused Complainant FHRC to expend resources in pre-litigation expenses, diversion of resources, and frustration of mission which includes education and outreach in Complaint Nos. 39116 and 39125 in the following amounts:

Complaint No. 39116: $6000.00

Complaint No. 39125: $6000.00

(Comm. Ex. 30a and 30b)

PUNITIVE DAMAGES

1. 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).

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

- The nature of Respondents' conduct;
- Respondents' prior history of discrimination;
- Respondents' size and profitability;
- Respondents' cooperation or lack of cooperation during the investigation of the charge; and
- The effect Respondents' actions had upon Complainant.[3] O.A.C. 4112-6-01.

3. Applying the foregoing criteria to this case:

[3] This criterion is more appropriately considered when determining actual damages.

- Respondents' conduct showed a blatant disregard for the law and its goal of eliminating housing discrimination.

- The Commission did not present a prior history of discrimination by Respondents;

- The Commission presented evidence regarding other property owned by Respondent Gary Grybosky (Comm. Ex. 37)

- The effect of the Respondents' conduct was to make property unavailable in the Lake County Area to individuals with disabilities and families with children

4. Based on the foregoing discussion, the ALJ recommends that Respondents Gary Grybosky be assessed punitive damages in the amount of $7,000.00, and Helen Grybosky be assessed punitive damages in the amount of $3000.00.

ATTORNEY'S FEES

1. The Commission and Complainant FHRC are 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.

2. In order to create a record regarding attorney's fees, the Commission and Complainant FHRC should file affidavits from plaintiffs' attorneys in Ashtabula 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 Respondents. Respondents may respond with counter-affidavits and other arguments regarding the amount of attorney's fees in this case.

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

4. 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. 09-HOU-CLE-39116 and Complaint No. 09-HOU-CLE-39125 that:

1. The Commission order Respondents to cease and desist from all discriminatory practices in violation of Chapter 4112 of the Revised Code;

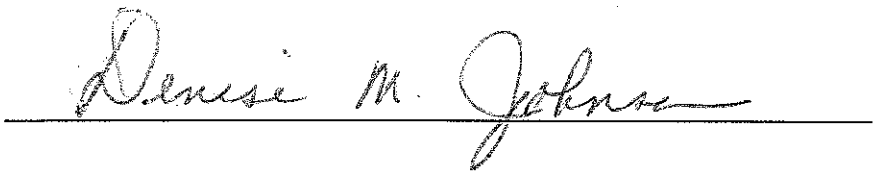
2. The Commission order Respondents to pay Complainant FHRC $12,000.00 in actual damages;

3. The Commission orders Respondents to pay Complainant FHRC $10,000.00 in punitive damages;

4. The Commission orders Respondents, 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 their participation in fair housing training, Respondents shall submit certification from the trainer or provider of services that Respondents have successfully completed the training; and

5. The Commission orders Respondents, 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

October 17, 2012