**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**LESLIE K. CALLOWAY**

Complainant

v.

**RAYMOND E. HODGE**

Respondent

Complaint No. 09–HOU–COL–36040
COL H1 (36040) 08122008
05–08–1660–8 22A–2009–01014F

# 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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## INTRODUCTION AND PROCEDURAL HISTORY

Leslie K. Calloway (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on August 12, 2008.

The Commission investigated and found probable cause that unlawful discriminatory practices had been engaged in by Raymond E. Hodge (Respondent) in violation of Revised Code Section (R.C.) 4112.02(H).

The Commission issued a Complaint, Notice of Hearing, and Notice of Right of Election on February 19, 2009.

The Complaint alleged that Respondent subjected Complainant to unequal terms and conditions of rental because of her race and familial status.

The Commission's conciliation efforts failed and the matter was scheduled for public hearing.

A public hearing was held on November 6, 2009 at the Ohio Civil Rights Commission, 5th Floor Conference Room, 30 East Broad Street, Columbus, Ohio.

Respondent, representing himself *pro se,* filed an Answer to the Complaint denying he had engaged in any discriminatory conduct.

The record consists of the previously described pleadings, the transcript consisting of 43 pages of testimony, exhibits admitted into evidence at the hearing, and a post-hearing brief filed by the Commission on July 6, 2011.

## 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.

1. Complainant filed a sworn charge affidavit with the Commission on February 19, 2009.

2. In a letter dated January 8, 2009, Respondent was notified of the Commission's probable cause finding that Respondent engaged in an unlawful discriminatory practice in violation of R.C. 4112.02(H).[1]

3. The Commission attempted to eliminate the alleged unlawful discriminatory practices by conciliation.

4. Respondent is a provider of housing accommodations. Respondent is the owner of rental property located at 1044 Marion Road in Columbus, Franklin County, Ohio.

5. Complainant has four (4) small children who reside with her.

6. Complainant inquired about renting the residence at 1044 Marion Road in or around July 2008. (Tr. 14)

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[1] The Commission indicated at the hearing it would not pursue the allegation that Respondent violated R.C. 4112.02(H) based on Complainant's race. However, the ALJ, *sua sponte*, amends the Complaint to include a violation of R.C. 4112.02(H)(1) to conform to the evidence presented at the hearing.

7. Complainant came out to view the property and Respondent asked her how many children she had. (Tr. 15)

8. Complainant told Respondent that she had four (4) children.

9. Respondent told Complainant that the children could fall out of the upstairs windows.

10. Respondent did not give Complainant an application, perform a background check, or inquire about her rental history. (Tr. 17)

11. Bobby Stearn (Stearn) submitted an application dated August 8, 2008 to Respondent to rent the residence at 1044 Marion Road. (Tr. 18, Comm. Ex. A)

12. Stearn did not have any children that would be living with him. (Tr. 19-20)

13. Respondent rented the apartment to Stearn but eventually evicted Stearn for non-payment of rent.

14. In March of 2009 Respondent rented the residence at 1044 Marion Road to Richard Clark (Clark).

15. Clark's rental application indicated that he would not have children living with him in the residence. (Comm. Ex. B)

## 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.[2]

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

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

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[2] Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

It shall be an unlawful discriminatory practice:

(H) For any person to:

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

(4) Discriminate against any person in the terms or conditions of ... renting, ... or use of any housing accommodations, ... because of ... familial status, ....

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

(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]

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 factfinder credits the direct evidence, the *McDonnell*

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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 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.

*Douglas* evidentiary framework does not apply. *Terbovitz v. Fiscal Court of Adair County*, 44 FEP Cases 841, 844 (6th Cir. 1987).

7. R.C. 4112.02(H) and FHAA prohibit discrimination in the sale, rental, or financing of dwellings based on familial status. "Familial status discrimination refers to discrimination against parents or other custodial persons domiciled with children under the age of 18." *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 728 n. 1, 115 S.Ct. 1776, 131 L. Ed. 2d 801 (1995).

8. To establish a familial status claim the Commission must establish that:

(1) Respondent made a statement;

(2) that statement was made with respect to the sale or rental of a dwelling, and

(3) the statement indicated a preference, a limitation, or discrimination against the plaintiff on the basis of the status as a parent.

*White v. HUD*, 475 F.3d 898, 904 (7th Cir. 2007).

9. The Commission need not prove the malice or discriminatory animus of a defendant to make out a case of intentional discrimination where the defendant expressly treats someone protected by the R.C. 4112.02(H) in a different manner than others.

> (...) a plaintiff makes out a prima facie case of intentional discrimination under the FHAA merely by showing that a protected group has been subjected to explicitly differential -- i.e. discriminatory -- treatment.
>
> *Bangerter v. Orem City Ordinance*, 46 F3d 1491, 1501 (10th Cir. 1995).

10. Respondent did not want to rent to Complainant based on his stated reason that the children might fall out of the upstairs windows.

11. Respondent was unable to articulate any known history of problems he had in past rental situations. He also testified that the windows had locks on them. (Tr. 15)

12. R.C. Chapter 4112, like its federal counterpart, requires that housing providers evaluate families with children on their

individual circumstances rather than using group stereotypes. *See HUD v. Schilling,* P-H: Fair Housing-Fair Lending Rptr. ¶25,052 at 25,484 (HUD ALJ 1993) (while landlords are free to seek quiet tenants, they may not exclude families with children because of "stereotypical beliefs" that children are "*per se* noisy"); *HUD v. Jeffre,* P-H: Fair Housing-Fair Lending Rptr. ¶25,020 at 25,254 (HUD ALJ 1991) (respondent's illegal policy of not renting to families with children was based on her view that children will cause "problems" and "a lot of noise").

13. Respondent engaged in illegal conduct when he refused to negotiate with Complainant for the rental of the residence in question. Complainant is entitled to damages as a matter of law.

## DAMAGES

14. When the Commission has proven a violation of the statute, Complainant is entitled to relief. Relief includes an award of actual damages shown to have resulted from the discriminatory action. R.C. 4112.05(G)(1). Relief may also include punitive damages.

## ACTUAL DAMAGES

15. 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.[5] *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974).

16. In this case, the Commission did not introduce evidence of Complainant having compensatory damages.[6]

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[5] 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).

[6] Complainant did not attend the hearing. The Commission represented at the hearing that it would file a motion to reopen the record to include the testimony of Complainant. The Commission did not file a motion. (Tr. 6-7, 41)

## PUNITIVE DAMAGES

17. The purpose of an award of punitive damages pursuant to R.C. 4112.05(G) is to deter future illegal conduct. Ohio Admin. Code (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).

18. 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]

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

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[7] These criteria are more appropriately considered when determining actual damages.

19. Applying the foregoing criteria to this case:

- There is no evidence that Respondent has been found to have discriminated in any other forum; and
- Respondent owned at least four (4) properties in 2008. (Tr. 11-14)

20. Based on this and the foregoing discussion, the ALJ recommends Respondent be assessed punitive damages in the amount of $3,000.00.

**ATTORNEY'S FEES**

21. 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.

22. In order to create a record regarding attorney's fees, the Commission's counsel should file affidavits from plaintiffs' attorneys in Franklin 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.

23. 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.

24. 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 the foregoing reasons, it is recommended in Complaint No. 09–HOU–COL–36040 that:

1. The Commission issues a Cease and Desist Order prohibiting Respondent from discriminating against families with children;

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

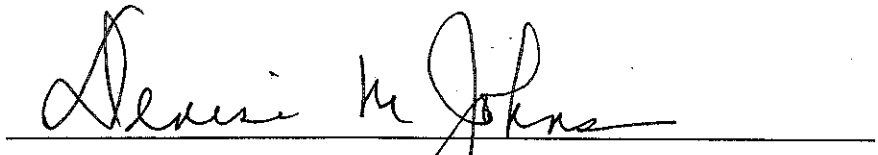
3. The Commission order Respondent to pay the Ohio Attorney General reasonable attorney's fees to be determined in the future;

4. The Commission order Respondent, within fix (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; and

6. The Commission order Respondent to use equal housing opportunity notices in Respondent's rental applications similar to the one set out in Appendix A.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

June 14, 2012