

INTRODUCTION AND PROCEDURAL HISTORY

Toledo Fair Housing Center (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 29, 1998.

The Commission investigated and found probable cause that The Herald Newspaper, Inc., Allen C. Foster, Bonnie Hunter, and Bob Stiegel engaged in unlawful discriminatory practices in violation of Revised Code (R.C.) 4112.02(H)(1) and (7).

The Commission issued a Complaint, Notice of Hearing, and Notice of Right of Election on August 19, 1999. The public hearing was held in abeyance pending the Commission's conciliation efforts.

The Complaint alleged that The Herald Newspaper Inc., Foster, Hunter, and Spiegel printed and published discriminatory advertisements that limited the rental of housing accommodations based on familial status.

Hunter, the president of The Herald Newspapers, Inc., filed an Answer on December 13, 1999. Hunter admitted that “The Herald Newspapers printed in error on November 12, 1997, June 24 and July 1, 1998 a classified by the same person stating ‘no children.’”

A public hearing was held on November 22, 2000 at the DiSalle Government Building in Toledo, Ohio. Prior to taking testimony, the Commission indicated that Foster agreed to a settlement. The hearing proceeded against Hunter and The Newspaper Herald, Inc. (Respondents).¹ Neither Respondents nor their representatives appeared at the hearing.

The Commission moved to leave the record open at the end of the hearing to allow Complainant to update its records to include time spent on this case after June 24, 1999. The Hearing Examiner granted the motion. The Commission filed updated time records on December 7, 2000.²

¹ The Commission elected not to proceed against Stiegel who apparently is no longer employed by the newspaper. Stiegel was the newspaper’s editor at the time the discriminatory advertisements were printed and published.

² The Hearing Examiner marked these records as Commission Exhibit H.

The record consists of the previously described pleadings, a 38-page transcript, exhibits admitted into evidence at the hearing, and a post-hearing brief filed by the Commission on January 30, 2001.

FINDINGS OF FACT

The following findings are based, in part, upon the Hearing Examiner's assessment of the credibility of the witnesses who testified before him in this matter. The Hearing Examiner has applied the tests of worthiness of belief used in current Ohio practice. For example, he considered each witness's appearance and demeanor while testifying. He considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. He further considered the opportunity each witness had to observe and know the things discussed; each witness's strength of memory; frankness or lack of frankness; and the bias, prejudice, and interest of each witness. Finally, the Hearing Examiner 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 October 29, 1998.

2. The Commission determined on August 19, 1999 that it was probable that Respondents engaged in unlawful discriminatory practices in violation of R.C. 4112.02(H)(1) and (7).

3. The Commission attempted, but failed to resolve this matter by informal methods of conciliation.

4. The Herald Newspapers, Inc. prints and publishes *The Herald*, a newspaper circulated in western Toledo. Bonnie Hunter is the president of the newspaper.

5. Complainant is a non-profit fair housing agency. The purpose of the agency is to eliminate housing discrimination through enforcement of fair housing laws and public education about such laws.

6. In November 1997, Complainant received an anonymous tip about a discriminatory advertisement placed in the classified section of *The Herald* on November 12, 1997. The advertisement was for rental of an apartment. The advertisement indicated the limitation of “no children”. (Comm.Ex. B)

7. Complainant assigned Sue Sekel, its legal specialist, to investigate the matter. On November 14, 1997, Sekel called *The Herald* and reported the discriminatory advertisement. Sekel also sent a follow up letter to the newspaper on that day. The letter set forth the particular provision in the federal Fair Housing Act that “this type of advertisement” violated. (Comm.Ex. C) Complainant “basically” closed the case after Sekel sent the letter to the newspaper, but it continued to monitor the newspaper’s advertisements. (Tr. 15)

8. In June 1998, Complainant received another anonymous tip about a discriminatory advertisement placed in *The Herald*. This advertisement, which was dated June 24, 1998, also indicated the limitation of “no children” for rental of an apartment. (Comm.Ex. D) This advertisement was published again in *The Herald* on July 1, 1998. (Comm.Ex. E)

9. Complainant assigned this matter to Nellie Edwards, its chief investigator. Edwards investigated the discriminatory advertisements. This investigation ultimately led to Complainant's filing of a complaint with HUD and a charge affidavit with the Commission.

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 alleged in its Complaint that Respondents printed and published discriminatory advertisements that limited the rental of housing accommodations based on familial status.

2. This allegation, 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:

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

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; or
- (b) Any person who is pregnant or in the process of securing legal custody of any individual who is under eighteen years of age.

4. Discriminatory advertisements, which affect the availability of housing, may also violate R.C. 4112.02(H)(1). This section prohibits not only discriminatory actions involving refusals to sell, rent, or negotiate, but also certain actions with discriminatory effects that negatively affect the availability

of housing. *Southend Neighborhood Imp. v. County of St. Clair*, 743 F.2d 1207 (7th Cir. 1984). The language “otherwise deny or make unavailable housing accommodations” has been construed to reach “every practice which has the effect of making housing more difficult to obtain on prohibited grounds.”³ *United States v. City of Parma, Ohio*, 494 F.Supp. 1049, 1053 (N.D. Ohio 1980), *aff’d. as modified*, 661 F.2d 562 (6th Cir. 1981).

5. 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(G) and 4112.06(E).

6. 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

³ R.C. 4112.02(H)(1) provides, in pertinent part, that it is an unlawful discriminatory practice for any person to:

Refuse to . . . rent, . . . housing accommodations, . . . or otherwise deny or make unavailable housing accommodations because of . . . familial status,

evidence sufficient to support a finding of unlawful discrimination under the federal Fair Housing Act of 1968 (Title VIII), as amended.⁴

7. Under Title VIII case law, the ordinary reader test usually applies to determine whether advertisements express an impermissible preference or limitation on housing accommodations. *Ragin v. New York Times Co.*, 923 F.2d 995 (2d 1991). The ordinary reader is “neither the most suspicious nor the most insensitive of our citizenry.” *Id.*, at 1002.

In applying the ‘ordinary reader’ test, courts have not required that ads jump out at the reader with their offending message, but have found instead that the statute is violated by ‘any ad that would discourage an ordinary reader of a particular [protected group] from answering it.’

Jancik v. HUD, 44 F.3d 553, 556, (7th Cir. 1995), *quoting Ragin, supra* at 999-1000.

8. Since the focal point of the inquiry is the message conveyed to the ordinary reader, proof of the author’s discriminatory intent is not required. *Jancik, supra* at 556. This does not mean that the author’s intent is irrelevant when considering the message conveyed. The author’s intent to indicate a

⁴ Sections 3604(a) and (c) of Title VIII are substantially the same as R.C. 4112.02(H)(1) and (7), respectively.

prohibited preference or limitation on housing accommodations “obviously bears on the question of whether the words in fact do so.” *Id.* However, when advertisements are clearly discriminatory on their face, the question of whether they indicate an impermissible preference or limitation may be answered without inquiry into the author’s intent.

In cases where ads are clearly discriminatory, a court may look at an ad and determine whether it indicates an impermissible preference to the ordinary reader, and inquiry into the author’s professed intent is largely unnecessary.

Soules v. HUD, 967 F.2d 817, 824 (2d Cir. 1992).

9. In this case, Respondents printed and published advertisements for rental of housing accommodations that were clearly discriminatory on their face; the words “no children” in the advertisements unlawfully limited occupancy based on familial status. See *Blomgren v. Ogle*, 850 F.Supp. 1427 (E.D.Wash. 1993) (court ruled that provisions for rental of apartments, which stated “[n]o children” and “[n]o children (other than visiting)”, were discriminatory on their face and therefore, violated Section 3604(c) of Title VIII). Respondents’ actions violated both R.C. 4112.02(H)(1) and (7). Complainant is entitled to relief as a matter of law.

DAMAGES

10. 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

11. In fair housing cases, the purpose of an award of actual damages is to place aggrieved persons "in the same position, so far as money can do it, as . . . [they] 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). Fair housing agencies, as aggrieved persons, may recover tangible injuries sustained as a result of combating unlawful housing discrimination. *Havens v. Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

12. The Commission provided documentary evidence showing that Complainant's employees spent 38.5 hours working on this case. (Comm.Ex. H) The Commission requested that Complainant be reimbursed at a rate of \$105 per hour. Respondent did not challenge the accuracy of the hours expended or the reasonableness of the hourly rate. The Hearing Examiner recommends that Complainant be awarded the requested amount of \$4,069.25 (38.5 times \$105 plus copying expenses) for actual damages.

PUNITIVE DAMAGES

13. The purpose of an award of punitive damages pursuant to R.C. 4112.05(G) is to deter future illegal conduct. Ohio Administrative Code (Adm.Code) 4112-6-02. Thus, punitive damages are appropriate "as a deterrent measure" even when there is no proof of actual malice. *Shoenfelt v. Ohio Civ. Right Comm.* (1995), 105 Ohio App.3d 379, 385, *citing and quoting, Marr v. Rife*, 503 F.2d 735, 744 (6th Cir. 1974).

14. 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; and
- Respondents' cooperation or lack of cooperation during the investigation of the charge.⁵

Adm.Code 4112-6-02.

15. Applying these factors to this case:

- The evidence shows that Respondents printed and published discriminatory advertisements in *The Herald* on at least three occasions. Respondents engaged in this illegal activity despite Complainant's warning that such advertisements were unlawful;
- The Commission did not present any evidence that there have been previous findings of unlawful discrimination against Respondents;
- The Commission did not present any evidence of the size and profitability of the newspaper. However, in its brief, the Commission described the newspaper as "a small neighborhood weekly." (Comm.Br. 10); and
- The Commission Investigator testified that Hunter was initially cooperative, but she did not respond to the Commission's inquiries after June 23, 1999.

⁵ Adm.Code 4112-6-02 also lists the effect that the illegal action had upon the complainant. However, this factor is more appropriately considered when determining actual damages.

16. Based on the foregoing discussion, the Hearing Examiner recommends that the Commission assess Respondents \$8,000 in punitive damages. A substantial amount of punitive damages is warranted in light of the nature of Respondents' violations, their failure to prevent further discriminatory advertisements despite notice of initial wrongdoing, and their lack of cooperation during the investigation. Additionally, a sufficient level of deterrence is necessary to prevent the public harm caused by discriminatory advertising.

ATTORNEY'S FEES

17. The Commission's counsel 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.

18. To create a record regarding attorney's fees, the Commission's counsel should file affidavits from plaintiffs' attorneys in Lucas County, Ohio regarding the reasonable and customary hourly fees that 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.

19. If the Commission adopts the Hearing Examiner'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 Hearing Examiner's Report is adopted. Respondents may respond to the Commission's Application for Attorney's fees within 30 days from their receipt of the Commission's Application for Attorney's Fees.

20. 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 Hearing Examiner issues a supplemental recommendation regarding attorney's fees.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint #8622 that:

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

2. The Commission order Respondents collectively to pay Complainant \$4,069.25 in actual damages;

3. The Commission order Respondents collectively to pay Complainant \$8,000 in punitive damages;

4. The Commission order Respondents to maintain copies of Complainant's fair housing brochures at its place of business for at least three years from the date of the Commission's Final Order; and

5. The Commission order Respondents to place $\frac{1}{4}$ page fair housing advertisements, provided by Complainant, in its newspaper on a monthly basis for at least one year from the date of the Commission's Final Order; and

6. The Commission order Respondents to report its compliance with the Commission's Final Order on a yearly basis for three years from the date of the order. Respondents should report such compliance to the Commission's regional office in Toledo, Ohio.

TODD W. EVANS
HEARING EXAMINER

February 23, 2001

PROCEDURAL HISTORY

This matter is before the Hearing Examiner on the Commission's Application for Attorney's Fees. On February 23, 2001, the Hearing Examiner issued Findings of Fact, Conclusions of Law, and Recommendations (Hearing Examiner's Report) on liability and damages in Complaint #8622. The Hearing Examiner found that Respondents violated R.C. 4112.02(H)(1) and (7). Among other things, the Hearing Examiner's Report recommended that the Commission award Complainant \$4,069.25 in actual damages and assess Respondents \$8,000 in punitive damages.

The Commission adopted the Hearing Examiner's Report on April 26, 2001. The Commission filed an Application for Attorney's Fees on May 25, 2001. Respondents did not respond to the Application.

CONCLUSIONS OF LAW AND DISCUSSION

1. When the Commission finds that a respondent has violated R.C. 4112.02(H), the Commission must require the respondent to pay reasonable attorney's fees.

If the commission finds a violation of division (H) of section 4112.02 of the Revised Code, the commission additionally *shall require the respondent to pay* actual damages and *reasonable attorney's fees* (Emphasis added.)

R.C. 4112.05(G)(1).

Such attorney's fees may be paid directly to the Commission's counsel, the Office of the Ohio Attorney General, pursuant to R.C. 109.11. *Shoenfelt v. Ohio Civ. Rights Comm.* (1995), 105 Ohio App.3d 379, 385-86.

2. In determining what constitutes reasonable attorney's fees in a particular case, the usual starting point and presumptively reasonable amount is the lodestar calculation, i.e., the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Blum v. Stenson*, 465 U.S. 886, 897, 34 FEP Cases 417, 421 (1984). As the fee applicant, the Commission must provide evidence documenting the time expended on the case. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 31 FEP

Cases 1169, 1174 (1983). The Commission is not required to record the time expended “in great detail”, but it should at least identify the “general subject matter” of such expenditures. *Id.*, at 437, 31 FEP Cases at 1174, n.12. Overall, the Commission’s counsel must exercise “billing judgment” in excluding hours that are excessive, redundant, or otherwise unnecessary. *Id.*, at 434, 31 FEP Cases at 1173.

3. The Commission also has the burden of providing evidence that supports the requested hourly rate. *Id.* Besides an affidavit from its counsel, the Commission must provide other evidence showing that the requested hourly rate is comparable to the prevailing market rate for similar work performed in the community where the hearing was held. In other words, the Commission must show that the requested hourly rate is “in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Blum, supra* at 895-96, 34 FEP Cases at 421, n.11.

4. Although the lodestar calculation is presumed reasonable, there may be circumstances where that calculation “results in a fee that is either

unreasonably low or unreasonably high.” *Id.*, at 897, 34 FEP Cases at 421.

In such cases, the Hearing Examiner may adjust the lodestar amount upward or downward, at his discretion, in light of the factors listed in Disciplinary Rule 2-106(B). *Bittner v. Tri-County Toyota* (1991), 58 Ohio St.3d 143, 145-46. These factors include:

The time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney’s inability to accept other cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent.¹

5. In weighing these factors, the most important factor is the results obtained. *Hensley, supra* at 434, 31 FEP Cases at 1173. To be upheld, a fee award must be “reasonable in relation to the results obtained.” *Id.*, at 440, 31 FEP Cases at 1176.

6. Besides compensating Complainant for its actual damages, the Commission’s success in this case has a significant public benefit. It sends a clear message to Respondents and other newspapers that they

¹ Since several of these factors are subsumed within the lodestar calculation, the factfinder should avoid considering a factor twice. *Cf. Hensley, supra* at 434, 31 FEP Cases at 1173, n.9.

are prohibited from printing and publishing discriminatory housing advertisements. *Cf. Cabrera v. Jakobovitz*, 24 F.3d 372, 393 (2d Cir. 1994) (court awarded attorney's fees in Title VIII case that served the public purpose of warning landlords that the law will not tolerate their use of brokers who discriminate invidiously). Such advertising unlawfully turns away prospective tenants who are members of protected classes.

7. The Commission satisfied its burden of documenting the time expended in this case. The Commission's counsel provided a billing log containing the subject matter of the work performed, the dates the work was performed, and the time spent on each activity. The billing log indicates that the Commission's counsel expended 19.50 hours on the prevailing issue of discriminatory advertising.

8. The Commission also satisfied its burden of providing evidence in support of the requested hourly rate (\$150). The Commission provided an affidavit from Janet Hales, a Toledo attorney whose practice includes "fair housing law." Hales stated that the range for attorney's fees for those

practicing civil rights and fair housing law in Toledo is between \$100 and \$240 per hour.²

9. Hales's affidavit demonstrates that the requested hourly rate is comparable to the prevailing market rate for housing discrimination cases litigated in Toledo. Respondents failed to rebut this evidence with any counter-affidavits from other civil rights attorneys practicing in Lucas County or the surrounding area.

10. After reviewing the billing log and the affidavits provided by the Commission, the Hearing Examiner concludes that the number of hours claimed and the requested hourly rate are reasonable. The lodestar amount in this case is \$2,925 (19.5 hours x \$150 per hour). Having considered the results obtained by the Commission, the Hearing Examiner also concludes that the lodestar amount is reasonable in relation to these results. The Commission is entitled to \$2,925 in attorney's fees for time expended on this case.

² In *White v. Morris*, 863 F.Supp. 607 (S.D. Ohio 1994), the court ruled that the requested hourly rates of \$175 and \$185 per hour were the prevailing market rates for the two plaintiff's attorneys in the case. Both were experienced litigators of civil rights cases in the Cincinnati area.

RECOMMENDATION

For all of the foregoing reasons, the Hearing Examiner recommends that the Commission's Final Order in Complaint #8622 include an Order requiring Respondents to pay \$2,925 in attorney's fees to the Office of the Ohio Attorney General.

TODD W. EVANS
HEARING EXAMINER

June 18, 2001