

**Ohio Civil
Rights Commission**

Memo

To: Desmon Martin, Director of Enforcement & Compliance

From: Denise M. Johnson, Chief Administrative Law Judge

Date: 11/4/2013

Re: *Michael Gunn v. Jamie Hein*

DAYH6(22452) 09062011 22A-2011-04085F

Complaint No. 11-HOU-DAY-22452

**CONSIDERATION OF
ADMINISTRATIVE LAW JUDGE'S REPORT**

ALJ RECOMMENDS CEASE AND DESIST

Report Issued: November 4, 2013

Report Mailed: November 4, 2013

*****Objections Due:*** November 27, 2013**



Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners

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

G. Michael Payton, Executive Director

November 4, 2013

Michael Gunn
2903 Vienna Woods Drive
Cincinnati, Ohio 45211

Jamie Hein
3045 Verdin Avenue
Cincinnati, Ohio 45211

Re: **Michael Gunn v. Jamie Hein**
(DAY)H6(22452)09062011 05-11-1557-8 Complaint No. 11-HOU-DAY-22452

Enclosed is a copy of the 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 three (23) days from the mailing date of this report. A request to appear before the Commission must also be submitted by this date.

Pursuant to Ohio Admin. Code § 4112-1-02, your Statement of Objections must be **received** by the Commission no later than **November 27, 2013**. *No extension 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 / apo

Desmon Martin
Director of Enforcement and Compliance

Enclosure

DM:apo

Cc: Lori A. Anthony – **Chief, Civil Rights Section**/Carolyn E. Gutowski, Esq., **Assistant Attorney General**, /Jamie Hein, Respondent /Michael Gunn, Complainant/ Denise M. Johnson – **Chief Administrative Law Judge**

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Michael Gunn

Complainant

Complaint No. 11-HOU-DAY-22452

v.

Jamie Hein

Respondent

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

**MIKE DeWine
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Counsel for the Commission

Jamie Hein
3045 Verdin Avenue
Cincinnati, Ohio 45211

Respondent

Michael Gunn
2903 Vienna Woods Drive
Cincinnati, Ohio OH 45211

Complainant

ALJ'S REPORT BY:

Chief Administrative Law Judge
Denise M. Johnson,
Ohio Civil Rights Commission
Rhodes Office Tower, 5th Floor
30 East Broad Street,
Columbus, OH 43215-3414
Ph. (614) 466-6684
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INTRODUCTION AND PROCEDURAL HISTORY

Michael Gunn (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on September 6, 2011.

The Commission investigated and found probable cause to believe that Jamie Hein (Respondent) engaged in unlawful discriminatory practices in violation of Revised Code Section (R.C.) 4112.02(H)(1), (4), and (7).

The Commission attempted to resolve the charge through informal methods of conciliation. After conciliation efforts failed, the Commission issued a Complaint, Notice of Hearing, and Notice of Right of Election on October 20, 2011.

The Complaint alleged that the Respondent, by posting a sign that read "Public Swimming Pool, White Only" denied Complainant's daughter access to the pool area because of her race, and forced

Complainant to move out in violation of R.C. 4112.02 (H)(1), (4), and (7).

The Respondent did not file Answer. On July 23, 2012 the Commission filed a Motion to Proceed As A Default Hearing. The Motion was granted by the ALJ.

A public hearing was held on August 3, 2012 in the Cincinnati City Hall in Cincinnati, Ohio.

The record consists of the previously described pleadings, a transcript (103 pages), exhibits admitted into evidence at the hearing, and a post-hearing brief filed by the Commission on September 12, 2012.

FINDINGS OF FACT

The following findings of fact are based, in part, upon the ALJ's 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 September 6, 2011.
2. The Commission determined on September 29, 2011 that it was probable that Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(H).
3. The Commission attempted and failed to conciliate this matter by informal methods of conciliation.
4. Respondent owns a two-family duplex residential property located at 3045 Verdin Avenue, Cincinnati, Ohio 45211.
5. Complainant paid \$500.00 per month based on a verbal lease agreement with Respondent. (Tr. 10-11)

6. Complainant, who is Caucasian has a bi-racial daughter, Ravyn, whose mother is African American. In 2011 Ravyn was ten (10) years old. (Tr. 11, 27)
7. Ravyn did not live with Complainant but visited him once or twice a month on weekends, staying overnight. (Tr. 11)
8. Complainant and his girlfriend, Elizabeth Gerard (Gerard) lived at the two -family duplex from August 2009 until June 21, 2011 with unrestricted access to the pool area. (Tr. 10, 49-50)
9. Gerard is Caucasian.
10. Respondent invited Complainant and Gerard to a pool party on the weekend of Memorial Day, May 2011.

11. Ravyn was visiting Complainant that weekend so she attended the party and swam in the pool. There were fifteen to twenty (15-20) other people attending the party. (Tr. 13)
12. Many of the people at the party had on sun-screen lotion. (Tr. 13, 50-51)
13. Ravyn was the only African American at the pool party.
14. The following day Respondent sent Complainant a text message wherein she accused Complainant's daughter of making the swimming pool "cloudy" because she used chemicals in her hair. (Comm. Ex. 2, Tr. 13-16)
15. Respondent told Complainant that Ravyn was going to have to take a shower before getting into the pool and wear a swimming cap because the pool was nasty.

16. Complainant informed Respondent that Ravyn had a chemical relaxer put in her hair two weeks before the Memorial Day weekend and he thought the issue was resolved.
17. Complainant went out of town for a few days.
18. Complainant was working from home and decided to take a break at lunch and sit out by the pool.
19. When he walked outside toward the pool he saw a sign posted on the gate of the pool that read "Public Swimming Pool, White Only." (Comm. Exh. 3, attached hereto as Addendum A)
20. Complainant's response to the sign was that he was shaken and upset. He could not work for the rest of the day. Complainant was unable to focus on anything other than how he was going to explain the sign and Respondent's motivation for posting the sign to Ravyn.

21. Complainant texted Gerard and told her about the sign. Gerard texted back with the message, "This is beyond wrong."
(Tr. 22 Comm. Exh. 2)
22. That evening Complainant and Gerard discussed what to do in light of the posted "White Only" sign.
23. Complainant and Gerard decided to find another apartment. They did not want Ravyn to be humiliated or to risk the possibility of Respondent making racial comments to Ravyn.
(Tr. 23-24, 55)
24. Complainant and Gerard found another apartment at 2903 Vienna Woods Drive, Cincinnati, Ohio and moved in on June 22, 2011. (Tr. 9, 27-28)
25. Both Complainant and Gerard missed work in order to find another apartment. (Tr. 28-29, 56 Comm. Exh. 2)

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 by posting a sign that read "Public Swimming Pool, White Only" Respondent denied Complainant's daughter access to the pool area because of her race, and forced Complainant to move out in violation of R.C. 4112.02 (H)(1),(4), and (7).

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

(1) Refuse to ..., rent, lease, ..., or otherwise deny or make unavailable housing accommodations because of race, (...);

(4) Discriminate against any person in the terms or conditions of ... renting, leasing... any housing accommodations or in furnishing facilities, services, or privileges in connection with ... occupancy, or use of any housing accommodations...because of race, (...);

(7) Print, publish, or circulate any statement or advertisement, or make or cause to be made any statement or advertisement, relating ..., rental, lease, ... that indicates any preference, limitation, specification, or discrimination based

upon race, ... or an intention to make any such preference, limitation, specification, or discrimination;

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(G) and 4112.06(E).

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 statutes was similar).

5. The Commission presented direct evidence that Respondent treated Complainant's daughter, who is a bi-racial child who is part African American, differently based upon her race.

Direct evidence of discrimination "does not require a factfinder to draw any inference in order to conclude that the adverse (...) action was motivated at least in part by prejudice against members of the protected group." *Johnson v. Kroger Co.*, 319 F.3d 858, 865 (6th Cir. 2003)

6. There is no doubt in the ALJ's mind that the Respondent harbors a discriminatory animus toward African Americans.

7. In one of many text message communications with Respondent, Gerard attempted to explain that Ravyn does not use oil in her hair:

(...)

Elizabeth 5:26 PM As I said before ravyn does not put oil in her hair. If you think that

insulting me is hurting me you are very wrong.
Have a nice life.

Jamie 5:30 PM I don't care bitch...there has been no other black person in this pool and it so happens she'd in it 4 2 days and it looks like u pussy ass ugly bitch

(...)

(Comm. Exh. 2)

8. Respondent denied to the press that she engaged in any illegal conduct posting the "Public Swimming Pool Whites Only" sign. She specifically denied doing anything wrong to Ravyn and stated:

"I've never said anything to that child," Hein said. "If I have to stick up for my white rights, I have to stick up for my white rights. It goes both ways." (Comm. Exh. 5, ABC News, December 15, 2011 "Exclusive: "White Only" Pool Sign Owner Explains")

9. Respondent denied having a problem with people because of their race and defended posting the sign saying that it is a "historical sign".

(Comm. Exh. 5)

10. The sign is dated 1931 and from Alabama.

11. To many African Americans as well as other informed Americans who have knowledge of American history and have relatives and acquaintances that grew up during the era of Jim Crow South, Alabama in 1931 is not something that evokes warm thoughts of a benign and bucolic past.

12. To the contrary, Respondent's "historical sign" evokes knowledge (or memory) of the following: separate public facilities, segregated public common carriers, lynchings, inferior and separate educational facilities, employment and housing discrimination, voting disenfranchisement, miscegenation laws, etc. All actions designed to intimidate and dehumanize a group of people because of the color of their skin.

13. Respondent's actions forced Complainant and Gerard to move to prevent Ravyn from exposure to the humiliation of racial discrimination.

A constructive eviction occurs when a renter—subsequent to signing on the dotted line—is later compelled to vacate the accommodations due to a discriminatory “taking away” of a substantial rental benefit.

Bloch v. Frischholz, 587 F. 3d 771, 776 (2009), *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F. 3d 690, 712-713 (2009)

14. Respondent’s conduct is a violation of R.C. 4112.02 (H) (1), (4), and (7). Therefore, the Complainant is entitled to relief as a matter of law.

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. The Commission, in its discretion, may also award punitive damages. R.C. 4112.05(G)(1). The purpose of an award of damages is to both compensate the victim of discrimination and to deter future unlawful acts. *Ohio Civil Rights Comm. v. Ingram*, 69 Ohio St. 3d 89, 95 (1994).

ACTUAL DAMAGES

16. In fair housing cases, the purpose of an award of actual damages is to place the Complainant "in the same position, so far as money can do it, as . . . [the Complainant] 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. *Steele v. Title Realty Co.*, 478 F.2d 380 (10th Cir. 1973). Damages for intangible injuries may be established by testimony or inferred from the circumstances.¹ *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974).

17. In this case, the evidence shows that Complainants suffered economic loss and emotional distress because of Respondents' actions.

18. Both Complainant and Gerard incurred the following expenses related to moving to a new apartment:

Gerard: Missed four (4) days of work- \$225.00

Complainant: Missed one (1) day of

¹ Although emotional injuries are difficult to quantify, "courts have awarded damages for emotional harm without requiring proof of the actual value of the injury." *HUD v. Paradise Gardens*, P-H: Fair Housing-Fair Lending Rptr. ¶25,037 at ¶25,393 (HUD ALJ 1992), 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).

work- \$176.00

Moving expenses:

Security deposit: \$413.00

U-Haul Rental: \$54.06

Broken bed in move: \$148.04

New cell phone service due to poor reception
at new apartment: \$138.44

Increased Rent: \$140.00 per month²

(Tr. 28 and 57, Comm. Exh. 2)

19. At the date of the hearing the Complainant's moving expenses were \$1,960.00.

20. Complainant and Gerard also suffered emotional distress as a result of Respondent's discriminatory conduct. They felt angry and disgusted. The anger and anxiety caused them to lose focus on their work. Both Complainant and Gerard decided to move quickly to avoid any possible humiliation the sign would cause to Ravyn. Gerard lost sleep over the incident and her hair fell out. (Tr. 23, 46,51, 53, 55-56, 64-65, 78-79, Comm. Exh. 2)

² The Commission calculates that on the date of the hearing the difference in rent amounts was \$1,960.00

21. The ALJ recommends that following amounts for emotional distress damages:

Complainant - \$20,000

Gerard - \$15,000

Ravyn - \$10,000

PUNITIVE DAMAGES

22. The purpose of an award of punitive damages pursuant to R.C. 4112.05(G) is to deter future illegal conduct. Ohio Adm. Code 4112-6-02.

23. Punitive damages are appropriate "as a deterrent measure" even when there is no proof of actual malice. *Shoenfelt 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).

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

- The nature of Respondent's conduct;
- Respondent's prior history of discrimination;
- Respondents' 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.³

Ohio Adm. Code 4112-6-01.

25. Applying the foregoing factors to this case:

- Respondent's actions were intentional, malicious, and racially motivated;
- The Commission did not present any evidence that there have been previous findings of unlawful discrimination against Respondents
- Respondent transferred the property to John S. Hein, Sr. saying that she defaulted on the loan because she has no money. (Comm. Exh. 10)
- There is no evidence in the record regarding Respondent's level or lack of cooperation during the investigation.
- After Complainant and Gunn moved out of the apartment Respondent continued harassing

³ This factor is more appropriately considered when determining actual damages.

Complainant on several occasions when she saw him in public. (Tr. 35-36, 36-38)

- Respondent also harassed Gerard in public and on social media. When Gerard communicated to Respondent that she wanted her to stop the harassment, Respondent refused. (Tr. 60-63, 66, 67-68, Comm. Exh. 2 and 6)

- Elizabeth Brown, Executive Director of Housing Opportunities Made Equal (HOME) testified regarding the history of racism in Cincinnati, and the long term effects that discrimination has had on the city. She also testified that, due to the extreme and outrageous nature of Respondent's conduct and the attendant bad national publicity, it is a set back to the efforts of improving the reputation of Cincinnati. (Tr. 92-95, 96-101)

26. Based on the foregoing, the ALJ recommends a punitive damage award of \$10,000.00.

ATTORNEY'S FEES

27. 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.

28. To create a record regarding attorney's fees, the Commission's counsel should file affidavits from plaintiffs' attorneys in Hamilton 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 a counter-affidavit and other arguments regarding the amount of attorney's fees in this case.

29. If the Commission adopts the ALJ's Report and Recommendations 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 and

Recommendations 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.

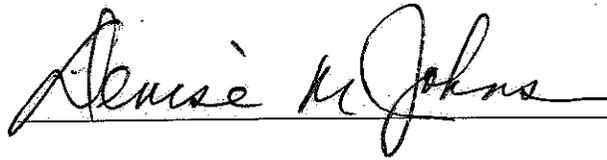
30. Meanwhile, any objections to this report should be filed pursuant to the Ohio Adm. Code. Any objections to the recommendation of attorney's fees can be filed after the ALJ makes her Supplemental Recommendation to the Commission regarding attorney's fees.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint 22452 that:

1. The Commission Order Respondent to cease and desist from all discriminatory housing practices in violation of R.C. Chapter 4112.02 (H) et. seq.;

2. The Commission Order Respondent to pay compensatory damages to Complainant, Gerard, and Ravyn in the amounts of \$20,000.00, \$15,000.00, and \$10,000.00, respectively.
3. The Commission Order Respondent to pay the Complainant \$10,000.00 in punitive damages as a means of discouraging and deterring future acts of housing discrimination.

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

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

November 4, 2013

PUBLIC SWIMMING POOL
WHITE ONLY

Michael Gunn v. Jamie Hein
Complaint No 11-HOU-DAY-22452

ADDENDUM A

COMMISSION EXHIBIT

3