

Substantial Equivalency and the Future of Fair Housing in Ohio

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I. Introduction

In just a few months, we will be celebrating the 50th anniversary of the passage of the Ohio Laws Against Discrimination and the creation of the Ohio Civil Rights Commission. As we look back on five decades of robust enforcement of the state’s civil rights laws, however, it is ironic that the future—at least in so far as it relates to fair housing—has been called into question by a series of state court decisions narrowly interpreting various provisions relating directly or indirectly to the enforcement of the state’s fair housing law. Although the Ohio Civil Rights Commission and its partners throughout the state have always prided ourselves on being leaders in fair housing enforcement and related initiatives, we now face the real possibility that the protections and remedies afforded under the state’s fair housing law will fall below the standards set forth in the federal Fair Housing Act.²

In this article, we will review these recent court decisions and discuss their potential impact on the continued certification of the state’s fair housing law as “substantially equivalent.” We will also address several responsive steps being taken by the Ohio Civil Rights Commission in order to re-establish the rights and responsibilities under the state’s fair housing law.

II. The Meaning and Importance of “Substantial Equivalency”

In fair housing circles, the phrase “substantial equivalency” is readily understood to mean the designation afforded by the U.S. Department of Housing and Urban Development to state laws that afford same or similar protections as the federal Fair Housing Act. In order to be certified as substantially equivalent, the state fair housing law must provide—both on its face and in operation—“rights, procedures, remedies, and the availability of judicial review that are substantially equivalent to those provided in the federal Fair Housing Act.”³ Moreover, after a state law is certified as substantially equivalent, there is a 5-year renewal process to ensure continuing substantial equivalency,⁴ and any changes limiting the effectiveness of a state’s fair

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² 42 U.S.C. § 3601 *et seq.*, as amended.

³ 24 C.F.R. § 115.201. For a detailed discussion of the criteria for determining the adequacy of a state’s fair housing law, see 24 C.F.R. § 115.204.

⁴ 24 C.F.R. § 115.208.

housing law may result in the need to take corrective action to maintain the substantial equivalency certification.⁵

Of course, amongst state and local agencies across the country, substantial equivalency means something of equal importance in these trying economic times—eligibility for federal funding. Interestingly enough, substantial equivalency was the basis for the last major revision to Ohio’s fair housing law in 1992. Although unusual in a state ordinarily lacking any detailed legislative history, the intent underlying this legislative enactment was extraordinarily clear. The legislation, House Bill 321, was declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety, and stated that “immediate action is required in order for Ohio’s Fair Housing Law to achieve substantial equivalency with the federal Fair Housing Act.”⁶ This legislation likewise stated that not amending the state’s fair housing law would result in a withdrawal of certification of substantial equivalence “and a loss of eligibility for at least 700,000 in federal funds for fair housing investigation and enforcement in Ohio.”⁷

If there were any doubt about the reach of the state’s fair housing law or the degree to which it seeks to prohibit unlawful discriminatory housing practices, House Bill 321 would appear to provide a definitive answer. There could be no stronger evidence of a legislative intent to ensure that fair housing provisions of Ohio Revised Code Chapter 4112 provide the same protections and remedies afforded under the federal fair housing law than this clear legislative pronouncement.

III. Recent Developments in Ohio’s Fair Housing Law

Since its initial designation as substantially equivalent, there have been few reasons to seriously re-examine Ohio’s fair housing law or question whether it afforded the same protections and remedies as its federal counterpart. While some applications of the law have given rise to spirited debate, the courts’ interpretations of the law, for the most part, have remained consistent with interpretations of the federal Fair Housing Act.

Despite nearly two decades of relative calm on the substantial equivalency issue, however, this past year proved the old adage, “When it rains, it pours.” In a span of less than one year, state courts issued not one, but four decisions interpreting the state fair housing law in a manner that threatens the certification of the state’s fair housing law as substantially equivalent.

⁵ 24 C.F.R. § 115.211.

⁶ H.B. 321, 119th Ohio Gen. Assembly (1992).

⁷ *Id.*

A. A Landlord's Liability for Tenant on Tenant Harassment

In *Ohio Civil Rights Commission v. Akron Metropolitan Housing Authority*,⁸ the issue was whether a landlord could be held liable for failing to take corrective action against a tenant who engaged in racially harassing conduct of another tenant and created a hostile housing environment. The Supreme Court of Ohio began its analysis with the unremarkable assessment that R.C. 4112.02(H)(4) “does not expressly recognize a cause of action against a landlord who fails to take corrective action in response to the creation of a hostile housing environment by one of his tenants,” but rather “provides only that it is an unlawful discriminatory practice for any person to ‘[d]iscriminate against any person in the terms or conditions of selling, transferring, assigning, renting, leasing, or subleasing any housing accommodations or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing accommodations . . . because of race.’”⁹

Next, the Supreme Court turned to the dearth of case law with respect to hostile housing environment, but rejected five of the cited federal court decisions because the claims involved harassment by the defendant, either directly or indirectly,¹⁰ and rejected the remaining federal court’s decision interpreting another state’s fair housing law as “unpersuasive.”¹¹

Finding no persuasive authority on the issue presented, the Supreme Court examined whether the hostile environment case law developed in the employment context could be applied to cases arising in the housing context. While acknowledging that employers were liable for workplace harassment by nonsupervisory coworkers that they “knew or should have known” about, the Court cautioned that this liability “derives from the established principles of agency law.”¹² “The agency principles that govern employer-employee liability have no parallel in the context of landlord-tenant disputes,” the Court explained. “The relation of landlord and tenant in itself involves no idea of representation or of agency. It is a relation existing between two

⁸ 119 Ohio St. 3d 77, 892 N.E.2d 415 (Ohio 2008).

⁹ The Ohio Supreme Court specifically distinguished this case from a case in which “a tenant alleges that the landlord or building supervisor created a hostile housing environment through his own harassment of the tenant,” stressing that it was not deciding whether such a cause of action existed under the state’s fair housing law. *Id.* at 79, 892 N.E.2d at 417.

¹⁰ See *DiCenso v. Cisneros*, 96 F.3d 1004 (7th Cir. 1996) (claim of direct harassment by landlord of tenant); *Honce v. Vigil*, 1 F.3d 1085, 1088 (10th Cir. 1993) (same); *Smith v. Mission Assoc. Ltd. Partnership*, 225 F. Supp. 2d 1293 (D. Kan. 2002) (same); *Halprin v. Prairie Single Family Homes of Dearborn Park Association* (C.A.7, 2004), 388 F.3d 327, 330. (claims of direct harassment by a homeowners’ association, its members and a corporation that acted in cooperation with the association). See also *Neudecker v. Boisclair Corp.*, 351 F.3d 361 (8th Cir. 2003) (claim of harassment by building managers and the children of building managers).

¹¹ See *Bradley v. Carydale Ents.*, 707 F.Supp. 217 (E.D.Va. 1989) (holding that toleration by the building owner, manager, and employees of harassment of tenants by other tenants was actionable under the Virginia fair housing law).

¹² *Akron Metropolitan Housing Authority*, 119 Ohio St.3d at 80-81, 892 N.E.2d 418-19 (citation omitted).

independent contracting parties. The landlord is not responsible to third persons for the torts of his tenant.”¹³

The Supreme Court then observed that “[t]he amount of control that a landlord exercises over his tenant is not comparable to that which an employer exercises over his employee.”¹⁴ While a landlord has the ability to evict tenants, the Court concluded that “[t]he power of eviction alone . . . is insufficient to hold a landlord liable for his tenant’s tortious actions against another tenant.”¹⁵ For these reasons, the Supreme Court held that a landlord may not be held liable under the state’s fair housing law for failing to take corrective action against a tenant whose racial harassment of another tenant created a hostile housing environment.¹⁶

B. Preventative Relief and Retrofitting Inaccessible Housing

One of the most perplexing problems facing both governmental and private enforcement efforts to address the design and construction of multifamily dwellings not accessible to persons with disabilities is the statute of limitations. Generally speaking, under both state and federal law newly designed and constructed covered multifamily dwellings must be designed and constructed so as to be readily accessible to and usable by persons with disabilities.¹⁷ Not surprisingly, the violations in these cases are often discovered more than one year after construction is completed, occupancy permits are issued or the last individual unit is sold, presenting a timeliness problem. In Ohio, state trial and appellate courts have rejected nearly every argument presented in response to the statute of limitations problem posed by the latency of design and construction violations.¹⁸

The one argument that has succeeded, at least in part, is that the State of Ohio is not subject to the one year statute of limitations when it brings a civil action pursuant to R.C. 4112.052 to protect fair housing rights. This section provides that:

Whenever the Ohio civil rights commission has reasonable cause to believe that any person or persons are engaged in a pattern or practice of resistance to a person or persons’ full enjoyment of the

¹³ *Id.* at 81-82, 892 N.E.2d at 419-20 (citations omitted).

¹⁴ *Id.* at 82, 892 N.E.2d at 420.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See 42 U.S.C. § 3604(f)(3)(C) and Ohio Rev. Code § 4112.02(H)(22). A covered multifamily dwelling is defined as “buildings consisting of 4 or more units if such buildings have one or more elevators” and “ground floor units in other buildings consisting of 4 or more units.” See 42 U.S.C. § 3604(f)(7). See also Ohio Rev. Code § 4112.02(H)(22) (including a definition of covered multifamily dwelling similar to federal law).

¹⁸ See, e.g., *Ohio Civ. Rights Comm. v. Triangle Real Estate Servs.*, No. 06AP-157, 2007 Ohio App. LEXIS 1639, at *15-27 (10th Dist. Apr. 17, 2007) (holding that neither the continuing violation theory, the discovery rule nor public policy considerations extended the statute of limitations in a case involving noncompliance with design and construction requirements).

rights granted by [R.C. 4112.02(H)], or that any group of persons has been denied any of the rights granted by that division and the denial raises an issue of public importance, the commission may refer the matter to the attorney general for commencement of a civil action in a court of common pleas. The attorney general may seek any preventive relief considered necessary to ensure the full enjoyment of the rights granted by that division, including a permanent or temporary injunction or temporary restraining order.

In *Ohio Civil Rights Commission v. Fairmark Development, Inc.*,¹⁹ the Tenth District Court of Appeals held that R.C. 4112.052 “sets forth no time limitations on OCRC’s ability to seek the authorized relief.” Recognizing that a civil action under R.C. 4112.052 “is distinct from other causes of action under R.C. Chapter 4112 in that R.C. 4112.052 was primarily designed to redress public wrongs, unlike other provisions in the chapter that are primarily designed to redress individual wrongs,” the court reasoned that “R.C. 4112.052 need not be construed with other statutes, including those that contain a limitations period.”²⁰ Consequently, the court held:

[A]s in the analogous federal law that authorizes preventive and injunctive relief for public wrongs involving unlawful discriminatory practices, Ohio’s legislature did not impose a time limit on OCRC in seeking preventive relief under R.C. 4112.052. Had the General Assembly intended to limit the period within which a civil action must be commenced and relief sought under R.C. 4112.052, it could have specifically done so, as it did in other sections of R.C. Chapter 4112.²¹

The court, however, went on to address a related issue—whether the preventative relief authorized under R.C. 4112.052 included injunctive relief in the form of contribution to a monetary fund for the purpose of retrofitting inaccessible features or by requiring retrofitting necessary to bring inaccessible multifamily dwellings into compliance.²² While agreeing “that, when authorized and available as a remedy, retrofitting is a particularly appropriate remedy to remove the lingering effects of past discriminatory practices that have violated the rights of disabled persons to accessible housing,” the court nonetheless concluded that “neither retrofitting nor the creation of a monetary fund for the purpose of retrofitting is ‘preventive relief’ permitted

¹⁹ No. A08-250, 2008 Ohio App. LEXIS 5400, at *12 (10th Dist. Dec. 11, 2008).

²⁰ *Id.* at **14 (citing *Cosgrove v. Williamsburg of Cincinnati Mgt. Co.*, 70 Ohio St.3d 281, 289, 638 N.E.2d 991 (Ohio 1994) (Resnick, J., concurring)).

²¹ *Id.* at **16.

²² Generally speaking, retrofitting means making those structural modifications necessary to ensure that covered multifamily dwellings are readily accessible to and usable by persons with disabilities.

under R.C. 4112.052 and therefore is not available as a remedy in a cause of action under [that section].”²³

A request that a defendant retrofit noncompliant multifamily dwellings or contribute to a monetary fund for that purpose, the court stated, “is in the nature of damages where the monetary relief is sought as redress for defendants’ alleged past unlawful discriminatory practices.”²⁴ “The purpose of preventative relief,” however, “is to prevent future injury, not redress past wrongs.”²⁵ “[I]f [retrofitting or contributing to a monetary fund for the purpose of retrofitting] is not a request for monetary relief,” the court continued, “it is a request in the nature of a mandatory injunction, which is used to remedy a past injury by compelling a defendant to restore a party’s rights through some affirmative action.”²⁶

As a result, this decision stands for the perplexing proposition that the State of Ohio is not subject to any limitations period when it brings a civil action to protect fair housing rights—in particular compliance with design and construction requirements—pursuant to R.C. 4112.052, but that this same section does not authorize any form of retrofitting to bring multifamily dwellings into compliance, which the court itself recognized as “a particularly appropriate remedy to remove the lingering effects of past discriminatory practices that have violated the rights of disabled persons to accessible housing.”²⁷

C. Standing of Fair Housing Organizations

The most surprising of the recent decisions was issued in *Chance v. Fair Housing Advocates Association*,²⁸ a case in which a private fair housing group filed a lawsuit alleging that a landlord refused to rent an apartment to a prospective tenant because she had too many children. The private fair housing group, which assists tenants and prospective tenants who believe they have been unfairly discriminated against, conducted an investigation and determined that the prospective tenant was discriminated against on the basis of familial status. The trial court granted a motion to dismiss the case, holding that the private fair housing group lacked standing.

On appeal, the Ninth District Court of Appeals affirmed the trial court’s decision, holding that a private fair housing group did not have standing to pursue a prospective tenant’s familial

²³ *Id.* at **27. In reaching this conclusion, the court distinguished those decisions interpreting a similar federal provision, 42 U.S.C. § 3614(d)(1), noting that the remedial language in that federal provision includes not only preventative relief, but also “such other relief as the court deems appropriate, including monetary damages.” *Id.*

²⁴ *Id.* at **26.

²⁵ *Id.* at **27.

²⁶ *Id.*

²⁷ *Id.*

²⁸ No. 07CA0016, 2008 Ohio App. LEXIS 2210, at *1 (9th Dist. C.A. June 2, 2008)

status housing discrimination claim against a landlord in a civil action because the private fair housing group could not show that it was an “aggrieved person.”²⁹ Pursuant to R.C. 4112.051(A)(1), “[a]ggrieved persons may enforce the rights granted by [the fair housing law] by filing a civil action in the court of common pleas of the county in which the alleged unlawful discriminatory practice occurred.”

In support of its opinion, the appellate court simply noted that the federal fair housing law, 42 U.S.C. § 3616a(c)(2), “expressly provides for enforcement by ‘private fair housing enforcement organizations,’” while Ohio law does not include a similar provision.³⁰ “The Ohio legislature,” the appellate court continued,

could have provided for enforcement of Ohio’s Fair Housing laws by private enforcement agencies . . . The statutes reflect that the legislature chose a different method for enforcement. Accordingly, there is no need for private enforcement under Ohio’s Fair Housing laws.³¹

There are, suffice to say, multiple problems arising from this decision. To begin with, it ignores the fact that state law defines the word “person” very broadly and includes “one or more individuals, . . . associations, organizations, . . . and other organized groups of persons,”³² which, when coupled with the ordinary meaning of “aggrieved,” would easily encompass a private fair housing organization conducting investigations and related activities to identify and remedy unlawful discriminatory housing practices.

It is also inconsistent with the well-established principle under the federal Fair Housing Act that private fair housing organizations do have standing to file fair housing discrimination lawsuits,³³ which in turn threatens the designation of Ohio’s fair housing laws as “substantially equivalent” to federal fair housing laws and the federal funding made available as a result of such designation.

On a deeper level, though, it undermines those robust private enforcement actions resulting from the initiative and dedication of private fair housing organizations across the state acting as private attorneys general, actions that both supplement and enhance the investigations and enforcement actions undertaken by the Ohio Civil Rights Commission.

²⁹ *Id.* at **9.

³⁰ *Id.* at **7.

³¹ *Id.* at **8-9.

³² R.C. 4112.01(A)(1).

³³ *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S. Ct. 1114, 1124-25, 71 L. Ed. 2d 214 (U.S. 1982).

D. Issuance of Subpoenas during the Preliminary Investigation

While not a fair housing case, *State ex rel. American Legion Post 25 v. Ohio Civil Rights Commission*³⁴ warrants discussion because of its impact on the investigative process for all civil rights cases, including fair housing investigations. The issue in this case was whether respondents have the right to request the issuance of subpoenas during the preliminary investigation—not the administrative hearing stage, but rather the stage at which the Ohio Civil Rights Commission seeks to determine only whether there is probable cause of discrimination.

For years the agency had taken the position that respondents can request subpoenas only after a formal complaint has been issued and the matter is set for a public hearing. This not only maintained the independence of the preliminary investigation, but also avoided unnecessary disruptions that unreasonably burden the agency and well as persons who have filed discrimination charges with the agency.

The Ohio Supreme Court, however, held that the Ohio Civil Rights Commission is required to issue a subpoena at a respondent's request during, as well as after, the preliminary investigation. The statutory provision at issue, the Court explained, "requires the OCRC to issue subpoenas in a party's name 'to the same extent and subject to the same limitations' as those issued in the agency's name. No limitation on when the subpoena should be issued appears in the statute."³⁵ So, because the OCRC "is entitled to issue subpoenas on its own behalf during the preliminary investigation of a [respondent], the [respondent] is also entitled to have the commission issue subpoenas on its behalf during the investigation."³⁶

The immediate problem with the decision in this case is that it usurps the authority of the Ohio Civil Rights Commission to determine the manner, method and scope of its preliminary investigation. In essence, this decision has bestowed upon respondents the right to undertake their own preliminary investigations, to the same extent as, and with the same power and authority of, the Ohio Civil Rights Commission, a result which clearly stands the neutral, independent investigative procedure envisioned by the statutory framework on its head.

The less obvious, but equally significant, problem is that this decision permits respondents to engage in what amounts to full discovery against any person who has filed any form of discrimination charge, including a housing discrimination charge, even though that person is usually unrepresented and wholly unfamiliar with the formalities of subpoenas and the legal process in general, and more importantly, easily dissuaded from asserting or maintaining his or her right to be free from discriminatory practices when confronted with the full brunt of a respondent's independent, but legally-authorized, preliminary investigation.

³⁴ 117 Ohio St. 3d 441, 884 N.E.2d 589 (Ohio 2008).

³⁵ *Id.* at 445-46, 884 N.E.2d at 593-94

³⁶ *Id.*

IV. Steps Taken to Ensure Substantial Equivalency

As a result of these decisions and the possible consequences for the continuation of the state's substantially equivalent designation, the Ohio Civil Rights Commission has taken steps to amend Ohio Revised Code Chapter 4112 to re-establish the rights and remedies previously believed to be available under the state's fair housing law. At the time of this writing, several amendments—those deemed most fundamental to substantial equivalency—have already been prepared and are beginning to make their way through the legislative process.

For example, in response to the decision in *American Legion Post 25* case, the Ohio Civil Rights Commission has proposed an amendment to R.C. 4112.04(B)(3)(b) that will extend to both a charging party and a respondent the ability to request the issuance of a subpoena to the same extent and subject to the same limitations as a subpoena issued by the agency. The ability of either a charging party or a respondent to request a subpoena, however, would arise only after a finding of probable cause has been made and the matter is scheduled for a public hearing under R.C. 4112.05(B); neither may request that a subpoena be issued during the investigation. This will level the playing field for all parties during the litigation phase, while maintaining the ability of the Ohio Civil Rights Commission to conduct an independent and efficient investigation.³⁷

The Ohio Civil Rights Commission's proposed amendment to reverse the decision in the *Chance* case is relatively straightforward, adding a definition of "aggrieved person" under R.C. 4112.01(A) that specifically includes private fair housing organizations. This new definition defines that term as including any person injured by, or who will be injured by, an unlawful discriminatory housing practice, as well as private nonprofit fair housing enforcement organization or nonprofit group performing investigations and enforcement activities designed to identify, eliminate, and remedy unlawful discriminatory housing practices.

Finally, the Ohio Civil Rights Commission has proposed an amendment to reverse the decision in the *Fairmark Development* case. This amendment states that under R.C. 4112.052 the State of Ohio may seek preventative relief as well as any other order of relief, specifically including the remedy of retrofitting in design and construction cases.

V. Conclusion

While there is always a healthy amount of uncertainty surrounding any legislative effort, and the give-and-take of the political process means that even the best of intentions often meet

³⁷ Although not related to a court decision, the Ohio Civil Rights Commission is also taking steps to ensure that aggrieved persons may intervene when an election is made to have the alleged unlawful discriminatory housing practices covered by an administrative complaint addressed in a civil action pursuant to R.C. 4112.051(A)(2)(b). An amendment has been proposed specifying that an aggrieved person may intervene as a matter of right in a civil action commenced pursuant to an election made under that section.

strong resistance, the Ohio Civil Rights Commission remains optimistic that the amendments proposed in response to the decisions discussed herein will be enacted. These amendments, after all, seek to do nothing more than ensure that Ohio's fair housing law provides protections and remedies equal to (as opposed to less than) its federal counterpart and maintains its designation as "substantially equivalent," which is precisely the same rationale underlying the substantial revision of the state's fair housing law that occurred over fifteen years ago.