



Governor John Kasich

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Fair Housing Contact Service

Complainant,

Complaint No. 15-HOU-AKR-37746

v.

Cary Hendy & Community Capital, LLC

Respondents.

OHIO
CIVIL RIGHTS
COMMISSION

G. Michael Payton
Executive Director

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

Commissioners

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INTRODUCTION AND PROCEDURAL HISTORY

Fair Housing Contact Service (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on December 31, 2014.

The Complainant is an organization dedicated to ensuring non-discrimination and equal housing.

The Commission investigated and found probable cause to believe that Cary Hendy (Respondent) and Community Capital, LLC engaged in unlawful discriminatory housing practices in violation of Revised Code Sections (R.C.) 4112.02(H)(4) and (19).

The Commission attempted, but failed, to resolve this matter by informal methods of conciliation. The Commission subsequently issued a complaint on October 22, 2015.

The Commission alleged that: (1) Respondents' steering of Complainant's tester due to the racial composition of the neighborhood is a violation of R.C. 4112.04(H)(4), and (2) the application of a policy that would require an additional security

deposit and/or fees for a service animal to Complainant's tester is a violation of R.C. 4112.02(H)(4) and (19).

Respondent filed an Answer to the Commission's Complaint on January 11, 2016 generally denying the allegations in the Commission's complaint.

A public hearing was held on July 26, 2016, at the Akron Government Building located at 161 South High Street, Akron, Ohio.

During the hearing, the Commission made a motion to dismiss Community Capital, LLC as a party. The Commission's motion was granted.¹ (Tr. 315)

The record contains previously described pleadings, a hearing transcript consisting of 342 pages, a post-hearing brief filed by the Commission on September 12, 2016, and Respondent's post-hearing brief filed on September 27, 2016.

¹ On February 22, 2017, the ALJ issued a Report and Recommendation that named Community Capital, LLC as a party. Both the Commission and the Respondent filed objections to the report. After consideration of the objections the Commissioners adopted the Report and Recommendation on April 6, 2017. On July 19, 2017, counsel for Community Capital, LLC filed a motion to dismiss Community Capital, LLC as a party. The amended report accurately reflects the record.

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 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 charge with the Commission on December 31, 2014.
2. The Commission determined on June 26, 2015, that it was probable that Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(H)(4) and (19).
3. The Commission attempted to resolve this matter by informal methods of conciliation.

4. The Commission issued the complaint after conciliation efforts failed.
5. At all times relevant to the complaint, Respondent owned property at 819 Aberdeen Street, Akron, Summit County, Ohio. (Tr. 335, 337)
6. Complainant is an agency whose mission is to identify and eliminate housing discrimination and promote equal housing opportunity. (Tr. 54)
7. In order to fulfill its mission, Complainant conducts random tests on properties within the organization's service area to monitor the practices of housing providers. (Tr. 54)
8. A test consists of sending a trained individual, called a tester, out to attain information from the selected housing provider. (Tr. 54-55)
9. The tester writes a report of what happened, which is then analyzed to determine if there were any discriminatory practices. (Tr. 55)
10. Each tester receives an initial three hour training session and annual training. (Tr. 55, 158)
11. Once a tester has been assigned a test, the testing director contacts the tester and provides ad information and a profile

they will assume during the test. (Tr. 56, 159-160, 193-194, 244)

12. The profile is a role provided that may differ from the individual's actual status, such as being married, having a disability, or requiring a service animal. (Tr. 56-57, 244)
13. The profile varies based on what protected class is being investigated. (Tr. 57)
14. Testers do not know for which protected class they are testing. (Tr. 162-163, 194)
15. The tester then contacts the housing provider to schedule an appointment to see a unit, seeing the unit if required, and writing a report documenting all of the details of the interaction with the housing provider. (Tr. 56, 160)
16. Testers get paid \$50 per site test and \$20 per phone test. (Tr. 159, 193, 243)
17. Complainant located Respondent through an ad posted on Craigslist.com. (Tr. 54)
18. Antalene Hunter (Hunter) has been a tester with Complainant for about three years and has conducted about 40 tests. (Tr. 157-158, 160)

19. Hunter is African American. (Tr. 163)
20. Hunter's assigned profile was married with two children ages four and six and a \$2,600 monthly income. (Tr. 163, Comm. Exh. 6)
21. Hunter contacted Respondent on August 26, 2014, and asked about the property. (Comm. Exh. 6)
22. Respondent wanted to talk to Hunter first before agreeing to let her see the property. (Comm. Exh. 6)
23. Hunter viewed the property the next day. (Tr. 165-167, Comm. Exh. 6)
24. Hunter documented her interactions with Respondent immediately afterwards. (Tr. 165)
25. Hunter felt welcomed to look at the property by Respondent. (Tr. 168)
26. Jessi James (James) has been a tester for Complainant for about four and a half years and has performed about 113 tests. (Tr. 191, 194)
27. James is Caucasian. (Tr. 191)
28. James's assigned profile was married with two children ages eight and three. (Comm. Exh. 7)

29. James called Respondent on August 26, 2014 to inquire about the property. (Comm. Exh. 7)
30. Respondent told her he didn't allow people to see his properties until he had a detailed conversation with them first. (Comm. Exh. 7)
31. James took notes during their telephone conversation. (Tr. 196, Comm. Exh. 7)
32. When James called Respondent, he told her that it wasn't the best area in town and gave a specific racial breakdown of the residents living in the area: 20% white, 30% Hispanic and 50% African American. (Tr. 198-199, Comm. Exh. 7)
33. Although James gave Respondent assurances that she and her husband did not mind the racial composition of the area, adding that they had an African American friend living in the neighborhood, Respondent persisted in making comments about the area adding "well I just want you to know that there are very few white people living over here," and "I hate to see you move over here or drive over here just to waste your time." (Tr. 198-199, Comm. Exh. 7)
34. James felt like she had to work very hard to be able to look at the property. (Tr. 200)

35. The next day while James was looking at the property, Respondent told her, "This might sound racist but I'm just being completely honest with you. I want a family here. I don't want like Lakisha Brown and her six kids living in my house." (Tr. 200, Comm. Exh. 7)
36. James took notes while she was at the property and added them to her report as soon as she returned home. (Tr. 196-197)
37. Lon Cseplo (Cseplo) has been a tester for Complainant since 2007 and previously tested for another housing authority beginning in 2004. (Tr. 241-242)
38. Cseplo is Caucasian. (Comm. Exh. 8)
39. Cseplo's assigned profile was married with one son who had a disability and required a seizure alert dog, and an income of \$2,300 a month. (Tr. 246, Comm. Exh. 8)
40. Cseplo contacted Respondent on September 5, 2014, and asked to see the property. (Comm. Exh. 8)
41. Respondent wanted to talk to him first and inquired if he had a pet; Cseplo told Respondent his family did not have pets but his son had a disability and required a service animal. (Tr. 248, Comm. Exh. 8)

42. Respondent said he was okay with the service animal as long as it was a small family. (Tr. 248, Comm. Exh. 8)
43. While visiting the property the next day, Cseplo again mentioned the service animal and Respondent stated that he would be charged a pet fee for the dog. (Tr. 249, Comm. Exh. 8)
44. Cseplo asked if the service fee could be waived in light of his son's disability and his son requiring services of the dog as the dog was not a pet. (Tr. 250, Comm. Exh. 8)
45. Respondent said that Cseplo would still have to pay a fee for his son's dog. (Tr. 249-250, Comm. Exh. 8)
46. Cseplo wrote down what happened during the test as soon as possible afterward. (Tr. 245-246)
47. After the testers completed their reports and submitted them to Complainant, Complainant analyzed the reports to determine if the practices of the Respondent appeared to be discriminatory or not. (Tr. 55, 58)
48. Complainant determined that there were concerns of discrimination on four bases and thereafter filed a complaint with the Commission. (Tr. 57-58)

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. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.²

1. The Commission alleged that the Respondent subjected Complainant's testers to unequal terms and conditions of renting based on race and disability. This allegation, if proven, would constitute a violation of R.C. § 4112.02(H)(4) and (19), which provides in pertinent part, that it is an unlawful discriminatory housing practice for any person to:

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

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

composition of the neighborhood in which the housing accommodations are located;

- (19) Refuse to make reasonable accommodations in rules, policies, practices, or services when necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling unit. . . .
2. Federal case law applies to alleged violations of R.C. Chapter 4112. *Little Forest Med. Ctr. of Akron v. Ohio Civil Rights Comm.*, 61 Ohio St.3d 607, 610, 575 N.E.2d 1164, 1167 (1991).
3. 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).
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(G) and 4112.06(E).

5. These standards require the Commission to first prove a *prima facie* case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 1819, 36 L.Ed.2d 668 (1973).

The *prima facie* case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the [adverse action]. . . . [T]he *prima facie* case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981), citing *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978), and *Teamsters v. United States*, 431 U.S. 324, 358, and n. 44, 97 S.Ct. 1843, 1866, n. 44, 52 L.Ed.2d 396 (1977).

6. The *prima facie* case serves to elucidate the intent of the alleged discriminator in the absence of direct evidence of discriminatory intent.

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 [Respondent's] actions. *White v. Columbus Metropolitan Housing Authority*, 429 F.3d 232, 238 (6th Cir. 2005).

7. In the instant case the Commission introduced direct evidence that Respondent made statements to a Caucasian tester which were intended to "steer" or discourage the tester from renting the property because of the race of the tester and

the racial composition of the neighborhood in which the housing accommodations are located.

Racial steering is a practice by which real estate brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 366 n.1, 102 S.Ct. 1114, 1118

Where choice influencing factors such as race are not eliminated, freedom of choice in the [selection of where a person resides] is a fantasy. *Zuch v. Hussey*, 394 F.Supp. 1028, 1047, citing *Coppedge v. Franklin County Board of Education*, 273 F.Supp. 289, 298-299 (E.D.N.C.1967), *affd.*, 394 F.2d 410 (4th Cir. 1968); *Lee v. Macon County Board of Education*, 267 F.Supp. 458 (M.D.Ala.1967), *affd. sub nom.*, *Wallace v. United States*, 389 U.S. 215, 88 S.Ct. 415, 19 L.Ed.2d 422 (1967).

8. Respondent asserts that he did not take "actionable behavior" against the testers because neither were denied access, nor communicated different terms and conditions, or prevented from applying for the housing unit.
9. Contrary to Respondent's assertions, the statements made by him to the Caucasian tester is "actionable behavior."

Steering is not an “outright refusal to rent to a person within a class of people protected by the statute; rather it consists of efforts to deprive a protected homeseeker of housing opportunities in certain locations.” *Llanos v. Estate of Coehlo*, 24 F.Supp.2d 1052, 1057 (1988) (quoting *Department of Housing and Urban Dev. v. Edelstein*, 1991 WL 442784 at *5 (H.U.D.1991)).

10. To determine whether a statement “indicates” impermissible discrimination, an “ordinary listener” standard is employed. *Ragin v. New York Times Co.*, 923 F.2d 995, 999 (2d Cir.), *cert. denied*, 502 U.S. 821, 112 S.Ct. 81, 116 L.Ed.2d 54 (1991); *see also Jancik v. Department of Housing & Urban Development*, 44 F.3d 553, 556 (7th Cir. 1995) (adopting the “ordinary listener” test).
11. The inquiry under this standard is whether the alleged statement at issue would suggest to an “ordinary listener” that people of “a particular race is preferred or dispreferred for the housing in question.” *Id.*

The ordinary [listener] is neither the most suspicious nor the most insensitive of our citizenry. *Id.* at 1002.

12. Section 3604(c) may be violated without a showing of a subjective intent to discriminate. *Jancik*, 44 F.3d at 556.

13. Two testers, one African American, one Caucasian, called Respondent to view the same property based on an ad listed in the newspaper.
14. Both testers had profiles that represented that they were married with two children.
15. When the African American tester viewed the apartment she received a very welcoming reception from Respondent.
16. When the Caucasian tester viewed the apartment Respondent made comments to her about the racial composition of the neighborhood with the intent to steer her from renting in the neighborhood. (Tr. 199, Comm. Exh. 7)
17. The Caucasian tester did not ask or solicit information from Respondent about the racial composition of the neighborhood that the apartment was located in, Respondent volunteered the information.
18. A reasonable inference can be drawn from Respondent's statements that he assumed that because the tester was white, she would not want to live in a multi-racial neighborhood.
19. The Commission introduced credible evidence that Respondent's statements would suggest to an ordinary listener that Respondent was attempting to discourage the Caucasian tester from renting an apartment in a predominately minority

neighborhood in an attempt deprive the Caucasian tester of her choice of the type of community she wanted to live in.

20. The Commission also introduced direct evidence that Respondent required a pet deposit for a service animal. (Tr. 248-250, Comm. Exh. 8)
21. Housing providers have an affirmative duty to provide reasonable accommodations to disabled individuals who require an animal assistant when it's necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling unit.

Every disabled person who has an animal assistant or who obtains an animal assistant shall be entitled to keep the animal assistant on the premises . . . rented . . . by such disabled person. He or she shall not be required to pay any extra charge for such animal assistant but shall be liable for damage done by the animal assistant to the premises. O.A.C. 4112-5-07(C).

22. The credible evidence in the record supports a determination that Respondent's policy was to charge prospective renters a fee for animals regardless of whether or not the animal was a service animal that provided support to a person with a disability.

23. The Respondent engaged in illegal housing discrimination in violation of R.C. 4112.02(H)(4) and (19) and the Complainant is therefore entitled to damages as a matter of law.

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).
2. The statute also provides that the Commission, in its discretion, may award punitive damages. R.C. 4112.05(G)(1).

ACTUAL DAMAGES

3. The purpose of an award of actual damages in a fair housing case, as in employment discrimination cases, "is to put 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).
4. When fair housing groups use resources to counteract discrimination and provide training, advertisement, and testing to address issues to insure housing and neighborhood choice to individuals, they can be awarded damages for diversion of resources and frustration of mission. *Havens*, 455 U.S. at 378-379, 102 S.Ct. at 1124.
5. Diversion of resources damages is the harm caused by the diversion of resources away from other programs to address the defendants' discriminatory practices. *Id.*
6. Frustration of mission is injury to "non-economic interest in encouraging open housing." *Id.* at 379 n. 20.
7. To recover damages for frustration of mission, a fair housing organization must establish that expenditures in education, counseling or outreach are necessary to counteract the effects

of discrimination. *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 28-29 (D.C.Cir 1990).

8. The Complainant chronologically itemized the expenditures associated with pre- and post-litigation expenses from August, 26, 2014 through July 20, 2016. (Comm. Exh. 9)
9. The resources that the Complainant diverted to redress the discriminatory conduct of the Respondent is \$5,892.00.
10. The Complainant also asks for \$4,600.00 for frustration of mission damages. (Comm. Exh. 9 addendum)
11. Although the Complainant testified that it did training, education, and outreach, no documentary evidence (i.e. annual report, brochures, website, etc.) was introduced that shows specifically the type of training and outreach done by Complainant.
12. Courts look to something more concrete or specific than generalized statements.

For example, as previously noted, MWPHA and FHC might prove that the advertisements discouraged potential minority home buyers from attempting to buy homes at defendants' developments and forced the organizations to spend funds informing minority home buyers that the homes are in fact available to them. Or the organizations could show that the ads created a public impression that segregation in

housing is legal, thus facilitating discrimination by defendants or other property owners and requiring a consequent increase in the organizations' educational programs on the illegality of housing discrimination. *Spann*, 899 F.2d at 30.

13. The expense to monitor Respondent's housing activity based on his illegal conduct and the fact that he still maintains ownership of rental property is a service that the Complainant regularly performs and is therefore more than a generalized statement.
14. Based on the foregoing the ALJ recommends that the Complainant be awarded \$8,013.00 for diversion of resources and \$2,700.00 for frustration of mission.

PUNITIVE DAMAGES

15. 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.
16. Thus, punitive damages are appropriate "as a deterrent measure" even when there is no proof of actual malice. *Schoenfelt v. Ohio Civil Right Comm.*, 105 Ohio App.3d 379, 385, 663 N.E.2d 1353, 1356 (1995), *citing and quoting Marr v. Rife*, 503 F.2d 735, 744 (6th Cir. 1974).
17. 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.³ O.A.C. 4112-6-02.

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

18. Applying the foregoing criteria to this case:

- Respondent's actions show a disregard of laws that regulate his conduct in renting housing accommodations to the public.
- The Commission did not present a prior history of discrimination by Respondent;
- Evidence was introduced regarding the number of rental properties owned by Respondent. (Tr. 335, 337, Res. Exh. H)
- The effect of Respondent's conduct was to deny prospective renters of housing choice based on the racial composition of neighborhoods and deny people with disabilities who rely on animal assistants the right to the equal opportunity to use and enjoy a dwelling unit.

The FHA was enacted to ensure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics. *United States v. Parma*, 494 F.Supp. 1049, 1053 (N.D. Ohio 1980), *rev'd on other grounds*, 661 F.2d 562 (6th Cir.), *cert. denied*, 456 U.S. 926 (1982).

[The Act was designed to] prohibit all forms of discrimination [even the] simple-minded. . . . *Williams v. Matthews Co.*, 499 F.2d 819, 826

(8th Cir. 1974).

19. Based on the foregoing criteria, Respondent should pay punitive damages in the amount of \$5,000.00.

ATTORNEY'S FEES

1. The Commission is entitled to attorney's fees. R.C. 4112.05(G)(1); *Schoenfelt*, 105 Ohio App.3d at 386, 663 N.E.2d at 1357. 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 should file affidavits from plaintiffs' attorneys in Summit 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.
3. 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 their receipt of the Commission's and Complainant's Applications.

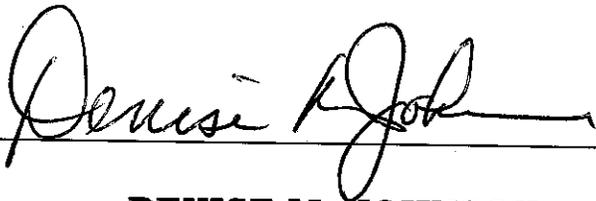
4. Meanwhile, any objections to this Report should be filed pursuant to the Ohio Administrative Code. Any objections to the recommendation of attorney's fees can be filed with the Commission's Compliance Unit after the ALJ makes her Supplemental Recommendation to the Commission Regarding Attorney's Fees.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 15-HOU-AKR-37746 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of Chapter 4112 of the Revised Code;
2. The Commission order Respondent to pay Complainant \$10,713.00 in actual damages;
3. The Commission order Respondent to pay Complainant \$5,000.00 in punitive damages;
4. The Commission order Respondent, 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 his 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 his Letter of Certification of Training to the Commission's Compliance Department.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

Date mailed and emailed: July 26, 2017