

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

JUANITA CARRILLO

Complainant

and

**JERRY MAJERS
AND PAM MAJERS**

Respondents

Complaint #8138 AMENDED
(TOL) H2071196 (21480) 111896
HUD #: 05-97-0331-8

**HEARING EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDATION**

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HEARING EXAMINER'S REPORT BY:

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INTRODUCTION AND PROCEDURAL HISTORY

Juanita Carrillo (Complainant) filed two sworn charge affidavits with the Ohio Civil Rights Commission (Commission) on November 8, 1996. The charge affidavits were amended on February 14, 1997. On September 15, 1997 the two charges were consolidated into a single charge.

The Commission investigated and found probable cause to believe that unlawful discriminatory practices had been engaged in by Jerry and Pam Majers (Respondents) in violation of Revised Code (R.C.) § 4112.02(H).

The Commission issued a Complaint, Notice of Hearing, and Notice of Right of Election on October 30, 1997.

The Complaint alleges that Respondents refused to rent to Complainant because of her Mexican-American ancestry. Respondents filed a timely Answer to the complaint.

After the Commission issued its Complaint, the public hearing was held in abeyance pending conciliation efforts. The Commission subsequently attempted conciliation. Conciliation was unsuccessful. Therefore, the matter was scheduled for public hearing.

A public hearing was held on September 29, 1998 at the Knox County Courthouse in Mt. Vernon, Ohio.

The record consists of the previously described pleadings; the transcript consisting of 137 pages of testimony; exhibits admitted into evidence at the hearing; written stipulations of the parties, and the post-hearing briefs filed by the Commission on January 4, 1999 and by Respondent on January 29, 1999.

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 the 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 two sworn charge affidavits with the Commission on November 8, 1996. The charge affidavits were amended on February 14, 1997. On September 15, 1997 the two charges were consolidated into a single charge.

2. The Commission determined on October 30, 1997 that it was probable that unlawful discriminatory practices had been engaged in by Respondent in violation of R.C. 4112.02(H).

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

4. Respondents are providers of housing accommodations. They own a three-bedroom house at 308 Newark Road in Mt. Vernon, Ohio and another three-bedroom house at 5 Riley Street in Mt. Vernon, Ohio. The house at 5 Riley Street is smaller than the house at 308 Newark Road. Respondent Jerry Majers makes the final decision about renting each of the properties. He is concerned about the number of persons occupying each property because he believes that larger families cause more wear and tear on the property creating more work for him.¹

5. Complainant's husband began looking for a house to rent in Mt. Vernon in November 1995. In January 1996, Complainant, who is of Mexican-American descent, began looking for a house to rent. She and her husband were still looking for a house to rent in July 1996. The Newark Road and Riley Street properties were both available for rent in July 1996.

¹ Mr. Majers performs all of his own maintenance.

6. Complainant made an appointment with Mr. Majers to see the Newark Road property in July 1996. Complainant was allowed to tour the house by herself, as was the Majers' usual practice. When she was finished, Complainant met with the Majers in the kitchen. She was given a lease application to complete. Pursuant to their customary practice, the Majers told Complainant to drop the application off or mail it back to them.

7. During the conversation, Jerry Majers, as was his normal practice, asked Complainant the size of her family in order to ascertain how many persons would be living in the house. Complainant replied that her family consisted of herself, her husband, her two sons, her daughter, and her granddaughter. During the conversation, she also told the Majers that her family consisted of six persons. The Majers got the impression that six or seven persons were going to occupy the property at Newark Road. This exceeded the number of persons that Mr. Majers desired as tenants. He believed that no more than five persons should occupy the house on Newark Road.²

² Apparently one of the three bedrooms is only large enough for one person.

8. Subsequently, Complainant completed the rental application and her husband mailed it to Respondents. Jerry Majers reviewed the application and noted that there was only one wage earner in the family, Mr. Carrillo. He preferred to rent to families which had more than one wage earner or more than one source of income. Based on his impression that at least six persons would be occupying the Newark Road Property and based on the information contained in the rental application, Mr. Majers decided not to rent the Newark Road property to Complainant.

9. After she did not hear from Mr. Majers for a few days, Complainant concluded he had decided not to rent her the property on Newark Road. Approximately two weeks later, Complainant's husband called Mr. Majers about the property on Riley Street. Mr. Majers told him he could view the property when other couples were viewing it.

10. Complainant, accompanied by Christy Martinez, went to the Riley Street property.³ When they arrived, Mr. Majers was standing outside talking

³ Christy Martinez was married to Complainant's nephew. Complainant asked her to accompany her to the property because a fair housing organization had advised her to bring a witness with her when she looked at property. (Complainant testified that Christy Martinez was not accompanying her as a witness; Complainant's husband and Christy

to a former tenant. He recognized her from a distance. Two other couples were already inside the house when Complainant arrived. Mrs. Majers also recognized Complainant and told her that the Riley Street property was smaller than the Newark Road, but if Complainant wanted to look at the house, she could do so.

11. Complainant and her niece briefly looked at the property and Complainant confronted Mrs. Majers demanding she be given first chance to rent the property because she had not been given the opportunity to rent the Newark Road property. Mrs. Majers, who was already upset and angry because her husband was not assisting her in showing the property and because she was unable to do her college course work that evening, told Complainant she would need to go outside and talk to Mr. Majers.

12. Complainant, who was upset, went outside and spoke with Jerry Majers. She also told him she should be given the first chance to rent the Riley Street property. He told her that her family size was too large to rent either of the properties. Complainant told Mr. Majers that her family size had

Martinez testified that it was their understanding that a fair housing organization had told Complainant to bring a witness with her.)

been reduced by two persons within the last two weeks because she had decided to have one son live elsewhere and the other son was going to stay in Toledo. Thus, there would be only four persons operating the Riley Street property.

13. Mr. Majers did not believe Complainant's family had shrunk by two persons in two weeks and was concerned about the number of persons who would occupy the property if he were to rent it to Complainant. The conversation ended after Complainant threatened to file a discrimination complaint against the Majers.

14. Complainant and her husband rented a house in October or November 1996 for one year. They moved back to Toledo about a year later.

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 herein, it is not credited.⁴

1. The Commission alleged in its complaint that Respondent refused to rent to Complainant because of her Mexican-American ancestry.

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:

⁴ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

(H) For any person to:

- (1) Refuse to . . . lease, . . ., or otherwise deny or make unavailable housing accommodations because of . . . ancestry, . . . of any prospective owner, occupant, or user of the housing.

3. The Commission has the burden of proof in cases brought under Chapter 4112 of the Revised Code. The Commission must prove a violation of Section 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.

5. The same standards of proof that apply to employment discrimination cases apply to housing discrimination cases.⁵

6. Normally, these standards of proof require the Commission to prove a *prima facie* case of discrimination.

The plaintiff . . . possesses the ultimate burden of persuasion and the intermediate burden of proving by a preponderance of the evidence a *prima facie* case of discrimination.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 1093, 25 FEP Cases 113 (1981).

7. However, it is not necessary to follow the traditional allocation of the burdens of proof, when, as here, Respondents responded to the Commission's case in chief by offering a legitimate, nondiscriminatory reason for her action. *U.S. Postal Svc. Bd. of Governors v. Aikens*, 103 S. Ct. 1478, 31 FEP Cases 609, 611 (1983). The articulation of a legitimate, nondiscriminatory reason by Respondent removes any need to determine if the Commission proved a *prima facie* case and the “factual inquiry proceeds

⁵ “All of the Courts of Appeals that have addressed the question have held that the same evidentiary approach developed by the Supreme Court in Title VII ‘disparate treatment’ cases should also be available in disparate treatment cases brought under the Fair Housing Act.” (Citations omitted.) R. Schwemm, *Housing Discrimination Law*, 1996 Ed. at p.10-7, 10-8.

to a new level of specificity”. *Aikens*, at 611; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113, 116 (1981).⁶

8. Respondent Jerry Majers testified that he rejected Complainant as a prospective tenant because of her family size. Mr. Majers also testified that after he received the rental application in the mail, he noticed that there was only one wage earner. This fact made Complainant’s application less desirable because Mr. Majers preferred to rent to tenants with two wage earners or two sources of income.

9. Respondent having met its burden of production, the Commission must show by a preponderance of the evidence that Respondent’s articulated reasons for not renting to Complainant were not the true reasons but were a pretext for discrimination. *Hicks, supra* at 511, 62 FEP Cases at 100.

[A] reason cannot be proved to be a “pretext for discrimination” unless it is shown *both* that the reason is false, *and* that discrimination is the real reason.

Hicks, supra at 515, 62 FEP Cases at 102.

⁶ “Where the defendant has done everything that would be required of him if the plaintiff has properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.” *Aikens*, 460 U.S. at 713, 31 FEP Cases at 611.

10. Thus, even if the Commission proves that Respondent's articulated reasons are false or incomplete, the Commission does not automatically succeed in meeting its burden of persuasion:

That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the . . . [Commission's] proffered reason of race is correct. That remains to the factfinder to answer . . .

Id., at 524, 62 FEP Cases at 106.

In other words,

nothing in law permit[s] . . . substitut[ion] for the required finding that the . . . [landlord's] action was the product of unlawful discrimination, the much different (and much lesser) finding that the . . . [landlord's] explanation of its action was not believable.

Id., at 514-515, 62 FEP Cases at 102.

11. Although it is not enough to simply disbelieve Respondent's articulated reasons to infer intentional discrimination,

[t]he factfinder's disbelief of the reasons put forward by the defendant (*particularly if disbelief is accompanied by a suspicion of mendacity*) may, together with the elements of a *prima facie* case, suffice to show intentional discrimination.⁷

Id., at 511, 62 FEP Cases at 100 (emphasis added).

⁷ Even though rejection of Respondent's articulated reasons under these circumstances is "enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*" *Hicks, supra* at 511, 62 FEP Cases at 100, n.4.

Ultimately, the factfinder must be convinced that Complainant was “the victim of intentional discrimination.” *Id.*, at 508, 62 FEP Cases at 99, *quoting Burdine, supra* at 256, 25 FEP Cases at 116.

12. The Commission argued that Respondents’ legitimate, nondiscriminatory reasons were not credible. I disagree. Considering all the surrounding facts and circumstances, it is clear that once Complainant told Jerry Majers that there were six or seven persons in her family, he made the decision not to seriously consider her as a prospective tenant at the Newark Road property.⁸

⁸ There was a conflict in the testimony regarding Complainant’s family size. Complainant testified she told Jerry Majers that there were six persons in her family but only five would be occupying the property because one of her sons would be living in Toledo. Jerry Majers testified it was his understanding the family consisted of six persons. When he asked Complainant how many persons were in her family, he testified she responded there were six persons in the family. Logically, he assumed six persons would be occupying the house. He did not recall anything being said about only five persons occupying the property.

Since Complainant admitted that she told him there were six persons in her family, I credited his testimony that he believed six persons would be occupying the property. I also credited his testimony that he told Complainant he would not rent the Newark Road property to her because of her family size. Complainant testified she did not remember the Majers saying that her family was too large to live in the Newark Road house. However, during her deposition, she responded to the question, “When you gave them the size of your family, did they indicate to you at that point that there was a problem with that?” Complainant responded, “Yes. They said my family was too big to live in that house.” (Tr. 78)

He believed the property was too small to accommodate that many persons. This is consistent with his belief that larger families create more wear and tear on the property and increase the amount of maintenance that he has to perform.

13. Subsequently, Complainant went to view the Riley Street property, which was smaller than the property on Newark Road. Although Complainant came away with the subjective impression that Respondents were treating her less favorably than they were treating other persons who happened to be viewing the property at the same time, her subjective impressions cannot support an inference of discrimination.

14. Respondent Jerry Majers also adequately explained his reasoning for refusing to rent the Riley Street property to Complainant, even after she had told him her family size had decreased from six persons to four persons. He simply did not believe her. He was concerned that if he rented the property to her, her family size could increase afterwards, thereby exceeding the maximum number he believed the property could accommodate.⁹

⁹ This is not a case of familial status discrimination. Apparently none of the prospective tenants qualified for protection under the familial status portion of Chapter

15. The Commission's argument that there was no reason for Jerry Majers to allow Complainant to look at the Riley Street property if she had already been rejected as a tenant is not persuasive in this case. Persons often act out of a sense of common courtesy or expediency when confronted with a difficult situation. That is what happened here. Mrs. Majers' response indicated that Complainant could look at the smaller property on Riley Street if she wanted to. However, Mrs. Majers' response was not an enthusiastic one.

It was easier to allow Complainant to look at the property than to refuse her request. If Complainant was denied the opportunity to look at the property, the Commission would be arguing that this denial was evidence of discrimination because she would have been treated differently than other prospective tenants.

16. The Commission also argued that Mr. Majers testimony that he would not have rented to Complainant and her husband because the family had only one income was also a pretext for discrimination. The evidence showed Respondent had rented to families with only one wage earner.

4112. Thus, Respondent was free to limit the number of occupants to whatever number he believed was reasonable.

However, the evidence showed that this was rare. (Comm.Ex. 2) Most of these couples had other sources of income. Where there was only one income, Mr. Majers had determined that the likelihood of that income being lost was small, e.g. cases where the income consisted of retirement, government benefits, or cases where the tenant had been working for a large corporation for a long time. Thus, when all of the surrounding circumstances are considered, the comparison between former tenants and Complainant's family does not support an inference that the second reason given by Mr. Majers was either untrue or a pretext for unlawful discrimination.

17. In summary, the evidence showed that Complainant was trying to find a house to rent in Mt. Vernon, Ohio and was frustrated and upset because she and her husband had been looking for housing for nine months and had been rejected on numerous occasions. On one occasion, she had also been subjected to racial and ethnic slurs.¹⁰

¹⁰ Prior to visiting the Riley Street property, Complainant visited a rental property on Howard Street in Mt. Vernon. During the visit, the property owner made racial slurs about African-Americans and derogatory comments about Mexican-Americans.

18. This probably affected the way she interacted with the Majers and her perceptions about their actions. In any event, after speaking with Complainant, the Majers had the impression that six persons were going to be occupying the house on Newark Road. Based on that impression, Jerry Majers decided that Complainant was not a suitable tenant because of her family size. His discussion with Complainant at the Riley Street property did not alleviate his concerns.

19. Based on all of the surrounding facts and circumstances, it was more likely Complainant was rejected as a tenant because of her family size than it was that she was rejected as a tenant because of her Mexican-American ancestry.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8138.

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

July 28, 1999