

INTRODUCTION AND PROCEDURAL HISTORY

Earnestine L. Woods (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on December 10, 1998.

The Commission investigated and found probable cause that Ruth and McNeil McGann (Respondents) engaged in unlawful discriminatory practices in violation of Revised Code (R.C.) 4112.02(H)(1) and (2).

The Commission issued a Complaint, Notice of Hearing, and Notice of Right of Election on July 22, 1999. The public hearing was held in abeyance pending the Commission's conciliation efforts.

The Complaint alleged that Respondents falsely misrepresented the availability of housing accommodations and otherwise refused to rent to Complainant because of her familial status.

On March 9, 2000, the Commission filed a Motion for Default based on Respondents' failure to file an Answer. Respondents subsequently retained

counsel to represent them. On March 17, 2000, Respondents filed a brief in opposition and moved for leave to file an Answer Instanter. The Hearing Examiner granted Respondents' motion on March 29, 2000.¹

The Commission filed a Motion to Compel Discovery and For Sanctions on June 21, 2000. The Commission moved for a default judgment against Respondents for their failure to answer interrogatories and respond to a request for production of documents. The Commission requested that the public hearing proceed only on evidence in support of the Complaint. The Hearing Examiner denied the Commission's request for a default judgment and ordered Respondents to answer the interrogatories and provide the requested documents prior to the hearing.

A public hearing was held on June 27, 2000 at the Lausche State Office Building in Cleveland, Ohio. Prior to taking testimony, the Hearing Examiner granted the Commission's motion to remove McNeil McGann as a respondent in light of his death in March 2000. Ruth McGann

¹ This Order rendered the Commission's Motion for Default moot.

(Respondent) withdrew her denial of the procedural allegations set forth in paragraphs two and four of the Complaint. Since Respondent failed to provide all of the documents requested by the Commission, the Hearing Examiner prohibited Respondent from presenting documents that confirm the residential tenancy of any person at 14201 Miles Avenue during the period from January 1, 1998 to the present. The Hearing Examiner also prohibited Respondent from presenting any income tax records from 1997 through 1999.

The record consists of the previously described pleadings, a 166-page transcript, exhibits admitted into evidence at the hearing, and a post-hearing brief filed by the Commission on August 16, 2000. Respondent did not file a post-hearing brief.

FINDINGS OF FACT

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

1. Complainant filed a sworn charge affidavit with the Commission on December 10, 1998.

2. The Commission determined on July 22, 1999 that it was probable that Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(H)(1) and (2).

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

4. Complainant is a single mother of three children. The children are under the age of 18 and reside with her.

5. Respondent is a provider of housing accommodations. Respondent owns and rents housing accommodations at three locations in Cleveland, Ohio: 2916 East 116th Street, 12601 Abell, and 14201 Miles Avenue. These properties vary in size, rent, and number of dwelling units.

6. The East 116th property has four efficiency units whose average rent is \$250 per month. The Abell property, which rents for \$300, has a storefront with two bedrooms in the back. The Miles Avenue property has two

storefronts, one large unit downstairs, and two three-bedroom units upstairs. Respondent usually charges \$400 per month to rent one of the upstairs units.

7. In September 1998, Respondent and her husband resided in the downstairs unit at Miles Avenue. Their telephone number was 491-1012. At least one of the upstairs units was vacant at that time. (Tr. 98, 144)

8. Meanwhile, Complainant sought better housing accommodations for her family. Complainant contacted the Council for Economic Opportunities in Greater Cleveland (Council) about listings for three-bedroom apartments within her price range.² The Council provided Complainant a referral form with such listings. (Comm.Ex. 10) Each listing contained information about the type of property, its address, the landlord's name, and the landlord's telephone number.

9. On September 10, 1998, Complainant called the landlords on the referral form. One listing identified the property as having three bedrooms,

² Complainant testified that she was willing to pay up to \$550 for a three-bedroom apartment. (Tr. 28) At the time, Complainant and her children lived in a two-bedroom apartment on East 86th Street. Complainant used the Council's services to locate that apartment. Her rent there was \$400. (Tr. 26, Comm.Ex. 3)

the address as 14201 Miles, the landlord as “Mrs. McGants”, and the telephone number as 491-1012. *Id.*

10. When Complainant dialed this number, Respondent answered and identified herself as Ruth McGann. Respondent asked Complainant a series of questions including who would be renting the apartment. Complainant identified herself and her three children as the prospective tenants. Respondent inquired about Complainant’s age and the ages of her children. Complainant indicated that she was 30, and her children were 8, 9, and 11. Respondent then told Complainant that her housing units were “already rented.” (Tr. 31, 60, Comm.Ex. 1) Complainant thanked Respondent and hung up.

11. After she hung up, Complainant immediately called a local fair housing agency.³ Complainant described her conversation with

³ The Commission’s investigatory file referred to the fair housing agency as Cleveland Tenants Organization. (Comm.Ex. 1)

Respondent and expressed her belief that she was the victim of familial status discrimination. Approximately one week later, Complainant went to the agency and filed a sworn charge of housing discrimination. The agency then arranged for telephone testing of Respondent's rental practices.

12. On September 22, 1998, Marcia Rieves-Bey, a tester for the agency, called 491-1012. A male answered the telephone. Rieves-Bey told him that she was calling about the home for rent. He stated that "the lady" was not there and told her to call back later that evening. (Comm.Ex. 11) Rieves-Bey called later, but she received no answer.

13. Rieves-Bey called the same telephone number the following day. A female answered the telephone. Rieves-Bey told her that she was calling about the home for rent. The female inquired about how she learned about the vacancy. Rieves-Bey indicated that a friend told her about "the listing at the Counsel for Economic Opportunities."⁴ The female asked

⁴ All the quotations in this paragraph are found in a tester report prepared by Rieves-Bey immediately after the call. (See Comm. Ex. 11, Tr. 84)

Rieves-Bey about the number of persons in her family. Rieves-Bey told her “four.” The female further inquired about their ages. Rieves-Bey replied, “four, eight, twenty-four, and twenty-eight.”⁵ The female then stated that she did not have “anything for . . . [her] right now.”

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.

⁵ Prior to the calls, the agency provided Rieves-Bey only the telephone number (491-1012) and the ages of her “hypothetical” family. (Tr. 88)

1. The Commission alleged in the Complaint that Respondents falsely misrepresented the availability of housing accommodations and otherwise refused to rent to Complainant because of her familial status.

2. These allegations, if proven, would constitute a violation of R.C. 4112.02(H), which provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

- (1) Refuse to . . . rent, . . . housing accommodations, . . . or otherwise deny or make unavailable housing accommodations because of . . . familial status, . . .; and
- (2) Represent to any person that housing accommodations are not available for . . . rental, when in fact they are available, because of . . . familial status,

3. R.C. 4112.01(A)(15) defines “familial status” as either:

- (a) One or more individuals who are under eighteen years of age and who are domiciled with a parent or guardian having legal custody of the individual or domiciled, with the written permission of the parent or guardian having legal custody, with a designee of the parent or guardian; or
- (b) Any person who is pregnant or in the process of securing legal custody of any individual who is under eighteen years of age.

4. 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. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569. 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.⁶

6. Under federal case law, the same evidentiary framework used in employment discrimination cases applies to housing discrimination cases. *Kormoczy v. HUD*, 53 F.3d 821, 823 (7th Cir. 1995). In absence of direct evidence, this framework requires the Commission to first establish a *prima facie* case of unlawful discrimination. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792 (1973). The burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253,

⁶ Sections 3604(a) and (d) of Title VIII are substantially the same as R.C. 4112.02(H)(1) and (2), respectively.

25 FEP Cases 113, 115 (1981). It is simply part of an evidentiary framework “intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.” *Id.*, at 254, 25 FEP Cases at 116, n.8.

7. The proof required to establish a *prima facie* case is also flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas, supra* at 802, 5 FEP Cases at 969, n.13. In this case, the Commission may establish a *prima facie* case by proving that:

- (1) Complainant is a member of a protected class;
- (2) Complainant was qualified for and sought to rent available housing accommodations;
- (3) Respondent represented that housing accommodations were unavailable, despite having availability; and
- (4) Respondent turned Complainant away under circumstances that give rise to an inference of unlawful discrimination.

8. The Commission proved a *prima facie* case of familial status discrimination. In September 1998, Complainant’s three children were under the age of 18 and domiciled with her. Thus, Complainant was protected under the statute because of her familial status.

9. In regard to the second and third elements, the evidence shows that Complainant called Respondent on September 10, 1998 and inquired about renting housing accommodations for her family. At the time, Complainant paid the same rent (\$400) for other housing accommodations that Respondent usually charged for one of her three-bedroom units on Miles Avenue. Respondent conceded during the hearing that at least one of the upstairs units on Miles Avenue was vacant in September 1998. Despite this fact, Respondent told Complainant that her housing units were already rented.

10. Lastly, the Commission presented credible evidence that Respondent turned Complainant away under circumstances that created an inference of familial status discrimination. Complainant testified that Respondent told her on September 10, 1998 that her housing units were already rented *after* Respondent elicited information about the number and ages of those in her family. Marcia Rieves-Bey, a fair housing tester, testified that she called Respondent's telephone number on September 23, 1998 and posed as a prospective tenant with children.

Rieves-Bey described receiving similar treatment as Complainant from the woman who answered the telephone.

11. Since the Commission proved a *prima facie* case, the burden of production shifted to Respondent to “articulate some legitimate, nondiscriminatory reason” for the alleged discriminatory practices. *McDonnell Douglas, supra* at 802, 5 FEP Cases at 969. To meet this burden of production, Respondent must:

. . . “clearly set forth, through the introduction of admissible evidence,” reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the . . . [housing action].

St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 507, 62 FEP Cases 96, 103 (1993), *quoting Burdine, supra* at 254-55, 25 FEP Cases at 116, n.8.

The presumption created by the establishment of a *prima facie* case “drops out of the picture” when the housing provider articulates a legitimate, nondiscriminatory reason for the alleged discriminatory practices. *Hicks, supra* at 511, 62 FEP Cases at 100.

12. Although Respondent testified at the hearing, she failed to articulate a legitimate, nondiscriminatory reason for turning Complainant away as a tenant. Respondent never denied talking to Complainant or Rieves-Bey

and did not dispute either's version of these conversations. Instead, Respondent claimed that she did not recall these conversations.⁷

13. Respondent's testimony, as the Commission argues, tended to corroborate the allegations in the Complaint. For example, Respondent acknowledged that she provided her telephone number to the Council for rental listings and received telephone inquiries from persons using such listings. Respondent also acknowledged that she has asked about the number and ages of prospective tenants during such calls. As noted earlier, Respondent even conceded that at least one of the upstairs units on Miles Avenue was vacant in September 1998.

14. In summary, the Commission provided sufficient evidence to prove a *prima facie* case of familial status discrimination. This evidence created a rebuttable presumption of unlawful discrimination. Respondent neither challenged the factual accuracy of Complainant's allegations nor

⁷ On the whole, Respondent's memory of events was poor. Her testimony was often inconsistent.

articulated a legitimate, nondiscriminatory reason for turning her away. Respondent's failure to rebut the presumption of unlawful discrimination that flows from the Commission's proof of a *prima facie* case, along with the Hearing Examiner's belief of that evidence, entitles Complainant to relief as a matter of law:

Establishment of a *prima facie* case in effect creates a presumption that the . . . [defendant] unlawfully discriminated against the . . . [plaintiff]. If the trier of fact believes the plaintiff's evidence, and if the . . . [defendant] is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Burdine, supra at 254, 25 FEP Cases at 116 (emphasis added and footnote omitted).

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

ACTUAL DAMAGES

16. In fair housing cases, the purpose of awarding 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). Toward 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. *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974).⁸

⁸ 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*, Fair Housing-Fair Lending (P-H), ¶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).

17. During the hearing, the Commission presented evidence that Respondent's discriminatory behavior caused Complainant economic loss. Respondent testified that she usually charges \$400 per month to rent one of the upstairs units on Miles Avenue. The evidence shows that Complainant eventually found adequate housing accommodations in April 1999 at a cost of \$550 per month. (Comm.Ex. 2) Without evidence that Complainant failed to mitigate her damages by seeking comparable housing, Complainant is entitled to the difference between the rent she paid from April 1999 through June 2000 and the rent she would have paid for Respondent's housing accommodations during that same period. The Hearing Examiner recommends that the Commission award Complainant \$2,250 (15 months x \$150) for her economic loss.

18. The Commission argues that Complainant is also entitled to the emotional distress caused by her inability to attain "safe and sanitary surroundings" for her family. (Comm.Br. 20) Complainant testified about the substandard housing conditions and unsafe neighborhoods that she and

her children endured at both East 86th Street and 9134 Wade Park.⁹ The substandard housing conditions included, among other things, dirty carpet, furnace problems, roof leaks, and roach and mice infestation. (Tr. 27, 33, Comm.Exs. 4, 6) Complainant testified that living at these locations made her feel like she “wasn’t a very good mother.” (Tr. 36)

19. While it is uncertain whether Respondent’s housing accommodations on Miles Avenue would have provided Complainant and her children with a “safer” living environment, the evidence suggests that upstairs units at that location were superior to the substandard housing at East 86th Street and 9134 Wade Park. When asked about the condition of one of the upstairs units in September 1998, Respondent testified that she had no concern about its ability to pass a Section 8 inspection. Respondent further testified that everyone “says” that she should charge more money to rent the upstairs units because they are “nice apartments.” (Tr. 137) In light of Complainant’s testimony and the

⁹ Complainant and her children moved from East 86th Street to 9134 Wade Park in early November 1998. Complainant eventually found adequate housing accommodations in April 1999.

totality of the circumstances, the Hearing Examiner recommends that the Commission award Complainant \$4,500 for her emotional distress.

PUNITIVE DAMAGES

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

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

- The nature of Respondent’s conduct;
- Respondent’s prior history of discrimination;
- The size and profitability of Respondent’s housing accommodations; and

- Respondent's cooperation or lack of cooperation during the investigation of the charge.¹⁰

Adm.Code 4112-6-02.

22. Applying these factors to this case:

- The evidence suggests that Respondent did not want families with children living above her while she resided in the downstairs unit on Miles Avenue. Ohio's fair housing laws prohibit housing providers from misrepresenting the availability of housing as a means to restrict housing that families with children are qualified for and capable of renting. While Complainant may have been unaware of the illegality of her behavior, such ignorance of fair housing laws does not exempt her from compliance;
- The Commission did not present any evidence that there have been previous findings of unlawful discrimination against Respondent;
- Respondent stipulated that she owned housing accommodations at three different locations in Cleveland. These locations have approximately seven units combined. The profitability of these units is uncertain. The record on this issue is inadequate, at least in part, because of Respondent's failure to fully respond to the Commission's discovery requests; and
- The evidence shows that Respondent and her husband failed to cooperate with the Commission during its investigation.

¹⁰ Adm.Code 4112-6-02 also lists the effect that the illegal action had upon the complainant as a factor. However, this factor is more appropriately considered when determining actual damages.

- The Commission Investigator testified about his efforts to elicit a response from Respondents to the charge of discrimination. Ultimately, Respondents' failure to cooperate resulted in the Commission's issuance of a probable cause finding. (Comm.Ex. 1)

23. Based on the foregoing discussion, the Hearing Examiner recommends that the Commission assess Respondent \$7,000 in punitive damages.

ATTORNEY'S FEES

24. 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.

25. To create a record regarding attorney's fees, the Commission's counsel should file affidavits from plaintiffs' attorneys in Lorain County, Ohio regarding the reasonable and customary hourly fees that they charge in housing discrimination cases. Also, a detailed accounting of the time spent on this case must be provided and served upon Respondent. Respondent

may respond with counter-affidavits and other arguments regarding the amount of attorney's fees in this case.

26. If the Commission adopts the Hearing Examiner's Report and the parties cannot agree on the amount of attorney's fees, the Commission should file an Application for Attorney's Fees within 30 days after the Hearing Examiner's Report is adopted. Respondent may respond to the Commission's Application for Attorney's fees within 30 days from her receipt of the Commission's Application for Attorney's Fees.

27. Meanwhile, any objections to this report should be filed pursuant to the Ohio Administrative Code. Any objections to the recommendation of attorney's fees can be filed after the Hearing Examiner issues a supplemental recommendation regarding attorney's fees.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint #8596 that:

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

2. The Commission order Respondent to pay Complainant \$6,750 in actual damages; and

3. The Commission order Respondent to pay Complainant \$7,000 in punitive damages.

TODD W. EVANS
HEARING EXAMINER

November 22, 2000

PROCEDURAL HISTORY

This matter is before the Hearing Examiner on the Commission's Application for Attorney's Fees. On November 22, 2000, the Hearing Examiner issued Findings of Fact, Conclusions of Law, and Recommendations (Hearing Examiner's Report) on liability and damages in Complaint #8596. The Hearing Examiner found that Respondent violated R.C. 4112.02(H)(1) and (2). Besides a Cease and Desist Order, the Hearing Examiner's Report recommended that the Commission award Complainant \$6,750 in actual damages and assess Respondent \$7,000 in punitive damages.

The Commission adopted the Hearing Examiner's Report on January 4, 2001. The Commission filed an Application for Attorney's Fees on January 9, 2001. Respondent filed a response to the Application on January 11, 2001. The Commission filed a reply on January 17, 2001.

CONCLUSIONS OF LAW AND DISCUSSION

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

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

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

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

2. In determining what constitutes reasonable attorney's fees in a particular case, the usual starting point and presumptively reasonable amount is the lodestar calculation, i.e., the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Blum v. Stenson*, 465 U.S. 886, 897, 34 FEP Cases 417, 421 (1984). As the fee applicant, the Commission must provide evidence documenting the time expended on the case. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 31 FEP Cases 1169, 1174

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

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

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

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

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

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

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

6. Besides compensating Complainant for her emotional distress, the Commission’s success in this case has a significant public benefit. It sends a clear message to Respondent and other housing providers that they

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

are prohibited from misrepresenting the availability of housing as a means to restrict housing from qualified families with children. *Cf. Cabrera v. Jakobovitz*, 24 F.3d 372, 393 (2d Cir. 1994) (court awarded attorney's fees in Title VIII case that served the public purpose of warning landlords that the law will not tolerate their use of brokers who discriminate invidiously).

7. The Commission satisfied its burden of documenting the time expended in this case. The Commission's counsel provided a billing log containing the subject matter of the work performed, the dates the work was performed, and the time spent on each activity. (Comm.Ex. 1) The billing log indicates that the Commission's counsel expended 51.85 hours on the prevailing issue of familial status discrimination as well as .75 hours in travel.

8. The Commission also satisfied its burden of providing evidence in support of the requested hourly rate (\$200). In an affidavit, the Commission's counsel outlined her training and experience in fair housing as a former:

- Consultant on fair housing issues to the Department of Housing and Urban Development (HUD), the Ohio General Assembly, and the Ohio Department of Development;
- Assistant director of a fair housing agency; and
- Private attorney specializing in civil rights cases.

9. The Commission further provided an affidavit from Edward Kramer, an attorney, who is the senior partner in a “plaintiff’s civil rights law firm” and the executive director of The Housing Advocates, Inc. (Comm.Ex. 2) Kramer stated that \$225 is the prevailing market rate in the Cleveland area for a private civil rights attorney with the experience and expertise possessed by the Commission’s counsel. Kramer’s affidavit demonstrates that the requested hourly rate in this case is comparable to the prevailing market rate for civil rights cases litigated in the Cleveland area by attorneys with the level of skill and experience in the field as the Commission’s counsel.²

10. Respondent failed to provide any counter-affidavits from other civil rights attorneys practicing in Cuyahoga County or the surrounding area. Instead, Respondent argued that any award of attorney’s fees should be based on the actual salary of the Commission’s counsel, not the

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

prevailing market rate charged by private civil rights attorneys. Respondent did not provide any legal authority for this argument.

11. In its reply, the Commission cites to a number of federal cases where non-profit legal organizations were awarded reasonable attorney's fees at the prevailing market rate rather than a cost-based standard. *Blum, supra*; *Dennis v. Chang*, 611 F.2d 1302 (Hawaii, 1980); *Perez v. Rodriguez Bou*, 575 F.2d 21 (1st Cir. 1978). The Commission also advances the public policy argument that calculating attorney's fees awarded under R.C. 4112.05(G)(1) according to the prevailing market rate encourages compliance with and enforcement of the statute's fair housing provisions. This argument is well-taken.³

12. More importantly, the plain language of R.C. 4112.05(G)(1) does not support Respondent's position. This provision states the Commission shall require the respondent to pay "reasonable attorney's fees" when there is a violation of R.C. 4112.02(H). Given the fact the statute requires the Ohio Attorney General to represent the Commission during

³ As a practical matter, the use of the prevailing market rate for attorney's fees awarded under R.C. 4112.05(G)(1) encourages settlement of housing complaints prior to hearing. The Attorney General's willingness to waive attorney's fees to facilitate settlement is also a factor.

administrative hearings, it is reasonable to conclude that the Ohio Legislature intended that the Ohio Attorney General receive reasonable attorney's fees rather than reimbursement for the cost of its legal services.

13. The Commission argues that it is also entitled to costs totaling \$440.40. These costs are "exclusively related to court reporter time and transcription of depositions." (Comm.Ex. A) The Commission contends that R.C. 4112.05(G)(1) grants the Hearing Examiner discretion to require respondents to pay costs as "affirmative action or other action that will effectuate the purposes of this chapter." The Hearing Examiner disagrees. This language, when read in context, immediately precedes a list of make whole remedies for victims of employment discrimination.⁴ Although the list is not exhaustive, it does not include payment of costs. R.C. 4112.05(G)(1) also sets forth additional remedies for housing cases, i.e., actual damages, reasonable attorney's fees, and potentially punitive damages, without any reference to costs. The exclusion of costs from this sentence is a strong indicator that the Ohio

⁴ The Commission does not usually request costs as a prevailing party in employment discrimination cases.

Legislature did not intend for the Commission to receive costs from respondents who violate provisions of R.C. 4112.02(H).

14. Further, Ohio case law interpreting R.C. 4112.02(G)(1) is inconsistent with the Commission's position. In *Jackson v. Ohio Civ. Rights Comm.*, 552 N.E. 2d 237 (Ohio App. 1990), the petitioner, who was a complainant before the Commission, argued that the language "take such further affirmative action or other action as will effectuate the purposes" of Ohio's anti-discrimination laws, empowered the Ohio Civil Rights Commission to order a place of public accommodation to reimburse him for his out-of-pocket loss (\$18 plus tax) caused by its discriminatory practices against him. In rejecting this argument, the court relied on the Ohio Supreme Court's language in *Ohio Civ. Rights Comm. v. Lysyj* (1974), 38 Ohio St.2d 217:

The power to award damages to a person suffering loss as a result of the unlawful action of another has traditionally been limited to judicial proceedings. We are not willing to imply a grant of that power to an administrative agency.

We find nothing in R.C. 4112.05(G) which indicates that the General Assembly attempted to authorize appellant to award either compensatory or punitive damages . . . The authority to take 'affirmative action' may well include extensive powers to effectuate the purpose of the Civil Rights Acts, but, under existing

statutory language, those powers are to be directed towards ending the unlawful discriminatory practice and securing compliance with the cease and desist order. *If the General Assembly had intended to authorize the commission to grant compensatory or punitive damages, it would have been a simple matter to explicitly so provide, as was done elsewhere in the Act.*

Id., (footnote and statutory example omitted).

15. While the Hearing Examiner believes that the Commission's remedial powers should be substantially equivalent with remedies available in judicial proceedings, the Ohio Legislature has not taken that step.⁵ In short, the Commission cannot award costs to itself or

⁵ The Commission's inability to award punitive damages in employment cases has recently lead an increasing number of complainants filing civil rights actions in state or federal court after the Commission finds probable cause and issues a complaint.

the Ohio Attorney General without a legislative mandate to do so:

The Ohio Civil Rights Commission is a creation of statute, and like all legislatively-created agencies, can exercise only those powers and jurisdiction as are conferred upon it by the General Assembly.

State, ex rel. Cincinnati v. Ohio Civ. Rights Comm. (1981), 2 Ohio App. 287, 288 (citations omitted).

16. The Commission further argues that “costs are the actual damages to the Commission who is the party plaintiff in this case.” (Comm.Rep. 4) The Commission is a party to these proceedings; however, actual damages and costs are distinct legal remedies. In civil rights cases, actual damages are awarded for injuries or monetary loss that flow from the unlawful discriminatory practice. Costs are a pecuniary allowance for expenses incurred by the prevailing party in bringing a lawsuit, or in this context, proving the allegations in the Commission’s complaint. The Commission may not receive costs under the guise of actual damages.

CONCLUSIONS

17. After reviewing the billing log and the affidavits provided by the Commission, the number of hours claimed and the requested hourly rate are reasonable. Respondent did not present any evidence to the contrary. Having considered the results obtained by the Commission, the Hearing Examiner concludes that the lodestar amount is reasonable in relation to these results. The Commission is entitled to \$10,370 ($51.85 \times \200) in attorney's fees for time spent on the prevailing issue plus \$18.75 ($.75 \times \25) for travel time.

18. Neither the Commission nor the Ohio Attorney General are entitled to costs in this case. It is reasonable to conclude from the statute's silence on costs that the Ohio Legislature did not intend for the Commission, or respondents for that matter, to receive costs as a prevailing party after an administrative hearing before the Commission.

RECOMMENDATION

For all of the foregoing reasons, the Hearing Examiner recommends that the Commission's Final Order in Complaint #8596 include an Order requiring Respondent to pay \$10,388.75 in attorney's fees to the Office of the Ohio Attorney General.

TODD W. EVANS
HEARING EXAMINER

March 30, 2001