

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

DAVID FARRAR & ROSE FARRAR

Complainant

and

**JERRY McMAHAN & CYNTHIA McMAHAN,
CYKA INVESTMENTS, INC. &
SHRINE ROAD MOBILE HOME PARK**

Respondents

Complaint #8574

(DAY) H6070598 (13636) 092298

HUD # 05 – 98 – 1604 – 8

HEARING EXAMINER'S FINDINGS OF FACT,

CONCLUSIONS OF LAW, AND RECOMMENDATIONS

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INTRODUCTION AND PROCEDURAL HISTORY

David Farrar and Rose Farrar (Complainants) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on September 22, 1998.

The Commission investigated and found probable cause that Jerry McMahan and Cynthia McMahan, CYKA Investments, Inc. and Shrine Road Mobile Home Park (Respondents) engaged in unlawful discriminatory practices 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 June 10, 1999. The Complaint alleged that Respondents discriminated against Complainants by refusing to allow them to sell their mobile home to a family with minor children.

Respondents filed a timely Answer to the complaint, admitting certain procedural allegations but denying that they engaged in any unlawful discriminatory practices.

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

A public hearing was held on May 23, 2001 at the Common Pleas Court Conference Room in Springfield, Ohio.

The record consists of the previously described pleadings, a transcript consisting of 115 pages, the deposition of Julie Baker Honn consisting of 62 pages, exhibits admitted into evidence at the hearing and during the deposition, and the post-hearing briefs filed by the Commission on August 3, 2001 and by Respondents on September 4, 2001.¹ The Commission filed a reply brief on September 4, 2001.

¹ Respondents filed a brief on August 28, 2001 which was subsequently withdrawn because it contained formatting errors. The brief was re-filed on September 4, 2001.

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 was supported or contradicted by reliable documentary evidence.

1. Complainants filed a sworn charge affidavit with the Commission on September 22, 1998.

2. The Commission determined on June 10, 1999 that it was probable that Respondents engaged in unlawful discriminatory practices 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. Respondents own five mobile home parks. The mobile home park at issue in this case is Shrine Road Mobile Home Park (Shrine Road). It contains 230 lots. Jerry McMahan acquired Shrine Road in 1988. During the relevant time period, Cynthia McMahan, Jerry McMahan's daughter, was the manager at Shrine Road.

5. Complainants have resided at Shrine Road since 1983. The lot on which their mobile home is situated is owned by Shrine Road. Complainants pay \$165 per month lot rent. Complainants are required to notify management if they intend to sell their mobile home. Park management must approve the transfer of the lot from one lot owner to

another. Potential purchasers of mobile homes within the park must apply for residency within the park. (Tr. 58)

6. Shrine Road has printed park rules and regulations. Prior to September 21, 1998, the park rules and regulations did not mention anything about the ages of the park occupants. On September 21, 1998 the park rules were revised. A statement was inserted at the beginning of the rules that said, "Shrine Road Mobile Home Park is a 55 and older adult community." Prior to September 21, 1998, Respondents' lease application did not say anything about minimum age requirements for occupancy. After September 21, 1998, a statement was inserted under the lease application caption. The statement said, "Shrine Road MHP is a 55 and older adult community."

7. There are two signs at the entrance of Shrine Road Mobile Home Park. Neither sign says anything about the park being reserved for persons 55 and older.

8. Complainants advised Cynthia McMahan that they were going to put their mobile home up for sale sometime in 1998. Shortly thereafter, Mr.

Farrar had a conversation with Cynthia McMahan regarding the sale of the home where she told him that she thought the price they were asking was too high. During that conversation she did not say anything to him regarding any age restrictions for potential buyers. (Tr. 41, 104)

9. On July 5, 1998, Complainants discussed the sale of their mobile home with Julie Baker Honn (f/k/a Julie Baker). Baker was under 55 years of age. At the time she had two minor children. She has legal custody of one of them.

10. Baker and her fiancé viewed the mobile home and expressed an interest in purchasing it for \$39,500. Pursuant to park rules and regulations, the Farrars told Baker that she needed to speak with the manager of the mobile home park to obtain her approval. Baker telephoned Cynthia McMahan about renting the Farrars' lot. McMahan asked Baker about her age and her children. During the conversation, McMahan told Baker that she could not have an application form because she was not over 55 and because she had children. (Baker depo, p. 11, 13) Baker asked for a copy of the park's rules and regulations.

11. The next morning Baker went to the mobile home park office to pick up a copy of the rules and regulations. She had another conversation with Cynthia McMahan. McMahan repeated that Shrine Road would not rent a lot to her because it was a 55 and older park, and they did not accept children. She referred Baker to her attorney.

12. Complainants ultimately sold their mobile home on November 11, 1998 to a person under 55 for \$37,500. (Comm.Ex. 8, Tr. 20)

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.²

1. The Commission alleged in its complaint that Respondents violated R.C. 4112.02(H)(1) and (7).

2. R.C. 4112.02(H)(1) and (7) provide in pertinent part that:

It shall be an unlawful discriminatory practice:

² 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 do any of the following:
- (1) Refuse to . . . lease, . . . housing accommodations, . . . because of . . . familial status,³
 - (7) *Print, publish*, or circulate any statement or advertisement, or make or cause to be made any statement or advertisement, relating to the sale, transfer, assignment, rental, lease, sublease, or acquisition of any housing accommodations, or relating to the loan of money, whether or not secured by mortgage or otherwise, for the acquisition, construction, rehabilitation, repair, or maintenance of housing accommodations, that indicates any preference, limitation, specification, or discrimination based upon . . . familial status, . . . or an intention to make any such preference, limitation, specification, or discrimination. (Emphasis added.)

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.

³ Housing accommodations include any vacant land offered for sale or lease. R.C. 4112.01(A)(10).

4. R.C. 4112.22(K)(5) provides in pertinent part that:

(5) Nothing in division (H) of this section pertaining to discrimination on the basis of familial status shall be construed to apply to any of the following:

(c) Housing accommodations intended and operated for occupancy by at least one person who is at least fifty-five years of age or older per unit, as determined under the “Fair Housing Amendments Act of 1988,” 102 Stat. 1623, 42 U.S.C.A. 3607, as amended.

5. The Fair Housing Amendments Act of 1988 (the Amendments) contained the first “fifty-five and over” exemption. The Amendments required the Department of Housing and Urban Development (HUD) to develop regulations that required at least the following factors:

- (i) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and
- (ii) that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit; and

- (iii) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.

42 U.S.C. § 3607(b)(2)(C).⁴

6. The housing industry strenuously objected to the first criteria, “the significant facilities and services” criteria, because it was too difficult to define and generated numerous lawsuits. The passage of the “Housing for Older Persons Act” (HOPA) in 1995 did away with “the significant facilities and services” criteria. Schwemm, *Housing Discrimination*, § 11:29, p. 11-172.

7. HOPA set out three criteria for qualifying for a 55 and over exemption. Housing providers offering 55 and older housing had to: (1) have at least 80% of the occupied units occupied by at least one person who was 55 years of age and older; (2) “publish and adhere to policies that demonstrate the intent required under this subparagraph”; and (3) comply

⁴ HUD published regulations implementing the 1988 Fair Housing Amendments Act in 1990. These rules were subsequently amended in 1994, pursuant to Congressional edict in the 1992 Housing and Community Development Act. Subsequent rules were proposed in 1994 and 1995 which led to a final rule which was published on August 18, 1995.

with rules issued by the Secretary of HUD for verification of occupancy.”

Schwemm at § 11:29, p. 11-171.

8. As summarized by Schwemm, *Housing Discrimination Law and Litigation*:

Thus, the current version of the “fifty-five and over” housing exemption may be satisfied by meeting only the “80%” rule (with proper verification techniques) and the requirements of having policies and procedures demonstrating an intent to provide housing for this age group.

Schwemm at p. 11-173.

9. HUD published its first proposed rule implementing its obligation under these amendments on January 14, 1997. HUD published a final rule on April 2, 1999.

10. Based on the foregoing discussion, the Hearing Examiner concludes that Respondents violated the familial status prohibition contained in Chapter 4112. This conclusion is based on the testimony from Julie Baker Honn that she was told that children were not allowed in the mobile home park. It is also based on Respondents’ characterization

of the park as an “over 55 adult community.” The words “adult community” connote a community that does not have children. Furthermore, I rejected Respondents’ testimony that the park allows children because it was in the context that the park allows a few children who are being raised by grandparents. (Tr. 65) This does not convert the park from an adult community to a 55 and older community where children are permitted. Therefore, based on direct evidence and circumstantial evidence, I find that it was the practice of Shrine Road Mobile Home Park not to permit children except under very unusual circumstances, such as grandparents raising grandchildren.⁵

11. The Commission having proven that Respondents violated the familiar status prohibitions in Chapter 4112, the burden of proof shifted to Respondents to prove that Shrine Road Mobile Home Park qualifies for the 55 and over exemption. *HUD v. Nelson Mobile Home Park*, 2 A Fair

⁵ This issue could also be addressed using a disparate impact analysis. Respondents’ practice of leasing to families where one person is 55 and older had a disparate impact on families with children since most parents of minor children are less than 55 years of age.

Housing-Fair Lending ¶¶25,603 at p. 25,607 (citations omitted) (HUD ALJ, December 2, 1993).

12. Since the Ohio legislature has grafted the Federal Housing Act Amendments of 1988, as amended, onto Chapter 4112, Respondents must comply with 42 U.S.C.A. § 3607. The first criteria under that section is the 80% rule. There is no dispute that at least 80% of the units at Shrine Road are occupied by at least one person who is 55 years of age or older. However, Respondents must also comply with the remaining criteria.

13. The second criteria requires the housing provider to “publish and adhere to policies and procedures that demonstrate the intent required under this subparagraph.” This is known as the “policies and procedures requirement.” HUD regulations dating back to 1990 set out six factors that could be considered in determining whether the policies and procedures requirements had been met.⁶ These nonexclusive factors were:

- the housing facility’s written rules and regulations;

⁶ This regulation was the regulation that was in effect up until April 25, 1996 when Respondents allege they decided to make Shrine Road Mobile Home Park a 55 and older facility. Thus, Respondent could have used these factors as guidelines. The courts continued to do so up until the 1999 regulation which established seven nonexclusive factors which were similar to the six factors. See numerous citations in Schwemm at p.

- the manner in which the housing is described to prospective residents;
- the nature of advertising;
- age verification procedures;
- lease provisions; and
- actual practices of the management in enforcing the relevant rules and regulations.

14. Applying these factors to this case leads to the conclusion that Respondents did not satisfy the policies and procedures requirement. Although Cynthia McMahan testified she told all prospective tenants Shrine Road was a 55 and older park, Respondents' written rules and regulations did not confirm that it was such a park. Respondents did not change the caption on their rules and regulations until after charges were filed with the Commission in the summer of 1998.⁷

11-178, fn. 24.

⁷ Although Complainants filed their charge on September 22, 1998, there were other charges pending on this issue prior to that date.

15. Respondents' advertising also failed to convey the message to the public that they were a 55 and older community. There was nothing in Respondents' lease provisions that would convey this message until after charges were filed with the Commission. Respondents had no signage that let prospective residents know that the Shrine Road Mobile Home Park was a 55 and older community. Respondents also continued to lease lots to persons under 55, e.g. the person who purchased Complainants' mobile home.

16. Finally, Respondents had no procedure for verification of occupancy by persons 55 and older. Respondents' lease application contained a section for date of birth, but the applicant was not required to certify that they were 55 or older, nor was there any procedure followed to verify the applicant's date of birth by requesting proof of age, something that could have been easily done.

17. Since the Commission proved that Respondents violated the familial status divisions of Chapter 4112 and Respondents were unable to prove the 55 and older exception, the Commission is entitled to relief. Relief includes actual damages, punitive damages, and other appropriate relief.

ACTUAL DAMAGES

18. In fair housing cases, the purpose of an award of actual damages is to place the Complainant “in the same position, so far as money can do it, as . . . [the Complainant] would have been had there been no injury or breach of duty” *Lee v. Southern Home Sites Corp.*, 429 F.2d 290, 293 (5th Cir. 1970) (citations omitted). To that end, victims of housing discrimination may recover damages for tangible injuries such as economic loss and intangible injuries such as humiliation, embarrassment, and emotional distress. *Steele v. Title Realty Co.*, 478 F.2d 380 (10th Cir. 1973). Damages for intangible injuries may be established by testimony or inferred from the circumstances. *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974).

19. The Commission contends that Complainants suffered economic loss from Respondents’ violation of R.C. 4112.02(H). The Commission argues that Complainants are entitled to actual damages for the difference between what they ultimately received for their mobile home and what Ms.

Baker Honn offered.

20. In its brief the Commission argued that it is impossible to determine whether Ms. Baker Honn would have been able to purchase the house because Respondents interfered with the negotiation process when Ms. Baker Honn was told that the mobile home park would not let her fill out an application to lease the lot. This argument is well taken.

21. Respondents' attempts to show that Ms. Baker Honn had no credit, and, therefore, could not have obtained a loan are not necessarily dispositive. Ms. Baker Honn testified that she was going to get financing through her parents. (Baker Depo, p. 14)

22. When there is a finding of discrimination and there are ambiguities regarding the issue of damages, all ambiguities should be resolved in favor of the victim. *Cf. OCRC v. Ingram, D.C., Inc.*, (1994) 69 Ohio St.3d 89, 94 (employment case). Therefore, the Hearing Examiner recommends that Complainants receive \$2,000, the difference between the ultimate selling price and the price that was discussed with Ms. Baker Honn.

23. Complainants are also entitled to damages for emotional distress. 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).

24. The Commission did not offer any evidence about how Respondents’ interference in the negotiations with Ms. Baker Honn affected Complainants’ emotional well being. Even though there was no specific testimony about Complainants’ emotional well being, anyone in the Complainants’ position would be upset. Therefore, the Hearing Examiner recommends \$500 in damages for emotional distress.

PUNITIVE DAMAGES

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

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

- The nature of Respondents’ conduct;
- Respondents’ prior history of discrimination;
- Respondents’ size and profitability;
- Respondents’ cooperation or lack of cooperation during the investigation of the charge; and
- The effect Respondents’ actions had upon Complainants.⁸

Ohio Adm.Code 4112-6-02.

27. Applying the foregoing factors to this case:

⁸ This factor is more appropriately considered when determining actual damages.

- Respondents' actions were intentional but they were not malicious;
- There is no evidence of any previous findings of unlawful discrimination against Respondents;
- Respondents own other mobile home parks; neither the Commission nor Respondents presented evidence about the profitability of these parks, and
- There was no evidence offered regarding the level of cooperation by Respondents during the investigation.

28. Based on the foregoing discussion, the Hearing Examiner recommends that the Commission assess Respondents \$5,000 in punitive damages.

ATTORNEY'S FEES

29. 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.

30. To create a record regarding attorney's fees, the Commission's

counsel should file affidavits from plaintiffs' attorneys in Clark 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 Respondents. Respondents may respond with counter-affidavits and other arguments regarding the amount of attorney's fees in this case.

31. 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. Respondents may respond to the Commission's Application for Attorney's fees within 30 days from their receipt of the Commission's Application for Attorney's Fees.

32. 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 #8574 that:

1. The Commission order Respondents to pay Complainants \$2,500 in actual damages;

2. The Commission order Respondents to pay Complainants \$5,000 in punitive damages; and

3. The Commission order Respondents to pay attorney's fees (to be determined at a later date).

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

December 7, 2001