

INTRODUCTION AND PROCEDURAL HISTORY

Howard Burroughs (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on December 24, 1998.

The Commission investigated and found probable cause that Gary Northup and Scioto Estates, Inc. d/b/a K & K Mobile Home Sales (Respondents) engaged in unlawful discriminatory practices in violation of Revised Code (R.C.) § 4112.02(H)(1) and (4).

The Commission issued a Complaint, Notice of Hearing, and Notice of Right of Election on September 16, 1999. The public hearing was held in abeyance pending the Commission's conciliation efforts.

The Complaint alleged that Respondents refused to allow Complainant to sell his mobile home because of the buyer's familial status.

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

A public hearing was held on August 22, 2000 at the Pickaway County Commissioners' Office in Circleville, Ohio.

The record consists of the previously described pleadings; a transcript consisting of 249 pages of testimony; exhibits admitted into evidence at the hearing; and a post-hearing brief filed by the Commission on January 3, 2001. Respondents did not file a brief.

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. Howard Burroughs filed a sworn charge affidavit with the Commission on December 24, 1998.

2. The Commission determined on September 16, 1999 that it was probable that Respondents engaged in unlawful discriminatory practices in violation of R.C. § 4112.02(H)(1) and (4).

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

4. Complainant leased a lot from Respondents in a mobile home park known as Scioto Estates. Gary Northup is president and Chief Executive Officer of Scioto Estates and is responsible for managing the day-to-day operations.

5. Scioto Estates is separated into three sections called phases. Phases 1 and 2 collectively contain 224 lots and Phase 3, which is in progress, will contain additional lots upon completion. One area of Scioto Estates is exclusively reserved for adults. This area consists of 22 lots on a cul-de-sac. Respondents will not lease a lot to anyone with children who is attempting to purchase a mobile home that is located on one of these 22 lots.

6. In 1993, Complainant and his wife Beverly moved into a mobile home located in the adults-only section of Scioto Estates. Complainant does not own the lot on which the mobile home is situated. His monthly lot rental is \$190.00.

7. In 1998, Complainant and his wife decided to purchase a home in Piketon, Ohio. They hired a realtor to sell their mobile home; the home was listed at \$17,000. Richard and LaDawna Dent, who were represented by a realtor, offered to purchase the mobile home for \$15,500. Complainant rejected this offer. The Dents increased their offer to \$16,000. Complainant accepted their offer on September 24, 1998. The Dents had approval from two lenders to finance the mobile home purchase.

8. The contract was contingent upon approval by the mobile home park owners, since the land where the mobile home was situated was owned by the park owner. The park owner had to agree to permit the Dents to lease the land. Otherwise, the Dents would have to move the mobile home to another site.¹

9. The Dents met with Respondent Northup to secure approval to reside in Complainant's mobile home and lease the lot upon which it was situated. He told them that they could purchase the home and move it anywhere they wanted to move it, but it could not stay in the adult section because they had a child. (Tr. 25)

10. After this conversation, the Dents decided not to purchase Complainant's mobile home because they only wanted to purchase it if it could remain on the site where it was located. Subsequently, the Dents purchased another mobile home in a different section of the park.

¹ The evidence showed that it was customary for mobile homes to remain on the same site. Gary Northup testified that a mobile home has never been moved from one lot

11. Complainant continued to try and sell his mobile home. In February 1999, Complainant negotiated a sale with Judy and Adam Block. The purchase price was to be \$14,000. The Blocks were approved for a loan that would enable them to purchase the mobile home. The Blocks decided not to purchase the mobile home after Northup informed them that they could not move into the adults-only section because they had a child. Complainant continued to attempt to sell his mobile home. Ultimately, it was sold to Kenneth and Kimberly Amerine for \$10,000.

12. Throughout the time period when Complainant was attempting to sell his mobile home, he had an outstanding loan with American General Finance Company (American General). The loan was secured by his mobile home. If Complainant had been permitted to sell his home to the Dents, he would have been able to pay off the loan in full and would have received a refund of \$907.36. Instead, after he sold the home for \$10,000, he had to refinance the loan in the amount of \$7,151.95.

to another lot. (Tr. 235)

13. As a result of Respondent Northup's refusal to allow Complainant to sell his mobile home to the Dents, Complainant will have to pay additional interest on the loan to American Financial, totaling approximately \$6,518. Complainant also made two additional lot rental payments totaling \$380.00 because he was unable to sell the mobile home to the Dents. He also paid an insurance premium of \$30.64.

14. While the sale was pending with the Dents, Respondent Northup was advised by Complainant's realtor that refusing to approve the sale might be illegal. When the Commission was investigating Complainant's charge affidavit, the Commission investigator advised Respondent Northup that maintaining an "adults-only" section in the mobile home park was a violation of the law.

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 (4).³

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

³ The Commission also alleged that Respondent violated R.C. 4112.02(H)(12). However, the Assistant Attorney General did not pursue this allegation in its brief. (Br. 7)

2. R.C. § 4112.02(H)(1) provides in pertinent part that:

It shall be an unlawful discriminatory practice: . . .

(H) For any person to do any of the following:

- (1) Refuse to . . . rent, . . . housing accommodations because of . . . familial status,

- (4) Discriminate against any person in the terms or conditions of . . . renting, . . . any housing accommodations or in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing accommodations . . . because of . . . familial status

Housing accommodations includes “any vacant land offered for sale or lease”.

R.C. 4112.01(A)(10).

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. 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.⁴

6. Under federal case law, the same evidentiary framework used in employment discrimination cases (Title VII of the Civil Rights Act of 1964) applies to housing discrimination cases. *Kormoczy v. HUD*, 53 F.3d 821, 823 (7th Cir. 1995). Under Title VII case law, the Commission is normally required to establish a *prima facie* case and ultimately show that the employer's articulated reasons for its actions were a pretext for unlawful

⁴ Sections 3604(a) and (d) of Title VIII are substantially the same as R.C. 4112.02(H)(1) and (4), respectively.

discrimination. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792 (1973). However, the *McDonnell Douglas* evidentiary framework does not apply when there is direct evidence of unlawful discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion). In such cases, the burden of persuasion shifts to the Respondent to show by a preponderance of the evidence that it would have taken the same action despite its unlawful discriminatory practices. *Id.*, at 258.

7. There is direct evidence in this case that Respondents maintained a policy that prohibited families with children from occupying an area in the mobile home park consisting of 22 lots. Although there are exceptions to the familial status prohibition, [see, e.g. R.C. 4112.02(K)(5)], there was no evidence that this policy fell within one of the exceptions. Therefore, the Commission and Complainant are entitled to relief.

DAMAGES

8. 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

9. 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).⁵

10. During the hearing, the Commission presented evidence that Respondents' discriminatory behavior caused Complainant economic loss. Complainant suffered actual damages totaling \$12,928. This includes \$6,000 – the difference between the purchase price of the mobile home if it had been sold to the Dents and the purchase price Complainant had to accept in order to sell it subsequently to another buyer.

11. In addition, the evidence showed Complainant will ultimately have to pay an additional \$6,518 in interest on his loan which is secured by his mobile home, if he were to have to continue making payments on the loan to June 6, 2002. Therefore, Complainant is entitled to additional damages in this amount, less any interest that is remitted if the loan is paid off

⁵ 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).

before June 6, 2002. Complainant is also entitled \$410 in damages for the additional insurance payments and lot rental for the months of October and November 1998.

12. Complainant is also entitled to actual damages for the emotional distress that he suffered while he was attempting to sell his mobile home. It is obvious that Complainant was distressed after Respondents prevented him from selling his mobile home to the Dents. Therefore, the Hearing Examiner recommends that the Commission award Complainant \$5,000 for emotional distress.

PUNITIVE DAMAGES

13. 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).

14. 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.⁶

Adm.Code 4112-6-02.

15. Applying these factors to this case:

- The evidence showed Respondent Northup continued to maintain an adults-only section even after he was warned that his conduct might be illegal.
- The Commission did not present any evidence that there have been previous findings of unlawful discrimination against Respondents;
- Respondent stipulated that the mobile home park is profitable; and
- The evidence showed that Respondent Northup cooperated with the Commission during the investigation, although he did not agree with the investigator's conclusion that his policy was illegal.

⁶ 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.

16. Based on the foregoing discussion, the Hearing Examiner recommends that the Commission assess Respondents \$7,500 in punitive damages.

ATTORNEY'S FEES

17. 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.

18. To create a record regarding attorney's fees, the Commission's counsel should file affidavits from plaintiffs' attorneys in Pickaway 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.

19. 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 her receipt of the Commission's Application for Attorney's Fees.

20. 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 #8641 that:

1. The Commission order Respondents to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112. In addition, the

Commission should order Respondent Northup to attend and complete a fair housing training program at Respondent's expense. Furthermore, the Commission should order Respondent to display an Equal Housing Opportunity statement at its place of business and include the statement in all advertisements, rental applications and rental agreements;

2. The Commission order Respondents to pay Complainant \$17,928 in actual damages; and

3. The Commission order Respondents to pay Complainant \$7,500 in punitive damages.

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

March 30, 2001

PROCEDURAL HISTORY

This matter is before the Hearing Examiner upon the Commission's Application for Attorney's Fees. On March 30, 2001, the Hearing Examiner issued Findings of Fact, Conclusions of Law, and Recommendations (Hearing Examiner's Report) on liability and damages in Complaint #8641. Besides a Cease and Desist Order, the Hearing Examiner's Report recommended that the Commission award Complainant \$17,928 in actual damages and assess Respondent \$7,500 in punitive damages.

The Commission adopted the Hearing Examiner's Report on May 17, 2001. The Commission's counsel filed an Application for Attorney's Fees on July 31, 2001. Respondent did not file a reply.

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.)

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, e.g., 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. 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.

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.

6. The Commission satisfied its burden of documenting the time expended in this case. The Commission 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. The billing log indicates that counsel spent 71.60 hours on legally-related work.

7. The Commission also satisfied its burden of providing evidence in support of the requested hourly rate (\$150). The Commission provided an affidavit from John S. Marshall, an attorney who represents plaintiffs in civil rights cases in the Columbus area. Marshall stated that his hourly fee is \$250. He also stated that the rate of \$150 an hour for legal work is quite reasonable for work in Franklin County, Ohio for attorneys with Mr. Bowman's background and experience.

8. After reviewing the billing log and the affidavits provided by the Commission, the Hearing Examiner found the number of hours claimed and the requested hourly rate reasonable. Therefore, the lodestar amount in this case is $\$150 \times 71.60$ hours. Having considered the results obtained by the Commission, the Hearing Examiner concludes that the

lodestar amount is reasonable in relation to these results. Therefore, the Commission is entitled to \$10,740 in attorney's fees for time expended on all issues.

9. The Commission also requested compensation for 4.75 hours of travel time, including three hours to travel from Circleville to Columbus and back. Since three hours is somewhat longer than the average driving time to Circleville and back, the Hearing Examiner will allow two hours.² The rate of compensation for travel time is less than the rate of compensation for legal work. A reasonable rate of compensation for travel time is \$25 per hour. Therefore, the Hearing Examiner will recommend an award of \$93.75 for travel time (\$25 x 3.75 hours).

10. Counsel for the Commission also requested legal intern fees at the rate of \$50 an hour for 15.3 hours. Upon reviewing the legal intern's affidavit and time log, I reduced the number of hours for time spent on clerical duties and time that appears to be redundant, e.g., one half hour for sitting in on the telephone pre-hearing conference which was a learning

² Forty-three minutes is average. See Expedia.com

experience and not actually a work activity. I also deducted 1.2 hours for locating witnesses (the Dents and the Blocks), which was an investigatory/clerical function, as was one hour spent issuing subpoenas and three hours spent organizing the file. The total reductions are 6.7 hours. The hourly rate was reasonable – one third of the attorney’s rate. Therefore, the Hearing Examiner will recommend fees for the legal intern totaling \$425 (8.5 hours x \$50 per hour).

RECOMMENDATIONS

For all of the foregoing reasons, the Hearing Examiner recommends that the Commission’s Final Order in Complaint #8641 include an Order requiring Respondent to pay \$11,258.75 in attorney’s fees to the Office of the Ohio Attorney General.

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

November 16, 2001