

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

BOBBIE ROSS, ET AL.

Complainant

and

Complaint #8696

(AKR) H3022499 (23624) 040599

HUD #: 05 – 99 – 0701 – 8

RUBIN SZERLIP

Respondent

HEARING EXAMINER'S FINDINGS OF FACT,

CONCLUSIONS OF LAW, AND RECOMMENDATIONS

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HEARING EXAMINER'S REPORT BY:

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INTRODUCTION AND PROCEDURAL HISTORY

Bobbie Ross (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on April 5, 1999.

The Commission investigated and found probable cause that Rubin Szerlip (Respondent) 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 January 6, 2000. The public hearing was held in abeyance pending the Commission's conciliation efforts.

The Complaint alleged that Respondent sexually harassed Complainant because of her gender and threatened her with eviction after she refused his advances.

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

A public hearing was held on November 30, 2000 at the Mt. Vernon and Knox County Public Library in Mt. Vernon, Ohio.

The record consists of the previously described pleadings, a 335-page transcript, exhibits admitted into evidence at the hearing, and the post-hearing briefs filed by the Commission on April 18, 2001 and by Respondent on July 3, 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. Complainant filed a sworn charge affidavit with the Commission on April 5, 1999.

2. The Commission determined on January 6, 2000 that it was probable that Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(H).

3. Respondent is a provider of housing accommodations. He owns a five-unit apartment building located at 209 North Park Street in Mt. Vernon, Ohio.

4. Complainant is a female. Complainant is a single parent. In November 1998 she was living with her mother and receiving public assistance for herself and her two young children. She was also expecting a third child who was born on December 8, 1998.

5. Complainant responded to Respondent's rental advertisement in the newspaper. Ultimately, she rented Unit A, the apartment next to Respondent's apartment. Complainant signed a one-year rental agreement on November 3, 1998. The rent, \$450 per month, was paid directly to Respondent by Knox County Metropolitan Housing Authority. Complainant was responsible for paying the \$450 rental deposit, the monthly gas, and electric bills. Respondent was responsible for paying the water bill.

6. Complainant's father gave her \$200 or \$250 which she applied toward the \$450 deposit. (Tr. 115) Respondent agreed to let Complainant work for him in order to pay off the remainder of the deposit. Complainant cleaned Respondent's apartment and did other cleaning jobs around the common areas, including the yard and the laundry room. Respondent paid her \$7.00 an hour. He paid her by check. After she cashed the check, she occasionally made payments toward the balance due on the deposit. (Tr. 329) There was no payment schedule.

7. When Complainant rented the apartment, it did not have a refrigerator. Respondent let her use an old refrigerator that had been sitting outside in the back of the apartment complex.

8. Respondent had a habit of becoming involved in the personal lives of his tenants, most of whom were single females. (Tr. 17, 22) He also became involved in Complainant's personal life. He frequently visited her apartment. (Tr. 121, 325) On occasion he brought food (pizzas) and video tapes. (Tr. 121) He also asked Complainant to have lunch or dinner with him. Complainant always declined his invitations. (Tr. 122)

9. Respondent also complimented Complainant on her appearance. On one occasion he stated that she was "very beautiful." (Tr. 123) On another occasion he kissed her on the forehead. (Tr. 325) On occasion he would also put his arms around her or touch her on the shoulder or the leg. (Tr. 327) Respondent also told Complainant that she was a great housekeeper, a good worker, an excellent mother, that he had never met anyone like her before, and that she was the best thing that had ever happened to him and that he "loved her." (Tr. 124) Although Respondent's

statements and his actions made Complainant uncomfortable, she considered Respondent a “good friend.” (Tr. 124)

10. On February 5, 1999, Complainant went out on her first date since she moved to 209 North Park Street. She went out with Steve Keene, a friend of her cousin. When Complainant and Keene returned to Complainant’s apartment that evening, they found two or three of Keene’s friends waiting for Keene in order retrieve keys from him. (Tr. 186) Respondent had observed a car with some males in it parked across the street from the apartment complex prior to Complainant’s arrival. When Complainant and Keene arrived, one of the occupants of the car got out and walked up to the sidewalk. Keene proceeded to walk Complainant to the door of her apartment. He did not enter the apartment. He turned around and walked back to his car. (Tr. 187, 208, 209)

11. Respondent was outside when Complainant returned with Keene. Respondent, who was prone to using profanity and cursing, yelled at her, “I’m not having this shit here!” (Tr. 125, 203) He also said, “Don’t do this to me!

You can choose right now, me or them, but if this is what you're going to do over there, you're out!" (Tr. 263)

12. On February 11, 1999, Complainant received a Notice to Leave the Premises (Eviction Notice). The grounds for the eviction were various alleged violations of the rental agreement: failing to remit the balance of the security deposit (which was \$119 at that time); failing to pay utilities, which was \$105.07 for the period of time gas service was in the landlord's name; violating the no-smoking clause; committing disorderly conduct; and becoming a nuisance to guests and other tenants. Respondent also demanded that Complainant return the refrigerator or purchase it from him for \$100.

13. On February 23, 1999, Respondent gave Complainant a 24-hour notice that he was going to enter her apartment the following day to remove the refrigerator. Complainant had made arrangements for another refrigerator, but it was not going to be delivered until later that day. Respondent would not extend the time period to allow the new refrigerator to arrive. Complainant asked the police to intervene so she could have a few

extra hours to transfer her baby formula and children's food from Respondent's refrigerator to her new refrigerator. (Tr. 132, 133)

14. Prior to giving Complainant the Eviction Notice, Respondent did not advise Complainant that he wanted her to pay the balance due on the security deposit or pay him \$100 for the refrigerator. He did not ask her to stop violating the no-smoking clause, and he did not ask her to pay \$105.07 for past gas bills.

15. After Complainant received the Eviction Notice, her relationship with Respondent deteriorated. She stopped working for him and did not want to associate with him. She was unable to voluntarily move out of the apartment because she lacked the resources necessary to establish herself in another apartment.

16. When Complainant did not leave the premises by the March 15, 1999 deadline, Respondent served her with a second eviction notice ten days later. This notice ordered her to leave the premises on or before March 31, 1999. Complainant did not leave the premises.

17. In April 1999, Respondent put a new lock on the laundry facility and sent Complainant a letter telling her she could not longer use it.

18. Sometime after he gave Complainant the first eviction notice, Respondent filed an eviction action against Complainant in Mt. Vernon Municipal Court. A hearing was held in May 1999. The eviction failed because Kelly Strayer, Respondent's secretary, accepted payments from Complainant for the balance due on the security deposit and the unpaid gas bill, curing some of the alleged violations of the lease.

19. Respondent served Complainant with a third eviction notice on June 8, 1999, telling her to leave the premises by June 14, 1999. Complainant was not evicted.¹

20. Respondent served Complainant with a fourth eviction notice on July 26, 1999, notifying her to leave the premises before July 30, 1999. This notice contained new grounds for eviction:

¹ Apparently Respondent was still receiving rent from Knox County Metropolitan Housing Authority and, therefore, this kept Complainant from being evicted.

- (1) Repeatedly moving trash (week of May 23, 1999);
- (2) Laundry room vandalism (April 10, 1999);
- (3) Tool room break-in (between May 20 - May 26, 1999);
- (4) Harassing other tenants and guests;
- (5) Compliance with law — threatening acts (July 25, 1999); and
- (6) No-smoking clause.

(Comm.Ex. 7)

After receiving this notice, Complainant did not leave the premises and was not evicted through the court proceeding.

21. Respondent served Complainant with a fifth eviction notice on August 24, 1999 to leave the premises on or before August 31, 1999, for “continued violations of the lease agreement and municipal criminal ordinance.” Complainant did not leave the premises by August 31, 1999 and was not evicted by the Court.

22. On September 11, 1999, Respondent called the police alleging that Complainant was constantly running the water in her apartment. When the police entered the apartment with Respondent, they found one toilet was

running because a plastic piece was broken off in the tank. Complainant knew the toilet was broken and had been turning the shut off valve on and off whenever it was used. (Tr. 180, 181) While the police were at the apartment, Respondent shut the water off. He did not turn it back on after they left.

23. Complainant advised her attorney that Respondent had shut off her water.² Complainant's attorney filed a Motion for a Temporary Restraining Order to get the water turned back on. A hearing was held on the Motion on September 15, 1999. Respondent was ordered to fix the toilet and to restore water service to Complainant's apartment and keep it restored during the remainder of her tenancy. The Court also ordered the Knox County Metropolitan Housing Authority to continue paying the rent into escrow and stayed the eviction proceedings. Complainant was ordered to find an alternative residence and move out of the residence as soon as possible.

² Complainant was represented in the eviction action by an attorney from the Legal Aid Society.

The Court also ordered each party to avoid each other and communicate through their attorneys. Likewise, there was to be no harassment of either Respondent, Complainant, employees or associates of either party.

24. Complainant's lease expired on November 3, 1999. Complainant vacated the apartment on November 7, 1999.

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.³

³ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

1. The Commission alleged in the Complaint that Respondent threatened to evict Complainant because of her gender. The Complaint also alleged that Respondent harassed, coerced, and intimidated Complainant for exercising rights protected by R.C. 4112.02(H).

2. These allegations, if proven, would constitute violations of R.C. 4112.02(H)(4) and (12). These provisions provide in pertinent part that:

It shall be an unlawful discriminatory practice:

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

- (4) Discriminate against any person in the terms or conditions of . . . renting, . . . any housing accommodations, or in furnishing . . . services, or privileges in connection with the ownership, occupancy, or use of any housing accommodations . . . because of [their] sex; and
- (12) Coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person's having exercised or enjoyed . . . any right granted or protected by division (H) of this section.

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. Revised Code § 4112.05(E) and (G).

4. Sex discrimination claims in housing include claims of sexual harassment. Although sexual harassment is not specifically mentioned in Chapter 4112, the courts, in the context of employment discrimination and housing discrimination, have included sexual harassment as part of the definition of sex discrimination. *See Shellhammer v. Lewallen*, Fair Housing Fair Lend. Reporter, ¶15,472 (W.D. Ohio 1983), *affirmed without opinion*, 770 F.2d 167 (6th Cir. 1985).

5. The same standards of proof that apply to employment discrimination cases apply to housing discrimination cases.⁴ Since federal law is similar to state law, federal cases may also be used to interpret state law.

⁴ The standards for determining sexual harassment under Title VII of the Civil Rights Act of 1964 (Title VII) are applicable in addressing sexual harassment claims in a housing context. *Honce v. Vigil, supra* at 1088.

6. There are two forms of sexual harassment in housing cases: *quid pro quo* and hostile environment. *Honce v. Vigil*, 1 F.3d 1085 (10th Cir. 1993). Hostile environment claims require conduct that is “sufficiently severe or pervasive to alter the conditions of the housing environment.” *Id.*, at 1090, citing *Meritor Savings Bank v. Vinson*, 40 FEP Cases 1822 (1986). In order to satisfy the definition of sexual harassment, the behavior must have a sexual connotation.⁵

7. Based on the foregoing discussion, Respondent’s behavior was not sexual in nature. He merely asked Complainant to go out with him. There was no evidence that he made sexual comments or comments that contained sexual innuendoes. Nor did he touch Complainant in an intimate manner. Furthermore, even if Respondent’s conduct could be arguably sexual in nature, it was not serious enough to rise to the level necessary to create a hostile housing environment. See *Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333, 337 (7th Cir. 1993) (holding plaintiff’s claims – supervisor repeatedly asked about her personal life, told her how beautiful she was, asked her on dates, called her a dumb blonde, put his hand on her

⁵ Sexual harassment is defined as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.” Admin. Code

shoulder at least six times, placed “I love you” signs in her work area, and tried to kiss her once at a bar and twice at work – were not sufficient for actionable sexual harassment).

8. Nor was there evidence of *quid pro quo* harassment. “*Quid pro quo* harassment occurs when housing benefits are explicitly or implicitly conditioned on sexual favors.” *Honce v. Vigil, supra* at 1089.

9. Since the conduct in this case was not of a sexual nature and did not involve a request for sexual favors, the Commission cannot recover under the traditional sexual harassment theories.

10. However, the Commission can still recover if the terms and conditions of Complainant’s tenancy were adversely affected by her gender or if she was threatened, coerced, or intimidated in ways that interfered with her quiet enjoyment of the premises because of her gender. Conduct of a non-sexual nature can support a sexual harassment claim. The Commission must prove the conduct would not have occurred but for Complainant’s

gender. See *Hampel, infra*, quoting *McKinny v. Dole*, (C.A.D.C. 1985, 765 F.2d 1129, 1138-1139 (“We have never held that sexual harassment or other unequal treatment of an employee or a group of employees that occurs because of the sex of an employee must, to be illegal under Title VII, take the form of sexual advances or other instances with clearly sexual overtones. And we decline to do so now. Rather, we hold that any harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, compromise an illegal condition of employment under Title VII.”).

11. The Supreme Court of Ohio and the Sixth Circuit (the federal Court of Appeals where decisions from lower federal courts in Ohio are appealed), have both recently ruled that incidents constituting sexual harassment need not be sexual in nature, but need merely to be gender-based. The Supreme Court of Ohio stated:

[A]ctions that are simply abusive, with no sexual element, can support a claim for sexual harassment if they are directed at an employee because of his or her sex. Simply put, “[h]arassment alleged to be because of sex need not be explicitly sexual in nature.”

Hampel v. Food Ingredients Specialties, Inc., (2000) 89 Ohio St.3d 169, 179 (quoting *Carter v. Chrysler Corp.*, (8th Cir. 1999),

173 F.3d 693, 701.
See also *Bowman v. Shawnee State University* (6th Cir. 2000), 220 F.3d 456, 463 (“Non-sexual conduct may be illegally sex-based and properly considered in a hostile environment analysis where it can be shown that but for the employee’s sex, he would not have been the object of harassment.”); *Williams v. General Motors Corp.*, (6th Cir. 1999), 187 F.3d 553 at 565 (“Contrary to the dissent’s vehement assertion, the law recognizes that non-sexual conduct may be illegally sex-based where it evinces ‘anti-female animus, and therefore could be found to have contributed significantly to the hostile environment.’”).

12. Based on the foregoing discussion, the relevant inquiry is: Was the harassment, though not sexual in nature, based on Complainant’s gender? There is overwhelming evidence that Complainant was harassed after she returned from a date on February 5, 1999. Respondent’s decision to attempt to evict her was clearly not a business decision. It was an emotional decision. The reasons that were stated in the eviction notices were either false reasons or reasons that would not lead a reasonable landlord to evict a tenant under the circumstances.

13. The first reason set out in the eviction notice was Complainant's failure to remit the balance of the security deposit. This reason is suspect because there was no prior arrangement as to when the security deposit balance would have to be paid off, and there was no payment schedule.

Furthermore, there was no demand for payment in full prior to the eviction notice.

14. The second reason set out in the eviction notice was the failure to pay a past-due utility bill that was sent to the landlord before Complainant put the utilities in her name. Again, the evidence showed that there was no meaningful opportunity given to Complainant to pay the past-due utility bill before the eviction action.

15. The allegation in the eviction notices that Complainant committed disorderly conduct was never explained. It may have been a reference to the February 5, 1999 incident which is discussed *infra*.

16. The allegation that Complainant violated the no-smoking clause

was correct. However, Respondent had given Complainant permission to smoke in her apartment and never warned her that he was going to begin enforcing the clause again in February 1999.⁶

17. Respondent's request that the refrigerator be returned to him was also harassment. There was never any agreement that the refrigerator was to be paid for at some time in the future. There was never any discussion about the refrigerator until the February 5, 1999 incident and the subsequent notice of eviction.

18. After Complainant cured some of the alleged grounds for eviction, Respondent came up with new grounds. The new grounds also had no basis in fact or would not lead a reasonable landlord to evict a tenant under the circumstances. The allegation that Complainant repeatedly removed trash was partially true, but not cause for eviction. The trash was located next to Complainant's apartment. Complainant put the trash out for pick-up on the days that it was supposed to be picked up. On one occasion, it was not

⁶ Complainant used to smoke on her porch. Respondent told her that since she took such good care of her place, he did not mind if she smoked in there once in a while. (Tr. 131) Respondent also saw Complainant's father smoking in the apartment and never said anything to her about it. (Tr. 131)

picked

up when it was supposed to be, so Complainant put it in the back of the premises until the next pick up. (Tr. 139)

19. Another ground, “laundry room vandalism”, was not vandalism at all. Instead it was accidental damage caused by young children who were playing in the laundry room. Complainant’s child was not the only one who caused the damage. (Tr. 221-222) Likewise, the alleged tool room break-in was not really a break-in and was another incident that involved children. (Tr. 140)

20. The “threatening act” allegation was the result of an argument Complainant had with Kelly Strayer after Complainant accidentally locked herself out of her apartment in July 1999. When this occurs, Respondent routinely uses his spare key to let the tenants back in their apartments. When Complainant asked Kelly Strayer to open the door to her apartment, she heard Respondent tell Strayer to tell Complainant to call a locksmith. Complainant could not afford to call a locksmith. Instead, she pushed in the window air conditioner, lifted one of her children through the opening, and had them unlock the door. (Tr. 144) Strayer came around the corner

and began laughing at Complainant. There was an exchange. Complainant was upset and told Strayer she needed to get out of her face or she was “going to go off” on her. (Tr. 144) Subsequently, Strayer filed a criminal complaint in Municipal Court about this incident. Ultimately, Complainant was found guilty of disorderly conduct because she “alarmed” Kelly Strayer. (Tr. 173)

21. In addition to harassing Complainant about these issues, Respondent also harassed her in other ways. He shut off her water for one week, allegedly because she was intentionally letting the water run. There was no evidence she was doing this. The only evidence regarding water usage was evidence that the toilet was running because Respondent had delayed repairing the toilet. The toilet was not repaired until the Court ordered Respondent to repair it in September 1999. Locking Complainant out of the laundry room was additional evidence of harassment.

22. Therefore, while it is clear that Respondent was trying to evict Complainant and harassing her, the Commission cannot prevail unless Respondent’s behavior was based on her sex. I believe there is ample

circumstantial evidence from which to conclude that the harassment and the attempted eviction were sex-based. First, there was testimony that Respondent took a special interest in his female tenants. (Tr. 22) Some of these tenants believe that Respondent took adverse actions against them because they would not have a relationship with him.⁷ (Tr. 21, 50-53) This evidence tends to support the Commission's argument that Respondent's reaction on February 5, 1999 was sex-based.

23. The incident on February 5, 1999 arose when Complainant went on her first date since moving into Respondent's apartments. When Complainant returned with Steve Keene, she went right into her apartment. He did not go in with her. He merely walked her up to the door and left. Respondent was upset and angry. This incident caused him to file the eviction one week later. (Tr. 87, 203, 208, 209, 263)

⁷ This evidence was, for the most part, hearsay evidence. Respondent's ex-wife testified. There is no question there was a lot of animosity between the parties; however, I still found her testimony credible. She was *not* anxious to come forward with this evidence. She *did not* even want to be in the same room with Respondent. Therefore, I find that in spite of the animosity between the parties, her testimony about Respondent's overtures toward a female tenant was credible. Her testimony was consistent with the testimony of Respondent's former bookkeeper, who, while also having some disagreement with Respondent about a failed business deal, testified credibly about instances where other female tenants told her that Respondent made overtures toward them. She also testified about occasions where these tenants believed Respondent was looking into their apartments through the windows or through peepholes. (Tr. 50-53) I found her testimony credible. There was also credible testimony about Respondent's efforts to evict female

tenants because they had relationships with males. (Tr. 96, 98, 288)

24. Respondent testified that the decision to evict Complainant was based on all of the reasons given in the eviction notices and was triggered by Complainant's conduct on February 5, 1999. Respondent testified that the males who were waiting for Keene to return were being disruptive.⁸ He testified that when Complainant returned with Keene, his male friends were trying to carry a case of beer into the apartment. He testified that he caught one of them urinating on his property and that another one of them was vomiting near the street by the car. His testimony was not credible. I believe Complainant's testimony that there was nothing unusual occurring when she returned with Keene and that no one went beyond the sidewalk except Keene, and no one entered her apartment or attempted to enter her apartment. The evidence showed that another tenant was having a party that night. Complainant was not the one having the party.

⁸ The testimony about the number of males in the car was unclear. Respondent testified about a car with four males in it. (Tr. 261) He testified about a second car with one or two males in it. (Tr. 262) He testified there could have been 3 males in the first car. (Tr. 262) Complainant could only recall one car and the exchange of keys between Keene and his friend.

25. After a careful review of the entire record, the Hearing Examiner does not believe that Respondent's articulated reasons for Complainant's eviction were good faith business decisions. Instead, the Hearing Examiner concludes that they are more likely than not a pretext for unlawful sex discrimination.⁹ The Hearing Examiner concludes that Respondent was motivated by Complainant's rejection of his repeated attempts to have their relationship evolve into a romantic one. When Respondent saw what he perceived as the beginning of a relationship with other males, he became enraged and decided to evict Complainant. Thus, his attempts to evict her were sex-based. In addition, he also began to harass her. The harassment was sex-based and pervasive. It created a hostile housing environment.

⁹ Normally, the Commission cannot second guess a landlord's reasonable business decision, however erroneous or illogical it may appear to be. However, it is within the province of the fact-finder to conclude that the landlord's business decision was so lacking in merit that it was not genuine.

The distinction lies between a poor business decision and a reason manufactured to avoid liability. Thus, facts may exist from which a reasonable jury could conclude that the employer's business decision was so lacking in merit as to call into question its genuineness.

Hartsel v. Keys, 72 FEP Cases 951, 955 (6th Cir. 1996) (citations and quotation marks omitted).

26. For all the foregoing reasons, the Commission and Complainants are entitled to relief. Relief includes actual damages, punitive damages, and other appropriate relief.¹⁰

ACTUAL DAMAGES

27. 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).

¹⁰ References to “Complainants” refer to Ms. Ross’ children.

28. The Commission contends that Complainant suffered economic loss from Respondent's violation of R.C. 4112.02(H). The Commission argues that Complainant is entitled to actual damages for babysitting costs when she had to go to court to defend herself in the eviction action, laundry costs when she was denied the use of Respondent's laundry facilities, and moving costs. However, the Commission did not provide any evidence concerning the amounts that were expended. Therefore, I will recommend a nominal amount, \$200, for economic damages.

29. The Commission also contends that Complainant suffered 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).

30. Complainant testified that Respondent's actions made her extremely upset and upset her children. Her testimony was credible. In light of her testimony and the totality of the circumstances surrounding Respondent's actions, the Hearing Examiner recommends that the Commission award Complainants \$6,000 for emotional distress.

PUNITIVE DAMAGES

31. 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).

32. Another purpose is to punish the wrongdoer for his outrageous, willful, and wanton conduct. *Marr v. Rife*, 503 F.2d 735, 744 (6th Cir. 1974).

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

- The nature of Respondent's conduct;
- Respondent's prior history of discrimination;
- Respondent's size and profitability;
- Respondent's cooperation or lack of cooperation during the investigation of the charge; and
- The effect Respondent's actions had upon Complainants.¹¹

Ohio Adm.Code 4112-6-02.

34. Applying the foregoing factors to this case:

- Respondent's actions were intentional and they were extreme;
- There is no evidence that there had been previous findings of unlawful discrimination against Respondent;
- Respondent owned at least one rental property – the five units where he and Complainant resided, and apparently owned some additional property. Neither the Commission nor Respondent presented evidence about the profitability of the units; and

¹¹ This factor is more appropriately considered when determining actual damages.

- The Commission argued that Respondent did not cooperate in *these* proceedings because he was unruly, interrupted the proceedings, and made editorial comments during the proceedings. However, the standard for punitive damages relates to Respondent's cooperation or lack of cooperation *during the investigation*. There was no testimony from the investigator about this issue.

35. Based on the foregoing discussion, the Hearing Examiner recommends that the Commission assess Respondent \$5,000 in punitive damages to be shared equally by Complainants.

ATTORNEY'S FEES

36. 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.

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

38. 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 their receipt of the Commission's Application for Attorney's Fees.

39. 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.

OTHER RELIEF

40. In its brief Respondent's counsel maintains that Respondent is no longer a housing provider. However, should this be in error, or should Respondent become a housing provider in the future in Ohio, he must report that fact to the Commission. The Hearing Examiner also recommends that Respondent be ordered to attend a class on fair housing practices given by a fair housing agency and that he post a fair housing poster in a conspicuous place where it can be viewed by all of his tenants.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint #8696 that:

1. The Commission order Respondent to pay Complainants \$6,200 in actual damages;
2. The Commission order Respondent to pay Complainants \$5,000 in punitive damages;

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

4. The Commission order Respondent to display the fair housing logo and take a class on fair housing law.

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

September 20, 2001

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

BOBBIE ROSS, ET AL.

Complainant

and

Complaint #8696

(AKR) H3022499 (23624) 040599

HUD #: 05 – 99 – 0701 – 8

RUBIN SZERLIP

Respondent

ADDENDUM TO THE HEARING EXAMINER'S RECOMMENDATIONS

RE: THE COMMISSION'S APPLICATION FOR ATTORNEY'S FEES

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Complainant

HEARING EXAMINER'S REPORT BY:

Franklin A. Martens, Esq.
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PROCEDURAL HISTORY

This matter is before the Hearing Examiner on the Commission's Application for Attorney's Fees. The Hearing Examiner issued Findings of Fact, Conclusions of Law, and Recommendations (Hearing Examiner's Report) on liability and damages in Complaint #8641 on September 29, 2001.

Besides a Cease and Desist Order, the Hearing Examiner's Report recommended that the Commission award Complainant \$6,200 in actual damages and assess Respondent \$5,000 in punitive damages.

The Commission adopted the Hearing Examiner's Report on November 8, 2001. The Commission's counsel filed an Application for Attorney's Fees on December 5, 2001 and a Supplemental Application on December 7, 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 82 hours on legally-related work.²

7. The Commission also satisfied its burden of providing evidence in support of the requested hourly rate (\$150). The Commission provided affidavits from Alexander Spater and Joshua J. Morrow who represent plaintiffs in civil rights cases in the Columbus area. Attorney Spater stated that the rate of \$150 an hour for legal work is quite reasonable for work in Franklin County, Ohio for attorneys with Ms. Goldstein's background and experience.

² Two hours were spent organizing the file. This is not legally-related work and, therefore, not fee-generating. The four and one half hours spent on travel time is addressed in ¶ 9.

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 x 82 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 \$12,300 in attorney's fees for time expended on all issues.

9. The Commission also requested compensation for 5.0 hours of travel time, including time spent waiting for Respondent to appear for a deposition. 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 \$50.00 for travel time (\$25 x 2 hours).³

³ Two hours for travel from Columbus to Mt. Vernon is reasonable. See Expedia.com.

10. Counsel for the Commission also requested reimbursement for court reporter fees of \$42.00 and attorney's fees for waiting time for a deposition where Respondent failed to appear. This request must be denied because the Commission does not have statutory authority to award costs under R.C. 4112.04(G)(1). This section refers to "reasonable attorney's fees," not costs. Costs related to the failure of a party to appear for a deposition can only be awarded pursuant to an Order issued pursuant to Civ. R. 37(D).

RECOMMENDATIONS

For all of the foregoing reasons, the Hearing Examiner recommends that the Commission's Final Order in Complaint #8696 include an Order requiring Respondent to pay \$12,350 in attorney's fees to the Office of the Ohio Attorney General.

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

January 9, 2002