

INTRODUCTION AND PROCEDURAL HISTORY

Nikki M. Taylor (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on July 9, 1999.

The Commission investigated and found probable cause that Kirk Whitmore and Kimberly Whitmore (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 8, 2000. The public hearing was held in abeyance pending the Commission's conciliation efforts.

The Complaint alleged that Respondents discriminated against Complainant because of her disability.

A public hearing was held on January 23, 2001 at the DiSalle Government Center in Toledo, Ohio.

The record consists of the previously described pleadings, a transcript consisting of 183 pages, and exhibits admitted into evidence at the hearing. The Commission filed a post-hearing brief on May 31, 2001. Respondents did not file a post-hearing brief.

PROCEDURAL ISSUE

Respondents did not file an Answer. At the hearing Counsel for the Commission objected to Respondents' counsel's participation because no Answer was filed and he did not participate in the pre-hearing conference. The Hearing Examiner asked Respondents' Counsel to admit or deny the allegations in the Complaint for the record. Respondents' Counsel admitted all the procedural and jurisdictional allegations. He also admitted that Complainant was disabled.¹ He denied that Respondents discriminated against Complainant because of her disability.

¹ The concession by Respondent that Complainant was disabled was a major concession. Many of the courts that have addressed the question of whether asthma is a disability have concluded that it is not.

Many courts addressing the issue, have found that asthma does not substantially limit the ability of the particular plaintiff to work or breathe and that asthma therefore does not constitute a disability under the ADA.

Tangires v. The Johns Hopkins Hospital, 10 AD Cases 215 (D. Md. 2000) at fn. 5 (citations omitted).

While there is no question that asthma is a physical impairment that impairs a person's ability to breathe when they are having an asthma attack, the condition must be one that substantially limits the major life activity of breathing. Complainant's asthma was seasonal in nature; Complainant did not have any major problems with her asthma until spring 1999. (Tr. 30) A condition that is seasonal is not substantially limiting. *Mayers v. Washington Adventist Hospital*, 131 F.Supp. 2d 743, 749 (plaintiff who experienced only temporary difficulty in breathing due to extreme work conditions or seasonal changes was not substantially limited in her ability to breathe).

R.C. 4112.05(C) states that:

The respondent has the right to file an answer or an amended answer to the original and amended complaints and to appear at the hearing in person, by attorney, or otherwise to examine and cross-examine witnesses.

Therefore, the Hearing Examiner allowed Respondents' counsel to participate in the hearing.

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 July 9, 1999.

2. The Commission determined on June 8, 2000 that it was probable that Respondents engaged in unlawful discriminatory practices in violation of R.C. 4112.02(H).

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

4. Complainant is a single mother. She has one child. She suffers from asthma in the summer months when she is exposed to allergens in the outside air. Therefore, her doctor recommended that she live in an apartment with air conditioning. (Tr. 17)

5. In August 1998 she was searching for an air conditioned apartment in the Toledo area. Respondents, who are providers of housing accommodations, leased Complainant a two-bedroom apartment at 3533 Woodland, Toledo, Ohio on August 18, 1998 for one year. The apartment contained two window air conditioners, one in the dining room and one in the master bedroom. (Tr. 19, Comm.Ex. 1)

6. In late October 1998 Complainant asked Kirk Whitmore to remove the air conditioner in the dining room because it was leaking water. (Tr. 21)

7. During Complainant's tenancy she experienced numerous maintenance problems. (Tr. 24) In April 1999 the stove stopped working and Respondents replaced it. The apartment also was infested with insects in 1998 and again in June 1999. (Comm.Ex. 5, Comm.Ex. 11)² The pilot light on the hot water tank needed to be re-lit on one occasion. (Tr. 142)

8. In April 1999 Complainant concluded that one air conditioner was not sufficient to cool the apartment. (Tr. 22) In May 1999 Complainant concluded the air conditioner was not cooling properly. (Tr. 22) She notified Mike Morris, Respondents' maintenance person. He visited Complainant's apartment on May 20 in response to her complaint to him about the air conditioner and a clogged drain. (Tr. 25, Comm.Ex. 2) Complainant was not present. Morris left a note which stated: "I snaked the drain, don't have AC certification (can't get freon). Will communicate with the Whitmores." (Comm.Ex. 2)

² Commission Exhibit 11 was a proffered exhibit. However, upon reconsideration, it is admitted.

9. Complainant called the Whitmores on May 21 and spoke to Kim Whitmore. She told her that Mike Morris left a note that the air conditioner needed freon. (Tr. 25) Kim Whitmore said she would have her husband check into it. (Tr. 25) Mr. Whitmore examined the unit on May 28. Complainant was not present. He concluded the unit was not properly cooling because the thermostat was not at its highest setting. When he adjusted it, the compressor came on and the unit began to cool. (Tr. 145-146)

10. Complainant sent Respondents a written notice on May 30, 1999 that the air conditioner was still not operating properly. She threatened to escrow her rent if the air conditioner was not serviced by June 30, 1999. (Comm.Ex 3) Respondents believed the air conditioner was operating properly and took no further action.

11. Complainant continued to live in the apartment with her daughter. She continued to work and attend school. Complainant continued to complain to Respondents that the air conditioner was not operating properly. She called them approximately 15 times during the month of June. (Tr. 30)

Complainant also decided to purchase a house and began working with a realtor.

12. Complainant placed her July rent in rent escrow with the Toledo Municipal Court. A rent escrow hearing was held on July 14, 1999. Respondents were ordered to repair or replace the air conditioner by July 16, 1999. (Comm.Ex. 8) Respondents contacted Household Centralized Service to examine the unit. The unit was examined on July 14, 1999. The service technician reported the wattage was normal and no freon was needed. He tested the output air temperature and there was an 18° drop. He reported that no defects were found. (Resp.Ex. A)

13. Since Complainant believed the unit was not functioning properly because it was not cooling the apartment, she had another appliance service company, Appliance Palace, inspect the unit on July 17, 1999. The inspector provided a written statement that the air conditioner needed internal cleaning of the condenser coils and “possible freon.” His report stated, “The evaporator coil does not cool all the way up to top of coil.” (Comm.Ex. 9)

14. Complainant entered into a contract to purchase a house on June 21, 1999. A second rent escrow hearing was held on July 21, 1999. Complainant advised the court that she was going to move out of her apartment. Complainant moved into the house she purchased on July 22, 1999. (Unmarked Exhibit, Auburndale City Wide Moving) She had a new furnace with central air conditioning installed in the house on September 3, 1999. (Comm.Ex. 12)

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.³

1. The Commission argues that Respondents failed to reasonably accommodate Complainant's disability because they did not provide her apartment with air conditioning.

2. This allegation, if proven, would constitute a violation of R.C. § 4112.02, which provides in pertinent part that:

It shall be an unlawful discriminatory practice:

(H) For any person to:

(19) . . . [r]efuse to make reasonable accommodations in rules, policies, practices, or services when necessary to afford a disabled person equal opportunity to use and enjoy a dwelling unit

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

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

of Section 4112.02(H) by a preponderance of reliable, probative and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. Federal case law 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.

5. Under federal case law, the same evidentiary framework used in employment discrimination cases applies to housing discrimination cases. *Kormoczy v. HUD*, 53 F.3d 821, 823 (7th Cir. 1995). In absence of direct evidence, this framework normally requires the Commission to first establish a *prima facie* case of unlawful discrimination. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792 (1973).

6. However, in this case, it is not necessary to determine whether the Commission proved a *prima facie* case because Respondents articulated a legitimate, nondiscriminatory reason for their failure to fix Complainant's air

conditioner. Respondents' articulation of a legitimate, nondiscriminatory reason removes any need to determine whether the Commission proved a *prima facie* case, and the "factual inquiry proceeds to a new level of specificity." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 713, 31 FEP Cases 609, 611 (1983), *quoting Burdine, infra* at 255, 25 FEP Cases at 116.

Where the defendant has done everything that would be required of him if the plaintiff has properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant.

Aikens, supra at 713, 31 FEP Cases at 611.

7. Respondents articulated their legitimate, nondiscriminatory reason through the testimony of Complainant's landlord, Kirk Whitmore. He testified that the air conditioner did not need to be serviced or replaced. Respondents also offered the inspection report from a service appliance service company. The report was dated July 14, 1999 and found the air conditioner free of defects and operating properly. (Resp.Ex. A)

8. Respondents' testimony and documentary evidence were sufficient to meet their burden of production at this stage of the

proceeding. (A respondent's burden is not a burden of proof. It is only a burden of production.⁴) A respondent is not required to prove absence of discriminatory intent. *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978), 18 FEP Cases 520; *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978), 17 FEP Cases 1062.

9. Respondents having met their burden of production, the Commission must prove that Respondents unlawfully discriminated against Complainant because of her disability. *St. Mary's Honor Center v. Hicks*, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondents' articulated reason for failing to service Complainant's air conditioner was not the true reason, but was "a pretext for discrimination." 62 FEP Cases at 102, *quoting Burdine, supra* at 253, 25 FEP Cases at 115.

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

Hicks, supra, 62 FEP Cases at 102.

⁴ Respondent articulates a legitimate, nondiscriminatory motive when it produces admissible evidence which allows the trier of fact to rationally conclude that Respondent's decision was not motivated by discriminatory animus. The Commission retains the burden of persuasion throughout the proceeding. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 25 FEP Cases 113, 115 (1981).

10. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondents' articulated reason for failing to service Complainant's air conditioner. The Commission may directly challenge the credibility of Respondents' articulated reason by showing that the reason had no basis *in fact* or it was *insufficient* to motivate the decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Such direct attacks, if successful, permit the factfinder to infer intentional discrimination from the rejection of the reason without additional evidence of unlawful discrimination.

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination . . . [n]o additional proof is required.⁵

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

11. The Commission argues that Respondents' reason for failing to service the air conditioner, (i.e. that it did not need to be serviced), was not

⁵ Even though rejection of a respondent's articulated reason is "enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*" *Hicks, supra* at 511, 62 FEP Cases at 100, n.4.

credible. Respondent Kirk Whitmore testified that he and his brother went to the apartment around noon on May 28, 1999 believing that Complainant would be present with the intent to remove the air conditioner to have it serviced. Complainant was not there. When Whitmore inspected the air conditioner, he found that the thermostat was only turned up half way. He turned it to the maximum setting and the unit began to cool. He concluded that no service was necessary and did nothing further.⁶ (Tr. 126, 127) The next written notice Respondents received was the letter Complainant sent them on June 30, 1999 which was also the date that she filed her application with the Toledo Municipal Court to place her rent into escrow. A hearing was held on her request on July 14, 1999, which resulted in a court order that the Whitmores replace or repair the air conditioner. A service technician checked the air conditioner on July 14 and found it was operating properly. Therefore, Respondents believed they complied with the court order because they could not repair something that did not need to be repaired.⁷ (Tr. 130-132)

⁶ The Commission relies on the note from Mike Morris as evidence that the air conditioner needed freon. *See Finding of Fact, paragraph 8.* However, the note was ambiguous. It is more likely that Mike Morris did not inspect the unit. Complainant misinterpreted the note, which led her to believe the unit needed freon.

⁷ The report from Respondent's service technician was more credible than the report Complainant obtained. Respondent paid \$49.95 for a service call that included testing. Complainant paid \$14.95 for a visual inspection that was not conclusive regarding the need for freon.

12. Although Complainant disputed that Respondents came to her apartment on May 28, I find Respondent Kirk Whitmore's testimony credible. I also believed Kirk Whitmore's testimony that the unit was cooling. Ultimately the most persuasive evidence that the unit was cooling properly was the evidence from the appliance service company that inspected the unit on July 14, 1999. It follows that if the unit was operating properly on July 14, 1999, it was operating properly when Complainant first complained about the problem at the end of May 1999.

13. Even if I were to find that Respondents' testimony was not credible and that the air conditioner wasn't functioning properly, the facts of this case do not support the conclusion that Respondents' reluctance to service the air conditioner was motivated by any animus against Complainant because she was disabled. Complainant did not believe that Respondents were refusing to fix the air conditioner because she was disabled; she believed it was related to her race, African-American.⁸ (Comm.Ex. 11)

⁸ There was no allegation of race discrimination in the Commission's Complaint.

14. Having considered the entire record and all the surrounding facts and circumstances, it is my conclusion that this is a landlord/tenant dispute about the need to fix an air conditioner. The evidence showed that the air conditioner was functioning properly, although it may not have had the ability to cool an entire apartment during a hot summer. Unfortunately, the controversy deteriorated to the extent that Complainant believed she was being persecuted by the Whitmores, and the Whitmores believed that Complainant was repeatedly making unfounded complaints.

15. Since the evidence failed to support the allegation that the Whitmores intentionally discriminated against Complainant because of her disability, the Complaint must be dismissed.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8830.

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

October 30, 2001