

INTRODUCTION AND PROCEDURAL HISTORY

Marlina Moore (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 6, 1999.

The Commission investigated and found probable cause that James R. Hatcher (Respondent) engaged in unlawful discriminatory practices in violation of Revised Code (R.C.) 4112.02(H)(1).

The Commission issued a Complaint, Notice of Hearing, and Notice of Right of Election on July 13, 2000. The public hearing was held in abeyance pending the Commission's conciliation efforts.

The Complaint alleged that Respondent refused to rent housing accommodations to Complainant because of a perceived disability.

Respondent filed an Answer to the Complaint. Respondent denied all of the allegations in the Complaint except for the averment that he is a provider of housing accommodations.

A public hearing was held on May 3, 2001 at the Lausche State Office Building in Cleveland, Ohio. At the end of the hearing, Respondent moved for the admission of an affidavit from one of his former tenants. The Commission objected to the admission of the affidavit. The Hearing Examiner denied admission of the affidavit, but left the record open to allow counsel to depose the former tenant, Roberta Legion, after the hearing.

Counsel took Legion's deposition on June 19, 2001.¹ Respondent filed the deposition with the Hearing Examiner on July 11, 2001. The deposition is hereby admitted into evidence.

The record consists of the previously described pleadings, a 188-page transcript divided into two volumes, two exhibits admitted into evidence at the hearing, Legion's deposition, and a post-hearing brief filed by the Commission on October 16, 2001. Respondent did not file a post-hearing brief.

¹ Legion, an elderly woman, currently lives in a nursing home. Legion was unable to attend the hearing for health reasons. Counsel took her deposition at the nursing home.

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. Complainant filed a sworn charge affidavit with the Commission on October 6, 1999.

2. The Commission determined on July 13, 2000 that it was probable that Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(H)(1).

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

4. Respondent is a provider of housing accommodations. Respondent owns a two-story house located at 3446 East 118th Street in Cleveland, Ohio. Respondent rents both the first floor and the second floor of the house.

5. Complainant has a physical impairment that requires her to walk with a cane. Complainant receives social security compensation because of this condition.

6. In June 1999, Complainant sought to rent housing accommodations in the Cleveland area. Complainant called Respondent in response to his advertisement in *The Plain Dealer* to rent the first floor unit of the

house at 3446 East 118th Street.² Respondent arranged for Complainant to view the available unit.

7. Complainant visited the house a few days after the initial call. Respondent noticed Complainant's use of a cane and asked her, "What happened?" (Tr. 20) Complainant informed Respondent that she had a stroke in March 1998. Respondent inquired whether Complainant needed any accommodations, and he specifically asked about how she would get in and out of the bathtub. Complainant advised Respondent that she did not need any special accommodations.

8. Respondent showed Complainant the first floor unit. Respondent informed Complainant that he was cleaning, painting, and doing other "minor adjustments" before anyone moved into the unit. *Id.* Complainant mentioned to Respondent that one of the railings leading to the front porch was "kind of loose." (Tr. 19)

9. Complainant and Respondent also discussed the cost of the apartment and her finances. Respondent informed Complainant that the rent

² The unit became vacant in the spring of 1999. (Tr. 137)

was \$450 per month, and the security deposit was one month's rent. Respondent asked Complainant about her employment.³ Complainant told Respondent that she was unemployed, but she and her children received approximately \$1,200 per month from Social Security for disability compensation.

10. Before Complainant left the premises, Respondent informed her that he usually requested references from prospective tenants. Respondent also informed Complainant that he had spoken to one other person about the unit at that time.

11. Complainant returned to the house approximately one week after her first visit. Respondent showed Complainant work that had been performed on the unit. Complainant provided Respondent the names and telephone numbers of six references.

12. Respondent called Complainant a few days after her second visit. Respondent indicated that he checked her references and "felt good" about renting to her. (Tr. 24) Respondent asked Complainant if she had \$900 for

³ Respondent also asked Complainant for other information such as her birthdate, Social Security number, and her childrens' names and ages.

the first month's rent and security deposit. Complainant told him that she had the money. Respondent then scheduled to meet with Complainant at a local Burger King to exchange the money and have her sign a rental agreement.

13. Complainant went to Burger King at the scheduled time.⁴ Respondent pulled his vehicle beside the car that Complainant was sitting in. Respondent apologized for being late. Respondent told Complainant that he was unable to meet with her because of an emergency. Complainant informed Respondent that she had \$900 with her. Respondent indicated that he would schedule another meeting where she could pay him the money, sign the paperwork, and get the keys. Respondent called Complainant "two or three days later" and arranged such a meeting at the house. (Tr. 26)

14. Complainant received a telephone call from Respondent as she was leaving for the meeting with him. Respondent informed Complainant that he was unable to rent to her based on the advice of his attorney. Respondent told Complainant that his attorney advised him to not rent

⁴ The meeting at Burger King apparently occurred in early July 1999. (Tr. 175)

to her because her disability might cause her to fall at the house, and he would be held liable as the homeowner.

15. Following Complainant's rejection, the unit in question remained vacant until Respondent rented it to Tonya Hobbs on November 9, 1999.

(Comm. Ex. 1)

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.

1. The Commission alleged in its complaint that Respondent refused to rent housing accommodations to Complainant because of a perceived disability.

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:

- (1) Refuse to . . . rent, . . . housing accommodations, . . . or otherwise deny or make unavailable housing accommodations because of . . . disability,

3. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(H) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

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. The same standards of proof that apply to employment discrimination cases generally apply to housing discrimination cases. *Kormoczy v. HUD*, 53 F.3d 821, 823 (7th Cir. 1995). Normally, these standards require the Commission to first prove a *prima facie* case of unlawful discrimination and ultimately show that the housing provider's articulated reasons for the housing decision were, more likely than not, a pretext for such discrimination. *Texas*

Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, (1973). However, if the Commission proves by a preponderance of the evidence that an impermissible factor “played a motivating part” in the housing decision, the burden of persuasion shifts to the housing provider to show that the same action would have been taken, more likely than not, without considering that factor. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion); *Kormoczy, supra* at 824.

6. To invoke *Price Waterhouse* and shift the burden of persuasion to Respondent, the Commission may rely on either direct evidence or circumstantial evidence “sufficient to prove, without benefit of the *McDonnell Douglas* presumption, that the defendant’s decision was more probably than not based on illegal discrimination.” *Hoffman v. Sebro Plastics, Inc.*, 108 F.Supp.2d 757, 768 (E.D. Mich. 2000). The dictionary definition of direct evidence is “[e]vidence which, if believed, proves the fact in issue without inference or presumption.” *Black’s Law Dictionary*, Sixth Ed., p. 460. The Hearing Examiner credited Complainant’s testimony about Respondent’s stated reason for not renting to her: his attorney advised him that Complainant

might fall at the house because of her disability, and he would be liable as the homeowner.⁵ This testimony is direct evidence of disability discrimination.⁶

7. Given this direct evidence, the burden of persuasion shifted to Respondent to show that he would not have rented to Complainant regardless of her physical impairment. Respondent failed to present sufficient evidence to meet this burden. Therefore, the Commission and Complainant are entitled to damages as a matter of law.

8. Assuming for purposes of argument that the *McDonnell Douglas* evidentiary framework applies here, the Commission must establish a *prima facie* case of discrimination. The burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). It is simply part of an evidentiary scheme “intended progressively to

⁵ In determining credibility in this case, the Hearing Examiner considered Roberta Legion’s deposition testimony. While Legion may have a disability that substantially limits her ability to breath, there is no evidence that she walked with a cane during her tenancy with Respondent. Legion’s testimony, while probative, did not overcome Respondent’s inability to articulate legitimate, nondiscriminatory reasons for denying Complainant housing accommodations, and the Hearing Examiner’s assessment that Complainant was more credible than Respondent.

⁶ Even if Complainant did not have an actual disability under the statutory definition, she would still be protected because Respondent perceived her to be disabled. (See *Conclusions of Law*, paragraphs 11-17, *infra*).

sharpen the inquiry into the elusive factual question of intentional discrimination.” *Id.*, at 253, n.8.

9. The proof required to establish a *prima facie* case is flexible and may vary on a case-by-case basis. *McDonnell Douglas, supra* at 802, n.13. The Commission may establish a *prima facie* case of discrimination in this case by proving that:

- (1) Complainant is disabled under R.C. 41112.01(A)(13);
- (2) Complainant expressed interest in renting and was qualified to rent available housing accommodations; and
- (3) Respondent denied Complainant available housing accommodations under circumstances which give rise to an inference of unlawful discrimination.

10. The Commission concedes that, though Complainant has a physical impairment, it does not rise to the level of an actual disability. The Commission argues that Complainant is protected under the statute because Respondent perceived her to be disabled. R.C. 4112.01(A)(13) defines "Disability" as:

. . a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or *being regarded as having a physical or mental impairment*. (Emphasis added.)

11. To determine whether Respondent perceived Complainant to be disabled, it is appropriate to refer to relevant case law under analogous federal statutes such as the Americans with Disabilities Act of 1990 (ADA). *McGlone, supra*. Likewise, it is appropriate to refer to the regulations and guidelines of the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcement of the ADA.

12. EEOC regulations identify three scenarios where an individual is “regarded as” or perceived to be disabled:

- (1) Ha[ving] a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
- (2) Ha[ving] a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; and

- (3) Ha[ving] . . . [no physical or mental impairment] but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R.1630.2(l).

13. The Commission's allegations in this case fit squarely within the first scenario. The perceived section of the definition of disability is "designed to protect against erroneous stereotypes some . . . hold regarding certain physical or mental impairments that are not substantially limiting in fact."

Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 885 (6th Cir. 1996).

By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

School Board of Nassau County v. Arline, 480 U.S. 273, 284 (1987).

14. The Commission may establish the first element of a *prima facie* case by showing that Respondent perceived or treated Complainant as having an impairment that substantially limits one or more major life activities. *Sullivan v. River Valley School Dist.*, 197 F.3d 804 (6th Cir. 1999); *Gordon v. E.L. Hamm & Assoc.*, 100 F.3d 907 (11th Cir. 1996), *cert. denied*, 522 U.S. 1030 (1997). Major life activities are “those basic activities that the average person in the general population can perform with little or no difficulty.” *Interpretive Guidance of Title I of the Americans with Disabilities Act (EEOC Interpretive Guidance)*, 29 C.F.R. pt. 1630 App., at § 1630.2(i). Such activities include, but are not limited to, “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, . . . working, . . . sitting, standing, lifting, and reaching.” *Id.*, (legislative citations omitted); *Bragdon v. Abbott*, 118 S.Ct. 2196, 2205 (1998) (“As the use of the term ‘such as’ confirms, the list is illustrative, not exhaustive”).

15. The Commission argues that Complainant is protected because Respondent perceived her to be substantially limited in the major life activities of walking, caring for herself, and working. This argument is well taken. Respondent questioned Complainant about her use of a cane shortly after she arrived to view the house. Respondent inquired about how

Complainant became injured, and whether she needed any special accommodations.

16. Respondent also questioned Complainant about her ability to care for herself. Respondent specifically asked Complainant how she was able to get in and out of the bathtub. (Tr. 20)

17. Perhaps, most compelling is Respondent's testimony, which demonstrates that he perceived Complainant as substantially limited in the major life activity of working. Respondent testified, in general, that he assumed that most persons who used canes were not employed. (Tr. 123) Respondent also acknowledged his deposition testimony that Complainant's use of a cane gave him the "impression" that she was "normally" unable to work:

Q: What did that mean to you that she had the cane, so you assumed she was getting assistance?

A: No. It's just . . . just gave me an impression that she wasn't able to normally work.

(Tr. 121)

18. The Commission also established the second element of a *prima facie* case; Complainant sought and was qualified to rent the vacant

unit in question. Complainant called Respondent in June 1999 in response to his housing advertisement. Complainant subsequently visited the house on two occasions and provided Respondent references as he requested. Complainant was also prepared to pay Respondent \$900 for one month's rent and the security deposit, but he rescheduled their meeting due to an emergency. Even though Complainant was unemployed at the time, her family's fixed income from disability compensation was approximately \$1,200 per month. Complainant met all of Respondent's qualifications to rent the unit.

19. The Commission established the third element of a *prima facie* case with Complainant's testimony about Respondent's stated reason for not renting to her. As discussed, the Hearing Examiner credited Complainant's testimony that Respondent told her that his attorney advised him that Complainant might fall at the house because of her disability, and he would be liable as the homeowner. This testimony, if not direct evidence, certainly

gives rise to an inference of disability discrimination sufficient for purposes of proving a *prima facie* case.

20. The Commission having established a *prima facie* case of disability discrimination, the burden of production shifted to Respondent to “articulate some legitimate, nondiscriminatory reason” for refusing to rent to Complainant. *McDonnell Douglas, supra* at 802. To meet this burden of production, Respondent must:

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

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

The presumption created by the establishment of a *prima facie* case “drops out of the picture” when the housing provider articulates a legitimate, nondiscriminatory reason for the housing action. *Hicks, supra* at 511.

21. Respondent met his burden of production with his testimony about his reasons for not renting to Complainant. Respondent testified that Complainant and Tonya Hobbs were the two finalists in the selection

process. Respondent testified that he selected Hobbs because “her income was more stabilized”, and her references had “no negatives.” (Tr. 134)

22. Respondent having met his burden of production, the Commission must prove by a preponderance of the evidence that Respondent’s articulated reasons for denying Complainant housing accommodations were not his true reasons, but were “a pretext for discrimination.” *Hicks, supra*, at 515, quoting *Burdine, supra* at 253.

[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, at 515.

23. Thus, even if the Commission proves that Respondent’s articulated reasons are false, the Commission does not automatically succeed in meeting its burden of persuasion:

That the . . . proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the . . . [Commission’s] proffered reason of . . . [disability discrimination] is correct. That remains a question for the factfinder to answer

Id., at 524.

24. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reasons for denying Complainant housing accommodations. The Commission may directly challenge the credibility of Respondent's articulated reasons by showing that the reasons had no basis *in fact* or they were *insufficient* to motivate the housing 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 reasons without additional evidence of unlawful discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000).

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. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.⁷

Reeves, supra at 2018, *quoting Hicks, supra* at 511.

⁷ Even though rejection of a respondent's articulated reason is "enough at law to sustain finding of discrimination, *there must be a finding of discrimination.*" *Hicks, supra* 511, n.4.

25. The Commission may indirectly challenge the credibility of Respondent's reasons by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" that the reasons are a pretext for unlawful discrimination. *Manzer, supra* at 1084. This type of showing, which tends to prove that the reasons did not *actually* motivate the decision, requires the Commission produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case. *Id.*

26. The Commission directly challenged Respondent's contention that one of Complainant's references, a male, did not give Complainant a "full endorsement." (Tr. 124) The evidence shows that Complainant provided Respondent three male references. Albert Burrell and Louis Bernard testified that Respondent called them and asked questions about Complainant. Both testified that they fully endorsed Complainant. The Hearing Examiner credited their testimony.

27. The other male reference was Calejah Benefield, who is Complainant's cousin. The evidence shows that the Commission Investigator contacted Benefield about being a reference for Complainant. (Comm.Ex. 3) The Commission Investigator testified that Benefield told him that he gave

Complainant “a good reference”, and he did not say anything negative about her. (Tr. 71) The Hearing Examiner credited this testimony.

28. The Commission also presented evidence that directly challenged Respondent’s contention that the income of the eventual tenant, Hobbs, was more stable than Complainant’s income. The evidence shows that Complainant and her children received approximately \$1,200 per month in disability compensation in July 1999. The Hearing Examiner credited Complainant’s testimony that she informed Respondent about the amount of her fixed income prior to her denial of housing accommodations.

29. Respondent testified that Hobbs received approximately \$600 per month from welfare, and he estimated that she received an additional \$400 monthly from babysitting. Assuming Respondent’s estimations are accurate, the evidence shows that Complainant not only receive more money per month than Hobbs, Complainant’s income was, in fact, the more stable of the two. Both of Respondent’s articulated reasons lack factual support and are unworthy of credence.

30. Other evidence casts doubt on whether Complainant was even in competition with Hobbs in July 1999. The evidence shows that Respondent

did not rent the first floor unit to Hobbs until November 9, 1999—approximately four months after Complainant’s inquiry. (Comm.Ex. 1) Although Respondent was cleaning, painting, and doing other “minor adjustments” to the unit in July 1999, he never apprised Complainant that she would have to wait several months before moving in.

31. Even if the Commission failed to present sufficient evidence to shift the burden of persuasion to Respondent, the Commission proved its case under the *McDonnell Douglas* evidentiary framework. In other words, the Commission proved by a preponderance of the evidence that Respondent’s articulated reasons for denying Complainant housing accommodations were a pretext for disability discrimination. The Commission and Complainant are entitled to damages under either method of proof.

DAMAGES

32. 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

33. In fair housing cases, the purpose of an award of actual damages is to place the victim of unlawful discrimination "in the same position, so far as money can do it, as . . . [the victim] 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 (7th Cir. 1974).

34. The Commission contends that Complainant suffered economic loss from the increased cost of alternative housing. To recover this cost, Complainant must have attempted to mitigate her damages by seeking comparable housing. *HUD v. DiBari*, Fair Housing-Fair Lending (P-H), ¶25,036 at 25, 377 (HUD ALJ 1992). Respondent bears the burden of proving that Complainant failed to seek comparable housing. If the alternative housing and the denied housing are comparable in size, location, and amenities, then Complainant may recover the cost of the more expensive alternative. *HUD v. Lee*, Fair Housing-Fair Lending (P-H) ¶25,121 at 26,033, n.6. In cases where the alternative housing is superior, Complainant may still recover the cost differential if comparable housing was unavailable at the time. *Id.*

35. It is undisputed that the rent for the first floor unit at 3446 East 118th Street was \$450 per month in 1999. Complainant found alternative housing accommodations at 10206 Empire Avenue in Cleveland in late August 1999. Complainant lived there for one year and paid \$650 per month in rent.

36. The evidence also shows that Complainant moved to other housing accommodations at 3417 East 146th Street in Cleveland in September 2000. Complainant continued to live there as of May 2001. Complainant paid \$600 in rent at that location.

37. The evidence shows that Complainant found other housing accommodations shortly after her denial by Respondent. Complainant testified that her rental unit at 10206 Empire Avenue was comparable to Respondent's first floor unit except the former had an additional bedroom. Complainant also testified that her current housing accommodations has the same number of bedrooms as Respondent's first floor unit, but it has "a little bit smaller" living space. (Tr. 67)

38. Respondent failed to meet his burden of showing that Complainant failed to mitigate her damages by seeking comparable housing. The evidence

shows, if anything, that Complainant's subsequent housing accommodations were comparable to the one she would have rented with Respondent. Complainant is entitled to the difference between the rent that she paid from September 1999 through the date of the Commission's Final Order and the rent that Complainant would have paid for Respondent's housing accommodations during the same period.

39. Complainant is also entitled to emotional distress caused by Respondent's discriminatory actions. 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*, P-H: Fair Housing-Fair Lending Rptr. ¶¶25,037, 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).

40. Complainant testified that she "felt bad" after Respondent denied her housing accommodations. (Tr. 31) Complainant was particularly upset because of the time she invested in her effort to rent from Respondent.

Complainant also testified that she became “really depressed” in late August 1999 and was prescribed medication by her physician for anxiety. *Id.*

41. Although the Commission failed to present sufficient evidence to establish a causal connection between Complainant’s anxiety and Respondent’s actions, the Hearing Examiner credited her testimony about her emotional distress caused by the denial of housing. In light of Complainant’s testimony and the totality of the circumstances, the Hearing Examiner recommends that Complainant be awarded \$3,000 for her emotional distress.

PUNITIVE DAMAGES

42. The purpose of an award of punitive damages pursuant to R.C. 4112.05(G)(1) is to deter future illegal conduct. Ohio Admin. Code 4112-6-02. Thus, punitive damages are appropriate "as a deterrent measure" even when there is no proof of actual malice. *Schoenfelt v. Ohio Civil Right Comm.* (1995), 105 Ohio App.3d 379, 385, *citing and quoting, Marr v. Rife*, 503 F.2d 735, 744 (6th Cir. 1974). Under the Commission’s policy, punitive damages

are “appropriate whenever a respondent engages in intentional discrimination.” Ohio Adm. Code 4112-6-02.

43. 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; and
- Respondent's cooperation or lack of cooperation during the investigation of the charge.

Ohio Admin. Code 4112-6-02.⁸

⁸ Ohio 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.

44. Applying the foregoing criteria to this case:

- Respondent perceived Complainant to be disabled simply because she walked with a cane. Respondent denied Complainant rental of housing accommodations based on a fear of liability. Respondent feared that he would be liable if Complainant fell on his property. Respondent's reliance on legal advice from counsel does not absolve him of liability for violating Ohio's fair housing laws;
- The Commission did not present any evidence that there have been previous findings of unlawful discrimination against Respondent;
- The Commission did not present sufficient evidence to establish that Respondent rented more than the two units at the house in question. The Commission did not present any evidence regarding Respondent's profitability; and
- The Commission Investigator testified "nothing really stands out" in terms of Respondent's cooperation or lack of cooperation during the investigation. (Tr. 76)

45. Based on the foregoing discussion, the Hearing Examiner recommends that Respondent be assessed punitive damages in the amount of \$4,000.

ATTORNEY'S FEES

46. The Commission is entitled to attorney's fees. R.C. 4112.05(G)(1); *Schoenfelt, 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.

47. To create a record regarding attorney's fees, the Commission's counsel should file affidavits from plaintiffs' attorneys in Cuyahoga County, Ohio regarding the reasonable and customary hourly fees 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.

48. 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 his receipt of the Commission's Application for Attorney's Fees.

49. 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 makes his supplemental recommendation to the Commission regarding attorney's fees.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint #8843 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;
2. The Commission order Respondent to pay Complainant the difference between the rent that she paid from September 1999 through the date of the Commission's Final Order and the rent that Complainant would have paid for Respondent's housing accommodations during the same period;

3. The Commission order Respondent to pay Complainant \$3,000 for her emotional distress caused by his actions;

4. The Commission order Respondent to pay Complainant \$4,000 in punitive damages;

5. The Commission order Respondent to place the words “Equal Housing Opportunity” in all of his housing advertisements for at least two years from the date of the Commission’s Final Order;

6. The Commission order Respondent to attend fair housing training, at his own expense, with a local fair housing organization within one year of the date of the Commission’s Final Order. The selection of the fair housing agency must be approved by the Commission’s Cleveland Regional Office; and

7. The Commission order Respondent to report his compliance with the Commission’s Final Order on a yearly basis for two years from the date of the Order. Respondent should report such compliance to the Commission’s

Office of Special Investigations at 1111 East Broad Street, Suite 301, in
Columbus, Ohio.

TODD W. EVANS
HEARING EXAMINER

November 19, 2001

PROCEDURAL HISTORY

On November 19, 2001, the Administrative Law Judge (ALJ) issued Findings of Fact, Conclusions of Law, and Recommendations (ALJ's Report) on liability and damages in Complaint #8843. The ALJ's Report found that Respondent violated R.C. 4112.02(H)(1) by refusing to rent housing accommodations to Complainant because of a perceived disability. Besides a Cease and Desist Order, the ALJ's Report recommended that Respondent pay Complainant her increase in rent from September 1999 through the date of the Final Order, \$3,000 for her emotional distress, and \$4,000 in punitive damages.

The Commissioners of the Ohio Civil Rights Commission adopted the ALJ's Report on January 31, 2002. The ALJ's Report required the Commission to file an Application for Attorney's Fees within 30 days of its adoption. On May 3, 2002, the Commission moved for additional time to file an Application for Attorney's fees. The ALJ granted the Motion on May 21, 2002.

On June 20, 2002, the Commission filed an Application for Attorney's Fees. Respondent did not reply (or request an extension) within the 30-day time period set forth in the ALJ's Report.

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

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

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

2. In determining what constitutes reasonable attorney's fees in a particular case, the usual starting point and presumptively reasonable amount is the lodestar calculation, i.e., the number of hours reasonably expended on

the litigation multiplied by a reasonable hourly rate. *Blum v. Stenson* (1984), 465 U.S. 886, 897. As the fee applicant, the Commission must provide evidence of the time expended on the case. *Hensley v. Eckerhart* (1983), 461 U.S. 424, 433. 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, n.12. Overall, the Commission’s counsel must exercise “billing judgment” in excluding hours that are excessive, redundant, or otherwise unnecessary. *Id.*, at 434.

3. The Commission also has the burden of providing evidence that supports the requested hourly rate. *Id.* Besides an affidavit from its counsel, the Commission must provide other evidence showing that the requested hourly rate is comparable to the prevailing market rate for similar work performed in the community where the hearing was held. In other words, the Commission must show that the requested hourly rate is “in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Blum, supra* at 895-96, 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. In such cases, the ALJ 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. To be upheld, a fee award must be “reasonable in relation to the results obtained.” *Id.*, at 440.

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, n.9.

6. The Commission satisfied its burden of verifying the time expended by its counsel in this case. The billing log of the Commission's counsel contained the subject matter of the work performed, the dates the work was performed, and the time spent on each activity. (Comm.Ex. A) In her affidavit, the Commission's counsel stated that the billing log was maintained as part of her reporting requirements as an Assistant Attorney General in the Civil Rights Section. The billing log indicates that the Commission's counsel expended 56.75 hours in legal work on this case.

7. The Commission also satisfied its burden of providing evidence in support of the requested hourly rate (\$150). The Commission provided an affidavit from Diane E. Citrino, the Senior Attorney for The Housing Advocates, Inc.² (Comm.Ex. B) Citrino stated that she has represented plaintiffs on behalf of The Housing Advocates, Inc. in the Cleveland area and obtained attorney's fee awards. Citrino, who has 20 years of legal experience, stated that her hourly rate is \$250 per hour. Citrino stated that an hourly fee

² The Housing Advocates, Inc. is a non-profit fair housing organization located in Cleveland, Ohio.

of \$125 to \$150 is the prevailing market rate in the Cleveland area for an attorney with four years of experience in housing discrimination cases.

8. The evidence in this case demonstrates that the requested hourly rate is comparable to the prevailing market rate for housing discrimination cases litigated in the Cleveland area. Respondent failed to provide any counter-affidavits from other civil rights attorneys practicing in Cuyahoga County or the surrounding area.

9. After reviewing the billing log and the affidavits provided by the Commission, the ALJ found the number of hours claimed and the requested hourly rate to be reasonable. Therefore, the lodestar amount in this case is \$8,512.50 (56.75 x \$150). Having considered the results obtained by the Commission, the ALJ concludes that the lodestar amount is reasonable in relation to these results.

RECOMMENDATION

For all of the foregoing reasons, the Administrative Law Judge recommends that the Commission's Final Order in Complaint #8843 include an Order requiring Respondent to pay \$8,512.50 in attorney's fees to the Office of the Ohio Attorney General.

TODD W. EVANS
ADMINISTRATIVE LAW JUDGE

July 25, 2002