

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

**GREGORY J. GERITY AND
JUDY A. GERITY**

Complainants

and

**PAT GITLER AND MEL GITLER D/B/A
PEACEFUL ACRES MOBILE PARK**

Respondents

Complaint #7932

(TOL) H2011796 (20685) 031196

HUD #: 05-96-0690-8

**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

Gregory J. Gerity and Judy A. Gerity (Complainants) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on March 11, 1996.

The Commission investigated and found probable cause to believe that that Pat Gitler and Mel Gitler d/b/a Peaceful Acres Mobile Home Park (Respondents) engaged in unlawful discriminatory practices in violation of Section 4112.02(H)(12) of the Revised Code (R.C.).

The Commission issued a Complaint, Notice of Hearing, and Notice of Right of Election on February 20, 1997. The public hearing was held in abeyance pending the Commission's conciliation efforts.

The Complaint alleges that Respondents harassed Complainants and threatened to evict them in retaliation for filing a previous charge of discrimination. Respondents did not file an Answer to the Complaint.

A public hearing was held on November 25, 1997 at One Government Center in Toledo, Ohio. Respondents did not appear at the hearing.

The Record consists of the previously described pleadings, a transcript consisting of 63 pages of testimony, exhibits admitted into evidence at the hearing, and post-hearing briefs filed by the Commission on January 23, 1998 and by Pat Gitler on February 13, 1998.

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. Complainants filed a sworn charge affidavit with the Commission on March 11, 1996.

2. The Commission determined on February 20, 1997 that it was probable that Respondents engaged in unlawful discriminatory practices in violation of R.C. § 4112.02(H)(12).

3. The Commission attempted and failed to eliminate the alleged unlawful discriminatory practices by informal methods of conciliation.

4. Respondents are providers of housing accommodations. They own Peaceful Acres Mobile Home Park (Peaceful Acres). Peaceful Acres is located at 13555 Neapolis-Waterville Road in Lucas County, Ohio. Peaceful Acres contains 60 lots for mobile homes and three apartments. (Comm.Ex. 1)

5. Complainants are married. They reside with their three children. Complainants and their children lived in a mobile home and rented a lot at Peaceful Acres from September 1989 to June 1996.

6. On July 12, 1993, Gregory Gerity filed a charge of discrimination against Peaceful Acres. *Id.*, at p. 3. In this charge, he alleged that Peaceful Acres charged him an additional rental fee because of his familial status.

7. Following this charge, Ms. Gitler “verbally abused . . . [Gregory Gerity] and his family, and threatened to evict them.” *Id.*, at 6. Ms. Gitler told Greg Gerity “on numerous occasions” that his charge was “bullshit” and he and his family should “get the fuck out.” *Id.*

8. On August 5, 1993, Ms. Gitler informed tenants via letter that she had to increase rent to offset her legal expenses caused by “the activities of tenants *during the last two months.*” *Id.*, at 22. Ms. Gitler increased the rent at Peaceful Acres on September 1, 1993. *Id.*, at p. 7.

9. The Commission investigated Gregory Gerity's charge of discrimination and found probable cause to believe that Peaceful Acres had engaged in unlawful discriminatory practices. The Commission subsequently issued a Complaint (#6892), Notice of Hearing, and Right of Election on November 24, 1993. The public hearing was held in abeyance pending the Commission's conciliation efforts.

10. Franklin A. Martens, Chief Hearing Examiner, conducted a public hearing in this matter on December 2, 1994. Following the hearing, Complainants returned to their mobile home and found several eviction notices from Ms. Gitler.

11. Chief Hearing Examiner Martens issued his Findings of Fact, Conclusions of Law, and Recommendation (Hearing Examiner's Report) in Complaint #6892 on August 31, 1995. On the merits, he found that:

- Peaceful Acres equally applied its policy of charging tenants an additional rental fee of \$2.00 per month for each occupant over two;
- The Commission failed to prove that this policy had a disparate impact on families with children; and

- Ms. Gitler engaged in unlawful retaliation.¹

Ms. Gitler sent Complainants another eviction notice approximately three weeks after the Hearing Examiner's Report was issued. (Comm.Ex. 3)

12. On October 26, 1995, the Commission adopted the Hearing Examiner's Report, but remanded the case for determination of damages.² Chief Hearing Examiner Martens issued an Addendum to the Hearing Examiner's Report on November 30, 1995. (Comm.Ex. 2) The Addendum recommended that Gregory Gerity be awarded \$1,500 in actual damages; Peaceful Acres be assessed \$3,500 in punitive damages; and the Commission receive reasonable attorney's fees. *Id.*

13. On January 5, 1996, Ms. Gitler sent Complainants another eviction notice. (Comm.Ex. 4) Later that month, Ms. Gitler filed an eviction action against Complainants in Maumee Municipal Court. (Comm.Ex. 5) Ms. Gitler

¹ Chief Hearing Examiner Martens amended Complaint #6892 to conform to the evidence presented at the hearing. (Comm.Ex. 1, at pp. 9-12)

² The Commission also adopted the Objections of the Commission Attorney. See Commission's Minutes, October 26, 1995, p. 330. The Commission Attorney argued that the Commission had the authority under R.C. § 4112.02(H)(12) to assess damages and attorney's fees against Peaceful Acres for Ms. Gitler's retaliatory conduct.

indicated in the eviction action that Complainants were in default for payment of rent and utilities from October 1, 1993 to December 1, 1993, and they attempted to extort money from her “through frivolous court cases.” *Id.* In a lengthy brief to the court, Ms. Gitler wrote that Complainants conspired to put her out of business “by increasing . . . [her] legal fees, by legally extorting big judgments against . . . [her] through FREE Civil Rights Cases, and Court Cases”³ *Id.* The court dismissed the eviction action in early February 1996 based on *res judicata*. (Comm.Ex. 11)

14. During the last three years of Complainants’ tenancy at Peaceful Acres, Ms. Gitler repeatedly threatened and verbally harassed Complainants and their children. Ms. Gitler’s behavior toward them became “worse” during that period. (Tr. 29) Complainants left Peaceful Acres in June 1996 because of Ms. Gitler’s conduct toward their family.

³ Ms. Gitler made several similar statements throughout her 35-page brief.

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 alleges in its Complaint that Respondents harassed Complainants and threatened to evict them in retaliation for filing a previous charge of discrimination.

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:

(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 or having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by division (H) of this section.

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(E) and (G).

4. Federal case law applies to alleged violations of R.C. Chapter 4112. *Little Forest Med. Ctr. of Akron v. Ohio Civil Rights Comm.*, (1991), 61 Ohio St.3d 607. Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under the federal Fair Housing Act of 1968 (Title VIII), as amended.⁴

⁴ Section 367 of the Fair Housing Act is substantially the same as R.C. § 4112.02(H)(12). See 42 U.S.C. § 3617.

5. The same standards of proof that apply to employment discrimination cases generally apply to housing discrimination cases.⁵ Normally, these standards require the Commission to first prove a *prima facie* case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973). This burden is not onerous; it is simply part of an evidentiary scheme “intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.” *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 25 FEP Cases 113, 116, n.8 (1981).

6. The proof required to establish a *prima facie* case may vary on a case-by-case basis. *McDonnell Douglas Corp.*, *supra* at 802, 5 FEP Cases at 969, n.13. In this case, the Commission may establish a *prima facie* case by showing that:

- (1) Complainants engaged in activity protected by R.C. Chapter 4112;
- (2) Respondents took an adverse action against Complainants;
and

⁵ Although the Supreme Court has never addressed the issue, “. . . lower courts have generally assumed that . . . precedents from the employment discrimination field should be followed in interpreting Title VIII.” R. Schwemm, *Housing Disc.*, 1996 Ed. at 10-3.

- (3) A causal connection exists between the protected activity and the adverse action taken by Respondents.

HUD v. Krueger, P-H: Fair Housing-Fair Lending Rptr. ¶25,119 at p. 26,026 (HUD ALJ 1996), *aff'd*, 115 F.3d 487 (7th Cir. 1997).

7. In applying these elements to this case, the Commission established the first element of a *prima facie* case. Gregory Gerity engaged in protected activity by filing a previous charge of discrimination with the Commission. Judy Gerity is also protected under the statute because her husband filed a previous charge. *Cf., Kent v. R.J. Reynolds Tobacco Co.*, 27 FEP Cases 1628, 1633 (E.D. La. 1982) (employer violated Title VII when it retaliated against an employee whose relative engaged in protected activity under Section 704(a)).

8. The Commission established the second element of a *prima facie* case. Complainants' testified that Ms. Gitler sent them numerous eviction notices and otherwise interfered with the quiet enjoyment of their residence at Peaceful Acres by threatening and verbally harassing them. Further, the

evidence shows that Ms. Gitler filed an eviction action against Complainants in January 1996. (Comm.Ex. 5)

9. The Commission established the third element of a *prima facie* case.

The evidence presented at the hearing showed that:

- Complainants returned from a public hearing of the Commission to find eviction notices from Ms. Gitler;
- Ms. Gitler sent an eviction notice to Complainants approximately three weeks after the Hearing Examiner's Report in Complaint #6892 was issued;
- Ms. Gitler filed an eviction action against Complainants in January 1996 alleging that they attempted to extort money from her "through frivolous court cases" (Comm.Ex. 5); and
- Ms. Gitler alleged in a brief to the court that Complainant's conspired to put her out of business "by increasing . . . [her] legal fees, by legally exhorting big judgments against . . . [her] through FREE Civil Rights Cases" *Id.*; and
- Joyce Dubiel, a Commission Investigator, testified that Ms. Gitler that told her that Complainants' charge was an attempt to "legally extort money from her." (Tr. 43) Dubiel further testified that Ms. Gitler "always" referred back to Gregory Gerity's previous charge during her investigation of Complainants' charge. *Id.*

In light of this evidence, it is reasonable to infer that a causal connection existed between Ms. Gitler's actions and Gregory Gerity's filing of a previous charge of discrimination.

10. The Commission having established a *prima facie* case, the burden of production shifted to Respondents to “articulate some legitimate, nondiscriminatory reason” for their actions. *McDonnell Douglas, supra* at 802, 5 FEP Cases at 969. To meet this burden of production, Respondents must:

“. . . clearly set forth, through the introduction of admissible evidence,” reasons for . . . [their] actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of . . . [their actions].
St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2747, 62 FEP Cases 96, 99 (1993), *quoting Burdine, supra* at 254-255, 25 FEP Cases at 116.

11. Respondents did not attend the hearing in this matter. They failed to articulate legitimate, nondiscriminatory reasons for the adverse actions taken against Complainants. Therefore, Respondents failed to meet their burden of production. Respondents’ failure to rebut the presumption of unlawful retaliation created by the Commission’s *prima facie* case, coupled with the Hearing Examiner's belief of the Commission's evidence, entitles Complainants to relief as a matter of law.⁶

⁶ In addition to being entitled to relief under the *McDonnell Douglas* analysis, Complainants are also entitled to relief because Respondents failed to file an answer in this case. Respondent did not attempt to show good cause for their failure to file an answer.

Establishment of a *prima facie* case in effect creates a presumption that the . . . [defendant] unlawfully discriminated against the . . . [plaintiff]. If the trier of fact believes the plaintiff's evidence, and if the . . . [defendant] is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Burdine, supra at 254, 25 FEP Cases at 116 (emphasis added and footnote omitted).

DAMAGES

12. 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

13. The purpose of an award of actual damages in a fair housing case, as in employment discrimination cases, "is to put the plaintiff in the same

Therefore, Respondents are deemed in default pursuant to Ohio Administrative Code § 4112-3-06. There are no equitable terms or conditions to set aside Respondents' default.

position, so far as money can do it, as . . . [the plaintiff] 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. See *Steele v. Title Realty Co.*, 478 F.2d 380 (10th Cir. 1973) (actual damages of \$1,000 awarded to plaintiff consisting of \$13.25 in telephone expenses, \$125.00 in moving and storage expenses, and \$861.75 for emotional distress and humiliation). Damages for intangible injuries may be established by testimony or inferred from the circumstances.⁷ *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974).

14. In this case, the Commission did not present any evidence that Ms. Gitler’s retaliatory conduct caused Complainants economic loss. However,

⁷ 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, at p. 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).

Complainants testified about the emotional distress they suffered from Ms. Gitler's retaliatory conduct. Gregory Gerity testified that Ms. Gitler's retaliatory conduct made his and his family's residence at Peaceful Acres "deplorable" and "a living hell." (Tr. 28) Judy Gerity testified that her family was "always in an upheaval" and she "just couldn't mentally take it." (Tr. 54) Both testified that Ms. Gitler took actions that upset their children. Both testified that they moved to another state because of Ms. Gitler's behavior toward their family.

15. The Hearing Examiner credited Complainants' testimony their emotional distress caused by Ms. Gitler's retaliatory conduct. In light of Complainants' testimony and the totality of the circumstances surrounding Ms. Gitler's retaliatory conduct, the Hearing Examiner recommends that Complainants be awarded \$7,500 each for their emotional distress.

PUNITIVE DAMAGES

16. The purpose of an award of punitive damages pursuant to R.C. § 4112.05(G) 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).

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

- The nature of Respondents’ conduct;
- Respondents’ prior history of discrimination;
- Respondents’ size and profitability;
- Respondents’ cooperation or lack of cooperation during the investigation of the charge; and
- The effect Respondents’ actions had upon Complainants.⁸ Ohio Admin. Code § 4112-6-01.

18. Applying the foregoing criteria to this case:

- Ms. Gitler’s retaliatory conduct was repetitive, blatant, and intentional. She acted maliciously with wanton disregard for Gregory Gerity’s right to file a charge of discrimination under

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

R.C. § 4112.02. Such retaliation must be highly deterred to prevent a chilling effect on the exercise of fair housing rights;

- This violation was Respondents' second violation during the five-year period immediately preceding February 20, 1997, the date the Commission issued Complaint #7932. Under such circumstances, the Commission may award up to \$25,000 to deter repeat offenders. R.C. § 4112.05(G)(1)(b);
- Peaceful Acres is a large mobile home park containing 60 lots and three apartments. The Commission did not present any evidence about Peaceful Acres' profitability; and
- Dubiel testified that Ms. Gitler refused to cooperate with the Commission during its investigation. Dubiel testified that Ms. Gitler ignored telephone calls and written correspondence. Ms. Gitler's refusal to cooperate forced the Commission to issue a subpoena to compel her presence.

19. Based on the foregoing discussion, the Hearing Examiner recommends that Respondent be assessed punitive damages in the amount of \$25,000.

ATTORNEY'S FEES

20. 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. R.C. § 4112.05(G)(1). If the

parties cannot agree on the amount of attorney's fees, the parties shall present evidence in the form of affidavits.

21. 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 Respondents. Respondents may respond with counter-affidavits and other arguments regarding the amount of attorney's fees in this case.

22. If the Commission adopts the Hearing Examiner's Report and the parties cannot agree on the amount of attorney's fees, the Commission should file an Application for Attorney's Fees within 30 days after the Hearing Examiner's Report is adopted. Respondents may respond to the Commission's Application for Attorney's fees within 30 days from their receipt of the Commission's Application for Attorney's Fees.

23. 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 #7932 that:

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

2. The Commission order Respondents to pay Complainants \$15,000 in actual damages; and

3. The Commission order Respondents to pay Complainants \$25,000 in punitive damages.

TODD W. EVANS
HEARING EXAMINER

March 9, 1998