

## INTRODUCTION AND PROCEDURAL HISTORY

Denise S. Walsh and Derrick E. Smith (Complainants) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on December 16, 1996.

The Commission investigated the charge and found probable cause that Betty Johnston, Cindy Zvosec, and Gary Zvosec (Respondents) engaged in unlawful discriminatory practices in violation of Revised Code (R.C.) 4112.02(H)(4), (12) and R.C. 4112.02(J).

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

The Complaint alleged that Respondents discriminated against Walsh in the conditions of renting housing accommodations, harassed her, evicted her, and otherwise interfered with her enjoyment of rights granted under R.C. 4112.02(H). The Complaint further alleged that Respondents took these actions because of Walsh's interracial relationship with Smith.

Cindy and Gary Zvosec filed a narrative Answer to the Complaint on March 29, 1999. Respondents later filed an Amended Answer on November 19, 1999. Respondents admitted certain procedural allegations in the Amended Answer, but denied that they engaged in any unlawful discriminatory practices. Respondents also pled affirmative defenses.

This matter was scheduled for public hearing after the Commission's conciliation efforts failed. The public hearing was held on December 9-10, 1999 at the Lorain County Courthouse in Elyria, Ohio. During the proceedings, the Hearing Examiner left the record open to allow Respondents to depose Irene Jones. Respondents filed the transcript of Jones's deposition on January 10, 2000. The record closed upon this filing.

On April 21, 2000, Respondents filed a Motion to Supplement Record. Respondents moved to supplement the record with (1) a letter to Gary Zvosec from the Office of Sheriff Don Hunter inviting him to participate in a residential security survey and (2) portions of Complainants' depositions taken prior to the hearing. The Hearing Examiner denied this motion on May 4, 2000.

The record consists of the previously described pleadings, a 383 page transcript of the hearing, exhibits admitted into evidence during the hearing, the transcript of Jones's post-hearing deposition, and post-hearing briefs filed by the Commission on March 31, 2000 and by Respondents on April 28, 2000.

### **FINDINGS OF FACT**

The following findings of fact 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 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 December 16, 1996.

2. The Commission determined on November 20, 1997 that it was probable that Respondents engaged in unlawful discriminatory practices in violation of R.C. 4112.02(H)(4), (12) and R.C. 4112.02(J).

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

4. Cindy and Gary Zvosec, both white persons, are providers of housing accommodations. They own and rent a portion of a two-story house located at 1900 Oak Point Road in Amherst, Ohio. The house is divided into two dwelling units.

5. Betty Johnston is a white person. Johnston, who is Cindy Zvosec's mother, resides in one of the units. Johnston acts as the resident manager of the rental unit at 1900 Oak Point Road.<sup>1</sup>

6. Denise Walsh is a white person. She is divorced. She has three teenage daughters from two previous marriages.

7. Derrick Smith is a black person.

8. In June 1993, Walsh signed a "monthly rental agreement" to rent the front, upper portion of the housing accommodations at 1900 Oak Point Road. (Comm.Exs. 2, 3, 32) The rent was \$540 per month, which included "utilities (gas, electric, water and trash) and lawn maintenance." The agreement indicated that the tenant paid "extras such as phone or cable." The agreement limited the occupants of the unit to "no more than 4 adults and children."

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<sup>1</sup> Cindy and Gary Zvosec reside in Naples, Florida. They authorized Johnston to act as resident manager of the rental unit.

9. In 1996, Complainant began a romantic relationship with Smith whom she met at work.<sup>2</sup> In late May of that year, Smith visited Walsh's residence and stayed overnight there for the first time.

10. On June 8, 1996, Johnston approached Walsh in their driveway. Johnston told Walsh that she should reconsider the company that she was keeping; the neighbors complained about the presence of the black man; and Walsh would have to move if the black man continued to visit and stay overnight.

11. Johnston's statements made Walsh extremely angry and upset. Walsh told Johnston that she had no right to tell her whom she could invite over to the house. Walsh called Johnston a racist and threatened to sue her. Walsh also told Johnston that she was calling Cindy Zvosec about the matter.

12. Later that evening, Walsh called Cindy Zvosec at home. Walsh complained to Ms. Zvosec about her mother's behavior earlier that day.

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<sup>2</sup> Walsh and Smith work at the Lorain Correctional Institution in Grafton, Ohio. In 1996, Walsh worked days as a Licensed Practical Nurse (LPN) while Smith worked afternoons as a corrections officer.

Ms. Zvosec assured Walsh that she would talk to her mother about the matter. Ms. Zvosec also informed Walsh during the call that her rent would be increased the following month “due to the increase in utilities, insurance, taxes and maint[enance].” (Comm.Ex. 25, R.Ex. B)

13. On June 10, 1996, Smith walked from Walsh’s residence to get “a uniform shirt” or a “little carry bag” from his car. (Tr. 106) As Smith walked back to the house, Johnston came outside and took pictures of him. Johnston told Smith that he would have to leave because he was “invading private property.” (Tr. 33)

14. On June 26, 1996, Johnston left Walsh a note in the utility room. (Comm.Ex. 15) The note reminded Walsh of the following:

- Her rent would be increased to \$620, effective July 1996;
- The apartment was only rented to her and her three daughters;
- No men were allowed to stay overnight;
- She was required to pay for telephone and cable;
- She was three years past due on the cable bill; and
- She had “some custody problems” in the past.

15. In late June or early July 1996, Johnston called Walsh's ex-husband, Marty Walsh. Johnston told him that she was concerned about his children because Walsh had several men staying overnight including a black man.<sup>3</sup> During this time, Johnston also left Walsh a copy of a cable bill in the utility room. (Comm.Ex. 16) Johnston asked Walsh on the bill to pay half of the cable cost dating back to July 1993—Walsh's first month in the rental unit.

16. On July 8, 1996, Walsh called Ms. Zvosec and complained about Johnston locking the door to the utility room. Later that day, Johnson left Complainant a note in the utility room. (Comm.Ex. 31) The note indicated that Johnson locked the door because she noticed food missing from her freezer. The note further indicated that Johnston was unable to talk to Walsh about the missing food because "all you do is yell and scream that I am prejudice[d] and I can't take all the stress that is happening."

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<sup>3</sup> Marty and Denise Walsh have two daughters. They were eight and eleven years of age in the summer of 1996. They resided with their father for the summer and stayed with their mother every other weekend. They were scheduled to return to live with their mother once school began.

17. On July 17, 1996, Johnston filed a “small claim complaint” against Walsh in Oberlin Municipal Court. (Comm.Ex. 20) The complaint alleged that Walsh owed Johnston \$429.53 for half of the cable bill dating back to July 7, 1993.

18. On July 23, 1996, Walsh received an eviction notice prepared by Johnston. (Comm.Ex. 17) The stated reason for the eviction was the owners’ consideration of appraisals of the house for possible sale. The eviction notice gave Walsh until September 1, 1996 to vacate the premises.

19. On August 1, 1996, Johnston knocked on Walsh’s door and requested entry into her rental unit. Walsh’s eldest daughter, Jessica Leken, and her friend were there at the time. When neither answered the door, Johnston opened the door with a key and broke the latch. (Comm.Ex. 1, Tr. 356) Johnson entered Walsh’s unit and adjusted the gauge for the air conditioner.<sup>4</sup> Later that day, Walsh called the police when she learned that Johnston had entered her unit without prior notice.

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<sup>4</sup> Johnston apparently adjusted the gauge per the request of a person hired to fix the air conditioner. Complainant had previously complained to Cindy Zvosec in mid-July 1996 about problems with the air conditioner.

20. On August 7, 1996, Walsh received a three-day notice to vacate the premises from Johnston. (Comm.Ex. 18) The stated reason for this notice was Walsh's failure to pay rent for August. The notice informed Walsh that she could not use her security deposit "as payment of the last months rent", and she still owed her share of the cable bill.

21. Walsh received another three-day notice from Johnston the following day. (Comm.Ex. 19) This notice cited three reasons for the eviction: the appraisal of the house for possible sale, Walsh was "behind" in paying rent and cable, and Walsh's improper use of the air conditioner.

22. On August 18, 1996, Walsh and her daughter, Jessica, vacated the premises and relocated to a house located at 1960 South Carpenter Road in Brunswick, Ohio. Walsh incurred \$87.08 in moving expenses. (Comm.Ex. 22) Walsh purchased a new stove and a used refrigerator because her new residence did not have major appliances.<sup>5</sup> (Comm.Ex. 23, Tr. 53-54) Walsh also paid approximately \$200 for laundry until she purchased a new washer and dryer in February 1997. (Tr. 55)

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<sup>5</sup> Walsh's unit at 1900 Oak Point Road had a stove and a refrigerator. Walsh also had access to a washer and dryer in the utility room.

23. On September 10, 1996, Respondents entered into a rental agreement with new tenants for Walsh's former dwelling unit. (Comm.Ex. 29) Their tenancy began September 17, 1996 under the terms of the agreement.

24. Walsh resided at the house on 1960 South Carpenter Road from mid-August 1996 until she purchased a house in late September 1999. During that period, Walsh paid \$750 per month in rent plus approximately \$142 per month in utilities.

## **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.

1. The Commission alleged in the Complaint that Respondents discriminated against Walsh in the conditions of renting housing accommodations, harassed her, evicted her, and otherwise interfered with her enjoyment of rights granted under R.C. 4112.02(H).<sup>6</sup> The Complaint further alleged that Respondents took these actions because of Walsh's interracial relationship with Smith.

2. These allegations, if proven, would constitute a violation of R.C. 4112.02(H), which provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

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

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<sup>6</sup> Respondents moved to dismiss the Complaint at the hearing because the Commission found no probable cause that Complainants were harassed because of their interracial relationship. The Commission also found no probable cause that the rental increase in July 1996 "was motivated by racial animus." (R.Ex. D) Although the Complaint does not specifically mention the rental increase, it does allege that Respondents harassed her. Since the Commission found no probable cause on the harassment issue, this issue is not properly before the Hearing Examiner and is hereby dismissed. The dismissal of this allegation does not prevent the Commission from proving the other allegations in the Complaint. Therefore, Respondents' motion to dismiss the Complaint in its entirety is denied.

- (4) Discriminate against any person in the terms or conditions of . . . renting, . . . or use of any housing accommodations, . . . because of race, . . .; 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 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(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.<sup>7</sup>

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<sup>7</sup> Sections 3604(a), (b), and 3617 of Title VIII are substantially the same as R.C. 4112.02(H)(1), (4) and (12), respectively.

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 (7<sup>th</sup> Cir. 1995). In absence of direct evidence, this framework requires the Commission to first establish a *prima facie* case of race discrimination. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792 (1973). The burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 25 FEP Cases 113, 115 (1981). It is simply part of an evidentiary framework “intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.” *Id.*, at 254, 25 FEP Cases at 116, n.8.

6. The proof required to establish a *prima facie* case is also flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas*, *supra* at 802, 5 FEP Cases at 969, n.13. In this case, the Commission may establish a *prima facie* case of race discrimination by proving that:

- (1) Walsh, a white person, had a black visitor at Respondents’ housing accommodations;
- (2) Respondents knew about the presence of a black visitor;

- (3) Respondents took adverse action against Walsh after obtaining such knowledge; and
- (4) Respondents took adverse action against Walsh under circumstances which give rise to an inference of unlawful discrimination.

*Cf. Burdine, supra* at 253, 25 FEP Cases at 115; *HUD v. Jerrard*, Fair Housing-Fair Lending (P-H), ¶25,005 at 25,087 (HUD ALJ 1990).

7. The Commission established a *prima facie* case of race discrimination in this case. It is undisputed that Smith, a black male, visited Walsh, a white female, at her residence at 1900 Oak Point Road from late May to August 1996. Respondents also do not dispute that they were aware of Smith's presence at least by early June 1996.

8. The evidence shows that Complainant received the first eviction notice on July 23, 1996. (Comm.Ex. 17) Thus, this adverse action took place after Respondents had knowledge of Smith's presence.

9. Lastly, the Commission presented sufficient evidence to infer that Respondents took efforts to evict Walsh because of Smith's presence at the residence, Walsh's association with him, and Walsh's opposition to perceived race discrimination:

- Walsh testified that Johnston confronted her on June 8, 1996 about Smith's presence. Walsh testified that Johnston told her that she should reconsider the company that she was keeping; the neighbors complained about the presence of the black man; and Walsh would have to move if the black man continued to visit and stay overnight;
- Jessica Leken, Walsh's eldest daughter, testified that she overheard the June 8, 1996 confrontation between Johnston and her mother. Leken corroborated her mother's testimony about Johnston's statements on that day;
- Walsh and Smith testified that Johnston took pictures of him on June 10, 1996. Walsh testified that she overheard Johnston tell Smith that he would have to leave because he was "invading private property."<sup>8</sup> (Tr. 33); and
- In a note, dated July 8, 1996, Johnston indicated that she was unable to discuss matters with Walsh because "all you do is yell and scream that I am prejudice[d] and I can't take all the stress that is happening." (Comm.Ex. 31) Approximately two weeks later, Walsh received the first eviction notice from Johnston.

10. Once the Commission established a *prima facie* case, the burden of production shifted to Respondents to "articulate some legitimate,

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<sup>8</sup> Respondents correctly point out that Smith never testified that Johnston made this statement to him. Smith, however, testified that he did not remember much about Johnston's statements to him on that day because he was "more focused on just leaving the situation." (Tr. 108-109)

nondiscriminatory reason” for the alleged discriminatory practices.<sup>9</sup>

*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 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, 62 FEP Cases 96, 103 (1993), *quoting Burdine, supra* at 254-55, 25 FEP Cases at 116, 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 alleged discriminatory practices. *Hicks, supra* at 511, 62 FEP Cases at 100.

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<sup>9</sup> Although the burden of production shifted to Respondents at this point, the Commission retained the burden of persuasion throughout the proceedings. *Burdine, supra* at 254, 25 FEP Cases at 116.

The defendant’s burden is merely to articulate through some proof a facially nondiscriminatory reason for . . . [the alleged discriminatory practices]; the defendant does not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion.

*EEOC v. Flasher Co.*, 60 FEP Cases 814, 817 (10<sup>th</sup> Cir. 1992) (citations and footnote omitted).

11. Respondents met their burden of production with Cindy and Gary Zvosec's testimony. Cindy Zvosec testified that she and her husband decided to evict Walsh for several reasons: the problems between Walsh and her mother had "escalated"; the maintenance cost of the unit was "getting . . . way out of hand"; Walsh yelled and screamed at her "about repairs" during a telephone call late in the evening; and Walsh made alterations to the unit. (Tr. 314-316) Gary Zvosec also testified about the reasons why he agreed to evict Walsh: Walsh and Johnston were not "gettin[g] along"; "things" in the unit were breaking down; and Smith was staying overnight at the residence "a little bit more than maybe" he should have. (Tr. 337-338)

12. Respondents having met their burden of production, the Commission must prove that Respondents unlawfully discriminated against Walsh because of her association with Smith. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondents' articulated reasons for Walsh's eviction were not the true reasons, but were "a pretext for discrimination." *Id.*, at 515, 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* at 515, 62 FEP Cases at 102.

13. Thus, even if the Commission proves that Respondents’ articulated reasons are false or incomplete, the Commission does not automatically succeed in meeting its burden of persuasion:

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

*Id.*, at 524, 62 FEP Cases at 106.

Ultimately, the Commission must provide sufficient evidence for the factfinder to infer that Complainants were, more likely than not, the victims of race discrimination.

14. In order to show pretext, the Commission may directly challenge the credibility of Respondents’ articulated reasons for Walsh’s eviction by showing that the reasons had no basis in fact or were insufficient to motivate the decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6<sup>th</sup> Cir. 1994). Such direct attacks, if successful, permit

the factfinder to infer intentional discrimination from the rejection of the proffered reasons 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.<sup>10</sup>

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

15. In determining the true reason or reasons for Walsh's eviction, the logical starting point is the first eviction notice that she received from Johnston on July 23, 1996. (Comm.Ex. 17) The *only* reason cited for the eviction in the notice was the owners' consideration of appraisals for possible sale. Cindy Zvosec testified that she instructed Johnston to place this reason in the eviction notice.

16. Although stated as the official reason, the evidence belies the assertion that Walsh was evicted because the Zvosecs were considering appraisals in an attempt to sell the house. When asked directly at the

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<sup>10</sup> Even though rejection of a respondent's articulated reasons 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.

hearing why they decided to evict Walsh, neither Cindy nor Gary Zvosec cited having the house appraised for possible sale as a reason.

17. Assuming the Zvosecs were considering appraisals of the house in July 1996, this process did not prevent them from renting to Walsh in the meantime. In fact, Cindy Zvosec testified that she and her husband preferred to rent the unit until the house was sold because they needed the income. This explains why the Zvosecs rented Walsh's unit to new tenants within a month of her departure.<sup>11</sup>

18. Other evidence casts doubt on the factual accuracy of Respondents' articulated reasons for Walsh's eviction. Johnston's daily journal for 1996 contains only two entries of Walsh calling either her or Cindy Zvosec about repairs: an entry on February 2 about furnace trouble and an entry on July 18 about problems with the air conditioner.<sup>12</sup> (Comm.Ex. 1) Neither of these entries indicate that Walsh raised her voice when reporting these problems. The only entry of Walsh yelling at Cindy

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<sup>11</sup> The Zvosecs still owned the house at the time of the hearing.

<sup>12</sup> This evidence also raises doubt that increased maintenance costs was a reason for Walsh's eviction. Even if the Zvosecs incurred higher maintenance costs in 1996, they raised Walsh's rent in July by \$80 to allegedly cover such expenses.

Zvosec appears on June 8—the same date that Johnston confronted Walsh about Smith’s presence.

19. Johnston’s journal is consistent with Walsh’s testimony on the issue. Walsh acknowledged that she might have raised her voice to Cindy Zvosec on June 8, 1996 because she was angry and upset about Johnston’s earlier statements that day, which she perceived to be racially motivated. It is reasonable to conclude that any ire that Walsh directed toward Cindy Zvosec related to Johnston’s statements about Smith’s presence, not repairs to her unit.

20. In reaching this conclusion, the Hearing Examiner also considered that Cindy Zvosec provided conflicting accounts on this issue. Cindy Zvosec testified that Walsh called her late one night in early May 1996 and yelled about problems with appliances. (Tr. 256) This testimony conflicts with her earlier account in Respondents’ narrative Answer. She wrote in this initial pleading that Walsh “*started* complaining” about appliances and the air conditioner “within a short period of time” after she talked to Walsh about Smith’s presence. (Emphasis added.) By all

accounts, Respondents were unaware of Smith's presence at the rental unit until early June 1996.

21. Respondents argue that even if Johnston made "racially objectionable statements", Johnston played no part in the Zvosec's decision to evict Walsh on July 23, 1996. (R.Br. 43, 45) While it is clear that the Zvosecs had the ultimate authority to evict Walsh, it is difficult to believe that Johnston, a family member and resident manager, had no influence on the eviction decision. In rejecting this argument, the Hearing Examiner also considered Johnston's state of mind two weeks before the decision.<sup>13</sup> In her July 8, 1996 note to Walsh, Johnston wrote, "I can't take all the stress that is happening." (Comm.Ex. 31) Such evidence, along with adversarial nature of the events of June 8, 1996, demonstrates that Johnston had a strong motive to evict Walsh.

22. Further, certain portions of Johnston's testimony suggest that she, at least, participated in the decision to evict Walsh or perhaps, even

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<sup>13</sup> Cindy Zvosec had difficulty remembering when the eviction decision was made. She eventually testified that the timing of the final decision "would probably speak for itself by the eviction notices." (Tr. 310)

recommended it. For example, Johnston gave the following testimony on direct examination:

Q: Did you talk to your daughter before you left those [eviction] notices?

A: Yes, I spoke with her.

Q: And was it her decision to make the eviction?

A: She thought it was a good idea.

(Tr. 154)

Later, on cross-examination, Johnston testified:

Q: I believe it was your testimony that after June 8, which is the one time that you noted that Denise lost or blew her top and called you a racist, that after that point you two didn't speak to each other?

A: June 8 is when I talked to her outside. And when I mentioned there was [sic] so many problems we'd had, stuff that had to be repaired, *we thought it'd be best if she just left the premises.*

(Tr. 190) (Emphasis added.)

23. Assuming for purposes of argument that the Zvosecs solely made the eviction decision, this decision was inescapably intertwined with the confrontation between Walsh and Johnston on June 8, 1996. Both Cindy and Gary Zvosec testified that the poor relationship between Walsh and Johnston was a reason for the eviction. The substantial weight of the

evidence shows that Walsh's relationship with Johnston dramatically changed on June 8, 1996 after the confrontation about Smith's presence.

24. Walsh testified that she never had any problems with Johnston prior to June 8, 1996. Walsh testified that Johnston was "very good" to her and her children before that date. (Tr. 22-23)

There were never any issues between Betty and myself. Betty was very easy to get along with. We kinda [sic] lived there together and shared the same space . . . .

(Tr. 23)

25. Walsh testified that her relationship with Johnston began to deteriorate after their confrontation on June 8, 1996. Leken, who resided in the house throughout the summer of 1996, corroborated her mother's testimony on this issue. Leken also corroborated Walsh's and Johnston's testimony that they avoided each other after the confrontation as much as possible. This explains why Johnston resorted to placing notices in the utility room to communicate with Walsh.

26. Johnston testified that although Walsh never yelled at her before the June 8, 1996 confrontation, they had problems getting along with each

other before then. (Tr. 200) Yet Johnston's journal does not contain any entries about problems with Walsh before that date. Cindy Zvosec's testimony on this issue is also suspect. Cindy Zvosec testified that Walsh told her during their conversation in early May 1996 that she could not "get along" with Johnston. (Tr. 257) This testimony is questionable because Johnston's journal shows that Johnston was in Florida from mid-February to early May 1996.

27. Cindy Zvosec also testified that she was upset by alterations that Walsh made to the unit. The evidence shows that Walsh built a shelf in the kitchen in 1995 and a closet in "the front room" in late April 1996. (Comm.Ex. 7, Tr. 23-25) Walsh testified that Cindy Zvosec approved the building of the closet, provided that it was not too large.

28. Assuming that Cindy Zvosec was upset by these alterations, the record is void of any evidence that she expressed her disapproval to Walsh either before or after June 8, 1996. The only documentary evidence on this issue is a "p.s." written by Johnston in her July 8, 1996 note to Walsh. (Comm.Ex. 31) Johnston indicated in the note that she had asked Walsh several times to move the shelf in order to allow access to the fuse box and

sewer sump pump. The purpose of the note, according to its body, was to inform Walsh why she locked the utility room earlier that day; the postscript appears to be merely an afterthought.

29. Respondents also argue that Walsh forfeited any rights granted under R.C. 4112.02(H) because she violated her rental agreement by allowing Smith to “effectively” move into her unit. (R.Br. 44, 47-48) This argument lacks factual support. The evidence shows that Smith stayed overnight at Walsh’s residence approximately 7 to 10 times from late May 1996 to August 1996.<sup>14</sup> (Tr. 113, 356) Walsh’s rental agreement did not prohibit overnight guests or limit the frequency of such visits.<sup>15</sup> Therefore, Smith’s presence as an overnight guest did not violate Walsh’s rental agreement.

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<sup>14</sup> Johnston testified that she wrote “s.n.” (for spent night) in her journal every time Smith or another male stayed overnight at Walsh’s residence. Johnston’s journal is unreliable in this aspect because she assumed that Smith stayed the night if he was still there at 10:30 or 11:00 p.m. when she made her nightly entries. Johnston testified that she never wrote “s.n.” in the middle of the night or the next morning.

<sup>15</sup> The rental agreement limited the occupants of the unit to “no more than 4 adults and children”, not one adult and three children. Thus, an argument can be made that Walsh did not breach the rental agreement even if Smith had moved in because only she and her daughter were the other residents during the relevant time.

30. After a careful review of the entire record, the Hearing Examiner disbelieves Respondents' articulated reasons for Walsh's eviction and concludes that they are, more likely than not, a pretext for unlawful race discrimination. The Hearing Examiner is convinced that the motivating factor in Walsh's eviction was the strained relationship between Walsh and Johnston caused by Johnston's discriminatory conduct and Walsh's vehement opposition to it. In evicting Walsh under these circumstances, Respondents not only made housing accommodations unavailable to Walsh (and her daughter), but they also interfered with Walsh's enjoyment of rights granted by R.C. 4112.02(H), namely the right to lawfully associate with persons of her own choosing. Such actions violate both R.C. 4112.02(H)(1) and (12).

## **DAMAGES**

31. 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

32. 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 (5<sup>th</sup> 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 (10<sup>th</sup> 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 (7<sup>th</sup> Cir. 1974).

33. The Commission contends that Walsh suffered economic loss from Respondents’ violation of R.C. 4112.02(H). The Commission argues that Walsh is entitled to the following: “a \$4,810 increase in rent; \$750 for a security deposit of a new unit; \$87 in moving expenses; \$17 for a new bank account; \$5,890 in utilities; \$200 in expenses at the laundry mat; \$977 for a

washer and dryer; \$538 for an electric range; and \$200 for a refrigerator.” (Comm.Br. 22) In total, the Commission requests that Respondents pay Walsh \$13,469 for her economic loss.

34. Respondents do not dispute that Walsh is entitled to \$87 in moving expenses. Respondents, however, challenge their liability for the higher rent and the cost of utilities at the “substantially larger unit” that Walsh rented when she relocated to Brunswick, Ohio. (R.Br. 48-50)

35. To recover the increased cost of alternative housing, a complainant must have made a reasonable effort to minimize damages by seeking comparable housing. *HUD v. DiBari*, Fair Housing-Fair Lending (P-H), ¶25,036 at 25,377 (HUD ALJ 1992). If the alternative housing and the denied housing are comparable in size, location, and amenities, then a 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, a complainant may still recover the cost differential if comparable housing was unavailable at the time. *Id.*

36. In this case, neither the Commission nor Respondents provided any evidence on Walsh's efforts to find alternative housing. Walsh provided the only testimony about the alternative housing. Walsh testified that she rented a house in Brunswick for \$750 per month and paid approximately \$142 per month in utilities while living there. Walsh also testified that she had to purchase a stove, refrigerator, and eventually a washer and dryer because the Brunswick house lacked these items.

37. If anything, Walsh's testimony suggests that the house that she rented in Brunswick was not comparable to her rental unit in Amherst. Besides a significant cost differential (\$272 per month), there is no evidence that the Brunswick house was divided into two units like the Amherst house that Walsh shared with Johnston. Thus, Walsh and her children most likely had more living space at the Brunswick house.

38. Although the houses appear to be incomparable, neither the Commission nor Respondents provided any evidence about the availability of comparable housing in August 1996. Thus, there is no evidence that Walsh was forced to relocate to Brunswick and move into larger, more

expensive housing accommodations. Without such evidence, Walsh is not entitled to the difference in rent and utility costs between the Brunswick house and her rental unit in Amherst.<sup>16</sup>

[T]he record does not show whether the alternative housing was comparable to the denied housing, or when Complainant became free to move into cheaper housing—facts essential to support a claim for compensation for more expensive alternative housing. This portion of the claim therefore must be denied.

*Lee, supra* at 26,033.

In fair housing cases, a failure to “cover” has been taken to preclude recovery for the greater cost of alternative housing, even where the defendant did not actively set out to prove during the proceeding that the complainant failed to seek comparable housing and minimize damages.

*HUD v. Bangs*, Fair Housing-Fair Lending (P-H), ¶25,040 at 25,416 (HUD ALJ 1993).

39. Respondents also argue that Walsh is not entitled to the purchase price of appliances that she bought after relocating. This argument is well taken. Since Walsh did not own the stove, refrigerator, and washer and dryer that she used at the Amherst house, Walsh would be placed in a better position if Respondents were required to reimburse her for the

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<sup>16</sup> Similarly, Walsh is not entitled to recover the nominal expense of establishing a bank account in Brunswick because there is no evidence that she was forced to relocate after her eviction.

purchase price of these items. For the same reason, Walsh is also not entitled to the \$750 security deposit because she presumably recouped this expense upon leaving the house that she rented in Brunswick. *HUD v. French*, Fair Housing-Fair Lending (P-H), ¶¶25,113 at 25,975 (HUD ALJ 1995).

40. Walsh testified that she had to use a laundromat from August 1996 until she purchased a new washer and dryer in February 1997. Walsh further testified that she paid approximately \$200 for laundry during that period. The Hearing Examiner credited Walsh's testimony on this issue.

41. The evidence shows that Walsh had access to a washer and dryer located in the utility room of the 1900 Oak Point residence. Given this access, it is unlikely that Walsh, if she had not been evicted, would have incurred laundry expenses from August 1996 to February 1997. Therefore, Walsh is entitled to \$200 for her laundry expenses during that six-month period.

42. Based on the foregoing discussion, Walsh is entitled to \$87 for moving expenses and \$200 for laundry expenses. Accordingly, the Hearing Examiner recommends that the Commission award Walsh \$287 for her economic loss.

43. The Commission also contends that Complainants suffered emotional distress from Respondents' violation. 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 (8<sup>th</sup> 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).

44. Walsh testified that Johnston's statements to her about Smith on June 8, 1996 made her extremely angry and upset. Jessica Leken testified that she witnessed the confrontation between Walsh and Johnston on that

day. Leken corroborated her mother's testimony about her reaction to Johnston's statements.

45. Leken also testified that her mother became upset when she received the eviction notices. Walsh described the stress of having to find another place to live prior to the impending start of the school year.

46. Although Smith was neither a tenant of Respondents nor denied housing by them, he is entitled to damages for emotional distress caused by their discriminatory actions toward Walsh because of her association with him. *Cf. Indiana Civ. Rights Comm. v. Alder*, 714 N.E.2d 632 (Ind. 1999) (black boyfriend of mobile home park tenant was "personally aggrieved" by park owner's efforts to evict white tenant from park based upon her association with him, and thus, he was entitled to actual damages under state civil rights law). This finding is consistent with the legislative mandate that R.C. Chapter 4112 be liberally construed to effectuate its purposes. R.C. 4112.08. One of the central statutory purposes of this Chapter is making victims of unlawful discrimination whole.

47. Smith testified that Respondents' actions toward Walsh made him feel "inadequate" and question his self worth.

It was like, . . . what's wrong with me or what did I do to these people that I don't even know, that it would put them in jeopardy like that. Cause them to react or mistreat them just because who I am . . . It was a terrible thing.

(Tr. 107)

48. The Hearing Examiner credited Complainants' testimony and Leken's testimony about the emotional distress caused by Respondents' actions. In light of this testimony and the totality of the circumstances surrounding Respondents' actions, the Hearing Examiner recommends that the Commission award Walsh \$6,000 and Smith \$1,000 for emotional distress.

### **PUNITIVE DAMAGES**

49. The 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 (6<sup>th</sup> Cir. 1974).

50. 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.<sup>17</sup>

Ohio Adm.Code 4112-6-02.

Further, whether an agent engaged in the unlawful discriminatory practices, as opposed to a principal, "shall not affect the amount of punitive damages." *Id.*

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<sup>17</sup> This factor is more appropriately considered when determining actual damages.

51. Applying the foregoing factors to this case:

- Johnston's actions were intentional and rooted in racial intolerance. The evidence suggests that Johnston did not want a black man staying overnight in the same house with her. The evidence also suggests that Johnston, at least, participated in the decision to evict Walsh;
- While there is no evidence that either Cindy or Gary Zvosec harbored discriminatory animus against black persons, they tolerated Johnston's discriminatory conduct and allowed its effects to result in Walsh's eviction. As owners of housing accommodations, they had a non-delegable duty to ensure a living environment free of unlawful discrimination and its effects;
- The Commission did not present any evidence that there have been previous findings of unlawful discrimination against Respondents;
- As of December 10, 1999, Cindy and Gary Zvosec apparently owned only one rental property—the rental unit at 1900 Oak Point Road. Neither the Commission nor Respondents presented evidence about the profitability of this unit. There is no evidence that Johnston either owns or rents housing accommodations; and
- Neither the Commission nor Respondents presented any evidence about Respondents' cooperation or lack of cooperation during the investigation.

52. Based on the foregoing discussion, the Hearing Examiner recommends that the Commission assess Johnston \$5,000 in punitive damages and Cindy and Gary Zvosec \$5,000 collectively in punitive

damages. Under the statute, Complainants are entitled to share the total amount of punitive damages.

### **ATTORNEY'S FEES**

53. 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.

54. To create a record regarding attorney's fees, the Commission's counsel should file affidavits from plaintiffs' attorneys in Lorain County, Ohio regarding the reasonable and customary hourly fees that they charge in housing discrimination cases. Also, a detailed accounting of the time spent on this case must be provided and served upon Respondents. Respondents may respond with counter-affidavits and other arguments regarding the amount of attorney's fees in this case.

55. 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.

56. Meanwhile, any objections to this report should be filed pursuant to the Ohio Administrative Code. Any objections to the recommendation of attorney's fees can be filed after the Hearing Examiner issues a supplemental recommendation regarding attorney's fees.

## **RECOMMENDATIONS**

For all of the foregoing reasons, it is recommended in Complaint #8158 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 Walsh \$6,287 in actual damages;

3. The Commission order Respondents to pay Smith \$1,000 in actual damages;

4. The Commission order Johnston to pay Complainants \$5,000 in punitive damages; and

5. The Commission order Cindy and Gary Zvosec collectively to pay Complainants \$5,000 in punitive damages.

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TODD W. EVANS  
HEARING EXAMINER

June 19, 2000