

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

**CAROLYN DAWKINS AND
ERICA DAWKINS**

Complainant

v.

CRISTI EMMINGER

Respondent

Complaint No. 9745
(AKR) H3101903 (28274) 102703
05 – 04 – 0073 – 8

**CHIEF ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDATIONS**

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ALJ'S REPORT BY:

Denise M. Johnson
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INTRODUCTION AND PROCEDURAL HISTORY

Carolyn and Erica Dawkins (Complainants) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 27, 2003.

The Commission investigated and found probable cause that Cristi Emminger (Respondent) engaged in unlawful discriminatory practices in violation of Revised Code Section (R.C.) 4112.02(H)(12).¹

The Commission issued a Complaint, Notice of Hearing, and Notice of Right of Election on August 12, 2004.

The Complaint alleged that Respondent intimidated Complainants by subjecting them to unwelcome and unwanted acts of racially motivated harassment, including but not limited to, the use of offensive epithets and other forms of verbal harassment, that had the purpose or effect of creating a racially offensive, intimidating, and hostile living environment.

¹ The Commission's Complaint alleged violations of R.C. 4112.02 (H)(4) and (12). However, the evidence presented at the hearing by the Commission is consistent with allegations of prohibited conduct under R.C. 4112.02(H)(12). Accordingly, the Commission's Complaint is amended to conform to the evidence, *sua sponte*.

The Complaint further alleged that Respondent's actions had the purpose or effect of denying to Complainants the full enjoyment of the premises, and to otherwise deny or make housing accommodations unavailable to them for reasons not applied equally to all persons without regard to their race.

The Commission filed a Motion for Default on January 10, 2005.²

Thereafter, Respondent filed an Answer on February 18, 2005, generally denying the allegations of the Complaint.³

A public hearing was held on July 5, 2005 at the Ocasek Government Building in Akron, Ohio. Respondent did not appear at the hearing.

² Complaint and Notice of Hearing No. 9745 was sent to Respondent by certified mail dated August 17, 2004. The certified mail was returned unclaimed on September 9, 2004. Pursuant to O.A.C. 4112-3-06(A), the Answer was due in September of 2004.

³ The Commission's Motion for Default was granted at the hearing.

The record consists of the previously described pleadings, a transcript consisting of 68 pages, exhibits admitted into evidence at the hearing, and a post-hearing brief filed by the Commission on November 30, 2005. Respondent did not file a post-hearing brief.

FINDINGS OF FACT

The following findings are based, in part, upon the Administrative Law Judge's (ALJ) assessment of the credibility of the witnesses who testified before her in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. For example, she considered each witness's appearance and demeanor while testifying. She considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. She 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 ALJ 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 October 27, 2003.

2. The Commission determined on April 1, 2004 that it was probable that Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(H)(12).

3. The Commission attempted but failed to conciliate this matter by informal methods of conciliation.⁴

4. Complainants are mother and daughter and are African- American.

5. Complainants moved to 1166 Jason Avenue in Akron. The location is in a predominately Caucasian neighborhood. They felt that it was better than the congested public housing unit they had previously lived in.⁵

⁴ Comm. Exs. 10-15.

⁵ Carolyn Dawkins (mother) received an Associate Degree in 1995 in Child Development from the Adult Vocational College in Akron. Erica Dawkins received an Associate Degree in Medical Assisting from the University of Akron in 1997.

6. The original landlord was Jason Wallenhurst (Wallenhurst). He owned a total of ten units, consisting of five duplexes. Each duplex has a downstairs unit with a porch and an upstairs unit with a balcony.

7. Complainants moved into a two-bedroom downstairs unit.

8. When Complainants first saw the unit there was no one living upstairs over the unit they were interested in renting.

9. However, when they moved in, Respondent, who is Caucasian, occupied the upstairs unit.

10. When Complainants moved in Respondent was standing in the doorway. Both Complainants recall that Respondent was staring at them in a “cold and dirty” manner. (Tr. 5)

11. Respondent allowed her guests to park in spaces reserved for Complainants. Respondent also stayed up late at night entertaining guests who were constantly coming and going. Since Complainants were both employed, this conduct was disruptive because it kept them awake during the night.

12. Complainants attempted to approach Respondent to resolve the matter but without success. They eventually spoke to Wallenhurst who said he would talk to Respondent.

13. Instead of the situation improving, it worsened. Respondent continued playing loud music all night, turning it off at 5:00 a.m. each morning – the time Complainants got up to get ready for work.

14. Complainant Carolyn Dawkins talked to Wallenhurst again. The situation would improve for a week or so, but then Respondent went back to playing loud music all night.

15. In September 2002, Complainants called the police to complain about the noise level.

16. The police came out and spoke to Respondent. After they left, Respondent came out onto her balcony and shouted “Niggers, niggers, niggers!” (Tr. 55-56)

17. The problems with loud music, the guests, and trash being thrown in Complainants' yard area continued. Respondent's guests and boyfriend began throwing beer cans onto Complainants' porch. (Tr. 27-30)

18. On another occasion where Complainants heard loud noises in Respondent's apartment that sounded like a verbal and physical altercation taking place, Complainants called the new landlord, Ryan Creed (Creed), to complain.⁶

19. Thereafter, Complainants heard Respondent's telephone ring. After Respondent hung up the phone, she walked out onto her balcony and yelled out, "Niggers, niggers, niggers!" (Tr. 26-27)

20. In October of 2003 the problems with the loud music and partying intensified and complaints were responded to with racial slurs.⁷

⁶ Complainants also heard Respondent having a fight with her boyfriend, and heard the boyfriend say that Respondent had cut him. Complainants saw the boyfriend run out of the upstairs unit bleeding and holding a bloody towel. (Tr. 31-32)

⁷ Complainants' also called the police after they contacted Creed. The police came out regarding the noise complaint. After the police left Respondent began banging on a table in her unit, shouting "Niggers!" over and over again. She then began jumping up and down in a small hallway, yelling "Niggers!" Complainants called the police again who came out once more to quiet Respondent. (Tr. 57-59)

21. Complainant Carolyn Dawkins called Creed and told him about the continued obnoxious behavior. He said that the next day he would issue a Three Day Notice to Vacate.

22. On October 19, 2003, Creed issued a Three Day Notice to Vacate to Respondent.

23. After Creed handed the notice to Respondent she went out onto the balcony and said that she could not “believe that you would take up for those niggers!” (Tr. 33, 60-61)

24. Respondent continued her outburst on the porch yelling “Niggers!” over and over again. She also went inside her apartment and continued yelling “Niggers!” while banging on the ceiling of Complainants’ unit. (Tr. 34-35, 60-61)

25. Respondent also yelled that she was going to break the windows in Complainants’ cars and in their apartment.

26. Complainant Carolyn Dawkins called the police again. The police came out and tried to speak to Respondent, but she refused to open the door for them. Complainant Carolyn Dawkins ended up filing an incident report with the police. (Comm. Ex. 2)

27. On October 24, 2003 while Complainant Carolyn Dawkins was asleep in the chair in her living room an object was hurled through the living room window. Complainant Carolyn Dawkins opened up her door and saw someone going up the steps to Respondent's unit.

28. After the door to the upstairs unit slammed shut, Respondent then began yelling profanities and racial epithets over and over again. (Tr. 39-41)

29. The next day Complainants discovered that the back window of Complainant Carolyn Dawkin's car had been smashed. She filed two police reports on October 25, 2003 regarding the car window and Respondent's use of racial slurs. After the police left, Respondent came outside and again

began yelling racial slurs at Complainants. Complainants again filed a police report on this incident.⁸

30. Respondent vacated her unit soon after the last incident.

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.⁹

⁸ Complainant Carolyn Dawkins filed a lawsuit against Respondent seeking protection from physical assaults to themselves by Respondent. The court granted a temporary Protection Order on November 4, 2003, a permanent Protection Order on December 3, 2003, and a Civil Protection Stalking Order on April 14, 2004.

⁹ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

1. The Commission alleges in the Complaint that Respondent intimidated Complainants, threatened them, and otherwise interfered with the quiet enjoyment of their home on the basis of race.

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(G) and 4112.06(E).

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.¹⁰ It is also appropriate to refer to the regulations of the Department of Housing and Urban Development (HUD), the federal agency charged with enforcement of Title VIII.

5. Like its federal counterpart, a broad range of activities can constitute a violation of R.C. 4112.02(H)(12). Among other things, this provision prohibits acts that threaten, intimidate, or interfere with persons (and their associates) in their enjoyment of housing accommodations because of their race. See *HUD Regulations*, 24 C.F.R. 100.400(c)(2).

6. The evidence in this case shows that Respondent engaged in a campaign of intimidating and threatening behavior toward Complainants, and otherwise interfered with the quiet enjoyment of their home because of their race. (See *Finding of Facts*.) Complainants testified credibly about events that occurred during their tenure at 1166 Jason Avenue.

¹⁰ Section 3617 of Title VIII is substantially the same as R.C. 4112.02(H)(12). See 42 U.S.C. 3617.

7. In summary, Respondent threatened Complainants, intimidated them, and otherwise interfered with the quiet enjoyment of their home. Respondent's actions, which were racially motivated, are a violation of R.C. 4112.02(H)(12). Therefore, Complainants are entitled to damages.

DAMAGES

8. 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

9. In fair housing cases, the purpose of an award of actual damages is to place the Complainants "in the same position, so far as money can do it, as ... [the Complainants] would have been had there been no injury or breach of duty" *Lee v. Southern Home Sites Corp.*, 429 F.2d 290, 293 (5th Cir. 1970) (citations omitted). To that end, victims of housing discrimination may

recover damages for tangible injuries such as economic loss and intangible injuries such as humiliation, embarrassment, and emotional distress. *Steele v. Title Realty Co.*, 478 F.2d 380 (10th Cir. 1973). Damages for intangible injuries may be established by testimony or inferred from the circumstances.¹¹ *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974).

10. In this case, the evidence shows that Complainants suffered slight out-of-pocket damages but heavy emotional distress from Respondent's on-going campaign of harassment, intimidation, and terror.

11. Complainant Carolyn Dawkins had to replace her car window at a cost of \$150.

¹¹ 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 ¶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).

12. Both Complainants testified about their background of struggle to educate themselves, begin rewarding careers, and leave the crowded projects for a new life in what they believed would be a comfortable neighborhood.

13. Complainant Carolyn Dawkins gave credible testimony about the effect that Respondent's conduct had on her. She began to distrust people. She struggled to prevent the impact of the harassment from affecting her attitude toward other people with whom she had contact. She is a deeply religious person who constantly struggled with not letting Respondent's behavior affect her attitude toward the Caucasian children that she worked with. She ultimately received counseling to help her deal with her feelings. (Tr. 43-46)

14. Both Complainants testified about feeling physically unsafe and unwanted. They lost sleep and experienced stress. Complainant Carolyn Dawkins testified that she felt so unsafe that she was unable to sleep until her neighbors agreed that they would keep an eye on her unit in case Respondent tried to do something destructive. This feeling

went on months after Respondent had vacated the premises. (Tr. 43-46) Complainant Carolyn Dawkins even sought civil protection and anti-stalking orders because of Respondent's actions.

15. The ALJ credited Complainants' testimony and sincerity about the emotional distress that they suffered because of Respondent's actions. In light of their testimony and the totality of the circumstances surrounding Respondent's actions, the ALJ recommends that the Commission award Complainants \$45,000 for actual damages.

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 Administrative Code (O.A.C.) 4112-6-02. Thus, punitive damages are appropriate "as a deterrent measure" even when there is no proof of actual malice. *Shoenfelt 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 Respondent's conduct;
- Respondent's prior history of discrimination;
- Respondent's size and profitability;
- Respondent's cooperation or lack of cooperation during the investigation of the charge; and
- The effect Respondent's actions had upon Complainants.¹²

O.A.C. 4112-6-01.

18. Applying the foregoing factors to this case:

- Respondent's actions were intentional, malicious, and racially motivated;
- The Commission did not present any evidence that there have been previous findings of unlawful discrimination against Respondent;
- Respondent is not a provider of housing accommodations. Therefore, the factors relating to size of housing accommodations and profitability are inapplicable in this case; and
- There was no evidence introduced at the hearing about Respondent's cooperation or lack thereof.

¹² This factor is more appropriately considered when determining actual damages.

19. Based on the foregoing discussion, the ALJ recommends that Respondent be assessed \$7,500 in punitive damages.

ATTORNEY'S FEES

20. 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.

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

22. If the Commission adopts the ALJ'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 ALJ's Report is adopted. Respondent may respond to the Commission's Application for Attorney's fees within 30 days from her receipt of it.

23. Meanwhile, any Objections to this report should be filed pursuant to the O.A.C. Any Objections to the recommendation of attorney's fees can be filed after the ALJ makes her Supplemental Recommendation to the Commission regarding attorney's fees.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 9745 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 the Complainants \$45,150 in actual damages; and

3. The Commission order Respondent to pay the Complainants \$7,500 in punitive damages.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

September 25, 2006