

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**LENWOOD NUTT AND  
BARBARA NUTT**

Complainants

v.

Complaint No. 9892  
(OSI-COL) H1072104 (31296) 072704

**JAMES R. FORSYTHE**

Respondent

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

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**ALJ'S REPORT BY:**

Lenwood Nutt  
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P. O. Box 44063  
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**Complainant**

Denise M. Johnson  
Chief Administrative Law Judge  
Ohio Civil Rights Commission  
1111 East Broad Street, Suite 301  
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## INTRODUCTION AND PROCEDURAL HISTORY

Lenwood and Barbara Nutt (Complainants) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on July 27, 2004.

The Commission investigated and found probable cause that James R. Forsythe (Respondent) engaged in unlawful discriminatory practices in violation of Revised Code Section (R.C.) 4112.02(H) (4) and (12).<sup>1</sup>

The Commission issued a Complaint, Notice of Hearing, and Notice of Right of Election on June 23, 2005.

The Complaint alleged that Respondent failed and refused to undertake the necessary repairs to Complainants' housing accommodations, made statements declaring his intention to not make the repairs because of Complainants' race, and committed other acts directed against them,

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<sup>1</sup> The Commission's Complaint alleged violations of R.C. 4112.02 (H)(4) and (7). However, the evidence presented at the hearing by the Commission, as well as arguments presented in its brief, are consistent with allegations of prohibited conduct under R.C. 4112.02(H)(4) and (12). Accordingly, the Commission's Complaint is amended to conform to the evidence, *sua sponte*.

including, but not limited to, shutting off the water to their housing accommodations.

The Complaint further alleged that Respondent subjected Complainants to disparate terms and conditions of tenancy for reasons not applied equally to all persons without regard to their race.

A public hearing was held on January 6, 2006 at the Ohio Civil Rights Commission's Central Office, 1111 East Broad Street in Columbus, Ohio. Respondent did not appear at the hearing.<sup>2</sup>

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<sup>2</sup> Respondent failed to file an Answer. The Commission moved that the hearing proceed as a default, pursuant to Ohio Administrative Code (O.A.C.) 4112-3-06(F). The Commission's Motion was granted.

The record consists of the previously described pleadings, a transcript consisting of 26 pages, exhibits admitted into evidence at the hearing, and a post-hearing brief filed by the Commission on January 31, 2006. 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 July 27, 2004.

2. The Commission determined on May 26, 2005 that it was probable that Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(H)(4) and (12).

3. The Commission attempted but failed to conciliate this matter by informal methods of conciliation.<sup>3</sup>

4. Complainants are husband and wife, both of whom are African-American. They were seeking a house to rent during the spring of 2004. (Tr. 4, 21)

5. They located a house that they were interested in at 415 South Yale, and met with Respondent who is the owner and landlord. (Tr. 4-5, 21)

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<sup>3</sup> (Comm. Exs. 10-15)

6. Respondent resides in the house directly across the street from 415 South Yale Avenue. Respondent also owns property in Hocking County.

(Tr. 19)

7. At that time Respondent showed them around the house and assured Complainants if they rented the property he would complete a number of repairs needed to the property. (Tr. 7-8, 21)

8. Complainants signed the lease and paid the rent for the property on or about May 1, 2004. (Tr. 6-7, 21)

9. When Complainants began to move into their new home in the late spring of 2004, a worker was hanging drywall in one of the rooms. (Tr. 7-8)

10. While Complainant Lenwood Nutt was moving furniture, he heard Respondent tell the worker to stop working because “those niggers are moving in.” (*Id.*)

11. After a period of time passed, Complainants became concerned because Respondent was not doing the repairs to the property as promised.

12. Complainants approached Respondent about the repairs but he only offered excuses as to why he had not begun the repair work. (Tr. 9-10)

13. Although Respondent's excuses were based on his representation that he needed an operation on his shoulders and arms, Complainants regularly observed him making repairs and improvements to his own house by operating heavy machinery and chopping wood. (*Id.*)

14. Complainants were very frustrated Respondent had not even begun the promised repairs. They called the City Code Enforcement Office (CCEO) and reported the needed repairs. (Tr. 10, 22)

15. Mike O'Keefe with the CCEO conducted an inspection of the property at 415 South Yale Avenue and cited Respondent for eight (8) code violations. (Comm. Ex. 2)

16. After Respondent was cited for the code violations he turned off Complainants' water supply. (Tr. 11, 22)

17. Complainants reported the water shut off to the City Water Division. (Tr. 11)

18. Bob Lowery, a city water technician, came to Complainants' home to turn the water back on. Complainant Lenwood Nutt overheard Respondent tell Lowery that he did not want the water put back on "for those niggers." (*Id.*)

19. After Complainants filed a complaint with the CCEO, Respondent's use of racially derogatory comments directed toward them escalated:

- While making some repairs on Complainants' property, Respondent referred to them as "mammy"<sup>4</sup> and "pappy"; (Tr. 11)

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<sup>4</sup> The word "mammy" was misspelled due to a typographical error in the transcript.

- Respondent regularly sat at his neighbors' house across the street from Complainants and would join in with them calling Complainants "crack head niggers", and "coons", and would even call Complainants' grandchildren "little nigger monkey".<sup>5</sup>

20. Respondent also put watermelon rinds underneath the back of Complainants' station wagon and cut their garden hose. (Tr. 12-13)

21. Complainants started taking turns sleeping as the other guarded the door because they feared for their lives due to Respondent's conduct toward them. (Tr. 16-17, 23-24)

22. Sometime during August of 2004 Complainants moved out of 415 South Yale Avenue. (Tr. 17-18)

23. While Complainants were moving out Respondent and his neighbors engaged in shouting obscenities and racial epithets toward them like "niggers", "coons", and "niggers get out".

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<sup>5</sup> Complainants stopped having their grandchildren come to the house to keep them from being exposed to such comments. (Tr. 13-15)

24. On July 21, 2004, the *Columbus Dispatch* printed an article entitled, "Battle Lines Drawn over Franklinton Rental House," where it was reported that Complainants feared for their safety and, as a result, they took turns at night "securing the perimeter", while one slept, the other sat by the front door, peered into the yard, with the telephone in hand. (Comm. Ex. 3)

25. In the article when Respondent was asked about renting to Complainants, he stated: "I never had rented to, never had any dealings with, colored folks before. But I thought I'd take a shot at it." (*Id.*)

## 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.<sup>6</sup>

1. The Commission alleges in the Complaint that Respondent intimidated, threatened, and otherwise interfered with Complainants' 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:

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<sup>6</sup> Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

It shall be an unlawful discriminatory practice:

(H) For any person to:

- (4) Discriminate against any person in the terms or conditions of ..., renting, ... any housing accommodations or in furnishing facilities, services or privileges in connection with the ... occupancy, or use of any housing accommodations, because of race, ...
- (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.<sup>7</sup> 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. However, the federal counterpart to R.C. 4112.02(H)(4) – 42 U.S.C. § 3604(b) – is narrower in scope.<sup>8</sup> Federal Courts have interpreted this provision to apply only to discrimination that affects the “accessibility and availability of housing, not to claims of discriminatory conduct relating to the use and enjoyment of previously acquired housing.” *King v. Metcalf 56 Homes Assn.*, 2004 U.S. Dist. LEXIS 22726, No. 04-2192-JWL.

6. R.C. 4112.02(H)(4) language is broader in scope and provides that it is unlawful to discriminate:

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<sup>7</sup> Section 3617 of Title VIII is substantially the same as R.C. 4112.02(H)(12). See 42 U.S.C. 3617.

<sup>8</sup> 42 U.S.C. § 3604(b) makes it unlawful to:

... discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services in connection therewith, because of race, ....

... in furnishing facilities, services, or privileges in connection with the ownership, occupancy, or use of any housing accommodations, ... *because of race* ....”

See *Joseph Nattey, et al. and Christine Riddick, et al. v. First Realty Property Management, et al.*, Complaint No. 9243, 2005 Ohio Civil Rights Comm. LEXIS 4, and *Bobbie Ross v. Rubin Szerlip*, Complaint No. 8696, 2001 Ohio Civil Rights Comm. LEXIS 14.

7. The credible evidence supports a determination that Respondent failed to make promised repairs and turned off Complainants’ water supply, thereby refusing to provide services in connection with their occupancy of 415 South Yale Avenue because of their race.

8. 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).

9. 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 415 South Yale Avenue.

10. In summary, Respondent threatened Complainants, intimidated them, and otherwise interfered with the quiet enjoyment of their home, and discriminated in the furnishing of services to Complainants. Respondent's actions, which were racially motivated, violated R.C. 4112.02(H)(4) and (12). Therefore, Complainants are entitled to relief.

## **DAMAGES**

11. 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

12. In fair housing cases, the purpose of an award of actual damages is to place Complainants "in the same position, so far as money can do it, as ... [Complainants] 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.<sup>9</sup> *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7<sup>th</sup> Cir. 1974).

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<sup>9</sup> 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 (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).

13. In this case, the evidence shows that Complainants suffered severe emotional distress from Respondent's on-going campaign of harassment, intimidation, and terror.

14. Both Complainants testified about the fear and insecurity induced by Respondent's conduct. They also gave credible testimony about their attempts to secure their person and property from Respondent by keeping a 24-hour vigil at their door.

15. Complainant Barbara Nutt had triple bypass heart surgery prior to moving into 415 South Yale Avenue. She testified Respondent's conduct of harassment and intimidation, plus the emotional distress she suffered, adversely affected her heart condition. (Tr. 18)

16. Complainants also testified that they felt they were forced to ask their grandchildren not to visit because of Respondent's harassing and intimidating conduct. (Tr. 13-15)

17. The ALJ credited Complainants' testimony and sincerity about the emotional distress 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 the Commission award Complainants \$40,000 for actual damages.

### **PUNITIVE DAMAGES**

18. The purpose of an award of punitive damages pursuant to R.C. 4112.05(G) is to deter future illegal conduct. 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 (6<sup>th</sup> Cir. 1974).

19. 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.<sup>10</sup>

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

20. Applying the foregoing factors to this case:

- Respondent's actions were intentional, malicious, blatant, and racially motivated;
- The Commission did not present any evidence that there have been previous findings of unlawful discrimination against Respondent;
- Respondent owns the property at 415 S. Yale Avenue, the house that he resides in across the street, and property in Hocking County. (Tr. 5, 19)
- Respondent was uncooperative during the entire proceeding. (Tr. 2)

21. Based on the foregoing discussion, the ALJ recommends that Respondent be assessed \$10,000 in punitive damages.

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<sup>10</sup> This factor is more appropriately considered when determining actual damages.

## ATTORNEY'S FEES

22. 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.

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

24. 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 his receipt of it.

25. 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. 9892 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 \$40,000 in actual damages;
3. The Commission order Respondent to pay \$10,000 to the Complainants in punitive damages;

4. The Commission order Respondent, within ten (10) days of receipt of the Commission's Final Order, to make arrangements to attend a training course on fair housing law sponsored by a fair housing agency at his expense, said training course to be taken within six (6) months from the date of the Commission's Final Order.

5. The Commission order Respondent to use equal housing opportunity notices in his lease/rental agreements, similar to the one set out in Appendix A; and

6. The Commission order Respondent to report to the Commission's Compliance Department for the next three (3) years as set out in the ALJ's Report.

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DENISE M. JOHNSON  
CHIEF ADMINISTRATIVE LAW JUDGE

October 11, 2006

## **EQUAL HOUSING OPPORTUNITY**

It is illegal to discriminate against any person because of race, color, religion, sex, familial status (having one or more children), ancestry, disability, or national origin. Anyone who feels he or she has been discriminated against should contact:

**Ohio Civil Rights Commission**

**1111 East Broad Street, Suite 301**

**Columbus, OH 43205-1379**

**Phone: 614 – 466 – 2785**

**Fax: 614 – 466 – 7742**

**IT IS ALSO ILLEGAL TO RETALIATE AGAINST ANYONE  
WHO FILES A CHARGE WITH THE OHIO CIVIL RIGHTS COMMISSION  
OR PARTICIPATES IN A COMMISSION INVESTIGATION.**

**APPENDIX A**