

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

**Donald Adkinson,
Jeanette Adkinson and
James LaVelle**

Complainants

v.

**Phillip DeVoe and
Carolyn DeVoe**

Respondents

Complaint No. 9413 (Adkinsons)
(CLE) H4112601 (33610) 032502
05 – 02 – 0286 – 8

Complaint No. 9414 (LaVelle)
(CLE) H4093001 (33611) 032502
05 – 02 – 0288 – 8

Complaint No. 9670 (LaVelle)
(CLE) H4091602 (34383) 063003
05 – 03 – 0906 – 8

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

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ALJ'S REPORT BY:

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INTRODUCTION AND PROCEDURAL HISTORY

Donald and Jeanette Adkinson (the Adkinsons) and James LaVelle (Complainants) filed sworn charge affidavits with the Ohio Civil Rights Commission (Commission) on March 25, 2002.

The Commission investigated and found probable cause that unlawful discriminatory practices had been engaged in by Phillip and Carolyn DeVoe (Respondents) in violation of Revised Code Sections (R.C.) 4112.02(H)(1), (4), and (7) with regard to the Adkinsons, and R.C. 4112.02 (H)(1), (4), (7), and (12) with regard to Complainant LaVelle.

The Commission's efforts to eliminate the alleged unlawful discriminatory practices by informal methods of conciliation were unsuccessful. The Commission issued the Complaints, Notices of Election and Notices of Hearing on October 31, 2002. The Commission filed a Motion to Consolidate Complaint Nos. 9413 and 9414, which was granted on December 22, 2002.

Complainant Lavelle filed a second charge with the Commission on June 30, 2003. The Commission investigated and found probable cause that unlawful discriminatory practices had been engaged in by Respondent Phillip DeVoe in violation of R.C. 4112.02 (H)(12) and (I).

The Commission's efforts to eliminate the alleged unlawful discriminatory practices by informal methods of conciliation were unsuccessful.

The Commission issued the Complaint, Notice of Election, and Notice of Hearing No. 9670 on April 22, 2004.

The Complaints allege, *inter alia*, the following:

That the Respondent Carolyn DeVoe made or caused to be made statements indicating a preference that the subject property not be shown to or rented to African-Americans, that Respondent Phillip DeVoe subjected the Complainants to acts of harassment, and otherwise denied or attempted to deny housing accommodations to the Complainants for reasons not applied equally to all persons without regard to their race.

That the Respondent Phillip DeVoe has harassed Complainant LaVelle, filed a civil action, and engaged in other behaviors having the purpose or effect of depriving Complainant LaVelle and his tenants of the full use and enjoyment of the property in question, in retaliation for having engaged in activity protected by Revised Code 4112.02 (H)(12).

Respondents filed Answers to the Complaints, admitting certain procedural allegations but denying that they engaged in any unlawful discriminatory practices.¹

A public hearing was held on July 13-14, 2004 at the Mansfield Municipal Court, 30 North Diamond Street in Mansfield, Ohio.

The record consists of:

- the previously described pleadings;
- the transcript consisting of 421 pages of testimony;
- exhibits admitted into evidence at the hearing;
- the Commission's the post-hearing brief, filed March 23, 2005;
- Respondents' brief, filed May 5, 2005; and
- the Commission's reply brief, filed May 16, 2005.²

¹ The Commission filed a Motion to Consolidate Complaint No. 9670 with Complaint Nos. 9413 and 9414. This Motion was granted, pursuant to an Order dated February 27, 2004.

² The Commission filed a Motion to Supplement the Record on April 13, 2006. The evidence sought to be introduced is related to conduct engaged in by Respondent P. DeVoe after the hearing. The evidence offered is not relevant to the events that occurred during the time that the alleged discriminatory conduct occurred. The Commission's Motion is denied.

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' 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' 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 was supported or contradicted by reliable documentary evidence.

1. Complainants filed sworn charge affidavits with the Commission on March 25, 2002 and June 30, 2003.

2. The Commission determined on September 12, 2002 and January 29, 2004 that it was probable that unlawful discriminatory

practices had been engaged in by Respondents in violation of R.C. 4112.02(H)(1), (4), and (7) with regard to the Adkinsons and R.C. 4112.02(H)(1), (4), (7), (12), and (I) with regard to Complainant LaVelle.

3. Complainant LaVelle is Caucasian and is the owner of the housing accommodations located at 609 South Home Road in Mansfield, Ohio.

4. Carolyn DeVoe (Respondent C. DeVoe) and Phillip DeVoe (Respondent P. DeVoe) are Caucasian and are owners of and residents of 611 South Home Road in Mansfield, Ohio.

5. Donald Adkinson (Complainant D. Adkinson) and Jeanette Adkinson (Complainant J. Adkinson) are African-American. They rent from and reside at the property owned by Complainant LaVelle at 609 South Home Road in Mansfield, Ohio.

6. Complainant LaVelle has been a resident of Mansfield for fifteen (15) years. He owns several pieces of real estate, in addition to the South Home Road property.

7. In February of 1999 Complainant LaVelle purchased the residential property at 609 South Home Road from Respondents as an investment property.

8. The purchase price for the property was \$80,000. Complainant LaVelle invested an additional \$50,000 to rehabilitate the property.

9. It took approximately a year and a half to complete the renovations. Complainant LaVelle expected the property rehabilitation would pay off in the increased value of the property because of the location.

10. Complainant LaVelle's property is bordered on its west side by a public road, and two sides of his property are bordered by Respondents' property. (Comm. Ex. 17)

11. Respondent P. DeVoe operates a horse boarding business on his property.

12. The front of the house and the garage on the property located at 609 Home Road face a "jointly used limestone driveway" which leads back

to the buildings where his wife, Respondent C. DeVoe, resided in an apartment above one of the buildings. (Comm. Ex. 4)

13. The deed granted to Complainant Lavelle contained the following language:

Grantors further grant to Grantee, his heirs, successors and assigns an easement right for Grantee to continue to use the driveway on Grantors' property until Grantee constructs his own driveway.

(Comm. Ex. 3)

14. The first resident of 609 South Home Road was Kathy Clevenger (Clevenger) whose tenancy started in the summer of 2000. Clevenger is Caucasian.

15. Clevenger resided on the property during the time that most of the renovations were being done to the house.

16. Clevenger intended to eventually purchase the property from Complainant LaVelle. For that reason she worked closely with the contractors undertaking the renovations.

17. There is a brick walkway from the front porch of 609 South Home Road to the shared access road and a gravel driveway from the garage door to the shared access road.

18. Clevenger regularly walked across the property line to access the mailbox and the newspaper receptacle.

19. After the renovations were completed, Clevenger often entertained visitors who crossed the grassed area along the shared access road to park on Complainant LaVelle's property.

20. Respondent P. DeVoe only requested that parked vehicles be pulled over far enough so that horse trailers could get by when using the shared access road to reach the stables.

21. Clevenger moved from 609 South Home Road in the fall of 2001. Before she moved, she showed the house to the Adkinsons.

22. The Adkinsons entered into a lease agreement with an option to buy from Complainant LaVelle. The move-in date was September of 2001.

23. In December of 2001, Respondent P. DeVoe began the installation of a chain link fence, which was erected along part of the property line between Respondents' property and Complainant LaVelle's property. The fence obstructed free access from the Adkinsons' front door to the access road. (Comm. Ex. 13)

24. Respondent P. DeVoe did not place a gate at the fence line where the walkway existed to the access road. He removed the brick walkway that ran over his property to the shared access road.

25. He left an opening for the driveway and then continued the fence along the contiguous property lines.

26. Respondent P. DeVoe also posted "NO TRESPASSING" signs along the contiguous property line with Complainant LaVelle's property.

27. On September 16, 2002, Respondent P. DeVoe filed a Complaint in the Richland County Common Pleas Court (CPC) alleging that the easement granted in the deed was only for a period of time until Complainant LaVelle constructed his own driveway. Respondent P. DeVoe

further stated the easement granted to Complainant LaVelle was not intended as a permanent easement but contemplated that Complainant LaVelle would install his own driveway on the property within a reasonable period of time after the execution of the deed.

28. The CPC held in favor of Complainant LaVelle. Respondent P. DeVoe's appeal of the CPC's decision also resulted in a decision and Order in favor of Complainant LaVelle.

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.³

1. The Commission alleges in the Complaints that Respondents violated R.C. 4112.02(H)(1), (4), (7), and (12). These provisions provide, in pertinent part, that:

³ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

2. It shall be an unlawful discriminatory practice:
- (H) For any person to do any of the following:
- (1) Refuse to sell, transfer, assign, rent, lease, or finance housing accommodations, refuse to negotiate for the sale or rental of housing accommodations, *or otherwise deny or make unavailable housing accommodations because of race, ...*
 - (4) Discriminate against any person in the terms or conditions of ... renting, ... any housing accommodations, or in furnishing ... services, *or privileges in connection with the ownership, occupancy, or use of any housing accommodations . . . because of [their] race;* and
 - (7) Print, publish, or circulate any statement or advertisement, *or make or cause to be made any statement or advertisement, relating to ... rental, lease, sublease, or acquisition of any housing accommodations, ... that indicates a preference, limitation, specification, or discrimination based upon 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 ... any right granted or protected by division (H) of this section.

(Emphasis added.)

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

4. Federal case law applies to alleged violations of Chapter 4112 of the Revised Code. *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 violation under the federal Fair Housing Act (FHA).⁴

5. Federal courts have also decided Title VIII fair housing issues by applying the body of law developed in Title VII employment discrimination cases. *Village of Bellwood v. Dwivedi*, 895 F. 2d 1521

⁴ Section 3617 of the FHA mirrors R.C. 4112.02(H)(12).

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by [the FHA].

42 U.S.C. § 3617.

(7th Cir. 1990). The evidentiary standards in fair housing cases is the same as in a Title VII employment discrimination case.⁵

6. Accordingly, the Commission must establish a *prima facie* case of discrimination under *McDonnell Douglas v. Green*, (1973), 411 U.S. 792, and show that the housing providers' articulated reasons for the housing decision were, more likely than not, a pretext for unlawful discrimination, following the rule articulated in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 23 FEP Cases 113, 116 (1981).

7. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondents to "articulate some legitimate, non-discriminatory reason" for the alleged discriminatory conduct.⁶ *McDonnell Douglas, supra* at 802. To meet this burden of production, Respondents must:

⁵ See R. Schwemm, *Housing Discrimination Law*, 1983 Ed. at p. 405, stating that the courts of appeals that have addressed the issue have held that the same evidentiary approach developed by the Supreme Court in Title VII disparate treatment cases should also be available in cases brought under the federal fair housing statutes.

⁶ Although the burden of production shifts to Respondent at this point, the Commission retains the burden of persuasion throughout the proceeding. *Burdine, supra* at 254.

. . . “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 [alleged discriminatory conduct].

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

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 conduct]. *Hicks*, *supra* at 511.

8. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondents’ articulation of a legitimate, nondiscriminatory reason for the alleged discriminatory actions removes any need to determine whether the Commission proved a *prima facie* case, and the “factual inquiry proceeds to a new level of specificity.” *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 713 (1983), quoting *Burdine*, *supra* at 255.

Where the defendant has done everything that would be required of him if the plaintiff has properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant.

Aikens, *supra* at 713.

9. Respondent P. DeVoe met his burden of production by introducing evidence that he planned to build a fence on his property long before the Adkinsons moved in. He also introduced evidence that he monitored his property because the Adkinsons were continuously trespassing on his property, which interfered with his horse stable business.

10. Respondent P. DeVoe having met his burden of production, the inquiry moves to the ultimate issue of this case, i.e. whether Respondent P. DeVoe's conduct was motivated by the race of the Adkinsons. *Hicks, supra* at 511. The Commission must show by a preponderance of the evidence that Respondent P. DeVoe's articulated reason for his conduct was not the true reason, but was a "pretext for discrimination." *Id.* at 515, quoting *Burdine, supra* at 253.

[A] reason cannot be proved to be a "pretext for discrimination" unless it is shown *both* that the reason is false, *and* that discrimination is the real reason.

Hicks, supra at 515.

11. Thus, even if the Commission proves that Respondent P. DeVoe's articulated reason is false or incomplete, the Commission does not automatically succeed in meeting its burden of persuasion:

That the employer’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.

Ultimately, the Commission must provide sufficient evidence for the fact-finder to infer that Complainants were more likely than not, the victims of unlawful housing discrimination based on race.

12. However, if the Commission proves by a preponderance of the evidence that an impermissible factor “played a motivating part” in the housing decision, the burden of persuasion shifts to the housing providers to show that they, more likely than not, would have taken the same actions even without the impermissible factor. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 49 FEP Cases 954 (1989) (plurality opinion).

13. To invoke *Price Waterhouse* and shift the burden of persuasion to Respondents, the Commission may rely on circumstantial evidence that is “tied directly to the alleged discriminatory animus.” *Ostrowski v. Atlantic Mutual Ins. Cos.*, 59 FEP Cases 1131, 1139 (2d Cir. 1992). For example, the Commission may present evidence of recent conduct or statements by Respondents that directly reflect the alleged discriminatory

animus and have some connection to a potential, existing, or past landlord/tenant relationship. Such evidence may permit the fact-finder to conclude that the alleged discriminatory animus was, more likely than not, a motivating factor in Respondents' actions toward Complainants. *Id.*, at 1139-40; *Price Waterhouse, supra* at 277, 49 FEP Cases (O'Connor J., concurring).

**ALLEGATION OF
COMMUNICATION OF PREFERENCE BASED ON RACE**

14. The Commission alleged that Respondent C. DeVoe made statements to a neighbor and the previous Caucasian resident of the property that she did not want African-Americans living at 609 South Home Road.

15. Statements which communicate discrimination based upon race relating to the rental of any housing accommodations are prohibited conduct under R.C. 4112.02(H)(7).

16. Respondent C. DeVoe did not attend the hearing in this matter and wrote a letter confirming her intent to not defend the allegations being made against her by the Commission.

17. Counsel for the Commission moved to have the ALJ find Respondent C. DeVoe in default. The Motion was granted.

18. Respondent C. DeVoe's statements about the possibility of African-Americans renting the property at 609 South Home Road is reflected in the record as follows:

- Cathy Clevenger testified that Carolyn DeVoe stated she did not want African-Americans living next door and she would attempt to stop them by talking to her husband and to neighbors, including seeing a lawyer about reversing the easement and possibly installing a fence. (Tr. 75-76)
- JoAnn Blay testified that she had a brief conversation with Carolyn DeVoe who wanted to talk to Mrs. Blay's husband. She wanted to talk to her husband because "there were new people moving in." Respondent C. DeVoe "mentioned that they were black, and I simply said that I'd give my husband the message." (Tr. 103)

19. The analogous federal counterpart to R.C. 4112.02(H)(7), Section 3604(C) of the FHA, has been said to be essentially a "strict liability" statute. All that is required to establish liability is that the challenged statement was made with respect to the rental of a dwelling and that it indicates discrimination based on a prohibited factor. See Schwemm, *Housing Discrimination*, Sec. 15.2(1)(2)(1990).

20. Based on the foregoing evidence, I find Respondent C. DeVoe's statements to Clevenger and Blay are a communication of a racial preference in regard to the rental of the property at 609 South Home Road in violation of R.C. 4112.02(H)(7).

OTHERWISE DENY OR MAKE UNAVAILABLE AND DISCRIMINATE AGAINST ANY PERSON IN THE PRIVILEGES IN CONNECTION WITH THE USE OF ANY HOUSING ACCOMMODATIONS BECAUSE OF RACE

21. Respondent C. DeVoe threatened to restrict or deny use of the driveway and the shared access road to the Adkinsons, (their children and their guests and visitors), because of their race.

22. Respondent C. DeVoe communicated this threat to Complainant LaVelle's former tenant, Kathy Clevenger.

23. Before Respondent P. DeVoe erected the fence, he told both of his Caucasian neighbors on the adjoining property, Ray Jasinski (Jasinski) and Don Blay (D. Blay), about his plans. However, he did not extend the same courtesy to the Adkinsons. (Tr. 342)

24. Respondent P. DeVoe constantly monitored the Adkinsons' property to insure that they, [nor their children or their guests] would have access to the shared access road over his property:

- He posted "NO TRESPASSING" signs;
- He erected fencing and removed the walkway that led from the Adkinsons' front driveway to the shared access road; and
- He regularly drove his riding mower along the property line when the Adkinsons had guests or when their children played outside.

25. Respondent P. DeVoe's comparative conduct is in stark contrast to the privileges and accommodations afforded to Clevenger when compared to those afforded to the Adkinsons with regard to the ingress and egress of the shared access road.

26. Throughout Clevenger's tenancy at 609 South Home Road, Respondent P. DeVoe allowed trucks, cars, and visitors to have open ingress and egress over his property without objections or monitoring.

27. Respondent P. DeVoe's actions with regard to the Adkinsons' tenancy are consistent with the threat that Respondent C. DeVoe communicated to Clevenger.

28. Courts are willing to infer liability on the demonstrated discriminatory attitude of a person who lacks formal authority but who influences the decision-maker. See *Hill v. Lockheed Martin Logistics Management, Inc.*, 2001 App. LEXIS 146 at 27-28 (4th Cir. 2003), citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151-03 (2000) (where a supervisor's comments helped establish that the reason given by the employer was pretext because it showed that the supervisor was motivated by animus and was principally responsible for the adverse action). *Id.*

29. R.C. 4112.02(H)(4) and its federal counterpart, 42 U.S.C. 3604(b), are intended to address a broad range of conduct that may not rise to the level of cross burning or firebombing:

[The FHA] is designed to prohibit 'all forms of discrimination, sophisticated as well as simple-minded.'

Williams v. Matthews Co., 499 F. 2d 819, 826 (8th Cir. 1974).

The Act, therefore, is to be construed generously to ensure the prompt and effective elimination of all traces of discrimination within the housing field ... This broadly drafted section reaches every practice which has the effect of making housing more difficult to obtain on prohibited grounds.

United States v. City of Parma, Ohio, 494 F. Supp. 1049, 1053 (N.D. Ohio), *aff'd. in relevant part*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 465 U.S. 926 (1982) (citations omitted).

30. Respondent P. DeVoe testified that he had planned to put a fence up before the property was sold. I did not find his testimony credible.

31. Respondent P. DeVoe testified that he built the fence to keep his horses in and wild animals out. However, Respondent P. DeVoe admitted he would delay erecting the remainder of the fence until after a final decision is rendered in the case at bar.

32. I find Respondent P. DeVoe's conduct was intended to subject the Complainants (the Adkinsons and Lavelle) to acts of harassment, and otherwise deny or attempt to deny them the privileges associated with the use of housing accommodations because of the race of the Adkinsons.

RETALIATION ALLEGATION

33. The Commission alleges that Respondent P. DeVoe filed a lawsuit against Complainant LaVelle in retaliation for his participating in a protected activity in violation of R.C. 4112.02(H)(12) and (I).

34. Complainant LaVelle filed a charge with the Commission on March 25, 2002.

35. On August 2, 2002, Complainant LaVelle received the first of two letters from Counsel for Respondent P. DeVoe declaring it had been a reasonable time within which to build his own driveway. (Tr. 42, Comm. Ex. 6)

36. On August 16, 2002, Counsel for Respondent P. DeVoe received an update of the investigation. On the same day, Counsel for Respondent P. DeVoe sent the second letter giving Complainant LaVelle thirty (30) days in which to install a driveway. (Tr. 42, Comm. Ex. 7)

37. On September 12, 2002, the Commission issued its determination letter notifying Counsel for Respondent P. DeVoe of the probable cause finding. (Tr. 13)

38. On September 16, 2002, Respondent P. DeVoe filed a complaint in the Richland County Common Pleas Court naming both the Adkinsons and Complainant LaVelle as defendants. (Tr. 42-43, Comm. Ex. 8)

39. Increasing the level of harassing and intimidating conduct after exercising rights under 4112.02(H) has been found to be basis for retaliation. *See HUD on behalf of Laura R. Pantoja, Victor R. Pantoja, and Laura L. Pantoja v. Dwight M. Simpson, Jr. and Caroline Simpson*, HUDALJ 04-92-0708-9, Decided: September 9, 1994 (Charging Party and her parents filed a charge of housing discrimination based on national origin and skin color. Respondents filed many frivolous complaints against Complainants for code violations. After Charging Party filed the original complaint of housing discrimination, Respondents confronted Charging Party and told her that she had “not taken the right steps” and, because of that, “we are going to make things very unpleasant for you.” *Subsequent to this confrontation Respondents continued to*

engage in, and intensified, their campaign of intimidation and harassment aimed at preventing Complainants from using and enjoying their house).
(Emphasis added.)

40. Where a lawsuit is filed with the intent to intimidate a person who has exercised their rights under the FHA, the courts have recognized liability under Section 3617 of the FHA.⁷ See *U.S. v. Pine*, 940 F. Supp. 972, 978 (N.D. Texas 1996) (lawsuit brought against homeowner to prevent her from selling her house for use as a group home for six mentally retarded children).

41. A reasonable inference can be drawn from the credible evidence in the record that Respondent P. DeVoe filed the lawsuit against Complainant LaVelle in order to intimidate and retaliate against him for exercising his rights under R.C. 4112.02(H)(12).

⁷ The statutory provision, R.C. 4112.02(H)(12), is analogous to Section 3617 of the FHA.

DAMAGES

42. 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

43. 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 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.⁸ *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974).

44. In this case, the Commission presented evidence that Respondents' discriminatory actions caused Complainant LaVelle economic loss due to a loss in the market value of the house because of the fence.

45. When Complainant LaVelle purchased the property at 609 South Home Road, he purchased it knowing that Respondents' property bordered his property on two sides, with the exception of the driveway easement. Respondent P. DeVoe could have built the fence on his property at any time and for any reason.

⁸ Although emotional injuries are difficult to quantify, "courts have awarded damages for emotional harm without requiring proof of the actual value of the injury." *HUD v. Paradise Gardens*, P-H: Fair Housing-Fair Lending Rptr. ¶25,037, 25,393 (HUD ALJ 1992), citing *Block v. R. H. Macy & Co.*, 712 F.2d 1241, 1245 (8th Cir. 1983) (other citations omitted). The determination of actual damages from such injuries "lies in the sound discretion of the Court and is essentially intuitive." *Lauden v. Loos*, 694 F.Supp. 253, 255 (E.D. Mich. 1988).

46. When Complainant LaVelle purchased the property he had no legal right to prevent Respondent P. DeVoe from erecting a fence on his own property. The deed only granted an easement for the existing driveway over Respondents' property for a reasonable period of time until Complainant LaVelle built a new driveway.

47. Making representations to potential renters or buyers that they would have unrestricted use of the shared access road with the exception of the easement was something Complainant LaVelle did at his own risk.

48. Complainant LaVelle's investment in 609 South Home Road is analogous to making a purchase of land in a rural area where little development has taken place. Unless the purchaser buys all of the land surrounding the property they will not be able to control the character of the surrounding development.

49. I believe that Complainant LaVelle should be compensated for the humiliation and embarrassment he experienced which is inferred from his testimony. Clevenger's tenancy at 609 South Home Road was one where she enjoyed open ingress and egress over Respondents property:

- She was not plagued by riding mowers being driven outside of her house when she had guests or when her daughter played outside; and
- The police were not called when her guests parked on Respondent P. DeVoe's property

50. A reasonable inference can be drawn from the credible evidence that Complainant LaVelle suffered embarrassment and humiliation as a result of seeing his African-American tenants treated differently because of their race.

51. The Commission also presented evidence that Respondents' discriminatory actions humiliated the Adkinsons and caused them emotional distress.

52. Complainant D. Adkinson testified that it was humiliating to see the numerous "NO TRESPASSING" signs posted around 609 South Home Road while strangers were invited onto the property by signs posted

by Respondents at the front of the shared access road advertising free mulch and manure. They permitted anyone to enter the access road from which the Adkinson family and their friends were limited and harassed. (Tr. 152)

53. The Adkinsons' children showed fear when walking from the school bus on the shared access road, aggravated by the frequent appearance of Respondent P. DeVoe on his John Deere mower.

54. Mrs. Adkinson felt limited in her entertaining because of the parking problems. She had to tell family to come 4, 5, or 6 in a car. (Tr. 123)

PUNITIVE DAMAGES

55. 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. *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).

56. 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.⁹

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

57. Applying the foregoing criteria to this case:

- Respondents' actions were intentional. They intended to covertly engage in a campaign of conduct to intimidate and interfere with the Adkinsons' use and enjoyment of the property at 609 South Home Road;
- The Commission did not present any evidence that there have been previous findings of unlawful discrimination against Respondents;
- The Commission did present evidence at the hearing about the extent of Respondents' real property; and
- Neither the Commission nor Respondents presented any evidence regarding Respondents' cooperation or lack of cooperation during the investigation.

⁹ This criteria is more appropriately considered when determining actual damages.

58. Based on the foregoing discussion, the ALJ recommends Respondents be assessed punitive damages in the amount of \$10,000.

ATTORNEY'S FEES

59. The Commission is entitled to attorney's fees. R.C. 4112.05(G)(1); *Schoenfelt, supra*, at 386. If the parties cannot agree on the amount of attorney's fees, the parties shall present evidence in the form of affidavits.

60. In order to create a record regarding attorney's fees, the Commission's counsel should file affidavits from plaintiffs' attorneys in Richland 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.

61. 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. Respondents may respond to the Commission's Application for Attorney's Fees within 30 days from the receipt of the Commission's Application.

62. 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 Nos. 9413, 9414, and 9670:

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

2. The Commission order Respondents to pay Complainant LaVelle \$7,500 in actual damages, and Complainants Donald and Jeanette Adkinson \$12,500 in actual damages; and

3. The Commission order Respondents to pay Complainant LaVelle \$4,000 in punitive damages, and Complainants Donald and Jeanette Adkinson \$6,000 in punitive damages.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

December 18, 2006