

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

MICHELLE DILLER

Complainant

v.

Complaint No. 08-HOU-AKR-33318
AKR H3 (33318) 04122008
22A-2008-03234-F

**JENNIFER TABOR AND
ERIC BALDRIDGE (AKR ERIC TABOR)**

Respondent

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

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Complainant

ALJ'S REPORT BY:

Denise M. Johnson
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INTRODUCTION AND PROCEDURAL HISTORY

Michelle Diller (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on April 14, 2008.

The Commission investigated and found probable cause that Jennifer Tabor and Eric Baldrige aka Eric Tabor (Respondents) engaged in unlawful discriminatory practices in violation of Revised Code Section (R.C.) 4112.02(H)(12).

The Commission issued a Complaint, Notice of Right of Election, and Notice of Hearing on September 11, 2008.

The Complaint alleged Respondents harassed, threatened and attacked Complainant because of the charge that Complainant filed against the Respondents' relatives, Charles Berger and Elvie Berger (the Bergers), in 2004.

R.C. 4112.02(H)(12) makes it an unlawful discriminatory practice to intimidate or threaten any person on account of that person's having exercised or enjoyed any right granted by R.C. 4112.02(H).

The Complaint further alleges that by harassing, threatening and attacking Complainant because of the Charge she filed against the Bergers, Respondents have violated R.C. 4112.02(H)(12).

The Commission filed a Motion for Default on January 12, 2009.¹

A public hearing was held on June 30, 2009 via video conferencing. The Administrative Law Judge (ALJ) conducted the hearing at the Rhodes Tower, 17th Floor Conference Room of the Attorney General's Office in Columbus, Ohio. The Assistant Attorney General representing the Commission and Complainant were located at 4055 Highlander Parkway, Richfield, Ohio. Respondents did not appear at the hearing.

¹ The Commission's Motion for Default was addressed and granted at the hearing.

The record consists of the previously described pleadings, a transcript consisting of 64 pages, exhibits admitted into evidence at the hearing, and a post-hearing brief filed by the Commission on July 8, 2009. Respondents did not file a post-hearing brief.

FINDINGS OF FACT

The following findings are based, in part, upon the ALJ's 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. Complainant filed a sworn charge affidavit with the Commission on April 14, 2008.

2. The Commission notified Respondents by letter dated July 31, 2008 that it was probable that Respondents 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. On November 11, 2004 Complainant filed a charge of housing discrimination against the Bergers. (Comm. Ex. 1) The Bergers are the grandparents of Respondent Jennifer Tabor. (Tr. 14)

5. Complainant was a tenant of the Bergers in 2003 and 2004. (Tr. 11)

6. Complainant asked Michael Tramel (Tramel), an African-American male, to move into her apartment.

7. Complainant asked the Bergers' permission to have Tramel move in, which they granted.

8. When the Bergers discovered that Tramel was African-American they told Complainant he could not live in her apartment "because he is a nigger" or in the alternative they would double her rent. (Tr. 11)

9. The charges that Complainant filed against the Bergers were settled, and she received a monetary settlement award. (Tr. 13, Comm. Ex. 3)

10. In 2007 Complainant was riding in the car with her sister, Beth Ann Harper (Harper) and Harper's children, running errands.

11. Respondent Jennifer Tabor (Respondent Tabor) came upon Harper's car in a black vehicle and attempted to run Harper's car off of the road.

12. Harper pulled off the road into the Lakemore Plaza parking lot. Respondent Tabor also pulled into the parking lot and began yelling that they were nigger lovers and that they had ruined her grandparents' lives and other insults. (Tr. 49-50)

13. Complainant, Harper and her children got out of the car and went into the Fiesta Hair Salon and called the police.

14. Respondent Tabor continued driving around the parking lot yelling racial slurs and epithets at Complainant and Harper.

15. When the police arrived Respondent Tabor drove away.

16. After speaking to the police, Harper, Complainant, and the children drove to the Giant Eagle. Respondent Tabor again followed

them and drove away when they went inside the Giant Eagle.
(Tr. 17, 39)

17. After finishing shopping at the Giant Eagle they drove to the Lakemore Plaza to shop at J. C. Penney's.

18. As they were walking to the store Respondent Tabor drove her car at them and forced them to jump out of the way in order to avoid being hit.

19. Respondent Tabor drove away after they went into the store.
(Tr. 18-20, 38-40)

20. About six or seven weeks after the Lakemore Plaza and Giant Eagle incidents, Complainant and Harper were in a Family Dollar store shopping for Easter items.

21. Complainant had just been released from the hospital after major surgery and had staples in her midsection.

22. Respondent Tabor approached Harper without Harper being aware of her presence. Complainant saw Respondent Tabor and called Harper on her cell phone.

23. Complainant and Harper saw a police officer making a purchase at the cash register, and they went to the cash register to purchase their items, walked out and headed for Walgreens. (Tr. 21-22, 41, 44)

24. When Complainant walked out of the Family Dollar Respondent Eric Baldrige (Respondent Baldrige) grabbed Complainant by the shoulder and pulled her backwards.

25. He tore Complainant's shirt and caused some of the surgical staples to come undone.

26. Respondent Baldrige then said that he wanted a good look at the woman who made his grandparents' life a living hell before he "kicked her ass." (Tr. 21-22, 41-42, 44)

27. Harper, who is trained in self defense, pushed in between Complainant and Respondent Baldrige and jammed her fist into his sternum to back him off.

28. The police officer who had been in Family Dollar was outside of Walgreens, and Complainant and Harper asked him for help.

29. The police officer asked Respondents Tabor and Baldrige to leave the area.

30. They did not leave before they approached Harper's car and wrote down her license plate number, and they argued with the police officer.

31. Complainant and Harper filed an incident report with the Akron Police Department. (Tr. 22-24, 41-47, Comm. Ex. 5)

32. Respondent Tabor confronted Complainant at a CVS, getting in her face and telling her that she had no business calling the cops after the Walgreens incident. (Tr. 24-25)

33. Respondent Tabor followed Harper's car on several occasions and also walked up to Harper and told her that associating with African-Americans made people dislike her and her family, screaming "nigger lover" until Harper walked away. (Tr. 48-50)

34. Harper felt forced to quit her part-time job at a drive-thru because Respondent Tabor would come into the drive-thru and harass her.

35. In April of 2009 Respondent Tabor saw Harper and her children in the parking lot of Cameron Video returning a movie. Respondent Tabor made a U-turn to follow them out of the parking lot. Respondent Tabor hit another car while trying to follow Harper and her children. (Tr. 40)

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.²

1. The Complaint alleged that Respondents harassed, threatened and attacked Complainant because of the charges she filed against the Respondents' relatives, Charles Berger and Elvie Berger, in 2004.

² Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

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.³ 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 Respondents engaged in an egregious campaign of intimidating and threatening behavior toward Complainant, Harper and her children because Complainant exercised her rights under R.C. 4112.02(H).

7. Therefore, Complainant is entitled to relief.

³ Section 3617 of Title VIII is substantially the same as R.C. 4112.02(H)(12). *See* 42 U.S.C. 3617.

DAMAGES

1. 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

2. 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 (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.⁴ *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974).

3. In this case, the evidence shows that Respondents' actions were designed to terrorize and cause physical harm to Complainant, Harper and her children.

4. Complainant testified that she became so fearful for her life that she virtually became a prisoner in her own home.

5. Complainant needed Harper or a friend to accompany her everywhere in order to feel safe.

⁴ 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).

6. Complainant needed psychological care and medication to deal with the harassment. She even attempted suicide. (Tr. 20-21, 25-29, 51-53)

7. The ALJ credited Complainant's testimony and sincerity about the emotional distress she suffered from Respondents' actions. In light of Complainant's testimony and the totality of the circumstances surrounding Respondents' actions, the ALJ recommends the Commission award Complainant \$50,000 for her emotional distress: \$25,000.00 to be paid by Respondent Tabor and \$25,000.00 to be paid by Respondent Baldrige.

PUNITIVE DAMAGES

8. The purpose of an award of punitive damages pursuant to R.C. 4112.05(G) is to deter future illegal conduct. Ohio Adm. 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).

9. 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 Complainant.⁵

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

⁵ This factor is more appropriately considered when determining actual damages.

10. Applying the foregoing factors to this case:

- Respondents' actions were intentional and malicious, with the purpose of intimidating Complainant and sending a message that would have the chilling effect deterring individuals such as Complainant from exercising their rights under R.C. 4112.02(H);
- The Commission did not present any evidence that there have been previous findings of unlawful discrimination against Respondents;
- Respondents are not providers of housing accommodations. Therefore, the factors relating to size of housing accommodations and profitability are inapplicable in this case; and
- The Commission Investigator testified that the Respondents did not cooperate during the investigation.

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

ATTORNEY'S FEES

12. The Commission's counsel is entitled to attorney's fees. R.C. 4112.05(G)(1); *Shoenfelt, supra* at 386.

13. In determining what constitutes reasonable attorney's fees in a particular case, the usual starting point and presumptively reasonable amount is the lodestar calculation, i.e. the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Blum v. Stenson*, 465 U.S. 886, 897, 34 FEP Cases 417, 421 (1984).

14. As the fee applicant, the Commission must provide evidence documenting the time expended on the case. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 31 FEP Cases 1169, 1174 (1983).

15. The Commission is not required to record the time expended "in great detail", but it should at least identify the "general subject matter" of such expenditures. *Id.*, at 437, 31 FEP Cases at 1174, n.12.

16. Overall, Counsel for the Commission must exercise "billing judgment" in excluding hours that are excessive, redundant, or otherwise unnecessary. *Id.*, at 434, 31 FEP Cases at 1173.

17. The Commission also has the burden of providing evidence that supports the requested hourly rate. *Id.* Usually, the Commission must provide evidence showing that the requested hourly rate is comparable to the prevailing market rate for similar work performed in the community where the hearing was held. In other words, the Commission must show that the requested hourly rate is “in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *Blum, supra* at 895-96, 34 FEP Cases at 421, n.11.

18. Although the lodestar calculation is presumed reasonable, there may be circumstances where that calculation “results in a fee that is either unreasonably low or unreasonably high.” *Id.*, at 897, 34 FEP Cases at 421. In such cases, the Hearing Examiner may adjust the lodestar amount upward or downward, at his discretion, in light of the factors listed in Disciplinary Rule 2-106(B). *Bittner v. Tri-County Toyota* (1991), 58 Ohio St.3d 143, 145-46. These factors include:

the time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney's inability to accept other cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent.⁶

19. Of these factors, the most important is the results obtained. *Hensley, supra* at 434, 31 FEP Cases at 1173. To be upheld, a fee award must be "reasonable in relation to the results obtained." *Id.*, at 440, 31 FEP Cases at 1176.

20. The Commission satisfied its burden of documenting the time expended in this case. The Commission provided a billing log containing the subject matter of the work performed, the dates of its performance, and the time spent on each activity. In his Memorandum in Support of the Fee Application, Counsel for the

⁶ Since several of these factors are subsumed within the lodestar calculation, the fact-finder should avoid considering a factor twice. *Cf. Hensley, supra* at 434, 31 FEP Cases at 1173, n. 9.

Commission stated that the billing log was contemporaneously maintained. The billing log indicates that Counsel for the Commission expended 14 hours on this case.

21. Counsel for the Commission provided an affidavit in support of the requested hourly rate of \$175.00 for legal work and \$35.00 per hour for travel.

22. After reviewing the billing log, the ALJ finds the hours claimed were reasonable.

23. Based on the foregoing discussion, the Commission is entitled to \$2,502.50 in attorney's fees and expenses.

RECOMMENDATIONS

For all of the foregoing reasons, the ALJ recommends in Complaint No. 08-HOU-AKR-33318 that:

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

2. The Commission's Final Order should include an Order requiring Respondents to pay \$2,502.50 in attorney's fees to the Office of the Ohio Attorney General;

3. Within ten (10) days of receipt of the Commission's Final Order, the Commission order Respondents to pay Complainant actual damages in the amount of \$50,000; and

4. Within ten (10) days of receipt of the Commission's Final Order, the Commission order Respondents to pay Complainant punitive damages in the amount of \$20,000.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

November 4, 2009