

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

JOHN WORK

Complainant

v.

**EAGLES LAKE CONDOMINIUM
ASSOCIATION, MEMBERS AND
OFFICERS OF BOARD OF TRUSTEES,
AND FRANK BIRRI**

Respondents

Complaint No. 9778
(CIN) H5012804 (30684) 020204
05 - 04 - 0455 - 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

John Work (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on February 2, 2004.

The Commission investigated and found probable cause that unlawful discriminatory practices had been engaged in by Eagles Lake Condominium Association, Carolyn Hohnstein, Joan Menchen, Joan Schneider, Jim Searcy, Members and Officers of the Board of Trustees for the Eagles Lake Condominium Association, and Frank Birri, President of the Board of Trustees for the Eagles Lake Condominium Association, individually and as representatives of all members of the Eagles Lake Condominium Association and owners of units in the Eagles Lake Condominium (Respondents) in violation of Revised Code Section (R.C.) 4112.02(H).

The Commission issued a Complaint, Notice of Right of Election, and Notice of Hearing on November 18, 2004. The Commission subsequently attempted conciliation. The public hearing was held in

abeyance pending conciliation efforts. The matter was scheduled for hearing after conciliation efforts failed.

The Complaint alleges that Respondents failed and refused to permit Complainant to make reasonable modifications to the stairwell and other common and public use areas of Respondents' facilities and property, and have denied to Complainant the full use and enjoyment of the housing accommodations, for reasons not applied equally to all without regard to their disability status.

Respondents filed a timely Answer to the Complaint admitting certain factual allegations, but denied they engaged in any unlawful discriminatory practices.

A public hearing was held on June 20, 2006 and October 25, 2006 at the Commission's Cincinnati Regional office, 7162 Reading Road, Cincinnati, Ohio. A trial deposition of Michael Boeckermann was also taken on June 6, 2006, which is a part of the hearing record.

The record consists of the previously described pleadings; transcripts consisting of 310 pages of testimony; exhibits admitted into evidence at the hearing; and the post-hearing briefs filed by the Commission on March 5, 2008; by Complainant on April 11, 2008; by Respondent on April 9, 2008; and the Commission's Reply Brief, filed April 28, 2008.¹

¹ There was a delay in briefing because of multiple crucial mistakes in the transcript, i.e. grammar, punctuation, spelling and reversal of the questions and responses by the attorneys. The transcript for the June 20, 2006 hearing was received on July 24, 2006. The transcript for the October 25, 2006 hearing was received October 29, 2007. For the above cited reasons, Counsel for the Commission requested the transcript be returned and corrected. The transcript was returned to the transcriber. When it was sent back to the Division of Hearings several months later, the transcript had not been corrected. It was returned to the transcriber a second time. The corrected transcript was received January 20, 2008. Briefing was underway and was completed by April 28, 2008.

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 February 2, 2004.

2. The Commission determined on October 28, 2004 it was probable that unlawful discriminatory practices had been engaged in by Respondents in violation of R.C. 4112.02(H).

3. The Commission attempted and failed to eliminate the alleged unlawful discriminatory practices by informal methods of conciliation.

4. Respondents are providers of “housing accommodations” as defined by Ohio Revised Code section 4112.01(A)(10), maintaining such accommodations at 5150 Shoreview Run, Cincinnati, Hamilton County, Ohio.

5. Complainant owned and resided in a housing unit located within Respondents’ complex, Eagles Lake Condominiums, located at 5228 Foxridge, Cincinnati, Ohio.

6. Complainant and his wife, Kathryn, purchased and moved into a residential condominium unit within Respondents' complex in 1994.

7. Respondents' complex consists of 312 residential units. It is located just outside of Cincinnati in Green Township. (Vol. I, Tr. 21)

8. Complainant and his wife lived on the second floor of a five-unit building. Complainant's home was located in an area of the condominium community where the windows in his condominium had views of a wooded area. (Vol. I, Tr. 80)

9. They had to enter the building from the parking lot and climb a flight of stairs to reach the door of their unit.

10. Complainant and all other condominium owners comprise the Eagles Lake Condominium Association (the Association). (Vol. I, Tr. 21)

11. The Association's rules and policies are contained in its By-Laws and Declaration. (Vol. I, Tr. pp. 21-22; Comm. Exs. 8, 12)

12. The Board of Trustees (the Board) carries out the business of the Association. (Vol. I, Tr. pp. 23-24)

13. The business of the Board is generally carried out by the Board President, which includes making the agendas for the Board meetings. (Vol. I, Tr. pp. 24-26)

14. Frank Birri (Respondent Birri) has been President of the Eagles Lake Condominium Association Board of Trustees since November of 2003. (Vol. I, Tr. 24)

15. Complainant's medical conditions caused him to have difficulty walking, and he could not climb the stairs to his unit without assistance. (Vol. I, Tr. 70)

16. His conditions worsened to the point his kidney doctor informed him that he would soon need dialysis. (Vol. I, Tr. pp. 70-71)

17. Complainant was concerned that kidney dialysis would make him even more fatigued to the point where he would not be able to walk up and down the stairs to and from his unit.

18. Complainant saw a television advertisement about a chairlift and called to inquire about the product. (Vol. I, Tr. 71)

19. Complainant received a brochure containing models of several chairlifts.

20. Complainant called Respondent Birri and requested permission to install a chairlift. (Vol. I, Tr. 31, 74)

21. Complainant sent copies of five or six brochures he had obtained from various chairlift manufacturers in a letter to Respondent Birri in November of 2003. (Vol. I, Tr. 33; Comm. Ex. 11)

22. In the letter he requested permission to install a chairlift in the common stairwell in his condominium unit based on his health and difficulty walking up and down the common stairwell. (Vol. I, Tr. 77)

23. Respondent Birri sent Complainant a letter denying his request based on the need for a minimum of twenty (20) inches of clear width in the stairway. (Comm. Ex. 2)

24. Respondent Birri offered as an alternative to the installation of a chairlift that Complainant purchase a condominium unit with Eagles Lake stating:

However, if there are sufficient "Walk In" condominium units available, as there are at Eagles Lake, then Eagles Lake does not have to permit the installation of chair lifts in the common stairwells.

(Comm. Ex. 2)

25. Thereafter, Complainant contacted the Green Township Fire Department regarding safety issues with the installation of a chairlift.

26. Complainant then sent a second letter to the Board in which he addressed safety concerns and again requested permission to install a chairlift. Complainant also asked permission to appear at the next Board meeting. (Comm. Ex. 3)

27. Based on the advice of Respondent Birri, Complainant appeared before the Board of Trustees, and not at the Board meeting which is attended by all of the residents.

28. Complainant and his family appeared before the Board of Trustees prior to the January 28, 2004 Board meeting to explain why Complainant needed a chairlift.

29. The trustees raised concerns about potential problems, including the need for ground fault wiring, the blocking of the stairwell for emergency personnel, blocking of another resident's doorway, the electricity going off, and the ability to replace the carpet (when the

chairlift was removed) with matching carpeting in the other buildings.
(Vol. I, Tr. pp. 46-53; Comm. Ex. 17)

30. In a letter dated January 30, 2005, the Board denied Complainant's request. The Board provided Complainant a generalized cost comparison between installing a chairlift and moving into another condominium unit on the ground floor.

31. Because of the Respondents' continued denials of Complainant's requests, Complainant determined he and his wife needed to move to another condominium because of the advancement of his failing health.

32. Complainant and his wife moved to a new third floor condominium with an elevator. The new condominium is not located in Eagles Lake Condominiums.

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

² 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 that Respondents failed and refused to permit Complainant to make reasonable modifications to the stairwell and other common and public use areas of Respondents' facilities and property, and have denied to Complainant the full use and enjoyment of the housing accommodations, for reasons not applied equally to all without regard to their disability status.

2. This allegation, if proven, would constitute a violation of R.C. 4112.02(H)(18)(a) and (19), which provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

(H) For any person to:

(18)(a) Refuse to permit, at the expense of a person with a disability, reasonable modifications of existing housing accommodations that are occupied or to be occupied by the person with a disability, if the modifications may be necessary to afford the person with a disability full enjoyment of the housing accommodations.

3. The landlord of housing accommodations can condition the permission of proposed modifications by asking the disabled tenant to do one or more of the following:

- (1) Providing a reasonable description of the proposed modification and reasonable assurances that the proposed modification will be made in a workmanlike manner and that any required building permits will be obtained prior to the commencement of the proposed modification;
- (2) Agreeing to restore at the end of the tenancy the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if it is reasonable for the landlord to condition permission for the proposed modification upon the agreement;
- (3) Paying into an interest-bearing escrow account that is in the landlord's name, over a reasonable period of time, a reasonable amount of money not to exceed the projected costs at the end of the tenancy of the restoration of the interior of the housing accommodations to the condition they were in prior to the proposed modification, but subject to reasonable wear and tear during the period of occupancy, if the landlord finds the account reasonably necessary to ensure the availability of funds for the restoration work. The interest earned in connection with an escrow account described in this division shall accrue to the benefit of the disabled tenant who makes payments into the account.

R.C. 4112.02(H)(18)(a)(i), (ii), and (iii).

4. Further it is an unlawful discriminatory practice for any person to:

refuse to make reasonable accommodations in rules, policies, practices, or services when necessary to afford a person with a disability equal opportunity to use and enjoy a dwelling unit, including associated public and common use areas.

R.C. 4112.02(H)(19).

5. 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(E) and (G).

6. 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.

7. The same standards of proof that apply to employment discrimination cases generally apply to housing discrimination cases.³

8. These standards require the Commission to first prove a *prima facie* case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973).

9. The proof required to establish a *prima facie* case may vary on a case-by-case basis. *Id.*, at 802, 5 FEP Cases at 969, n.13. In this case, the Commission may establish a *prima facie* case of housing discrimination based on the individual's disability by proving that:

- (1) Complainant is disabled;
- (2) that the Respondent knew or should reasonably be expected to know of the disability;
- (3) that accommodation of the disability may be necessary to afford the disabled person an equal opportunity to use and enjoy the dwelling;

³ Although the Supreme Court has never addressed the issue, "... lower courts have generally assumed that ... precedents from the employment discrimination field should be followed in interpreting Title VIII." R. Schwemm, *Housing Disc.*, 1996 Ed. at 10-2.

- (4) that the accommodation is reasonable; and
- (5) that Respondent refused to make the requested accommodation.

Dubois v. Ass'n. of Apt. Owners, 453 F.3d 1175, 1179 (9th Cir. 2006).

10. Courts typically have found an accommodation to be reasonable when it imposes no undue financial or administrative burdens on the Respondent. *Hubbard v. Samson Mgmt. Corp.*, 994 F. Supp. 187, 190 (S.D. N.Y. 1998).

11. Courts also recognize the denial of an accommodation request that would pose a threat to the safety of the disabled individuals and others is an affirmative defense. *Howard v. Beavercreek*, 108 F. Supp. 2d 866, 875 (S.D. Ohio 2000), *aff'd.*, 276 F. 3d 802 (6th Cir. 2002).

12. After the Commission establishes a *prima facie* case of housing discrimination based on Complainant's disability, the burden

shifts to Respondents to articulate a legitimate, nondiscriminatory reason to rebut the presumption of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792(1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

13. If Respondents successfully articulate a legitimate, non-discriminatory reason, the Commission must prove by a preponderance of the evidence that Respondents' articulated reason is a pretext for discrimination. *Id.*

14. Pretext may be proven either by direct evidence or by discrediting rebuttal evidence. Complainant is required to prove pretext by a preponderance of the evidence. *Plumbers v. Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Comm.*, 66 Ohio St. 2d 192, 198 (Ohio 1981).

15. First, the Commission must establish that Complainant is disabled. R.C. 4112.01(A)(13) defines "disability" as:

(...) a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.

16. R.C. 4112.01(16)(a) defines physical or mental impairment”

to include any of the following:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine;

(...)

(ii) Diseases and conditions, including, but not limited to, orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, human immunodeficiency virus infection, mental retardation, emotional illness, drug addiction, and alcoholism.

17. Complainant has diabetes, high blood pressure, eczema, neuropathy, and emphysema and has had these conditions throughout his residency at Eagles Lake Condominiums. (Vol. I, Tr. 68)

18. Complainant's conditions cause him to have difficulty walking, and he could not climb the stairs to his unit without assistance. (Vol. I, Tr. 70)

19. Complainant spoke with Respondent Birri several times seeking Board approval for the installation of a chairlift in the common hallway of his condominium unit.

20. The first occasion was after Complainant received the first denial letter (dated November 3, 2003) to his request to install a chairlift due to his health conditions. (Vol. I, Tr. 62; Comm. Ex. 1)

21. Complainant specifically told Respondent Birri during that conversation that he needed the chairlift because he would be going on dialysis. (Vol. I, Tr. 63)

22. Complainant then requested permission to appear before the Board.

23. At the Board of Trustees meeting Complainant appeared with his two daughters and his wife:

Ms. Anthony: Tell me about the board meeting that you appeared.

Mr. Work: Myself, my two daughters, and wife. And they took care of some of the regular stuff and then they asked me to present what I had to say.

Ms. Anthony: Who asked you, I am sorry?

Mr. Work: Mr. Birri.

Ms. Anthony: Okay.

Mr. Work: So I told them about the dialysis and that I couldn't make the steps anymore and I know once the dialysis starts that is it. Then my daughters got up they said their little spiel and Mr. Birri said that he would let us know.

Ms. Anthony: Did anyone from the board in that meeting, did anyone from the board ask you to give them any further information about your medical conditions?

Mr. Work: No.

(Vol. I, Tr. pp. 63-64)

24. Three factors should be considered when determining whether an impairment substantially limits an individual's ability to perform a major life activity:

- (1) The nature and severity of the impairment;
- (2) The duration or expected duration of the impairment;
and
- (3) The permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).

25. At no time prior to denying Complainant's request to install a chairlift did Respondents question whether or not Complainant's conditions affected his ability to walk.

26. Complainant, his wife and two daughters communicated to the Board of Trustees how Complainant's medical conditions affected his ability to walk. (Tr. pp. 63-64)

27. Walking is a major life activity as defined by R.C. 4112.01(A)(13). Major life activities are "those basic activities that the average person in the general population can perform with little or no difficulty." *EEOC Interpretive Guidance*, at § 1630.2(i).

28. Complainant's doctor provided a letter dated January 1, 2004 that states Complainant "has multiple medical problems that make it very difficult for him to walk any distances and especially up and down stairs." (Comm. Ex. 24)

29. Respondents were aware Complainant had a condition which affected his kidneys and affected his ability to walk. The existence of a (disability) does not depend upon appearance; it depends upon physical condition. If Respondents were skeptical

about Complainant's disabilities it was Respondents' duty to request documentation or open dialogue. *Jankowski Lee & Associates v. Cisneros*, 91 F.3d 891, 897 (7th Cir. 1996).

30. The Commission also established the chairlift would have been necessary to afford Complainant an equal opportunity to use and enjoy his own dwelling.

Congress intended the FHAA to protect the right of handicapped persons to live in the residence of their choice in the community.

City of Edmonds v. Washington State Bldg. Code Council, 18 F.3d 802, 806 (9th Cir. 1994), *aff'd*, 115 S. Ct. 1776 (1995).

(...) the question (is) not whether any housing was made available, but whether the housing the individual desired was denied on impermissible grounds.

United States v. Badgett, 976 F.2d 1176, 1179 (8th Cir. 1992).

31. Complainant, his wife, and daughters gave credible testimony about Complainant's difficulties walking up and down the stairs due to his medical conditions. The chairlift would have

eliminated those difficulties and given him the same opportunity to enjoy his premises as non-disabled residents.

32. Respondents assert that installation of the chairlift in the common stairwell would not be a reasonable accommodation because it would create a safety hazard.

33. Respondents did not contact the Fire Department, ask for building permits, or measure the stairs prior to making the decisions on four (4) separate occasions to deny Complainant's requests to install a chairlift. (Vol. I, Tr. pp. 41, 44-45, 56, 213-214; Resps' Admissions Nos. 7, 8)

34. Respondents' denials were unconditional. Pursuant to R.C. 4112.02(H)(18)(a)(i), before denying a request to install the chairlift, Respondents' approval could have been conditioned upon Complainant's submission of building/installation plans, obtaining

final approval for his building/installation plans, and paying into a reasonable escrow account.

35. Courts have interpreted analogous statutory provisions as requiring housing providers to give conditional approval, reserving final approval on the satisfactory fulfillment of conditions set forth therein. *Elliot v. Sherwood Manor Mobile Home Park*, 947 F. Supp. 1574 (M.D. Fla. 1996).

36. Since Respondents chose not to condition approval upon information set forth in the above mentioned statutory provision, it needed to provide credible evidence to rebut the Commission's allegation of failure to provide reasonable accommodation by providing credible evidence the chairlift would create a safety hazard.

37. The Commission established a *prima facie* case of housing discrimination/failure to accommodate based on disability:

- (1) Complainant is disabled due to multiple medical conditions which affect his ability to walk;
- (2) Respondents knew Complainant was disabled because Complainant and his family members communicated to the trustees at the board meeting the affect that his disability had on his ability to walk up and down the steps to his condominium;
- (3) Complainant and his family also communicated to the trustees how the chairlift was necessary to afford Complainant the opportunity to use and enjoy his condominium;
- (4) Gregory Nichols testified that the stairwell could be modified to accommodate a stairlift that would be building-code compliant; and
- (5) Respondents on four (4) separate occasions refused to make the requested accommodation.

38. Instead of providing its own expert to refute the testimony of the Commission's expert witness, Respondents attempted to discredit the testimony of the Commission's expert witnesses.

39. Officer Michael Boeckermann is a Fire Prevention Officer for Green Township Fire Department whose primary responsibility is the enforcement of the Fire Code. Officer Boeckermann testified that

if there was an issue that was impeding egress that dealt with the building code, the Fire Code was subservient to the building code.

(Boeckermann Depo, Tr. 30)

40. Gregory Nicholls, the Commission's expert witness,⁴ testified it was possible to make alterations to the stairs by moving the handrail in order to create the extra stairwell width to install a building-code compliant chairlift. (Vol. II, Tr. pp. 18-19)

41. Probably the most persuasive evidence that Respondents' failure to accommodate Complainant's requests to install a chairlift based on his disability was there was no attempt made to verify the safety concerns prior to denying Complainant's requests. (Resps' Admissions Nos. 7-8).

⁴ Mr. Nicholls is the chief building official for the City of Mason, Ohio. In this position Mr. Nicholls conducts building department reviews, plans, does inspections and sees that life, safety and accessibility is provided for building construction in the City of Mason. Mr. Nicholls is a registered architect in the State of Ohio, a State certified plans examiner and a State certified residential and commercial building instructor. Mr. Nicholls has been an architect for twenty-four (24) years. (Vol. II, Tr. Pp. 5-6)

42. Respondents have failed to rebut the presumption of discrimination by demonstrating that Complainant's proposed modification is unreasonable, *i.e.*, would create a safety hazard. See *United States v. Freer*, 864 F. Supp. 324, 326.

43. Respondents' conduct is a violation of R.C. 4112.02 (H)(18)(a) and (19).

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. 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.⁵ *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974).

⁵ Although emotional injuries are difficult to quantify, “courts have awarded damages for emotional harm without requiring proof of the actual value

3. In this case, the Commission presented evidence that Respondents' discriminatory actions caused Complainant economic loss.

4. Instead of continuing to live in property that they owned without a mortgage Complainant had to acquire debt in order to secure accessible housing.

5. After Complainant and his wife moved to 5485 Michelle Oaks Drive until they were able to sell their Eagles Lake Condominium they continued to pay Eagles Lake Condominium dues, as well as property taxes, homeowners' insurance and utilities until it was sold at the end of April 2005. (Vol. I, Tr. pp. 129-132, 135; Comm. Ex. 35.)

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).

6. Complainant also replaced an awning at the Eagles Lake property before they were able to sell it.

7. The Commission provided evidence of the following out-of-pocket expenses incurred by Complainant as a result of relocating to

5485 Michelle Oaks Drive:

- \$20,000.00: The difference in the selling price of the Eagles Lake property and the purchase of the Michelle Oaks property;
- \$1,489.12: Closing costs for financing replacement housing;
- \$1,690.00: Payment of Eagles Lake Condominium dues while residing at Michelle Oaks Drive from May 2004 through April 2005;
- \$684.00: Payment of utilities at Eagles Lake Condominium from May 2004 through June 2005;
- \$360.00: Payment of moving expenses;
- \$849.00: Tax consequences for cashing in savings bonds; and
- \$1,672.00: Payments on the personal loan.

Total: \$24,691.50

(Comm. Ex. 29)

8. Respondent Birri and Respondent Board of Trustees are each assessed \$12,345.75 of Complainant's out-of-pocket actual damages.

9. The Commission also presented evidence Respondents' discriminatory actions humiliated Complainant and caused him emotional distress.

10. Complainant's wife and his daughter, Deborah Brenner, testified that Complainant had a difficult time going up and down the stairs, at times needing assistance. Complainant was humiliated because of the continued need for assistance and his difficulty getting up and down the stairs.

11. Complainant was humiliated after Respondent Birri asked that he make his request before the Board of Directors and make yet another request for an accommodation that he felt was not being taken seriously by Respondents.

12. Complainant was humiliated and suffered emotional distress at the thought of having to move away from a condominium unit that he loved because of the nice wooded views from his unit. He also was humiliated by the ease with which Respondents modified the rules for cats rather than giving serious consideration to allowing him to alter the common stairwell to accommodate his disability. (Vol. I, Tr. 74, 79)

13. Finally, Complainant suffered emotional distress when he had to take on debt in order to find a place where he would be able to enter and leave his home without the difficulty of walking up and down stairs because of his disabilities.

14. The Commission also requested actual damages for Complainant's "loss of freedom". *HUD v. Twinbrook Village Apts.*, FH-FL § 26, 157 at 26,267 (HUD ALJ 11-9-01) (actual damages awarded to disabled resident where failure to provide ramp and curb cuts for two years virtually made her "a prisoner in her own home").

15. Complainant was still able to walk to and from his condominium, albeit with difficulty, at the time he requested an accommodation from Respondents. At the time he made the request he was anticipating his need for kidney dialysis in the not-too-distant future would further impede his ability to walk up and down steps.

16. Complainant was, therefore, not a prisoner in his home and the awarding of damages for “loss of freedom” would be inappropriate.

17. However, for Complainant’s pain and suffering and humiliation, Respondent Frank Birri is assessed \$7,500.00 and Respondent Board of Trustees is assessed \$7,500.00.

18. The total amount of actual damages awarded to Complainant is \$39,691.50.

PUNITIVE DAMAGES

19. 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. *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).

20. The amount of punitive damages depends on a number of factors, including:

1. The nature of Respondent's conduct;
 2. Respondent's prior history of discrimination;
 3. Respondent's size and profitability;
 4. Respondent's cooperation or lack of cooperation during the investigation of the charge; and
 5. The effect Respondents' actions had upon Complainant.⁶
- O.A.C. 4112-6-01.

⁶ This criteria is more appropriately considered when determining actual damages.

21. Applying the foregoing criteria to this case:

1. Respondent Birri as Board President and Respondent board showed thoughtlessness and indifference toward Complainant in refusing to condition the accommodation request on the fulfillment on the conditions set forth in R.C. 4112.02(H)(12);
2. There is no evidence in the record of Respondents' having a prior history of discrimination; and
3. Although Respondents consist of 312 condominium units there was no testimony regarding profitability.

22. Based on the foregoing discussion, the ALJ recommends Respondent Birri be assessed punitive damages in the amount of \$10,000.00 for his conduct and Respondent Board of Trustees be assessed punitive damages in the amount \$10,000.00 for their conduct.

ATTORNEY'S FEES

23. 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.

24. In order to create a record regarding attorney's fees, the Commission's counsel should file affidavits from plaintiffs' attorneys in Hamilton 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. Respondents may respond with counter-affidavits and other arguments regarding the amount of attorney's fees in this case.

25. 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 (Application) within 30 days after the ALJ's Report is adopted. Respondents may respond to the Commission's Application within 30 days from its receipt of the Application.

26. 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. 9778 that:

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

2. The Commission order Respondent Birri and Respondent Board of Trustees within 10 days of the Commission's Final Order to each issue a certified check payable to Complainant for \$19,845.75, in actual damages (Total: \$39,691.50);

3. The Commission order Respondent Birri and Respondent Board of Trustees within 10 days of the Commission's Final Order to each issue a certified check payable to Complainant for \$10,000.00 in punitive damages (Total: \$20,000.00);

4. Respondents must change their policy on how residents request accommodations. The new policy shall state that Eagles Lake Condominiums complies with the Ohio Laws Against Discrimination and welcomes all people, including those with disabilities;

5. The new policy shall not require residents with disabilities to make a request in writing and shall require Respondents to respond to the disabled resident's request within ten (10) business days;

6. Respondents' policy will reflect and acknowledge its duty to engage in a good faith dialogue with a resident in an effort to accommodate the resident's request;

7. The new policy must be distributed to all current residents within six (6) months of the date of the Commission's Final Order and to those who become residents in the future;

8. Respondents must agree that for the next five (5) years, every resident serving on the Board of Trustees shall receive training on state and federal fair housing laws within sixty (60) days of assuming their office;

9. For five (5) years Respondents shall preserve all records relating to receipt and processing of requests for reasonable accommodations, including requests for reasonable accommodations in rules, policies, practices, or services when necessary to afford a

disabled person equal opportunity to use and enjoy a dwelling unit;
and

10. Upon reasonable notice to Respondents, the Commission shall be permitted to inspect and copy any of Respondents' records relating to compliance with these terms, provided, however, that the Commission shall endeavor to minimize any inconvenience and administrative burden to Respondents from such inspections.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

December 2, 2009