Ohio Civil Rights Commission

Memo

To: Desmon Martin, Director of Enforcement and Compliance

From: Denise M. Johnson, Chief Administrative Law Judge DMJ

Date: June 7, 2012

Re: *Harriet Butler v. Amber Honse*

(CLE) H4 (37810) 02072007
05–05–0545–8 22A–2007–03203F
Complaint No. 07-HOU-CLE-37810

CONSIDERATION OF
ADMINISTRATIVE LAW JUDGE'S REPORT

ALJ RECOMMENDS CEASE & DESIST ORDER

Report issued: June 7, 2012

Report mailed: June 7, 2012

** **Objections due: July 2, 2012**

DMJ:tg

Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners
Leonard J. Hubert, Chairman
Eddie Harrell, Jr.
Stephanie M. Mercado, Esq.
Tom Roberts
Rashmi N. Yajnik

G. Michael Payton, Executive Director

June 8, 2012

Harriet Butler
2064 Chesterland Avenue
Lakewood, OH 44107

Honse
ammer Apts., B-16
East Lake Road
ood, OH 44107

Dear Mr
Here's the
corrected letter
for Butler

Re: *Harriet Butler v. Amb*
(CLE) H4 (37810) 02
Complaint No. 07-H

On June 7, 2012 the Ad
usions of Law, and
Recommendations (ALJ's R
correct cover letter.

Enclosed please find the c
jection timeframe remains the same.

I apologize for any inconven

FOR THE COMMISSION

Tory J. Garrison

Tory J. Garrison
Division of Hearings

cc: Lori A. Anthony, Chief – Civil Rights Section
Wayne D. William, Esq.
Denise M. Johnson, Chief Administrative Law Judge

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June 8, 2012

Harriet Butler
2064 Chesterland Avenue – Up
Lakewood, OH 44107

Edward G. Kramer, Esq.
Kramer & Associates
3214 Prospect Avenue East
Cleveland, OH 44115-2600

Amber Honse
Windjammer Apts., B-16
4141 East Lake Road
Lakewood, OH 44107

Re: *Harriet Butler v. Amber Honse*
(CLE) H4 (37810) 02072007 05–05–0545–8 22A–2007–03203F
Complaint No. 07–HOU–CLE–37810

Enclosed is a copy of the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendations (ALJ's Report). You may submit a Statement of Objections to the ALJ's Report within twenty (20) days from the mailing date of this report.

Pursuant to Ohio Admin. Code § 4112-1-02, your Statement of Objections must be **received** by the Commission no later than **Monday, July 2, 2011**. *No extensions of time will be granted.*

Any objections received after this date will be **untimely filed** and cannot be considered by the Ohio Civil Rights Commission.

Please send the original Statement of Objections to: **Desmon Martin, Director of Enforcement and Compliance, Ohio Civil Rights Commission, State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414**. *All parties and the Administrative Law Judge should receive copies of your Statement of Objections.*

FOR THE COMMISSION

Desmon Martin / tg

Desmon Martin
Director of Enforcement and Compliance

DM:tg

cc: Lori A. Anthony, Chief – Civil Rights Section
Wayne D. William, Esq.
Denise M. Johnson, Chief Administrative Law Judge

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Re: *Harriet Butler v. Amber Honse*
(CLE) H4 (37810) 02072007 05–05–0545–8 22A–2007–03203F
Complaint No. 07–HOU–CLE–37810

Enclosed is a copy of the Addendum to the Chief Administrative Law Judge's Recommendations Re: the Commission's Application for Attorney's Fees (ALJ's Fees Report). You may submit a Statement of Objections to the ALJ's Fees Report.

Pursuant to Ohio Admin. Code § 4112-1-02, your Statement of Objections must be **received** by the Commission no later than **Monday, July 2, 2012**. *No extensions of time will be granted.*

Any objections received after this date will be **untimely filed** and cannot be considered by the Ohio Civil Rights Commission.

Please send the original Statement of Objections to: **Desmon Martin, Director of Enforcement and Compliance, Ohio Civil Rights Commission, State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414**. All parties and the Administrative Law Judge should receive copies of your Statement of Objections.

FOR THE COMMISSION

Desmon Martin / tg

Desmon Martin
Director of Enforcement and Compliance

DM:tg

cc: Lori A. Anthony, Chief – Civil Rights Section
Wayne D. William, Esq.
Denise M. Johnson, Chief Administrative Law Judge

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

HARRIET BUTLER

Complainant

v.

AMBER HONSE

Respondent

Complaint No. 07–HOU–CLE–37810
(CLE) H4 (37810) 02072007
05–05–0545–8 22A–2007–03203F

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

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Harriet Butler
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Complainant

ALJ'S REPORT BY:

Denise M. Johnson
Chief Administrative Law Judge
Ohio Civil Rights Commission
State Office Tower, 5th Floor
30 East Broad Street
Columbus, OH 43215-3414
614 – 466 – 6684

INTRODUCTION AND PROCEDURAL HISTORY

Harriet Butler (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on February 7, 2007.

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

The Commission issued a Complaint, Notice of Hearing, and Notice of Right of Election on July 19, 2007.

The Complaint alleged Respondent subjected Complainant to racially offensive comments.

Respondent did not file an Answer. The Commission filed a Motion for Default Judgment and Hearing on the Evidence in

Support of Complainant's Damages, pursuant O.A.C. 4112-3-06(F) and Civ. R. 55(A) of the Ohio Rules of Civil Procedure on April 4, 2008.[1]

A public hearing was held on November 20, 2009 at the Lorain County Administration Building, 226 Middle Avenue, Elyria, Ohio.[2]

The record consists of the previously described pleadings, a transcript consisting of 32 pages, exhibits admitted into evidence at the hearing, and a post-hearing brief filed by the Commission on December 31, 2009. Respondent did not file a post-hearing brief.

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[1] The Commission's Motion was granted during the public hearing.

[2] The Commission made a motion during the hearing to leave the record open to introduce an affidavit of Complainant's damages. The Commission's motion was granted. On January 5, 2009, the Commission filed a Motion to Close the Record. Complainant's Affidavit is entered into the record as Commission Exhibit 3.

FINDINGS OF FACT

The following findings are based, in part, upon the Administrative Law Judge's (ALJ) assessment of the credibility of the witnesses who testified before her in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. For example, she considered each witness's appearance and demeanor while testifying. She considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. She further considered the opportunity each witness had to observe and know the things discussed; each witness's strength of memory; frankness or the lack of frankness; and the bias, prejudice, and interest of each witness. Finally, the ALJ considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on February 7, 2007.

2. The Commission determined on May 10, 2007 it was probable that Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(H)(12).

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

4. Complainant, an African-American female, moved into the Windjammer Apartments in Sheffield Lake, Ohio towards the end of May 2006. (Tr. 9, 13)

5. From the beginning of her tenancy at the Windjammer Apartments she was subjected to racially derogatory comments by her neighbor, Amber Honse, including being called a "nigger". (Tr. 9, 12)

6. She contacted the police to complain about what she believed to be hostile and threatening behavior directed toward her by Respondent and Respondent's associates. (Comm. Ex. 1)

7. Complainant felt compelled to move to a different apartment to avoid the racially derogatory name calling and threatening behavior.

8. Even after she moved Complainant continued to encounter Respondent when she shopped at areas in close proximity to the Windjammer Apartments.

9. Complainant moved a total of three (3) times in an attempt to avoid being exposed to Respondent's racially derogatory comments and threatening behavior. (Tr. 13, 15, 19, 22-23, 26-28)

10. The racial epitaphs and harassing behavior had a severe negative emotional impact on Complainant. She cut her wrist and required weekly therapy sessions. (Tr. 16-18)

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.

1. The Commission alleges in the Complaint Respondent intimidated Complainant, threatened her, and otherwise interfered with Complainant's quiet enjoyment of her home on the basis of race.

2. These allegations, 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. 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).

4. 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).

5. 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.

6. Normally, 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).

7. Establishing a *prima facie* case creates an inference of discrimination absent direct evidence of discrimination:

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

> Direct evidence is evidence that "proves the existence of a particular fact in question without the need for inference or presumption."
>
> *Randle v. LaSalle Communications, Inc.*, 876 F.2d 563, 569 (1989).

8. The undisputed evidence in this case shows that Respondent threatened Complainant, intimidated her, and otherwise interfered with Complainant's quiet enjoyment of her home because of her race.

9. The Commission introduced seven (7) police reports filed by Complainant on February 6, 2007; February 16, 2007; February 17, 2007; February 23, 2007; June 10, 2007; June 18, 2007; and June 23, 2007. (Comm. Ex. 1)

10. The reports contain statements by Complainant wherein she alleged Respondent threatened, intimidated, and harassed her. Complainant lived on the floor above Respondent. Complainant stated in the reports Respondent called her "nigger", "slut," and "bitch" on

a regular basis and made racially derogatory statements directed to her that she heard from their apartment. (Comm. Ex. 1)

11. Respondent's actions, which were racially motivated, violated R.C. 4112.02(H)(12). Therefore, Complainant is entitled to damages.

DAMAGES

12. 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 the Commission, in its discretion, may award punitive damages.

ACTUAL DAMAGES

13. 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).

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[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).

14. In this case, the evidence shows because Complainant moved to a different location to escape from the racially derogatory comments and the threatening behavior of Respondent she incurred the following out of pocket expenses:

- Rent of $50.00 per month (2007, 2008, 2009) = $1,800.00;
- Moving Expenses of $6,329.96; and
- Medications in the total amount of $1,000.00.

(Comm. Ex. 3)

15. The Commission also provided credible evidence of the emotional suffering of Complainant due to the racially derogatory comments and threatening and intimidating behavior directed toward her by Respondent through Complainant's evaluations during counseling sessions wherein the counselor described her as "stressed and depressed". (Comm. Ex. 2, Progress note dated 12/12/07)

16. Additionally, Dr. Enrique Huerta wrote the following about Complainant on April 17, 2007:

> Re: Harriet Butler
>
> To Whom It May Concern:
>
> This letter is to certify the numerous problems Harriet Butler has reported withstanding at her place of residence.
>
> During her meetings at the Nord Center, Harriet has stated that her neighbors have antagonized her on a regular basis and threatened her in various forms and situations, including pounding on her walls, making derogatory and threatening comments to her, exhibiting gang signs and hostile gestures towards her, shooting a paintball, or similar gun, in the direction of her apartment, and creating an atmosphere in which she does not feel safe.
>
> Harriet has been hospitalized on two occasions since moving into her residence approximately ten months ago, due to the psychological duress she claims was induced by the actions of her neighbors.
>
> (Comm. Ex. 2)

17. Complainant is awarded $20,000.00 in actual damages.

PUNITIVE DAMAGES

18. The purpose of an award of punitive damages pursuant to R.C. 4112.05(G) is to deter future illegal conduct. Ohio Administrative Code (O.A.C.) 4112-6-02. Thus, punitive damages are appropriate "as a deterrent measure" even when there is no proof of actual malice. *Shoenfelt v. Ohio Civil Right Comm.*, (1995), 105 Ohio App.3d 379, 385, *citing and quoting, Marr v. Rife*, 503 F.2d 735, 744 (6th Cir. 1974).

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

- The nature of Respondent's conduct;
- Respondent's prior history of discrimination;
- Respondent's size and profitability;
- Respondent's cooperation or lack of cooperation during the investigation of the charge; and

- The effect Respondent's actions had upon Complainant.[5]

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

20. Applying the foregoing factors to this case:

- Respondent's actions were intentional, malicious and racially motivated;

- The Commission did not present any evidence that there have been previous findings of unlawful discrimination against Respondent;

- Respondent is not a provider of housing accommodations. Therefore, the factors relating to size of housing accommodations and profitability are inapplicable in this case; and

- (See paragraph 16, *infra.*)

21. Based on the foregoing discussion, the ALJ recommends that Respondent be assessed $10,000.00 in punitive damages.

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

ATTORNEY'S FEES

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

23. To create a record regarding attorney's fees, the Commission's counsel should file affidavits from plaintiffs' attorneys in Lorain County, Ohio regarding the reasonable and customary hourly fees they charge in housing discrimination cases. Also, a detailed accounting of the time spent on this case must be provided and served upon Respondent. Respondent may respond with counter-affidavits and other arguments regarding the amount of attorney's fees in this case.

24. If the Commission adopts the ALJ's Report and the parties cannot agree on the amount of attorney's fees, the Commission should

file an Application for Attorney's Fees within 30 days after the ALJ's Report is adopted. Respondent may respond to the Commission's Application for Attorney's Fees within 30 days from their receipt of the Commission's Application for Attorney's Fees.

25. Meanwhile, any objections to this report should be filed pursuant to the Ohio Administrative Code. Any objections to the recommendation of attorney's fees can be filed after the ALJ makes her Supplemental Recommendation Regarding Attorney's Fees to the Commission.

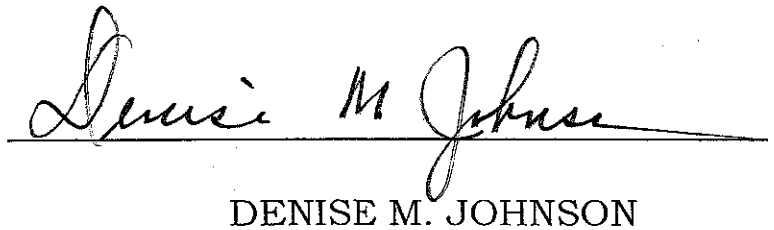
RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 07-HOU-CLE-37810 that:

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

2. The Commission order Respondent to pay $20,000.00 to Complainant in actual damages; and

3. The Commission order Respondent to pay Complainant $10,000.00 in punitive damages.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

June 7, 2012