



Governor John Kasich

OHIO CIVIL RIGHTS COMMISSION

IN MATTER OF:

Catherine Craft
Complainant,

Complaint No. 10-HOU-TOL-34762

v.

Excel Property Management
Respondent.

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

OHIO CIVIL RIGHTS COMMISSION

G. Michael Payton
Executive Director

Commissioners

Leonard Hubert, Chairman
Lori Barreras
William W. Patmon, III
Tom Roberts

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ALJ'S REPORT

Denise M. Johnson
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Chief Administrative Law Judge



Governor John Kasich

December 10, 2014

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**OHIO
CIVIL RIGHTS
COMMISSION**

**Re: Catherine Craft v. Excel Property Management
Complaint No. 10-HOU-TOL-34762**

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Enclosed is a copy of the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation(s) (ALJ's Report). You may submit a Statement of Objections to the ALJ's Report within twenty three (23) days from the mailing date of this report. A request to appear before the Commission must also be submitted by this date.

Pursuant to Ohio Admin. Code §4112-1-02, your Statement of Objections must be **received** by the Commission **no later than January 2, 2015**. *No extension 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 / rb

Desmon Martin
Director of Enforcement and Compliance

Enclosure

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cc: Lori A. Anthony, Section Chief - Civil Rights Section/Sharon Tassie,
Principal Assistant Attorney General Michael Payton, Executive Director /
Keith McNeil, Director of Operations and Regional Counsel /
Stephanie Bostos-Demers, Chief Legal Counsel



INTRODUCTION AND PROCEDURAL HISTORY

Catherine Craft (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission).

The Commission investigated the charges and found probable cause that Excel Property Management (Respondent) engaged in unlawful housing practices in violation of Revised Code Section (R.C.) 4112.02(H)(19).

The Commission attempted, but failed to resolve the matters by informal methods of conciliation. The Commission subsequently issued a Complaint, Notice of Hearing, and Notice of Right of Election on November 18, 2010.

The Complaint alleged that Respondent failed to make reasonable accommodations in rules, policies, practices, or services when necessary to afford persons with a disability equal opportunity to use and enjoy a dwelling unit.

The Commission filed a Motion for Default on April 12, 2011. The Respondent filed an Answer on July 15, 2011.

A public hearing was held on October 29, 2013 at the Ohio Civil Rights Commission Ocusek Government Office Building in Akron, Ohio. Respondent did not appear at the hearing.

The Commission's motion for default was granted at the hearing.¹

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 December 11, 2013. Respondent did not file a post-hearing brief.

¹ The Respondent's Answer was filed outside of the twenty-eight day filing period pursuant to O.A.C. 4112-3-06(A). The Respondent filed the Answer after the Commission filed a motion for default. The Respondent did oppose the Commission's motion.

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.
2. The Commission attempted to resolve these matters by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

3. Respondent owns and operates apartment complexes in Ohio. (Tr. 8)

4. Complainant moved into Village Green Apartments, owned by Respondent, in July of 2009. (Tr. 11)

5. Complainant's lease with Respondent included a provision penalizing her if she left the lease early by requiring her to pay two months rent after leaving and to forfeit her security deposit of \$299.00. (Comm. Ex 5)

6. The apartments at Village Green Apartments are four units contained in one building.

7. There were two entrances into each unit, with three or four steps to each unit. (Tr. 13)

8. The laundry room is in the basement of Village Green Apartments. (Tr. 14)

9. There are eight or nine steps to get from the unit into the basement. (Tr. 13)

10. At the time Complainant moved into her unit at Village Green Apartments, she had no problem walking up and down the stairs.

11. In October of 2009, Complainant slipped on ice and fell on the stairs to her apartment.

12. Complainant filled out an incident report describing the incident. (Tr. 16)

13. The fall resulted in Complainant sustaining injuries to her knee and lower back and as a result struggled to move around without assistance. (Tr. 17)

14. Complainant went to an orthopedic clinic, where she was deemed to be disabled from a knee injury and for respiratory problems. (Tr. 21)

15. The clinic suggested Complainant use a motorized wheelchair and home entry aids to help her with her disability. (Tr. 22)

16. Complainant had to quit her janitorial job as a result of the permanent injuries she sustained from the fall. (Tr. 47)

17. Complainant had difficulty using the stairs at her apartment at Village Green. (Tr. 47)

18. Complainant stayed home most of the time and had to rely on a friend to handle her housework for her. (Tr. 43)

19. Complainant gave Respondent the prescription from the clinic immediately after receiving it. (Tr. 27)

20. Complainant talked to Respondent's property manager, but Respondent would not allow Complainant out of her lease. (Tr. 25)

21. Complainant then called the local agency that oversees Section 8 vouchers to discuss her situation. (Tr. 28)

22. The agency referred her to Vince Curry (Curry), the executive director of Fair Housing Advocates Association (FHAA). (Tr. 28)

23. On October 29, 2009, Curry sent a letter to Respondent on behalf of Complainant asking for an accommodation of allowing Complainant out of her lease without suffering a penalty. (Tr. 30)

24. Respondent wrote back to Curry confirming that they had Complainant's medical information, acknowledging that she is disabled and that she requires a ramp and a wheelchair. (Tr. 31)

25. Instead of allowing Complainant out of her lease, the letter from Respondent offered to move Complainant to another unit with a ramp. (Tr. 32)

26. Complainant viewed the proposed apartment with Curry. (Tr. 32)

27. While the apartment had a ramp leading to the door, the unit was smaller than Complainant's original apartment, and the door would not allow her wheelchair into the unit. The wheelchair would have to be kept outside on the porch. (Tr. 32)

28. Curry sent another letter to Respondent explaining that the apartment's size and door restraints would not serve Complainant's needs and again asked for Complainant to be allowed out of her lease without penalty. (Tr. 34)

29. Respondent never responded to this letter, and Complainant remained in her original apartment. (Tr. 34)

30. At this point, Complainant had not yet received her motorized wheelchair, as the supplier would not deliver it until Complainant lived in an accessible unit. (Tr. 35)

31. Complainant then gave Respondent a 30-day notice that she would be moving out of Village Green Apartments. (Tr. 36)

32. Respondent responded back, acknowledging the notice and attached a buyout lease containing a penalty of \$1,085. (Tr. 37)

33. Complainant did not move out after the 30 days expired. (Tr. 37)

34. In December of 2009, Complainant fell twice in front of her apartment and filed two more incident reports. (Tr. 19)

35. On January 1, 2010, Complainant sent Respondent another 30-day notice that she would be moving out. (Tr. 38)

36. Respondent responded again, but this time with a penalty attached of \$1,689.50. (Tr. 40)

37. Complainant moved out of Respondent's apartment on February 2, 2010 to wheelchair accessible housing. (Tr. 38)

38. After Complainant moved out, Respondent sent her a cleanout/damage worksheet, saying she owed nothing in damages. (Tr. 40)

39. Complainant did not receive any part of her security deposit back and was notified that she still owed the \$1,689.50 penalty. (Tr. 41)

40. The Complainant has not paid the penalty.

41. This penalty has had a negative impact on Complainant's credit report. (Tr. 41)

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 that Respondent failed to make reasonable accommodations for Complainant's disability.

2. This allegation, if proven, would constitute a violation of R.C. 4112.02(H)(19), which states:

that it shall be 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.

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. See e.g. *Howard v. City of Beavercreek*, 108 F. Supp. 2d 866, 876 S.D. Ohio 2000) (applying FHAA analysis to state-law fair housing claims where language of the relevant provisions of the two statutes was similar).

5. 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).

6. The *prima facie* case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the [adverse action]. The *prima facie* case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981), citing *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978), and *Teamsters v. United States*, 432 U.S. 324, 358, and n. 44 (1977).

7. 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.

8. 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;

(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).

9. Complainant is disabled due to lung disease, drop foot, and mobility impairment. (Tr. 15)

10. Respondent knew Complainant was disabled, having acknowledged in writing that they received her medical records. (Tr. 31)

11. Respondent acknowledged in writing that Complainant required housing with a ramp and the use of a wheelchair in order for Complainant to use and enjoy her dwelling. (Tr. 31)

12. Complainant requested a reasonable accommodation of being let out of her lease without penalty. (Tr. 30)

13. Respondent sent Complainant a bill for \$1,689.50 as a penalty for getting out of her lease. (Tr. 41)

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

15. In the instant case, the Respondent failed to refute the allegations in the Commission's complaint by failing to file a timely answer.

16. Granting a default judgment, analogous to granting a dismissal, is a harsh remedy that should be imposed when the actions of the defaulting party create a presumption of willfulness or bad faith. *Accu-Check Instrument Serv. v. Sunbelt Bus. Advisors of Cent. Ohio*, 2009 Ohio App. LEXIS 5743.

17. Failure to file a timely answer or participate in the defense of the complaint shows a willful disregard for the Commission's authority under R.C. 4112 to resolve complaints of discrimination.

18. The facts establish that Respondent engaged in illegal housing discrimination in violation of R.C. 4112.02(H).

DAMAGES

19. 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

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

21. In this case, the Commission presented evidence that Respondent's discriminatory actions caused Complainant economic loss, emotional distress, and humiliation.

22. When Complainant moved out of Respondent's building, Respondent withheld Complainant's security deposit of \$299.00.

23. Complainant testified that she was confined to her apartment due to her inability to use the stairs in the apartment or to use her motorized chair.

24. After falling, Complainant was forced to rely on others to run her errands and handle all of her housework because of the inaccessibility of the apartment.

25. Complainant was not able to get in and out of her apartment until she moved away from Respondent and was able to use her motorized wheelchair.

26. Respondent's offer of an accommodation to move Complainant to an apartment with a ramp was not a reasonable accommodation.

27. The Respondent's offer only took into consideration Complainant's ingress/egress needs and not Complainant's accessibility once she was inside of the apartment.

28. Respondent then sent negative information to the credit agency regarding the Complainant which adversely affected Complainant's creditworthiness.

29. The ALJ recommends that Complainant be awarded actual damages of \$299.00 for her security deposit and an additional \$3,000.00 for emotional distress for a total of \$3,299.00.

PUNITIVE DAMAGES

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

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

- a. The nature of Respondent's conduct;
- b. Respondent's prior history of discrimination;
- c. Respondent's size and profitability;
- d. Respondent's cooperation or lack of cooperation during the investigation of the charge; and
- e. The Respondents' actions had upon Complainant O.A.C 4112-6-01.²

² This criteria is more appropriately considered when determining actual damages.

32. Applying the foregoing criteria to this case:

- a. Although Respondent offered to move Complainant to another one, the new unit failed to address the accommodations that Complainant requested. The Respondent's action was a mere formality without any consideration given to the actual accommodation request.
- b. There is no evidence in the record of Respondent having a prior history of discrimination;
- c. There is no evidence in the record of Respondent's size and profitability; and
- d. Complainant had to live in her apartment with no way to move around for nearly three months. During that period of time she fell twice and filed two incident reports. After Complainant moved out, Respondent tarnished Complainant's credit history when it failed to waive the penalty for the term of the lease.

33. Based on the foregoing discussion, the ALJ recommends that Respondent be assessed \$3,000.00 in punitive damages.

ATTORNEY'S FEES

34. 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.

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

36. 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.

37. 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 the foregoing reasons, it is recommended in Complaint No. 10-HOU-TOL-34762 that:

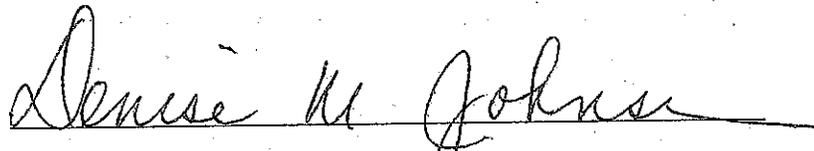
38. The Commission orders Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;

39. The Commission orders Respondent to cease reporting Complainant to credit agencies and prospective landlords as a credit risk;

40. The Commission orders Respondent to pay Complainant actual damages in the amount of \$3,299.00 and punitive damages in the amount of \$3,000.00 for a total of \$6,299.00.

41. The Commission orders Respondents, within six (6) months of the date of the Commission's Final Order, to receive training regarding the Anti-Discrimination Fair Housing laws of the State of Ohio. As proof of their participation in fair housing training, Respondents shall submit certification from the trainer or provider of services that Respondents have successfully completed the training; and

42. The Commission orders Respondents, within seven (7) months of the Commission's Final Order, to submit its Letter of Certification of Training to the Commission's Compliance Department.

A handwritten signature in cursive script, reading "Denise M. Johnson", written over a horizontal line.

DENISE M. JOHNSON

CHIEF ADMINISTRATIVE LAW JUDGE

Date: December 10, 2014