



Governor John Kasich

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Kathleen Strugis

Complainant,

Complaint No. 11-EMP-CLE-40302

v.

Ayman Akel and Mahmood Abdelwahab

Respondent.

OHIO CIVIL RIGHTS COMMISSION

G. Michael Payton
Executive Director

Commissioners

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

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

MIKE DeWine
ATTORNEY GENERAL

Sharon D. Tassie, Esq.
Principal Assistant Attorney General
Civil Rights Section
615 W. Superior Avenue - 11th Flr.
Cleveland, OH 44113
Counsel for the Commission

R. Paul Cushion, II, Esq.
75 Public Square, Suite 111
Cleveland, OH 44113
Council for Respondent

Ayman Akel
P.O. Box 770116
Lakewood, OH 44107
Respondent

Central Office
30 East Broad Street
5th Floor
Columbus, Ohio 43215
(614) 466-2785 Phone
(888) 278-7101 Toll Free
(614) 644-8776 Fax
www.crc.ohio.gov

Kathleen Sturgis
1630 Ridgewood Avenue -2nd Flr.
Lakewood, OH 44107
Complainant

ALJ'S REPORT

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



Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners

Leonard J. Hubert, Chairman
Stephanie M. Mercado, Esq.
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July 16, 2014

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Respondents

R. Paul Cushion, Esq.

75 Public Square - Suite 1111
Cleveland, OH 44113

Attorney for Respondents

Sharon Tassie, Esq.

Principal Assistant Attorney General
615 S. Superior Avenue - 11th Flr.

Cleveland, OH 44113

Attorney for Commission

Re: Kathleen Sturgis v. Ayman Akel and Mahmood Abdelwahab Complaint No. 11-HOU-CLE-40302

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 **August 8, 2014**. *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

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

CENTRAL OFFICE • State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414
• Central Office: 614-466-2785 • TOLL FREE: 1-888-278-7101 • TTY: 614-466-9353 • FAX: 614-644-8776

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INTRODUCTION AND PROCEDURAL HISTORY

Kathleen Sturgis (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on May 28, 2010.

The Commission investigated and found probable cause that Aymen Akel and Mahmood Abdelwahab (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 Hearing, and Notice of Right of Election on April 21, 2011.

The Complaint alleged that Respondent Akel made repeated attempts to evict Complainant in retaliation for her having previously filed a charge of discrimination.

A public hearing was held on November 13, 2012 at the Frank J. Lausche State Office Government Building in Cleveland, Ohio.

The record consists of the previously described pleadings, a transcript consisting of 206 pages, exhibits admitted into evidence at the hearing, and a post-hearing brief filed by the Commission on July 12, 2013. Respondents did not file a post-hearing brief.¹

¹ The Respondent subpoenaed and identified two witnesses that were not disclosed to the Commission prior to the hearing. The Respondent moved that the record stay open for a period of sixty days to allow the Commission to conduct discovery depositions.

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 May 28, 2010.

2. The Commission determined on March 17, 2011 that it was probable that Respondent 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. The Complainant has resided at 1630 Ridgewood Avenue in Lakewood, Ohio since October of 2005. (Tr. 25)

5. Respondent Akel and Respondent Mahmood Abdelwahab are owners of the property. Respondent Akel handles the day-to-day responsibilities of managing the property. (Tr. 168-169)

6. Complainant lived in the unit on the second floor of the building.

7. Due to the design of Complainant's apartment, there was only one way for Complainant to ingress and egress her unit. (Tr. 170)

8. Complainant's only way to access the door to her unit was to enter the backyard which was surrounded by a chain-linked fence.

9. Lynn Ashworth (Ashworth) signed a lease with Respondent Akel on November 11, 2009. (Comm. Exhibit 4)

10. Ashworth moved into the lower unit and brought with her two dogs. (Tr. 46-48)

11. One of the dogs was a Pit Bull. (Tr. 51-52)

12. Ashworth let the dogs out into the backyard area which was Complainant's only way of getting in and out of her apartment. (Tr. 72, 160-161)

13. Complainant was extremely afraid of the dogs.

14. Complainant first attempted to resolve the problem amicably with Ashworth and Respondent Akel.

15. When Complainant's attempts to resolve the issue failed she filed a charge with the Commission on January 7, 2010.

16. Complainant and Respondent Akel reached a non-monetary conciliation agreement that would allow Complainant to enter and exit her apartment safely without the worry and anxiety of injury from one of Ashworth's dogs. (Tr. 51-52)

17. Complainant, Respondent Akel, and the Commission executed a Conciliation agreement on January 7, 2010 that resolved the charge of discrimination filed by Complainant.

18. On March 23rd and May 16th 2010, Respondent Akel issued Complainant Notices to Vacate the apartment. (Comm. Exh. 7-12, 14)

19. The March 23rd and May 16th Notices to Vacate gave non-payment of rent as the reason for eviction.

20. Complainant filed a charge of retaliation with the Commission on May 28, 2010.

21. On July 1, September 2, and October 1, 2010, Respondent Akel issued Complainant Notices to Vacate the apartment. The reason stated for eviction on all of the Notices was due to non-payment of rent.

22. On August 10, 2010 Complainant filed a complaint with the Lakewood Municipal Court and began placing her rent in escrow naming Respondent Akel as Defendant. (Comm. Exh. 16)

23. The basis for the complaint was that Complainant lacked quiet enjoyment of the rental premises.

24. The court docket set forth the following:

“Case called for hearing on release of rent. Landlord and tenant present in court. The issue in this case is in part due to the conduct of another tenant. The landlord represented that eviction proceedings are being commenced against this other tenant and that the other tenant has represented that she will vacate the premises by September 12, 2010. In light of the foregoing and no objection by the parties, the hearing is rescheduled to Wednesday, September 15, 2010 at 9:00 A.M. Landlord is required to move any rocks or other impediments to free up use of the common driveway and make all reasonable efforts to keep the driveway open for both tenants.”
(Comm. Exh. 16)

25. Ashworth moved out of the apartment in December 2010.
(Tr. 66, Comm. Exh. 16)

26. Because Ashworth moved out the court determined that the basis for Complainant’s suit was resolved and released the rent in escrow to Respondent Akel.

27. On March 8, 2011 Respondent Akel filed an eviction action in court.

28. The court found that Respondent Akel accepted rent for the month of March 2011 and the case was dismissed.

(Comm. Exh. 19)

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 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 Commission alleges in the Complaint that Respondent intimidated Complainant and otherwise interfered with Complainant's quiet enjoyment because she exercised her right to file a charge of discrimination pursuant to R.C. 4112.02(H).

2. This allegation, if proven, would constitute a violation of R.C. 4112.02, which provides, in pertinent part, that:

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

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. Federal case law applies to alleged violations of R.C. Chapter 4112. *Greer-Burger v. Temesi*, 116 Ohio St. 3d 324, 2007-Ohio-6422.

4. 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 FFHA analysis to state-law fair housing claims where language of the relevant provisions of the two statutes was similar.”³

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

5. Under the FFHA, acts of intimidation, threats, and coercion can be more subtle than fire bombing, acts of physical violence, or burning crosses:

“Section 3617 is not limited to those who used some sort of "potent force or duress," but extends to other actors who are in a position directly to disrupt the exercise or enjoyment of a protected right and exercise their powers with a discriminatory animus.” *Michigan Protection & Advocacy Serv. v. Babin*, 18 F.3d 337 at 349 citing *Stirgus v. Benoit*, 720 F. Supp. 119 (N.D. Ill. 1989) (racially-motivated fire bombings), *Sofarelli v. Pinellas County*, 931 F.2d 718 (11th Cir. 1991), (sending threatening notes), *United States v. City of Birmingham*, 727 F.2d 560 (6th Cir.) (exclusionary zoning), cert. denied, 469 U.S. 821, 105 S. Ct. 95, 83 L. Ed. 2d 41 (1984).

6. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas Co. v. Greene*, 411 U.S. 792 (1973) for disparate treatment cases applies to retaliation cases. This framework normally requires the Commission to prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence.

7. The burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 25, (1981). It is simply part of an evidentiary framework “intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.” *Id.*, at n.8.

8. The proof required to establish a *prima facie* case is also flexible and therefore, may vary on a case-by-case basis. *McDonnell Douglas, supra* at 802. In this case, the Commission may establish a *prima facie* case of unlawful retaliation by proving that:

- (1) Complainant engaged in a protected activity,
- (2) Respondent was aware that the Complainant had engaged in that activity,
- (3) Respondent took an adverse action against the Complainant, and
- (4) There is a causal connection between the protected activity and adverse action.
Greer-Burger, infra at para. 13 citing *Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (1990).

9. 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).

10. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent's articulation of a legitimate, nondiscriminatory reason removes any need to determine whether the Commission proved a *prima facie* case, and the "factual inquiry proceeds to a new level of specificity." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 713 (1983), quoting *Burdine*, *supra* at 255.

Where the defendant has done everything that would be required of him if the plaintiff has properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. *Id.* at 713.

11. Respondent met its burden of production with the introduction of evidence that Complainant annoyed other tenants causing them to move, and that Complainant failed to timely pay her rent.

12. With Respondent having met its burden of production, the Commission must then prove that Respondent retaliated against Complainant because she engaged in a protected activity. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993), quoting *Burdine*, *supra* at 254-55.

13. The Commission must show by a preponderance of the evidence that Respondent's articulated reasons for serving Complainant eviction notices was not the true reason, but was "a pretext for . . . [unlawful retaliation]." *Id.*, at 515, quoting *Burdine*, *supra* at 253.

[A] reason cannot be proved to be a "pretext for [unlawful retaliation]" unless it is shown *both* that the reason is false, *and* that . . . [unlawful retaliation] is the real reason. *Id.*, at 515.

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

That the [housing provider's] proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the . . . [Commission's] proffered reason of . . . [unlawful retaliation] is correct. That remains a question for the fact finder to answer . . . *Id.*, at 524.

15. Ultimately, the Commission must provide sufficient evidence for the fact finder to infer that Complainant was more likely than not, the victim of unlawful retaliation.

The fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the *prima facie* case, suffice to show intentional discrimination . . . [n]o additional proof is required.⁴ *Hicks, supra* at 511 (emphasis added).

⁴ Even though rejection of a respondent's articulated reason is "enough at law to *sustain* finding of discrimination, there must be a finding of discrimination." *Hicks, supra* at 512.

16. The Commission may indirectly challenge the credibility of Respondent's reason by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" that the reason is a pretext for unlawful discrimination. *Texas, supra* at 1089.

17. This type of showing tends to prove that the reason did not *actually* motivate the housing provider's adverse decision, which requires the Commission to produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case. *Id.*

18. Thus, even if the Commission proves that Respondent's articulated reasons are false, the Commission will not automatically prevail in establishing its burden of persuasion:

That the [housing provider's] proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the [Commission's] proffered reason of [retaliation] is correct. That remains a question for the fact finder to answer... *Id., supra*, at 524.

19. The Commission introduced credible evidence that Complainant's tenancy or her payment of rent was a not a problem for Respondent Akel until after she filed a charge of discrimination based on Complainant's unresolved complaints about Ashworth and her dogs.

20. Respondent Akel agreed to inform Ashworth that she had to use the side door of the building when entering and exiting the building with her dogs and that Ashworth was to clean up the dog feces in the back yard. (Comm. Exh. 6)

21. When Respondent Akel signed the conciliation agreement he acknowledged the complaints that Complainant had with Ashworth.

22. Instead of complying with the terms of the conciliation agreement, Respondent Akel started sending Complainant eviction notices for non-payment of rent.

23. Respondent Akel's March 8, 2011 lawsuit to evict the Complainant for failure to pay rent was dismissed because the court found that Complainant had been paying her rent. (Comm. Exh. 19)

24. The credible evidence in the record supports the determination that Respondent Akel's attempt to evict Complainant was to intimidate and threaten the Complainant because she complained about what she believed to be a discriminatory practice.

25. Respondent Akel's conduct is in violation of R.C. 4112.02(H)(12). Therefore Complainant is entitled to relief as a matter of law.

DAMAGES

26. 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

27. 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.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 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

28. Complainant gave credible testimony regarding the anxiety and stress created by Respondent Akel's conduct:

(...) And it took—it's stressful. It's so bad. I looked for five places. I'm on Section 8. Each place failed inspection. It's not that I didn't want to move; they all failed. I have to do what Section 8 says do. If they don't pass, I can't move. (...)

And it just took so much of a toll on me, panic attacks. I'm on anxiety medication, Zoloft. I'm—I have cancer. I haven't even dealt with the cancer for dealing with the stress with the eviction notice and Ms. Ashworth and her dogs. Every time I open up that door I'm thinking her dogs are going to be there, the big one. When I close the door, I panic.

Now I'm getting over it, like, getting a little better. But the last day she moved out--excuse me—(...) (Tr. 66)

29. Although Respondent Akel had agreed to have Ashworth control her dogs thereby eliminating Complainant's access issues, he instead set about to harass and intimidate Complainant so that she would vacate the premises.⁶

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 On the date of the hearing the Complainant still resided at 1630 Ridgewood Avenue in Lakewood, Ohio.

30. The conciliation agreement was signed on January 7, 2010 and Ashworth did not vacate her apartment until almost twelve months later.

31. The ALJ credited Complainant's testimony and sincerity about the emotional distress she suffered from Respondent Akel's actions.

32. In light of Complainant's testimony and the totality of the circumstances surrounding Respondent Akel's actions, the ALJ recommends the Commission award Complainant actual damages in the amount of \$4,000 for her emotional distress.

PUNITIVE DAMAGES

33. 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. *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).

34. 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.⁷

⁷ This factor is more appropriately considered when determining actual damages.

35. Applying the foregoing factors to this case:

- Respondent's actions were intentional, malicious, and motivated by Complainant having filed a previous charge of discrimination;
- The Commission did not present any evidence that there have been previous findings of unlawful discrimination against Respondent;
- Respondent is an owner or part owner of the following properties:
 - Six (6) properties in Cleveland, Ohio
 - One (1) property in Strongsville, Ohio
 - Two (2) properties in Lakewood, Ohio
(Comm. Exh. 13)

36. Complainant wanted to quietly and peacefully be able to exit and leave her dwelling without the fear of being confronted by two dogs, one of which is a Pit Bull.

37. Complainant was not a problem tenant.

38. Respondent Akel's actions toward Complainant were intentional and malicious.

39. In order to deter Respondents from engaging in future acts of discriminatory conduct, an award of punitive damages is appropriate.

40. Based on the foregoing discussion, the ALJ recommends that Respondents be assessed \$4,000 in punitive damages.

ATTORNEY'S FEES

41. 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.

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

43. If the Commission adopts the ALJ's Report and the parties cannot agree on the amount of attorney's fees, the Commission should file an Application for Attorney's Fees within 30 days after the ALJ's Report is adopted. Respondents may respond to the Commission's Application for Attorney's fees within 30 days from their receipt of it.

44. Meanwhile, any objections to this report should be filed pursuant to O.A.C. §4112-1-02. 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. 11-HOU-CLE-40302 that:

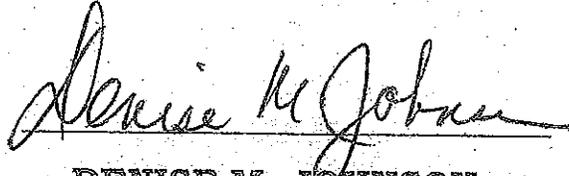
1. The Commission orders Respondents to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;

2. The Commission orders Respondents to pay Complainant actual damages in the amount of \$4,000; and

3. The Commission orders Respondents to pay Complainant punitive damages in the amount of \$4,000.

4. 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

5. 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 black ink, appearing to read "Denise M. Johnson", written over a horizontal line.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

Date: July 16, 2014

DMJ/rb