



GOVERNOR JOHN KASICH
OHIO CIVIL RIGHTS COMMISSION

COMMISSIONERS
LEONARD HUBERT, CHAIRMAN
LORI BARRERAS
WILLIAM W. PATMON, III
TOM ROBERTS

G. MICHAEL PAYTON,
EXECUTIVE DIRECTOR

Chairman Terhar, Vice-Chairman Hambley, Minority Ranking Member Bryant Kuhns, and Members of the House Financial Institutions Housing & Urban Development Committee Brenner, Brown, Craig, Dovilla, Hackett, Leland, Reineke, Scherer, Smith and Sprague:

On behalf of the Ohio Civil Rights Commission (OCRC), thank you for allowing the agency this opportunity to address the problematic provisions of House Bill 149. I am Leonard Hubert, Chairman of the Commission. With me today is Stephanie Demers, Chief Legal Counsel. We emphasize the importance of defeating this bill in current form not only because of the risk to the Commission's federal funding from HUD, but of equal, if not greater import, the public policy issues surrounding this bill far outweigh any purported benefits.

A. The Single Family Home and Mrs. Murphy exemptions are products of political concessions of the 1960's and should not be supported in Ohio in 2015.

Representative Craig - Would you wish to be the public official who signs into law a bill in 2015 that allows a landlord to tell you she refuses to rent to you simply because you are Black? **Representative Bryant Kuhns** - because you are a woman? **Representative Sprague** - because you have children under the age of 18? **Representative Scherer** - because of your religion? **Chairman Terhar** - because you are a military veteran? This is exactly what could happen should you pass HB 149.

Importantly, the fair housing provisions to Ohio's Civil Rights Act were enacted into law three years prior to the 1968 federal Fair Housing Act. Ohio legislators have long declined to inject a Mrs. Murphy or Single Family Home exemption into state law. Providing a landlord a pass to discriminate fifty years after passage of R.C. Chapter 4112 is unnecessary and obsolete. Consider, these exemptions were added to the Fair Housing Act as a political maneuver to pass the legislation. An examination of the reasons underlying the Single Family Home exemption reveals it was borne out of a concession to appeal to the Caucasian majority:

*** *[T]he Act was highly controversial. The fact that it was passed only one week after Dr. King's assassination is no coincidence. Some commentators believe that the exemption for single-family dwellings was a necessary concession and that the Act probably would not have passed without it.* Damon Keith, What Happens to A Dream Deferred: An Assessment of Civil Rights Law Twenty Years After the 1963 March on Washington, 19 Harv. C.R.-C.L. L. Rev. 469, 471-72 (1984).

The history of the Mrs. Murphy exemption is no less revealing:

*The Mrs. Murphy exemption was included in the FHA to protect Mrs. Murphy's First Amendment freedom of association. Senator Mondale, who co-sponsored the FHA, declared: 'The sole intent of [the Mrs. Murphy exemption] is to exempt those who, by the direct personal nature of their activities, have a close personal relationship with their tenants.' Yet implicit was an understanding that the First Amendment right at stake was specifically Mrs. Murphy's right **not** to associate with African Americans. * * * Circumstantial evidence also points to the influence of racial politics in the inclusion of the Mrs. Murphy exemption in the FHA. In the same breath in which Senator Mondale extolled the exemption as protecting Mrs. Murphy's privacy, he said, "I want it clearly understood as well that I do not agree with the need for granting this exemption."*

James D. Walsh, Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act, 34 Harv. C.R.-C.L. L. Rev. 605, 607-10 (1999).

To pass an exemption in 2015 that was based on political concessions of the 1960's can only be considered as a major setback to those seeking to eliminate discrimination. The changes HB 149 would produce are neither necessary, nor practical in the 21st Century where a majority of Ohioans have zero tolerance for bias. Senator Mondale, it seems, was willing to make a concession in order to save his bill. Such a concession is not necessary in 2015. We therefore urge this Committee to recognize the public policy implications HB 149 would bring to Ohio.

B. The Commission stands to lose a \$1 million annual contract with HUD. In exchange, landlords would suffer as well.

The OCRC is additionally concerned that HB 149 would have a major fiscal impact on the agency. HUD pays the Commission as a Fair Housing Assistance Program (FHAP) agency approximately \$1 million per fiscal year (FY) to process cases. Over the past five fiscal years, HUD has paid the OCRC **\$5,759,827** with the most recent contract - FY 2015 - bringing federal revenue of **\$1,240,093** to the agency. To qualify as a FHAP partner, the agency's accompanying state law must be "substantially equivalent" to federal law. HUD has strongly suggested in a letter from HUD Director Joseph Pelletier (04/03/15) that HB 149 could take Ohio's fair housing laws out of the realm of being substantially equivalent to the Fair Housing Act. The Commission therefore is highly concerned that HB 149 could be the death knell of its federal funding.

In exchange for the potential loss of funding, the passage of HB 149 would have the opposite effect of the underlying intent. This bill would result in negative implications for Ohio landlords and property owners. A major alteration is the substitution of civil penalties for punitive damages as a remedy. The maximum cap on punitive damages is currently \$10,000 for a first-time offense. The cap for a second and third offense is \$25,000 and \$50,000. The Commission could not find a sole example of when the elevated penalty was needed. Similarly, even in first time offenses, the maximum penalty award is used sparingly for only the most egregious cases, such as the Michael Gunn case outlined below.

Punitive damages clearly deter future conduct, more so than a \$2,000 civil penalty ever will. This unnecessary change alone serves to deter persons from using the OCRC's administrative arena to address housing grievances. Punitive damages are still permissible remedies in a court of law.

Therefore, this alteration, particularly considering the low cap of \$2,000 for a first time occurrence, when compared to the federal civil penalty cap of \$16,000, steers complainants to filing with HUD and/or electing to have the case heard in a court of law. Regardless of the forum, the transaction costs would certainly increase.¹

Additionally assume the law is passed, and the OCRC loses its status as a FHAP partner. HB 149 would become an unfunded mandate. Currently, the OCRC handles nearly all “dual filed” charges - those filed with HUD or OCRC which assert jurisdictional claims under federal and state law. If the bill passes, the OCRC would still investigate housing discrimination charges over which it has jurisdiction. The agency, however, would not receive federal funds for the work. The same charging party could then simultaneously file a charge with HUD asserting federal violations, subjecting respondents to duplicative costs in time, resources and legal fees.

In sum, the risk to the state of Ohio far outweighs any desired benefit for landlords. If enacted, HB 149 will create increased transaction costs for the constituency the bill is intended to aid.

C. The OCRC is efficient and effective, and the resulting remedies fair and reasonable.

The proponents attempted to paint a distorted picture of the inequities of a state commission addressing grievances against unsuspecting landlords, whom they claim have no due process in the system.² You heard the testimony about 80-year old Helen Grybosky, who allegedly due to her age or infirmity had no reason to know that it is illegal to refuse to allow disabled tenants animal assistants and that it is illegal to refuse to rent to families with children. It is insulting to insinuate that someone, because of age, or any other protected status, is ignorant of the law and therefore should be excused. Those motorists in their eighties are expected to abide by the traffic laws. Should age excuse them from this requirement?

Similarly, would you be so incensed if the tables were slightly turned. Would you expect a physician, an accountant, or any person subject to Ohio's regulatory agencies to be excused from the laws simply because he or she was advanced in years? The General Assembly created boards and commissions to regulate those who enter the stream of commerce, and those who become employers, or in this case landlords, are regulated by the OCRC. It is a cost of doing business. Why now is the agency vested to protect minorities, veterans, females, and families under attack

¹ The OCRC's statutory mandate is to receive, investigate and pass upon charges within one year. This means the Commission must determine whether it is probable or not that discrimination occurred and if so, to issue a formal complaint within one year from the date the charge was filed. HUD has no similar requirement and investigations take much longer at the federal level. Additionally, OCRC's remedies are generally lower than those awarded at the federal level. For example, in eight cases where the Ohio Attorney General, representing the Commission, tried and won the case in an administrative forum, the ALJ awarded a total of **\$222,282.70** in monetary remedies for a median case resolution of \$27,785.34. A comparison of cases tried before HUD Administrative Law Judges yields a much different result. In nine cases tried before a HUD ALJ, the remedies awarded nearly doubled state awards - **\$409,137.00** for a median case resolution of \$45,460.00. See 12-13 Annual Report, <http://portal.hud.gov/>.

² Procedural due process - notice and the opportunity to be heard - happens throughout the Commission's processes. Respondents are provided with the charge and asked to provide a position statement and any relevant materials. They are offered the opportunity to mediate. After an investigation, when facing a finding of probable cause, the parties may seek reconsideration. Respondents are afforded opportunities at the hearing to file answers, motions, and pleadings. They are permitted to submit testimony and evidence into an official record and are allowed to file objections to the ALJ's report and may ultimately appeal. R.C. Chapter 4112 and the Commission's processes have long survived due process scrutiny and attacks.

when other regulatory agencies are not? The OCRC was legislatively bestowed jurisdiction to address discrimination charges for the masses and at no cost to those who utilize the services. Why this notion is so offensive to the Real Estate Investors³ and to Attorney Hale is puzzling.

In fact, Ohioans routinely utilize our agency to address discrimination in employment, housing, public accommodation, credit and higher education. The Commission annually receives upwards of 3,000 charges a year. Though employment by far is the largest number of charges (76%), the OCRC routinely processes 500-600 housing charges a year for a total of 18% of its workload. In fact, over a five-year span, the OCRC has effectively processed 3,218 housing discrimination cases in 86 of Ohio's 88 counties. This illustrates that regardless of your viewpoint on testers, discrimination, unfortunately, is alive and well in Ohio. The numbers also demonstrate OCRC resolutions are reasonable. The OCRC resolved 271 housing cases from December 2013 through the present, whether by settlement, conciliation, or adjudication. The total amount of monetary remedies reported was **\$405,861.04**. This is a mean resolution of only **\$1,497.64**.

Despite what has been suggested, the Commission does not favor charging parties and does not align with fair housing organizations, known to HUD as fair housing initiative partners (FHIPs). The statistics alone dispel this mischaracterization. Of the 3,218 housing charges outlined above, nearly one-third (1,190) were closed with no probable cause; another third (1,394) were resolved through conciliation, mediation or private settlement; and another 579 were closed without any finding of liability. In fact, the OCRC finds probable cause in a very small percentage of its cases. The overall cause rate is about 4%, while housing runs higher (approximately 10-12%).⁴

Additionally, despite prior testimony, 69% of the Commission's housing charges are not filed by FHIPs. During the course of three years (2012-2014), of 1,835 housing cases closed by the Commission, a fair housing organization was the charging party in 387 or 21% of those cases. Examining these statistics on a slightly larger scale, the agency received 3,634 housing charges during the past six years. During the same period the OCRC resolved 939 (or 26%) of these cases where a FHIP was a party to the charge. Of those cases, the OCRC secured a total **\$994,258** in monetary remedies. The median case resolution was therefore **\$1,058.85** per FHIP. Of these 947 total cases, 638 were settled prior to issuance of a formal complaint for a total of **\$275,133** in remedies (median settlement of **\$431.24** per FHIP) and 301 were settled post-complaint issuance for a total of **\$558,900** in monetary remedies (median of **\$1,856.00** per FHIP).

Finally, the proponents would have you believe the state yields its authority upon unsuspecting landlords to accumulate excessive attorney fees. Upon request, the Ohio Attorney General's Office provided information on the amount of attorney fees they collected in litigation since

³ The primary proponents behind this bill are state, local and national real estate investor associations (REIA). It is important to recognize their function - to aid their members, *investors in real estate* - in understanding the laws and best practices of investment and a means to network and to create future business relationships. <http://www.nationalreia.com/>.

⁴ The proponent's citation of only 2% probable cause findings is inaccurate. Additionally, the Commission does not make a finding that cases have no basis in law or fact. The Commission simply finds whether it is probable (more likely than not) that discrimination occurred. Even at the administrative hearing level, an administrative law judge does not find cases are frivolous. She makes a recommendation of whether the Commission should issue a Cease and Desist Order or a Dismissal Order. "Frivolous" charges simply do not find their way past the investigative phase, where teams of investigators, supervisors, assistant attorneys general and executive staff are involved.

2002. Excluding the fees recovered in the Zanesville water case, in a total of 77 cases litigated, the average fee amount collected was **\$13,781.51**. However, the analysis does not end there. Of those 77 cases, only 15 were pursued against individual landlords, with a resulting median fee of **\$1,558.17**. Generally, the most the state recovered or even sought to recover against individual landlords ranged from **\$500 to \$1,000** for cases that proceeded through the adjudicatory process. In fact, in many cases, the Attorney General's Office will agree to waive or substantially reduce the amount of fees sought to effectuate a reasonable settlement for the parties.

D. The isolated Grybosky case should not be the impetus for unnecessary changes.

The impetus behind HB 149 is the OCRC's prosecution of two relatively straightforward administrative cases against Helen Grybosky and her son, Gary. Mrs. Grybosky has been publicized by certain advocates as the innocent victim of governmental bureaucracy. Legal Counsel Tarin Hale painted Mrs. Grybosky as an 80-year old widow living off social security payments. Yet, you heard him admit that she owns six rental units, and even if a Mrs. Murphy clause had been in place, *it would not have protected her*.

More importantly, what some of you aptly realized is that Helen Grybosky did actually violate the law by maintaining two clearly illegal housing policies. First, the Gryboskys did not rent to disabled applicants with assistant animals. That claim was widely discussed during prior testimony. Additionally, the Gryboskys also exercised a policy of not renting to families with children. This fact was not illuminated during the testimony.

Overlooked is the point that the Gryboskys' attorney ran up unnecessary legal fees through unconventional defense methods. You heard Attorney Hale testify that he had "absolutely not" handled any other cases for the OCRC. Rather than deny or challenge the existence of unlawful policies or discriminatory conduct, the Gryboskys engaged in protracted litigation on two legal fronts – one contesting the *manner* in which the unlawful policies were uncovered through testing, and the other by filing a civil action in court.⁵ Consequently, what should have been a simple matter, resulted in inordinate fees due to unsuccessful legal challenges.

To dispel another mischaracterization, Tarin Hale stated OCRC staff told Ms. Grybosky she had to pay \$6,000 in mediation or face "thousands" in damages and legal fees. **The case did not proceed through the mediation tract.** The OCRC employs a mediator in each region, who is specifically trained and whose primary job is to help the parties craft a voluntary resolution. The case gets to mediation prior to any investigation whatsoever, so for Mr. Hale to claim a mediator would have strong-armed Mrs. Grybosky into settlement is simply untrue. In fact, the Commission has such a successful mediation program,⁶ had the Gryboskys opted to use this free and efficient process, the cases could have been resolved for well less than the cost of defense.

⁵ The Gryboskys filed a civil action in the Ashtabula County Common Pleas Court alleging the agency, its employees, and the AAG, who prosecuted the case, were "extorting" them and violated their Constitutional rights. They argued that their policies are not "actual discrimination" because they were not uncovered by "actual applicants" with real children or disabilities. The court dismissed all claims. On appeal, the Eleventh District affirmed, except declaring absolute immunity for OCRC employees.

⁶ In five years time, 571 cases were resolved prior to investigation. The agency's mediation services are absolutely free, and neither party needs representation. Of all cases mediated, 83-86% are successfully resolved.

It is possible Mr. Hale confuses mediation with conciliation.⁷ As part of its statutory obligation, the Commission attempted to conciliate the matter by seeking the Gryboskys to change their policies, take fair housing training and pay damages to resolve two cases for less than \$5,000. In exchange, the Gryboskys offered far less than a nuisance or cost of defense offer. Because the Gryboskys refused to conciliate, the Commission was statutorily obligated to issue an administrative complaint. After entering his appearance, Attorney Hale filed multiple irrelevant motions/pleadings and a separate complaint in common pleas court, all of which were denied or dismissed, except a motion to continue the hearing date. Ultimately, the case proceeded to a three-day evidentiary hearing. The Gryboskys gambled on untested legal theories and lost, which proved to be a costly tactic. As a result, the Commission's Administrative Law Judge recommended an award of \$12,000 in actual damages, \$10,000 in punitive damages, \$39,848 in attorney fees to the FHIP, and \$47,375 in attorney's fees to the State.

Respecting axiomatic tenets of administrative law, the Commission has a statutory measure of checks and balances. After the ALJ issued her Report and Recommendation, the parties filed objections. Consequently, based on various factors, including the landlords' small size, no prior history of discrimination, and no bona fide victim of discrimination, the five appointed Commissioners collectively voted to reduce the award to **\$2,513.05 in actual damages, \$0 in punitive damages, \$3,985 in attorney fees to the FHIP and \$4,588 in attorney's fees to the State.** Speaking for the Commission, the Chairman sent a strong message to all concerned outlining that the Gryboskys should not be penalized for the acts of their counsel.

Despite the assertions, transaction costs before the Commission are relatively low for even those who hire counsel. Helen Grybosky was an isolated case. She dug in her heels when she should have worn flats. This was the reason for her excessive fees. Consequently, an entire state law should not be changed as the result of unsuccessful legal challenges.

E. Conclusion

The Commission has been in existence since 1959 - five years prior to passage of the Civil Rights Act of 1964. We are the great State of Ohio. Our civil rights laws were crafted to guard against the smaller discriminators. The General Assembly bestowed the Ohio Civil Rights Commission with jurisdiction over employers with four or more employees. Under federal laws, the jurisdictional floor is 15, 20 or sometimes 50 employees. Similarly, the law allows the Commission to challenge "any person" who discriminates in housing. The OCRC's federal partners - the EEOC and HUD - focus on patterns and discriminatory practices of large corporations and landlords. The OCRC challenges discrimination no matter the size or profitability of the respondent.

⁷ There again however, his factual account is simply inaccurate. Many times he states the Commission demanded **\$6000 to resolve the case**. In fact, during conciliation, the Fair Housing Resource Center made its first demand on January 14, 2009 of **\$4,500 to resolve two cases plus training and policy modifications**. Attorney Hale stated Mrs. Grybosky offered \$1,000. In fact, on January 21, Ms. Grybosky's former counsel, Gary Pasqualone, made an offer to accept training and policy changes and offered a total of **\$100** to resolve the two cases. The Commission therefore had to declare the matter at impasse on January 26, 2009. Curiously, how he could even attest to what occurred is perplexing considering Tarin Hale did not even represent Ms. Grybosky during the investigation phase. He entered a Notice of Substitution of Counsel on September 11, 2009, well after the Commission had found cause. Equally curious is his attestation that the Attorney General on the case, an 80-year old grandmother, strong armed or "threatened." his 76-year old client.

As the Ohio Supreme Court announced, "**there is no place in this state for any sort of discrimination no matter its size, shape, or form or in what clothes it might masquerade.**" Genaro v. Cent. Transport, Inc., 84 Ohio St.3d 293, 296 (1999). Is it any less discriminatory to deny a person a home because of race simply because s/he owns less than three properties? For example, the agency successfully litigated a multi-million dollar class action for citizens residing in Zanesville/Muskingum County, while at the same time, prosecuted a homeowner - who would be exempt under Mrs. Murphy – and who posted a sign, "Whites Only," in order to ensure a young black girl would not use her swimming pool. See, *In the Matter of Michael Gunn, et al. v. Jamie Hein*, OCRC Complaint No. 11-HOU-DAY-22452 (November 4, 2013). Ohio law was written to give the OCRC jurisdiction over small and large discriminatory actors, and our law should remain that way.

HB 149 is an extreme measure predicated on factual distortions of a case involving an elderly landlord that originated seven years ago. Is it just to change an entire law based on an isolated case, albeit a case that has been publicly and wrongfully distorted to the benefit of those who seek revenge? Compare the loss of \$1 million annually in federal funds to the assessment of remedies awarded against a very small percentage of respondents against whom the Commission finds probable cause. It remains to be seen exactly how or why passage of HB 149 - touted as "common sense changes" - would stop "frivolous claims." The Commission efficiently and effectively processes cases. Quite simply, current Ohio law is not broken and does not need fixed. HB 149, if passed, will prove costly to both the OCRC and Ohioans alike. For these reasons, we ask this committee to reject this bill.

We thank you for this opportunity and are available to answer any questions this honorable committee may have.