



# OHIO CIVIL RIGHTS COMMISSION

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Governor Mike DeWine

Commissioners: Lori Barreras, Chair | Juan Cespedes | William Patmon, III | Dr. Carolyn Peters | Madhu Singh  
Executive Director G. Michael Payton

August 28, 2019

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**Re: Jody Hayes v. B & P WEB Properties, LLC and Brian Heine  
Complaint No. 17-HOU-CLE-43592**

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 **September 20, 2019**. *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.



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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, Ohio 43215-3414.** *All parties and the Administrative Law Judge should receive copies of your Statement of Objections.*

FOR THE COMMISSION:

*Desmon Martin /kk*

Desmon Martin  
Director of Enforcement and Compliance

Enclosure

cc: Lori A. Anthony, Section Chief – Civil Rights Section/Wayne Williams, Principal Assistant Attorney General/Lori Friedman, Principal Assistant Attorney General/Michael Payton, Executive Director/Darlene Sweeney-Newbern, Director of Regional Operations/Stephanie Bostos-Demers, Chief Legal Counsel



IN THE MATTER OF:

**Jody Hayes**  
Complainant,

**Complaint No. 17-HOU-CLE-43592**

v.

**B & P WEB Properties, LLC and Brian Heine**  
Respondent.

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

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**ALJ'S REPORT**

Denise M. Johnson  
Ohio Civil Rights Commission  
Division of Hearings  
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Columbus, OH 43215  
(614) 466-6684  
**Chief Administrative Law Judge**

## **INTRODUCTION AND PROCEDURAL HISTORY**

Jody Hayes (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on September 12, 2016.

The Commission investigated the charge and found probable cause that unlawful discriminatory practices had been engaged in by Respondents Brian Heine (Heine) and B & P Web Properties, LLC (WEB Properties) in violation of Ohio Revised Code R.C. 4112.02(H)(1), (12), (16), and (19).

The Commission attempted but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on July 27, 2017.

The complaint alleges that Respondent Heine refused to grant a reasonable accommodation to Complainant based on her disability and served Complainant with an eviction notice in retaliation for opposing a discriminatory housing practice.

Respondents filed an Answer to the Complaint on August 10, 2017. Respondents admitted certain procedural allegations but denied that they engaged in any unlawful discriminatory practices. Respondents also pled affirmative defenses.

A public hearing was held on September 6, 2018 at the 3<sup>rd</sup> floor conference room of the Elyria City Hall located at 131 Court Street, Elyria, Ohio.

The record contains previously described pleadings, a transcript consisting of 306 pages of testimony, exhibits admitted into evidence at the hearing, post-hearing briefs filed by the Commission on February 25, 2019, Respondent on March 12, 2019, and the Commission's reply brief filed on March 15, 2019.

## **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 lack of frankness; and the bias, prejudice, and interest of each witness. Finally, the ALJ considered the extent to which each witness was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on September 12, 2016.
2. The Commission determined on June 8, 2017 that it was probable that Respondents engaged in unlawful discrimination in violation of R.C. 4112.02(H)(1), (12), (16), and (19).
3. The Commission attempted but failed to resolve this matter by informal methods of conciliation.

4. Waters Edge Apartments (Waters Edge) is a 72-unit residential apartment complex owned by Respondent WEB Properties and managed by Respondent Heine. (Tr. 202)
5. Complainant was diagnosed with Stage III ovarian cancer in 2014.
6. When Complainant was first diagnosed with cancer, she was in a relationship with David Jackson (Jackson).
7. Complainant and Jackson lived together for two and a half years at 417 East Broad Street in Elyria. (Tr. 112)
8. Jackson had a dog named Bella. (Tr. 75)
9. Jackson had Bella for three (3) years before he met Complainant. (Tr. 115)
10. Complainant became very attached to Bella when she lived with Jackson on Broad Street. (Tr. 114)
11. Jackson helped Complainant through her first diagnosis with cancer, but they went their separate ways after the difficulties they encountered with her struggle to overcome cancer. (Tr. 112)

12. In 2015 the Complainant moved into Waters Edge Apartments with a friend, Larry Smith (Smith). (Tr. 73, 202)
13. Smith was the lessee of the apartment. (Tr. 202)
14. When Complainant moved in with Smith, her cancer was in remission but recurred at Stage IV in late 2015. (Tr. 72)
15. The apartment was on the third floor. (Tr. 71, 202-203)
16. Smith asked Respondent Heine if he and Complainant could move to a first-floor apartment at Complainant's request because her cancer had progressed to the point where she needed chemotherapy. (Tr. 203)
17. Respondent Heine agreed to move Smith and Complainant into a first-floor apartment.
18. Respondent Heine also gave Complainant a new refrigerator after she complained the old one was not keeping her medicines cold enough. (Tr. 210)
19. Due to disagreements between Smith and Complainant, he moved out and Complainant remained in the apartment. (Tr. 71-72)



20. Complainant's youngest son, Tyler Hayes (Tyler) had lived with Complainant in 2014 but moved out in late 2014 to live with his older brother, David Slagle (Slagle). (Tr. 185)
21. After Smith moved out, Tyler moved in with his mother in 2016 because he felt a responsibility to help Complainant due to her terminal illness. (Tr. 185)
22. Tyler was in his senior year in high school. (Tr. 185-186)
23. Complainant filled out a lease application naming Tyler as a second occupant on May 5, 2016. (Resp. Exh. A)
24. Complainant obtained a copy of a lease agreement and was to have Tyler sign the lease because he was 18. (Tr. 251)
25. Slagle visited Complainant at least two or three times a week during the time that she lived at Waters Edge. (Tr. 72)
26. Slagle knew that Complainant wore a colostomy bag that was surgically attached to her side. (Tr. 73)
27. Slagle also observed the effect that ovarian cancer had on his mother: (1) Complainant was depressed and anxious and, (2) the chemo treatments affected her appetite and memory. (id.)

28. Complainant made attempts to sign a lease in June and July of 2016. (Tr. 204-205, 212) (Comm. Exh. 10)
29. The due date for the rent was on or before the first calendar day of the month.
30. The lease contained a clause that prohibited tenants harboring an animal of any kind on the premises without prior written approval from the landlord. (Comm. Exh. 9)
31. The lease made an exception for a service animal with "proper documentation".
32. Although Complainant moved out from Jackson in 2014, Complainant and Jackson continued to stay in contact with one another. (Tr. 113)
33. Jackson found out that Complainant's cancer recurred. (Tr. 112-113)
34. Jackson took Bella to visit Complainant when she lived at the Waters Edge Apartments. (Tr. 115-116)
35. Jackson also left Bella with Complainant when he was at work, depending on their schedules. (Tr. 75-77, 116)

36. Complainant told Jackson that dogs were not permitted to be at Waters Edge. (Tr. 123)
37. To benefit Complainant, on August 9, 2016 Jackson obtained an online certification for Bella to be designated as an emotional support animal with Jackson listed as the dog's handler. (Tr. 75-76, 117-118, 123, 175) (Comm. Exh. 2, 3)
38. On August 12, 2016 Complainant's doctor issued a letter of recommendation that she would benefit from having an emotional support animal live with her. (Tr. 119-120) (Comm. Exh. 4)
39. On Saturday, September 3, 2016, Respondent Heine was at the Water's Edge complex office collecting rents. (Tr. 229, 231)
40. Labor Day was on Monday September 5, 2016.
41. Respondent Heine and his son were at the river near the apartments where his son was fishing, and a tenant approached him and told him that Jackson had walked into Complainant's apartment with a dog. (Tr. 225)
42. Respondent Heine had met Jackson previously and knew that he was Complainant's friend. (Tr. 124, 225)

43. Respondent Heine went to Complainant's apartment and knocked on the door. (Tr. 124)
44. At the time, Jackson was on the phone talking to Complainant who was at the hospital receiving chemotherapy. (Tr. 124)
45. Bella barked before Jackson opened the door. (Tr. 124)
46. Jackson attempted to tell Respondent Heine that Bella was an emotional supported animal for Complainant while at the same time offering documents to Respondent Heine as an offer of proof of Bella's status. (id.)
47. The verbal exchange between Jackson and Respondent Heine turned confrontational with both Jackson and Respondent yelling and cursing at each other. (Tr. 125)
48. Respondent Heine left from outside of Complainant's apartment and went down to the river and called the police. (Tr. 128-129, 157, 273)
49. The police went to Complainant's apartment, and after asking to see Jackson's identification and asking a few questions, left the apartment. (Tr. 128-129)

50. Complainant returned to the apartment from the hospital where she had been receiving chemotherapy treatment on Sunday September 4, 2016.
51. Before Complainant arrived, Respondent Heine placed a 3-Day Notice to Vacate the premises on Complainant's apartment door for non-payment of rent. (Tr. 232, Comm. Exh. 1)
52. Under the terms of the leases at Waters Edge, rent is due on the first day of the month but is not considered late until after the third day of every month. (Tr. 206-207, Comm. Exh. 9)
53. If the due date falls on a weekend or holiday, the rent is due on the next business day. (*id.*)
54. Complainant generally paid her rent on the fourth of the month or later and had done so on four out of the previous six months. (Tr. 54, 58-59, 214-219, Comm. Exh. 8)
55. Complainant paid her rent on the same day that she received the 3-Day Notice. (Tr. 195, 232)
56. Monday, September 5, 2016 was Labor Day holiday. (Tr. 206-207, Comm. Exh. 9)

57. On Tuesday, September 6, 2016 Respondent Heine sent Complainant a text message stating that he was refusing to accept her rent payment because of late payment. (Comm. Exh. 10, Tr. 234)
58. Although there were other tenants who had not paid their rent by September 3, 2016, Respondent Heine did not serve those tenants with 3-Day Notices to Vacate the Premises. (Tr. 235, 239, 299)
59. Sometime during the week of September 7, 2016 Respondent Heine filed a Complaint in Forcible Entry and Detainer to evict Complainant and Tyler. (Tr. 232, 237, 240, Comm. Exh. 5)
60. The complaint alleged that "Defendants are in default of the lease because Defendants failed to pay rent on September 1, 2016". (Comm. Exh. 5)
61. Respondent also sued Complainant and Tyler for money damages. (Tr. 243, Comm. Exh. 5)
62. Complainant responded with a counterclaim of a civil rights violation filed on or around October 5, 2016. (Tr. 242, 287)
63. On October 6, 2016 Respondent sent Complainant a text stating that he had received a letter from Complainant's doctor

stating that it would be detrimental to her health if she was evicted. (Tr. 241, 280,)

64. On October 7, 2016 Respondent filed a Notice of Dismissal of the eviction action. (Tr. 241, 280-281, 287)

65. Complainant passed away on November 18, 2016. (Tr. 196)

## 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.<sup>1</sup>

1. The Commission alleged in the Complaint that Respondents denied Complainant housing accommodations because of her disability and initiated an action to terminate Complainant's tenancy in retaliation for having engaged in the protected activity of requesting an accommodation.
2. These allegations, if proven, would constitute violations of R.C. 4112.02(H)(1), (12), (16), and (19), which provides that it is an unlawful discriminatory practice for any person to:
  - (1) Refuse to (...) rent, lease, sublease, (...), refuse to negotiate for (...) rental of housing accommodations,

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<sup>1</sup> Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.



or otherwise deny or make unavailable housing accommodations because of (...), disability, (...);

- (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;
  
  - (16) Discriminate in the terms, conditions, or privileges of the (...) rental of housing accommodations to any person or in the provision of services or facilities to any person in connection with the housing accommodations because of a disability (...);
  
  - (19) 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;  
[ and]
3. When a disabled individual requests as a reasonable accommodation to have an animal assistant in their dwelling unit, the request is in conformance with R.C. 4112.02(H)(19) as amplified by O.A.C. 4112-5-07 (C) which sets forth in pertinent part that:

Every disabled person who has an animal assistant or who obtains an animal assistant shall be entitled to keep the animal assistant on the premises purchased, leased, rented, assigned or subleased by such disabled person. (...)

A reasonable accommodation under the Fair Housing Act may include the use of an emotional support animal in one's own home, despite the existence of a rule, policy or law prohibiting such an animal. *Revoock v. Cowpet Bay West Condominium Assn.*, 853 F.3d 96, 110 citing *Castillo Condo. Ass'n v. U.S. Dep't of Hous. & Urban Dev.*, 821 F.3d 92, 100 (1st Cir. 2016); *Anderson v. City of Blue Ash*, 798 F.3d 338, 363 (6th Cir. 2015); *Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.*, 765 F.3d 1277, 1289 (11th Cir. 2014).

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. *Columbus Civ. Serv. Comm. v. McGlone*, 82 Ohio St.3d 569, 697 N.E. 2d 204 (1998).
6. 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; *Hamrick v. Union Tp.*, 81 F. Supp. 2d 876, (applying FHAA analysis to state law fair

housing claims where language of the relevant provisions of the two statutes was similar).

7. These standards require the Commission to first prove a *prima facie* case of discrimination. *McConnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 1819, 36 L.Ed.2d 668 (1973). 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.

The *prima facie* case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the [adverse action]....[T]he *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, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981), citing *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978) and *Teamsters v. United States*, 431 U.S. 324, 358, and n. 44, 97 S.Ct. 1843, 1866, n. 44, 52 L.Ed.2d 396 (1977).

8. After the Commission establishes *prima facie* cases of housing discrimination based on Complainant's disability and retaliation for engaging in a protected activity, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason to rebut the presumption of discrimination and retaliation. *McDonnell Douglas Corp. v.*

*Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

9. If Respondent successfully articulates a legitimate, non-discriminatory reason, the Commission must prove by a preponderance of the evidence that Respondent's articulated reason is a pretext for discrimination. *Id.*
10. The Commission may show that Respondent's proffered legitimate reasons are pretextual by showing by a preponderance of the evidence "(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the action, or (3) that they were insufficient to motivate the action." *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994).
11. To prevail on the claim of retaliation the Commission must establish that the adverse action would not have occurred "but for" Respondent having engaged in unlawful retaliation. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533, 186 L.Ed. 2d. 503 (2013)

***A. Failure to Accommodate Complainant's Disability***

12. The Commission may establish a prima facie case of housing discrimination based upon the individual's disability/failure to accommodate 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 (9<sup>th</sup> Cir. 2006).

13. In order to establish the first element of a prima facie case of failure to accommodate based on disability the Commission must introduce credible evidence that Complainant was disabled pursuant to R.C. 4112.01(A)(13) which defines "disability" as:

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

14. R.C. 4112.01(16)(a) defines “physical or mental impairment” to include any of the following:

- (i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems; neurological’ musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; (...)
  
- (iii) Diseases and conditions including, but not limited to, orthopedic, visual, speech, and hearing impairments; cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, human immunodeficiency virus infection, mental retardation, emotional illness, drug addiction, and alcoholism.

15. In determining whether an individual is substantially limited in a major life activity the ADA’s rules give the following interpretive guidance:

The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. “Substantially limits” is not meant to be a demanding standard.

An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or

severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. (...) C.F.R. § 1630-2(j) (1) (i)(ii)

16. The Commission introduced the following credible evidence to establish a prima facie case of disability discrimination/failure to accommodate:

- (1) Complainant was diagnosed with a physical impairment, Stage III ovarian cancer, in 2014 which went into remission but recurred at Stage IV in late 2015. (Tr. 72)
- (2) Complainant's condition limited her ability to perform everyday living task of caring for herself, using the bathroom, and cooking. (Tr. 72)
- (3) Additionally, the Complainant's condition and her ongoing chemotherapy treatment caused her to suffer from depression, anxiety, and loss of appetite.
- (4) Respondent was aware that Complainant had cancer (Tr. 203, 210)
- (5) Complainant's health care provider recommended to Complainant that a support animal would help her deal with the effects of cancer and chemotherapy. (Tr. 21, 85, Tr. 98-101)
- (6) Respondent Heine rejected documentation from Jackson that showed that Bella was a support animal needed by Complainant to help ameliorate the

effects of her disability and directed that Bella be removed from the apartment. (Tr. 124, ,128, 143, 293)

17. The Respondents articulated reason for not providing a reasonable accommodation is that it had no knowledge of Complainant's need for an emotional support animal because Complainant did not present documentation to Respondent Heine in compliance with Section 18 of the lease agreement. (Tr. 207, 254-255, 258, Comm. Exh. 9)
18. Respondents introduced evidence that Respondent Heine saw that Jackson had papers in his hand but there was no discussion about the papers or Bella's status because Jackson was confrontational, and Respondent Heine felt threatened. (Tr. 228-229)
19. The Commission introduced evidence to show that Respondent Heine's reason is pretextual and not worthy of credence.
20. The Complainant was not the first tenant who made a request to Respondent Heine to have a therapy animal.
21. Sometime prior to September 3, 2016 during Respondents' ownership of Water's Edge Apartments, two tenants had



submitted documentation to Respondent Heine to have a support animal in their apartment.

Q: Now, a lot has been made over the course of this hearing about this emotional support dog whose name was Bella. Do you prohibit emotional support dogs at your property?

A: No.

Q: And, again, I know you explained this on direct—cross-examination, I think it's important to reiterate. Has anyone else at your property ever had such an animal?

A: I have two people that it never—they didn't keep them; they gave me the papers and stuff and that was it.

Q: And how did they give you the paper?

A: It was—it was a friend's dog on the one and the other one, she just called me, and there was complaints about it and she said she was going to give me paperwork and never did. (Tr. 255)

22. The ALJ finds that Respondent's testimony regarding the reasons for prior tenants not having therapy animals lacked frankness, creating the suspicion of mendacity.
23. The assertion that a tenant's request for a reasonable accommodation for a disability has to comply with the written procedure set for in the lease agreement before Respondents consider such a request is without merit.
24. Applying case law interpreting similar employment discrimination provisions under the ADA, a housing provider's duty to engage in the interactive process to consider a request for a reasonable accommodation should not be predicated upon formalism. *Hunt v. Aimco Properties, LP*, 814 F.3d 1213, 1216 (11<sup>th</sup> Cir. 2016)

What matters under the ADA are not formalisms about the manner of the request, but whether the employer has notice of the employee's wish to be accommodated. *id.*, citing *Taylor*, 184 F.3d at 313. *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999)

Plaintiff need not use magic words to express request for accommodation. *id.*, citing *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1172(10<sup>th</sup> Cir. 1999)

However, stated, a plaintiff can be said to have made a request for accommodation when the defendant has "enough information to know of both the

disability and desire for an accommodation.” *id.* citing *Conneen v. MBNA Am. Bank, N.A.*, 334 F.3d 318 (3d Cir. 2003) (internal quotations omitted)

25. Jackson was told by Complainant that Respondent Heine did not allow tenants to have dogs on the premises. (Tr. 123, 150)
26. It's reasonable to infer that because Complainant was in and out of the hospital receiving chemotherapy that Jackson was prepared to present paperwork to Respondent Heine in the event that the question of Bella's status was brought up by Respondent Heine before Complainant could submit documents to him.
27. Jackson testified that when he opened the door, the exchange started with Respondent Heine's asking, "so the fucking dog is here?" (Tr. 124)
28. The ALJ finds Jackson's testimony to be credible.
29. The confrontational and threatening tenor and tone in the verbal exchange was initiated by Respondent Heine, not by Jackson.
30. Sometime during the verbal exchange between Respondent Heine and Jackson, Respondent Heine saw that Jackson had papers in his hand. (Tr. 228-229)

31. A reasonable inference can be drawn from the credible evidence in the record that Jackson attempted to tell Respondent Heine that Bella was an emotional support animal and give him documentation to support Bella's status, but Respondent Heine refused to consider the request.
32. The credible evidence in the record supports a determination that Respondent Heine refused to provide a reasonable accommodation to Complainant to have a support animal as a reasonable accommodation for her disability in violation of R.C. 4112.02 (H)(1), (12), (16).

### ***1. Retaliation***

33. The Commission alleges that that the Respondents violated R.C. 4112.02 (H)(1) and (12) by denying housing accommodations to Complainant in in retaliation for having requested an accommodation for her disability.
34. To establish the elements a prima facie case of retaliation, the Commission must introduce credible evidence 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 v. Temesi*, 116 Ohio St.3d 327 at para. 13 citing *Canitia v. Yellow Freight Sys., Inc.* (C.A. 6, 1990), 903 F.2d 1064, 1066.

35. 42 U.S.C. 3617, the federal statutory counterpart to R.C. 4112.02 (H)(12), "reaches all practices which have the effect of interfering with the exercise of rights under the federal fair housing laws." *Michigan Protection and Advocacy Service Inc. v. Babin*, 18 F. 3d 337, 347 (6<sup>th</sup> Cir. 1994).

"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." *id* 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 (11<sup>th</sup> Cir. 1991), (sending threatening notes) *United States v. City of Birmingham*, 727 F.2d 560 (6<sup>th</sup> Cir.) exclusionary zoning, cert. denied, 469 U.S. 821, 105 S.Ct. 95, 83 L. Ed. 2 41 (1984).

36. The Commission introduced the following credible evidence to establish a prima facie case of retaliation:

1. Respondent Heine knew that Complainant had a disability.

2. On September 3, 2016 Jackson made a request to Respondent Heine to allow Complainant to have a therapy to accommodate her disability.
  3. Respondent Heine refused to engage in the interactive process to determine if a reasonable accommodation could be made.
  4. On September 4, 2016 Respondent served Complainant with a 3 Day Notice to Leave the premises based on non-payment of rent. (Tr. 273)
  5. The Commission established a causal connection with evidence of the short period of time between the request for the accommodation and 3 Day Notice to Leave.
37. The Respondents' legitimate articulated reason for serving Complainant with a 3 Day Notice to Leave the premises was based on late payment of rent.
38. The Commission introduced evidence to show that the Respondents' articulated reason is not credible based on the difference in treatment of other tenants who paid rent late after September 1<sup>st</sup>.
39. Complainant had paid her rent late in four out of the previous six months. (Tr. 214-218, Comm. Exh. 8)

40. Pursuant to the terms of the lease agreement Complainant's rent was not late when she paid it on September 4, 2016. (Tr. 206-207, Comm. Exh. 9)
41. Respondent admitted that there were other tenants at Waters Edge who had not paid their rent by September 3<sup>rd</sup>. (Tr. 239)
42. Respondent also admitted that he did not serve these tenants who had failed to pay their rent by September 3<sup>rd</sup> with 3-Day Notices to Vacate the premises. (Tr. 235, 239, 299)
43. The ALJ therefore finds that Respondent's articulated reason for initiating an eviction against Complainant is not worthy of credence.
44. But for Complainant's request for an emotional support animal as a reasonable accommodation for her disability, Respondent Heine would not have initiated eviction proceedings against Complainant.
45. The Respondents engaged in illegal housing discrimination based on Complainant's disability in violation of R.C. 4112.02(H)(1), (16), and (19) and retaliation in violation of R.C. 4112.02 (H) (12) and is therefore entitled to relief as a matter of law.

## **DAMAGES**

1. When there is a violation of R.C. 4112.02(H), the statute requires an award of actual damages shown to have resulted from the discriminatory action, as well as reasonable attorney's fees. R.C. 4112.05(G)(1).
2. The statute also provides that the Commission, in its discretion, may assess civil penalties to vindicate the public interest. R.C. 4112.05(G)(1)(b).

## **ACTUAL DAMAGES**

3. The purpose of an award of actual damages in a fair housing case "is to put 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).
4. 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, 384 (10th Cir. 1973) (actual damages of \$1,000 awarded to plaintiff consisting of \$13.25 in telephone expenses, \$125.00)



## **INTANGIBLE DAMAGES**

5. The Commission introduced credible evidence of the emotional distress that Tyler, a person who resided with Complainant, suffered as a result Respondent's discriminatory and retaliatory conduct.
6. Tyler, who was still in high school at time that he moved in, felt a responsibility to help his mother because of her disability.
7. Tyler was depressed because of the threat of eviction. (Tr. 193)
8. Tyler observed that after Complainant received the 3 Day Notice she became more depressed because of the threat of eviction while she was dealing with her terminal cancer. (id.)
9. Respondent Heine dismissed the eviction action only after he received the letter from Complainant's doctor on October 6, 2016.
10. The ALJ recommends that Tyler be awarded \$20,000.00 for the emotional distress and humiliation that he suffered as a result of Respondent Heine's illegal discriminatory and retaliatory conduct.

## **CIVIL PENALTIES**

11. When the Commission determines that there has been a violation of R.C. 4112.02 (H), the Commission may assess civil penalties. R.C. 4112.02(5)(b).
  
12. The purpose of an award of civil penalties is to deter future illegal conduct and punish the offender in order to vindicate the public's interest in the elimination of housing discrimination. *State ex rel. Petro v. Pure Tech Sys.*, 2015-Ohio-1638 (8<sup>th</sup> Dist. Cuyahoga Cty.)
  
13. Courts have wide discretion in assessing civil penalties. *Memphis Ctr. for Indep. Living v. Richard & Milton Grant Co.*, 2004 WL 6340158 (W.D. Tenn.)
  
14. The amount of civil penalties assessed depends on a number of factors, including:
  - 1) the nature of the violation;
  
  - 2) the degree of culpability;
  
  - 3) any history of prior violations;
  
  - 4) the financial circumstances of the defendants;
  
  - 5) the goal of deterrence; and

6) other matters as justice may require *Id.*

15. Applying the foregoing criteria to this case:

- Respondent Heine's conduct was immediate attempt to evict Complainant for engaging in an activity protected under R.C. 4112.02(H).
- The credible evidence supports a reasonable inference that Respondent Heine concocted an elaborate ruse to blame Jackson for his failure to interact with Jackson when Jackson attempted show him Bella's emotional support animal documents.
- Respondent Heine's conduct shows an indifference toward the law.
- There was no evidence introduced by the Commission of prior violations by the Respondents.
- The Commission introduced evidence that there are 72 apartments at Water's Edge owned by Respondents. (Tr. 243)
- The Commission has a substantial interest in seeking to deter Respondents and all housing providers from engaging in discriminatory housing conduct and

retaliation to intimidate individuals who have exercised their rights under R.C. 4112.02(H).

16. Based on the foregoing criteria, the ALJ recommends that Respondent be assessed \$10,000.00 in civil penalties.

### **ATTORNEY'S FEES**

17. The prevailing party is entitled to attorney's fees. R.C. 4112.05(G)(1) and (H); *Schoenfelt v. Ohio Civ. Rights Comm.*, 105 Ohio App.3d at 379.<sup>2</sup>

18. In the instant case the Commission and Complainant are the prevailing parties.<sup>3</sup>

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<sup>2</sup> If the commission finds that a respondent has not engaged in any unlawful discriminatory practice against the complainant or others it may award to the respondent reasonable attorney's fees to the extent provided in 5 U.S.C. 504 and accompanying regulations. R.C. 4112.05 (H)

<sup>3</sup> O.A.C. 4112-3-07(H) Procedure at hearings.

(1) Except as otherwise provided in this paragraph, the evidence in support of the complaint shall be presented at the hearing by counsel for the commission pursuant to division (B)(5) of section 4112.05 and section 4112.10 of the Revised Code.

(a) If an aggrieved person files a designation in accordance with paragraph (C)(5) of this rule, the evidence in support of the complaint shall be presented by counsel for the commission and by the aggrieved person or their counsel.

Notwithstanding the participation of the aggrieved person, counsel for the commission shall serve as lead counsel and retains the authority to manage and direct the manner of case preparation and presentation of evidence in support of the complaint at the hearing (...)

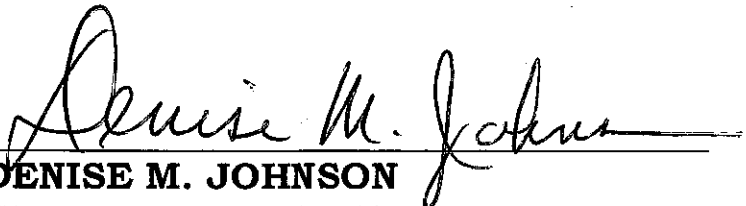
19. If the parties cannot agree on the amount of attorney's fees, the parties shall present evidence in the form of affidavits.
20. In order to create a record regarding attorney's fees, the Commission should file an affidavit from plaintiff's attorneys in Lorain County, Ohio regarding the reasonable 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 Respondents. Respondents may respond with counter-affidavits and other arguments regarding the amount of attorney's fees in this case.
21. 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 the Commission's and Complainants' Applications.
22. 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 with the Commission's Compliance Unit 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.17-HOU-CLE-43592 that:

1. The Commission orders Respondents to cease and desist from all discriminatory practices in violation of Chapter 4112 of the Revised Code;
2. The Commission orders Respondents to pay Tyler Hayes, an aggrieved party, \$20,000.00 in actual damages;
3. The Commission orders Respondents to pay the Commission \$10,000.00 in civil penalties;
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 their Letters of Certification of Training to the Commission's Compliance Department.

  
**DENISE M. JOHNSON**  
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed: August 28, 2019

DMJ/kk