



**Division of
Human Rights**

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

CNY FAIR HOUSING, INC.,

Complainant,

v.

ROBERT M. WEICHERT, SUSAN WEICHERT,

Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10170541

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on August 27, 2015, by Edward Luban, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE HELEN DIANE FOSTER, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any

member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED.

DATED: **OCT 07 2015**
Bronx, New York



HELEN DIANE FOSTER
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
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RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER

Case No. 10170541

SUMMARY

Complainant, a fair housing agency, alleged that Respondents refused to rent an apartment to people with disabilities. Complainant has proven its case and is awarded punitive damages. A civil fine and penalty is also assessed against Respondents.

PROCEEDINGS IN THE CASE

On August 11, 2014, Complainant filed a verified complaint with the New York State Division of Human Rights (“Division”), charging Respondents with unlawful discriminatory practices relating to housing in violation of N.Y. Exec. Law, art. 15 (“Human Rights Law”).

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

On April 16, 2015, the Division served copies of the notice of hearing in this matter on each Respondent at 46 Oswego Street, Baldwinsville, New York 13027. There is no indication that the United States Postal Service returned either notice, and they are presumed to have been delivered. (Tr. 7; ALJ's Exh. 1)

After due notice, the case came on for hearing before Edward Luban, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on April 29, 2015.

Complainant and Respondent Robert M. Weichert ("Mr. Weichert") appeared at the hearing. Complainant was represented by Conor Kirchner, Esq. Mr. Weichert appeared pro se. Respondent Susan Weichert ("Ms. Weichert") did not appear.

Mr. Weichert filed an answer to the complaint. He signed the answer for himself and purported to sign for Ms. Weichert. At the public hearing, Mr. Weichert acknowledged that he is not an attorney. (Tr. 5) Accordingly, the presiding ALJ advised him that he had no authority to appear for Ms. Weichert. In accordance with Human Rights Law § 297.4(b) and the Division's Rules of Practice, 9 N.Y.C.R.R. §§ 465.11(e) and 465.12(b)(3), the presiding ALJ entered Ms. Weichert's default.

The hearing proceeded with the presentation of testimony and documentary evidence from Complainant. After Complainant concluded its case, Mr. Weichert declined to testify or present evidence. Mr. Weichert said he would rely on his answer. (Tr. 150)

On May 4, 2015, the presiding ALJ received by mail a document entitled "Motion to Dismiss [*sic*] At the End of Complainant's Case" from Mr. Weichert. The motion was undated,

but the envelope in which it was received was postmarked May 1, 2015. On May 15, 2015, Complainant responded to the motion. The motion is untimely and will not be considered, but it and Complainant's response have been marked for the record as ALJ's Exhibits 4 and 5, respectively.

FINDINGS OF FACT

1. Complainant is an agency whose mission is "to end housing discrimination, to promote open opportunities in housing, and to ensure equal access to housing opportunity." (Tr. 127)

2. The United States Department of Housing and Urban Development ("HUD") has recognized Complainant as a qualified fair housing enforcement organization. Complainant has received a HUD fair housing grant for approximately 20 years. (Tr. 127)

3. Sally Santangelo is Complainant's executive director. (Tr. 126)

4. Gregory Ayers is Complainant's enforcement manager. (Tr. 78)

5. For approximately 24 years, Complainant has used testing to corroborate discrimination complaints from its clients. The person acting as a tester assumes an identity that matches the characteristics of the person who made the complaint, calls or visits the rental office for the property in question, and inquires about renting the property. (Tr. 49, 52, 78, 80-83, 127)

6. More than half of the housing discrimination complaints Complainant receives involve complaints of discrimination on the basis of disability. (Tr. 128)

7. Ms. Weichert is the owner of a building located at 15 West Genesee Street, Baldwinsville, New York ("15 West Genesee Street").¹ (Complainant's Exhs. 9, 10)

¹ The transcript erroneously identifies this address as 15 West Tennessee Street. (Tr. 11)

8. Onondaga Case Management is a not-for-profit company that provides case management services for people with physical or mental disabilities. (Tr. 10-12).

9. Nicole Fink is the housing specialist for Onondaga Case Management. (Tr. 10)

10. On or about March 17, 2014, Fink saw a listing for a two bedroom apartment on the website NYHousingSearch.gov. The apartment was located at 15 West Genesee Street. The listing indicated that the monthly rent was \$575 and that the contact person was Robert Weichert at telephone number (315) 635-3224. (Tr. 13-14, 42; Complainant's Exh. 1)

11. Fink called the listed number to inquire about the apartment for one of her clients. A person who identified himself as Robert Weichert answered the call. Fink said that she worked at Onondaga Case Management and had a client who was interested in the apartment. (Tr. 13, 20-21, 42, 44)

12. Mr. Weichert told Fink that her clients belonged in a place like "Christopher Communities." (Tr. 21, 38, 46)

13. I take official notice that Christopher Community, Inc. administers the Section 8 housing program that provides federally subsidized rental assistance to elderly, disabled, and low income families in Onondaga County, New York.

14. Mr. Weichert asked Fink whether her clients had mental health issues. Fink replied that some did but others had physical disabilities. Mr. Weichert said "people like that" may burn down his properties. He also said he could "pick and choose who I put in my properties" and did not have to rent to "crazy people." (Tr. 21, 23, 25, 46; Complainant's Exh. 2)

15. Mr. Weichert told Fink that he did not believe he had available apartments for the type of people for whom she was seeking housing but that she could call back on Friday of the following week and he would let her know what he had available. (Tr. 22, 26, 44)

16. Mr. Weichert did not show Fink any properties. (Tr. 32)

17. Fink did not disclose her client's disability to Mr. Weichert. This was consistent with Fink's agency's policy, based on the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). (Tr. 32, 38)

18. On the Friday of the following week and again the week after that, Fink called Mr. Weichert and left voicemail messages. Mr. Weichert did not return Fink's calls. (Tr. 39, 42, 44-45)

19. Fink contacted Complainant and reported her conversation with Mr. Weichert to Ayers. (Tr. 30, 93)

20. Ayers viewed the listing for the apartment at 15 West Genesee Street on NYHousingSearch.gov and saw Mr. Weichert's name and telephone number listed. (Tr. 93-94)

21. Ayers asked Lise Brown to conduct a test for the apartment at 15 West Genesee Street. Brown has been a tester for Complainant for approximately two years and has conducted approximately 15 tests. (Tr. 49-51, 92, 96; Complainant's Exh. 3)

22. Complainant provided Brown with a recording device for the test. (Tr. 90; Complainant's Exhs. 5, 7)

23. Brown posed as a caseworker for Syracuse Behavioral Healthcare who was looking for a two bedroom apartment for a client who was mentally disabled, wanted to move as soon as possible, could live independently, and could afford a monthly rent of \$575.00. (Tr. 52, 94-95; Complainant's Exh. 3)

24. On April 9, 2014, Brown called Mr. Weichert and left a message for him. Brown identified herself as "Lise Jennings" and said that she was calling about the two bedroom

apartment she thought was located at 10 West Genesee Street in Baldwinsville. Brown left her telephone number for a return call. (Tr. 53, 56; Complainant's Exhs. 4, 5 [p. 1])

25. On April 10, 2014, Mr. Weichert returned Brown's call. Brown asked if the two bedroom apartment was still available. Mr. Weichert said the apartment was located at 15 West Genesee Street and was available but he did not allow dogs or cats. Brown said that would not be a problem. Mr. Weichert gave Brown directions to his office at 46 Oswego Street in Baldwinsville and said that he was in the office every day and she could stop in any time. (Tr. 57, 59; Complainant's Exhs. 4, 5 [pp. 1-4])

26. On April 14, 2014, Brown went to 46 Oswego Street in Baldwinsville. A receptionist directed her to Mr. Weichert's office. (Tr. 59-60, 70)

27. Brown told Mr. Weichert that she was there to see the two bedroom apartment at 15 West Genesee Street, that she worked at Syracuse Behavioral Healthcare, and that the apartment was for her client. (Tr. 60; Complainant's Exh. 5 [pp. 5-6], Complainant's Exh. 66)

28. Mr. Weichert said, "And what's wrong with your client?" Brown said she could not say because of HIPAA regulations. Mr. Weichert said, "No, then I won't rent to him." Brown said her client would be able to live in the property. Mr. Weichert replied, "You've got your agenda. I've got mine. Mine [*sic*] agenda is who-the-hell is going burn [*sic*] my building down. . . . And if people don't answer my question, I tell them that there's the door, don't let it hit you in the ass." (Tr. 60-61, 71, 73; Complainant's Exh. 5 [pp. 6-7])

29. Mr. Weichert did not give Brown a rental application, and he did not show her any apartments. (Tr. 64, 68; Complainant's Exh. 6)

30. Brown recorded her telephone calls with Mr. Weichert and her visit to his office. (Tr. 61-62; Complainant's Exh. 5)

31. Immediately after Brown left Mr. Weichert's office, she called Ayers and reported what Mr. Weichert said to her. (Tr. 66)

32. On April 14, 2014, Brown completed a report of her test, including a narrative of her site visit and conversation with Mr. Weichert. (Tr. 62-63; Complainant's Exh. 6)

33. Complainant diverted resources, including staff salaries, overhead, and payment to the tester, to investigate and prepare to file the complaint against Respondents. (Tr. 129-30, 137)

34. Complainant did not present time records or other evidence to support Santangelo's testimony that these expenses were "in the range of about \$2,000." (Tr. 130)

35. Complainant pays testers \$25.00 for a telephone test and \$50.00, plus mileage, for a site visit. (Tr. 50-51)

36. The record contains no evidence that Complainant paid Brown for her test of 15 West Genesee Street.

37. I take official notice that Complainant represented the complainant and Mr. Weichert was a respondent in Division case number 10117054, a complaint filed in 2007 that alleged unlawful discrimination in housing on the basis of familial status. (Tr. 128, 136) On March 25, 2009, the Commissioner dismissed the complaint and annulled the complainant's election of remedies so the complainant could proceed in New York State court. The case is currently pending in Supreme Court, Onondaga County. The record does not show whether a finding of unlawful discrimination has been made against Mr. Weichert in that case.

OPINION AND DECISION

It is an unlawful discriminatory practice for the owner, managing agent, or other person having the right to rent or lease a housing accommodation to deny housing to any person on the

basis of disability. N.Y. Exec. Law, art. 15 (“Human Rights Law”) § 296.5 (a)(1).

An advocacy organization such as Complainant has standing to file a complaint of discrimination under the Human Rights Law. *National Organization for Women v. State Div. of Human Rights*, 34 N.Y.2d 416, 419-20, 358 N.Y.S.2d 124, 127 (1974). Complainant has the burden to establish a prima facie case of discrimination. Complainant must show that its constituents are members of a protected class, that they were qualified to rent the housing in question, that they were denied the opportunity to rent the housing, and that the denial occurred under circumstances giving rise to an inference of discrimination. *Dunleavy v. Hilton Hall Apartments Co., LLC*, 14 A.D. 3d 479, 480, 789 N.Y.S. 2d 164, 165 (2d Dept. 2005). If Complainant establishes a prima facie case, Respondents must articulate a legitimate, non-discriminatory reason for their actions. If Respondents do so, the burden shifts to Complainant to show that the articulated reason was a pretext for unlawful discrimination. *Broome v. Biondi*, 17 F.Supp.2d 211, 217 (S.D.N.Y. 1997).

Brown posed as a caseworker for a client who was mentally disabled. The client was qualified to rent the apartment at 15 West Genesee Street because he could afford the monthly rent. Mr. Weichert refused to rent to the client because Brown refused to identify his disability. Therefore, Complainant has established a prima facie case of unlawful discrimination.

Ms. Weichert did not appear at the public hearing. Mr. Weichert appeared but did not testify or present any evidence. Thus, Respondents did not meet their burden to present a legitimate, non-discriminatory reason for their refusal to rent to people with disabilities. Respondents failed to rebut Complainant’s prima facie case of unlawful discrimination.

It is also an unlawful discriminatory practice for the owner, managing agent, or other person having the right to rent or lease a housing accommodation “to make any record or inquiry

in connection with the prospective . . . rental or lease of such a housing accommodation which expresses, directly or indirectly, any limitation, specification, or discrimination as to . . . disability . . . or any intent to make any such limitation, specification or discrimination.” Human Rights Law § 296.5 (a)(3). When Brown told Mr. Weichert that she worked at Syracuse Behavioral Healthcare and was seeking housing for a client, he asked, “And what’s wrong with your client?” Mr. Weichert also asked Fink whether her clients had mental health issues, said he could “pick and choose” who he put in his rental properties, and said he did not have to rent to “crazy people.” In both instances, Mr. Weichert made unlawful inquiries on the basis of disability.

Damages

Complainant is entitled to an award of damages for the resources it diverted as a result of Respondents’ practices. *Mixon v. Grinker*, 157 A.D.2d 423, 426, 556 N.Y.S.2d 855, 857-58 (1st Dept. 1990); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). However, Complainant failed to establish the value of these resources. Santangelo testified that Complainant expended staff time, overhead, and tester expenses that were “in the range of about \$2,000,” but Complainant did not present time records or other evidence to substantiate her testimony. Brown testified about the rates she is generally paid for testing, but Complainant did not establish that it paid her for the test she conducted in connection with this complaint. Accordingly, Complainant is not entitled to compensatory damages.

However, Complainant is entitled to an award of punitive damages. Human Rights Law § 297.4 (c)(iv). Mr. Weichert unlawfully inquired into the disabilities of Fink’s and Brown’s clients, saying he could “pick and choose” who he put in his rental properties and did not have to rent to “crazy people.” When he learned that his prospective tenants had disabilities, he refused

to show the apartment or engage in any further conversation about the prospective rentals. In these circumstances, a punitive award of \$8,000.00 will serve to effectuate the purposes of the Human Rights Law. *Gostomski v. Sherwood Terrace Apartments*, DHR Case Nos. 10107538 and 10107540 (November 15, 2007), *aff'd*, *Sherwood Terrace Apartments v. New York State Div. of Human Rights*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009); *Housing Opportunities Made Equal, Inc. and Gilliam v. Johnston*, DHR Case Nos. 10132105 and 10132112 (February 3, 2011), *aff'd*, *Johnson v. Kirkland*, 100 A.D.3d 1354, 953 N.Y.S.2d 757 (4th Dept. 2012), *lv denied*, 107 A.D.3d 1502, 1503, 967 N.Y.S.2d 862 (4th Dept. 2013).

Civil Fine and Penalty

Human Rights Law § 297.4(c)(vi) authorizes the Division to assess civil fines and penalties, “in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious.” Any such civil penalty “shall be separately stated, and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article.” Human Rights Law § 297.4(e). In determining the amount of a civil penalty, the Division should consider the goal of deterrence, the nature and circumstances of the violation, the degree of the respondent’s culpability, any relevant history of the respondent’s actions, the respondent’s financial resources, and other matters as justice may require. *Id.*

A civil fine is appropriate in this matter. Respondents openly and deliberately disregarded their obligation under the Human Rights Law to rent to people without regard to disability. Respondents also made unlawful inquiries into the disabilities of prospective tenants.

While it has not been established that Respondents have a history of discriminatory actions, it is noted that Ms. Weichert failed to answer the complaint or participate in this proceeding. The record contains no evidence about Respondents' financial resources.

Considering these factors, a civil fine in the amount of \$8,000.00 may act as an inducement to comply with the Human Rights Law in the future, may deter Respondents and others from future discriminatory action, and will present an example to the public that the Division vigorously enforces the Human Rights Law. *Sherwood Terrace Apartments* at 1334, 877 N.Y.S.2d at 597.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED that Respondents, and their agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in housing; and it is further

ORDERED that Respondents shall take the following action to effectuate the purposes of the Human Rights Law and the findings and conclusions of this Order:

1. Within 60 days of the date of the Commissioner's Order, Respondents shall pay to Complainant the sum of \$8,000.00, as punitive damages for Respondents' unlawful actions. Interest shall accrue on the award at the rate of nine percent per year from the date of the Commissioner's Order until payment is made.

2. This payment shall be made by Respondents in the form of a certified check made payable to the order of Complainant, CNY Fair Housing, Inc., and delivered by certified mail, return receipt requested, to 731 James Street, Suite 200, Syracuse New York 13203.

Respondents shall furnish written proof to Caroline Downey, Esq., General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of their compliance with the directives contained within this order.

3. Within 60 days of the date of the Commissioner's Order, Respondents shall pay a civil fine and penalty to the State of New York in the amount of \$8,000.00. This payment shall be made in the form of a certified check made payable to the order of the State of New York and delivered by certified mail, return receipt requested, to Caroline Downey, Esq., General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York, 10458. Interest on this award shall accrue at a rate of nine percent per year from the date of the Commissioner's Order until payment is made;

4. Respondents shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained within this Order.

DATED: August 27, 2015
Syracuse, New York



Edward Luban
Administrative Law Judge