

IN THE SUPREME COURT OF OHIO

OHIO CIVIL RIGHTS COMMISSION,
FONTELLA HARPER & FAIR HOUSING
ADVOCATES ASSOCIATION,

Plaintiffs-Appellees,

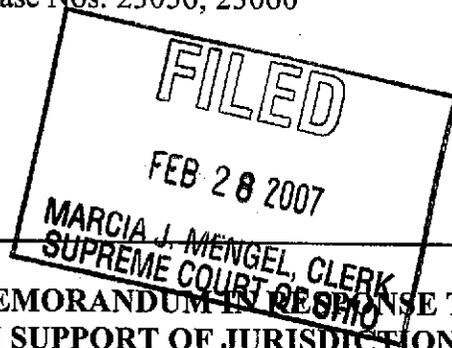
vs.

AKRON METROPOLITAN HOUSING
AUTHORITY AND JUNE DAVIDSON,

Defendants-Appellants.

) CASE NO. 2007-0254

) Appeal from Judgment of the Ninth
) District Court of Appeals, Summit County
) Case Nos. 23056, 23060



**APPELLEE HARPER AND FHAA'S MEMORANDUM IN RESPONSE TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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¹ Appellee Fair Housing Advocates Association is referred to herein as "FHAA."

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**APPELLEE HARPER'S AND FHAA'S STATEMENT OF POSITION
REGARDING WHY THIS CASE OFFERS NO CONSTITUTIONAL
QUESTION, AND IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

The issue here, application of a hostile environment doctrine under the Ohio Fair Housing Statute (R.C. 4112.02(H)) presents no genuine controversy. The doctrine is widely accepted in parallel federal Fair Housing law and no genuine constitutional question is apparent. No conflict or inconsistency exists. The Court of Appeals' opinion itself merely validates the federal anti-harassment protections already existent in Ohio, and warrants no further judicial scrutiny. The underlying opinion merely brings Ohio law in accord with the parallel federal fair housing law, and provide protection when severe racial or (sexual) harassment occurs between tenants, and the landlord is aware.

Appellants' position that employment law has no application here ignores that harassment against a protected class, whether in employment or in housing, grossly interferes with the full exercise of equal employment or housing rights. Landlord, like employers, are the only entity with control over the situation to protect against further erosion of rights.

Appellants arguments and the dissent in the 9th District Opinion, premised off of viewing harassment claims as "bad neighbor" lawsuits, neglects to account for both the importance of stopping racial harassment, and the core fact that these lawsuits require "severe and pervasive" harassment motivated by race, sex, or another protected class. The "bad neighbor" lawsuit simply has not occurred despite parallel federal anti-harassment protection in housing in Ohio since 1983 (*Shellhammer v. Lewallen*, Fair Hous./Fair Lend. (P-H) P 15,472, (N.D. Ohio, Nov. 22, 1983).

Appellants also appear to request less fair housing protection for public housing tenants even though eviction and lease terminations occur for comparable, and perhaps less egregious conduct (minor drug possession of guests). Racial harassment activity certainly warrants equivalent penalties to drug possession. Finally, Appellants argue that landlords should not be transformed into "peace officers." The

same argument could be used to preclude employers from stopping inter-office harassment. More accurately, the duty to intervene, just as in employment, only occurs once the landlord is placed on notice of racial interference. Any alleged inequity to the landlord can be mitigated by creation of a an anti-harassment complaint policy and procedure. as the landlord, just as an employer, can presumably be able to avail themselves of an affirmative defense if they have a basic complaint policy and enforcement procedure. *See, Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)(procedure is affirmative defense in employment).

**APPELLANT HARPER AND FHAA'S STATEMENT
OF FACTS RELEVANT TO THIS APPEAL**

Fontella Harper and her two sons, an African American family, moved into the Van Buren Homes rental housing development in 1991. Van Buren Homes is owned and operated by Akron Metropolitan Housing Authority, a public housing provider. Ms. Harper is employed and her children frequently returned from school on their own until their mother returned home from work. The Harper tenancy proceeded without event until August of 2001, when the Kask family, Caucasians, moved next door.

Shortly after the Kaskis arrived at the rental property, disputes arose. The Kaskis would swear at Harper's cousin and use racial epithets, calling them "niggers" and "Black bitches." The name calling, swearing and shouting escalated to overt threats of violence towards the Harpers. Ms. Harper stated the Kaskis continuously called the Harpers racially derogatory names. The misconduct escalated to physically confrontations towards Ms. Harper, and significantly interfered with the quiet enjoyment of her rental property. The yelling and threats would occur from the Kask's window and porch, and the statements were frequently punctuated by racial epithets. The language included terms such as "*niggers, nigger lovers, Black bitch, Black everything, Black f***ers.*" Ms. Harper explained "*I mean it was all vulgar language. But we was always a Black something or we was always a nigger something or they were*

always going to do something.” The Kaisks also directed racial slurs against other tenants as well. The harassment extended for a period in excess of one year.

Despite complaints from both sets of racially divergent tenants, AMHA never directly intervened or stopped the harassment. AMHA had no policy or procedures to address racial harassment complaints when Ms. Harper was complaining of the harassment. While AMHA Property Manager June Davidson eventually referred the complaints over to AMHA security, who then referred them to the Summit County Sheriff's Office, the Sheriff's office minimized the allegations, considered them in isolation, and looked only for criminal misconduct. AMHA failed identify the continuing history between the neighbors and no racial or fair housing training existed to assist in identifying and curing racial issues.

Ms. Harper orally complained of the harassment in September of 2001 by explaining to Ms. Davidson what had happened; Ms. Harper testified that the complaints included the Kaisk's use of racial epithets. The landlord never took action with regard to virtually all of the allegations of racial harassment and name calling and instead told Ms. Harper to call the police. AMHA has had a series of problems in organization and in locating Ms. Harper's file. The Kaisks complained that they were also having problems with another African American tenant named Tina Wiggins. In August of 2002, Ms. Kaisk again complained about the Harpers and other tenants; she stated that there were problems with “many black residents.”

Ms. Davidson's assistant also alerted Ms. Davidson to the problems between the Kaisks and the Harpers. (Davidson, pp. 93-94). However, Ms. Davidson did not inquire about the specific problems with this assistant. (Davidson, p. 94).

After many months of the racial dispute, AMHA allowed the Kaisks to move to another unit. The transfer, however, occurred **long after** the Harper harassment complaints had occurred, and months after the Kaisks complained.

The police officers learned that Kimberly Kaisk had used the term “nigger” towards the Harpers. but accepted the explanation that the term “nigger” was not used in anger. The landlord, through Ms. Davidson, failed to follow up with the Sheriff's office except they recall the summary it was a “*he said - she said*” situation. Clearly, Ms. Davidson lays blame towards the white kaisk family (they simply are “not nice people.”) No written investigation report occurred and AMHA took no action. The transfer was belated and unrelated to any racial investigation.

As of August 27, 2002, Ms. Davidson admits she was aware of a racial component to the harassment allegations. She limits her positions to acknowledged that a black tenant was complaining of “harassment” from a white tenant but did look into whether there was a racial component to the harassment. The white tenant was complaining of problems with multiple black tenants. Ms. Davidson felt an investigation based on race was unnecessary in spite of overt complaints about racial problems; Ms. Davidson's rationale for not investigating race was that '*racism no longer exists.*' Id. She clarified: "*No, not in this day and age.*"

ARGUMENT

I. APPELLANTS' SINGULAR PROPOSITION OF LAW, THAT OHIO'S FAIR HOUSING STATUTE SHOULD NOT RECOGNIZE A HOSTILE ENVIRONMENT CLAIM, IS CONTRARY TO PARALLEL FEDERAL LAW AND THE REMEDIAL INTENT OF THE STATUTE

The Appellate Court's adoption of the hostile environment theory in housing to protect against harassment is well accepted federal law in Ohio and throughout the United States. Federal law has consistently been used as guidance for R.C. 4112. *Little Forest Med. Ctr. v. Ohio Civ. Rights Comm.* (1991), 61 Ohio St.3d 607, 609-610; *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 677. The only difference is that Ohio fair housing law covers landlord's who have less than four units; these settings also deserve protection against racial harassment.

A. Appellants' Assertion that Recognition of this Cause of Action will Promote Neighborhood Disputes in the Courts Errs: Hostile Environment Claims Are Readily Distinguishable As They Require (1) Racial Motives, (2) Knowledge by the Landlord of Interference and Improper Motives, and (3) Racially Motivated Conduct Rising to the Level of "Severe and Pervasive" Misconduct

In asserting that recognition of a hostile environment cause of action gives way to regulating "neighborhood disputes," Appellants' position disregards the proof necessary to establish this claim and distinguish it from a simple neighborhood dispute. Hostile environment requires racially motivated conduct and, if tenant based, knowledge by the landlord and a failure to act. See, 9th District Court of Appeals Opinion, p. 9; *DiCenso v. Cisneros*, (7th Cir. 1996), 96 F.3d 1004, 1008 . Appellants' ignore that the racial motivation requirement removes the facts from a simple tenant dispute.

The need to establish landlord liability is the only means to protect against tenant/tenant racial harassment. It is not enough to simply guarantee an African American can buy or rent a dwelling if they can not live in it in peace. As here, the landlord at least has some control over the tenants. The failure to act caused increased hostility and escalation of racial misconduct at the Harper family. By ignoring racial motivations, as the landlord did here, the racial hostility festered and ultimately denied the Harper family the right to equal housing based off of their race. Remedial legislation such as R.C. 4112 is designed to insure equal - not partial - rights to fair housing and should be interpreted broadly. *Cosgrove v. Williamsburg Management* (1994), 70 Ohio St.3rd 281; Accord, *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205.

Appellants' reference to dicta in various cases, including the distinguishable case of *Lawrence v. Courtyards at Deerwood Ass'n.*, 318 F. Supp.2d 1222 (M.D. Fla 2003) is not persuasive. The Court in *Lawrence* readily distinguished itself (condominium situation) from rental situations like the present set of facts:

The circumstances here are distinguishable from those in *Bradley*. Apartment complex landlords are able to exert far more control over their tenants than a voluntary board of directors can exert over property owners. Tenants may be evicted; homeowners may not. Moreover, unlike the specific lease terms in *Bradley*, there were no documents here which specifically authorized the Association or the Property Manager to sanction, much less remove, Novillo for her offensive conduct. Finally, unlike in *Bradley*, the Defendants did undertake various efforts to address the problem, but ultimately had legitimate reasons for not taking sides.

Lawrence, 318 F. Supp.2d at 1151.

Thus, much of the dicta raised by Appellants, asserting that landlords have no control and thus no responsibility, is grossly out of context. The lower court's finding that the landlord here is not simply a condominium association, with no control, addresses Appellants' argument. (Opinion, p. 8).

The Appellants' argument, that the racial threats of the white neighbors should not be imputed to the landlord, ignores the point of the need for a hostile environment doctrine. The focus, as directly recognized by the Court (Opinion, p. 5), is towards the inaction by the landlord of ongoing racial harassment at a rental complex. Inaction by a landlord - coupled with knowledge of racial considerations - deprives a tenant of equal housing opportunities. The duty arises because the harassment can only be controlled through by the landlord. Landlords routinely take action for violation of leases, and public housing landlords discontinue housing for felons or drug abusers. If the landlord has notice of racial interference in housing, but does nothing, they become a tacit participant in the denial of fair housing rights.

Appellants' argument that public housing would suffer on ethical and constitutional grounds lacks specificity. Due process rights to eviction would still exist and the shortage of public housing underscores the need to give these scarce housing units to those deserving of this privilege (i.e., not those who discriminate).

B. Employment Claims are used in Parallel Federal Hostile Environment Claims as a Basis for Anti-Harassment Rights

Appellants' argument that employment law can not be a basis for the fair housing hostile environment right is without merit. Federal fair housing hostile environment law consistently relates back to hostile environment employment law. *DiCenso v. Cisneros, supra*, (hostile environment in housing based off of gender); *Honce v. Vigil* (10th Cir. 1993), 1 F.3d 1085, 1088 (hostile environment in housing based off of gender). *Bradley v. Carydale* (E. Dist. Va. 1989), 707 F. Supp. 217 (racial harassment in housing); *Smith v. Mission Associates Ltd. Partnership*, 225 F. Supp.2d 1293, (D. Kan. 2002); *Neudecker v. Boisclair Corp.* (8th Cir. 2003), 351 F.3d 361, 364 (disability), *Halprin v. Prairie Homes* (7th Cir. 2004), 388 F.3d 327, 330 (religion) and *Shellhammer v. Lewallen*, Fair Hous./Fair Lend. (P-H) P 15,472 (N.D. Ohio Nov. 22, 1983), aff'd without published opinion, 770 F.2d 167 (6th Cir. 1985)(gender/sex). All generate from the seminal employment hostile environment case of *Harris v. Forklift Systems*, 510 U.S. 17 (1993)(establishing the "severe and pervasive" threshold test). In Ohio, hostile environment protection in housing is based in *Hampel v. Food Ingredients Specialities, Inc.*, 89 Ohio St.3d 169 (2000).

The commonality of issues between employment and housing hostile environment claims balance any perceived differences. The paramount issue in both settings is to protect critical functions of society, housing and employment, from racial or illegal harassment. Both the employment and housing fields recognize that the employer/landlord is the only entity which can control the offensive conduct, and to acquiesce or ignore the misconduct often only encourages escalation or at a minimum, continued deprivation of equal housing or employment rights. The Appellants' reference to the *Lawrence* case identifies an area where there is no control: where harassment is occurring among condominium owners, not renters in an apartment complex.

C. A Landlord's Inconveniences, or Vague Constitutional Rights, Can Not Trump Fair Housing Against Harassment

Citing the lack of public housing opportunities, Appellants express concern that evictions or relocation cause a hardship. Despite lack of sufficient public housing units, public housing landlords consistently evict for drug or felony violations. Eviction can occur for any drug activity, including the drug activity of a guest even if the tenant has no knowledge or participation in the illegal activity. Title 24 C.F.R. Sections 966.4(f)(12)(I)(B), (1)(2)(ii)(B)). Evictions for racial harassment should at least receive the same eviction considerations, and power, as illicit drug activity. By extension, Defendants argue it is more equitable to evict an entire family because the 17 year old son uses marijuana as opposed to a tenant who overtly racially harasses its neighbors.

The vague constitutional grounds cited by Defendants have not proved to be an impediment to the parallel federal protections relating to hostile environment housing, and protection in Ohio would not seem to cause any extraordinary constitutional questions. Appellants' arguments about homelessness, 4th Amendment concerns, and recalcitrance towards eviction has not impeded eviction for simple drug possession. Appellant's argument that racial harassment does not warrant eviction where marijuana possession does, even by a co-tenant or minor, is untenable.

CONCLUSION

As no constitutional issues or conflicts exist with the precedent set by the Ninth District opinion in this case, Appellees Harper and Fair Housing Advocates request that this Court not accept jurisdiction, and remand the case to the trial court for further action in accord with the Appellate opinion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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ANDREW L. MARGOLIUS