UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Durand Evan,

Charging Party,

Durand Evan,

Intervenor,

v.

Nancy Dutra, Henry Fisher, Ray Stone, Ken Hunt and River Gardens Apartments, a California Limited Partnership,

Respondents.

HUDALJ 09-93-1753-8
Decided: November 12, 1996

Melvin J. Visger, Esquire
For the Respondents

David Grabill, Esquire
For the Complainant-Intervenor

Robert C. Mills, Esquire
For the Secretary and the Complainant

Before: CONSTANCE T. O'BRYANT
Administrative Law Judge

INITIAL DECISION AND ORDER

Statement of the Case

This matter arose as a result of a complaint filed by Durand Evan ("Complainant"), alleging discrimination in violation of the Fair Housing Act ("the Act"),

as amended, 42 U. S. C. §§ 3601-3619. Following an investigation and a determination that reasonable cause existed to believe that discrimination had occurred, the Department of Housing and Urban Development ("HUD" or "the Charging Party") issued charges against Nancy Dutra, Henry Fisher, Ray Stone, Ken Hunt and River Gardens Apartments, a California Limited Partnership ("Respondents"), alleging that they had engaged in discriminatory housing practices in violation of 42 U. S. C. §§ 3604 (f)(2)and(3) of the Act. The charges alleged that Respondents violated the Act by discriminating against Complainant due to handicapped status by failing to grant him a reasonable accommodation.

On April 24, 1996, this Court granted Complainant's Motion to Intervene and participate in this matter. A hearing was held on April 30, 1996, in Sacramento, California. After delays occasioned by the need to correct the transcript, both parties submitted post-hearing briefs. The case is now ready for decision.

Findings of Fact

1. The Complainant is a 49 years old Native American who, prior to October 1992, lived in an 18-foot trailer with no electricity or utility hookups. Tr. 30, 94.[1] He lived alone with his cat. He had owned the cat for all of its life and it was "like (his) child" -- he had raised it and was "bonded with it psychically." The cat was a source of warmth and comfort to him and helped him through "a lot of tense situations." Tr. 34, 96.

2. Complainant has a disability due to the condition of fibromyalgia. Tr. 32, 83-91, 95, Answer ¶ 1. During 1992 Complainant relied for his existence upon approximately $628 per month in Supplemental Security Income ("SSI") payments[2]. G-1; Tr. 31.

3. Respondent, River Gardens Apartments ("River Gardens")[3] is a California Limited Partnership. It is funded by Farmer's Home Administration ("FMHA") and is governed by rules set forth by FMHA. Pursuant to FMHA's rules and regulations, River Gardens has a "no pet policy," i.e. no pets of any kind are permitted without consent of management. Tr. 122, 202, 203, 209.

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[1]The following abbreviations are used throughout this decision: "Tr." for hearing transcript and "G-#" for Government Exhibit number.

[2]SSI is a federal program that provides financial assistance to the low income disabled.

[3]This entity is often identified in written documents as well as testimony as River Garden Apartments.

4. At all times relevant to this case, Respondents Henry Fisher, Ray Stone and Ken Hunt, were general partners of River Gardens Apartments. G-12. River Gardens Apartments was managed by Hank Fisher Properties. Tr. 224.

5. Respondent Karen Mead was the resident manager of River Gardens. Tr. 194. Ms. Mead accepted applications for rental units, interviewed applicants and signed leases on behalf of River Gardens. Respondent Nancy Dutra[4] was the property manager at River Gardens. She held this position from October 1992 to approximately June of 1993. Tr. 201. In the absence of the resident manager, Ms. Dutra would sometime perform the resident manager's duties. Tr. 194, 206.

6. In May 1992, Complainant submitted a rental application to River Gardens. Complainant was being displaced from his trailer location because the owner was selling the property and he needed a place to live. G-1. He was interested in renting at River Gardens because it was low-income housing and was close to a hospital. Tr. 35, 36, 40. On Complainant's application, he answered in the affirmative to the question whether he was handicapped or disabled and indicated that he used a wheelchair at times, although rarely. Complainant checked a box indicating that he received social security and SSI benefits. These benefits amounted to $676.00 per month. G-1. Complainant also stated on his application that he owned a cat. *id.*

7. In October 1992, Complainant was informed that an apartment had become available in the River Gardens complex. Complainant went immediately to River Gardens and spoke with the person on duty. Tr. 40, 41. Shortly thereafter, Complainant's application was approved. Because there were no copies of the written rental agreement available at the time, Complainant was allowed to move into River Gardens on October 25, 1992 without signing a written rental agreement. G-2; Tr. 42, 43. Complainant signed a written rental agreement on November 4, 1992. G-2; Tr. 194-197. Nancy Dutra signed the rental agreement on behalf of River Gardens Apartment.

8. While executing the lease, Ms. Dutra noticed on Complainant's application that he had a cat. She told Complainant that he could not keep his cat in his apartment -- that River Gardens had a "no pet" policy. Tr.45, 195. Complainant responded that his cat was very important to him and that he "really didn't want to get rid of the cat." Tr. 196. When Ms. Dutra asked him if he could find another home for his cat, Complainant responded that he would "see about it" or that he would "try to find a home for my pet because I need an apartment." Tr. 45, 196.

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[4]At the time of the hearing, the name was Nancy Dutra-Murphy. Tr. 193.

Complainant did not tell Ms. Dutra at the time that his cat was a "service" animal, or that it was medically necessary for him, or that it provided a therapeutic benefit to him, or make any statement which would have made her aware that his need for a cat went beyond that of any other owner who had become attached to his pet. *Id.* Tr. 124, 203, 204.

9. At the time he signed the rental contract, Complainant acknowledged receipt of a copy of documents incorporated by reference into the lease agreement. These documents included the Apartment House Rules. He also acknowledged that he had read the documents and understood them. Tr. 122. The House Rules for River Gardens provided on page 3 thereof, that "no pets of any kind are permitted in the apartment or upon the premises without written consent of the Management. See Pet agreement, Pet policies and Pet Information." G-2; Tr. 122-123.

10. Complainant's impairment which was determined to be disabling by the Social Security Administration (SSA) is fibromyalgia (sometimes referred to in the testimony as fibromyositis) -- a musculoskeletal condition. Tr. 83. Answer ¶1. He also suffers from mental anxiety resulting from having to endure the pain of the musculoskeletal condition. The fibromyalgia causes him to have chronic muscle pain, joint aches, fatigue, depression, headaches, sleep problems and minor neurological problems, all of which can be exacerbated by stress and anxiety. Tr. 32, 33, 83, 91, 93. At times, his condition is debilitating, causing difficulty walking or standing for long periods of time, and getting in and out of the bathtub. Tr. 34. Complainant does not like to talk about his disability and works hard to "cover up" and present an appearance that he is not disabled. Tr. 33, 118.

11. Although Ms. Dutra noted Complainant's response on his application that he had a handicap, she could not tell by looking at Complainant that he was disabled or that he had a handicap. Further, she believed that it was improper for her to ask him about his condition. Tr. 221.

12. Mr. Evan was very shaken by Respondent Dutra's request that he find another home for his cat. Tr. 45. Sometime in the fall of 1992, Complainant sought advice from the local Humane Society about what he should do with his cat. Tr. 46-48. He learned from them that there were federal laws that permitted a disabled person to keep a pet. Tr. 46-47. However he did not immediately inform Ms. Mead or Ms. Dutra or anyone at River Gardens about what he had learned from the Humane Society and continued to keep his pet and took no steps to get rid of it. Tr. 125; G-3. He put off making any decisions and hoped the problem would go away. He was "trying to calm myself down and reassure myself and just leave things be." Tr. 97.

13. Complainant heard no more from Respondents regarding the keeping of his cat in the apartment until February 5, 1993, when he received a warning notice from Respondents, stating that his continuing to keep the cat was a violation of the terms of his lease. He was asked to correct the matter immediately. The warning notice further advised him that if he persisted in keeping his cat, River Gardens would have no other choice but to give him an eviction notice. G-3; Tr. 50, 197, 504. Mr. Evan was "shocked and upset" by the notice. He started having pain and "going through traumas and getting really, really depressed . . . (he) was really, really distraught." Tr. 49, 51, 97.

14. Alarmed, upset, scared and confused, Complainant went to Karen Mead and talked to her about his need for his cat. He told her that he had checked with the Humane Society and that they told him that his keeping a pet should not be an issue since he was a disabled person -- that he was entitled to have a pet. Tr. 47, 51. The evidence does not show that Mr. Evan told Ms. Mead that he had a need for the cat in terms of it being a "service" animal; however, it is clear that the therapeutic benefit to him was communicated to Ms. Mead at the time because she requested that Complainant get verification from a medical source that his cat served a "therapeutic" purpose. Sounding sympathetic, Ms. Mead told him that the matter was out of her hands -- it was being handled by Ms. Dutra. Tr. 49, 51, 194-199.

15. In an attempt to follow Ms. Mead's instructions, Complainant went to his mental health counselor, Loraine E. Duff, and told her of the resident manager's request that he obtain a statement regarding his "therapeutic cat." Tr. 52, 53. Shortly thereafter, Respondents received a letter dated March 31, 1993 addressed to "River Garden Apartments" regarding Durand Evan, showing the signature of "Loraine E. Duff, L.C.S.W." The letter stated the writer's opinion that it was important that Mr. Evan be allowed to keep his cat and that the cat was "clearly important to his well being and over all health." G-4; Tr. 52-53, 206.

16. Ms. Dutra testified that had she received the letter from Ms. Duff on November 5, 1992, when she and Mr. Evan were first discussing the cat, she would have considered the letter to be a request for reasonable accommodation. However, she discounted his need for the cat as a form of therapy at this time because it was months into his tenancy before Mr. Evan had brought up the matter. Tr. 196, 206, 234-235. Her response to the March 31st letter was that notwithstanding Ms. Duff's comments, Complainant was to be evicted in 5 days if he still had the cat in his unit.

17. Although Ms. Duff's letter did not state that Complainant had a specific medical need for his cat, it was sufficient, when considered with Complainant's prior statement to Ms. Mead that he was entitled to keep his cat because he was disabled, to put Respondents on notice that Complainant's cat might serve a therapeutic purpose. It was

also suffieient to place on Respondents the responsibility of making further inquiry about Complainant's illness and the possible need for reasonable accommodation.

18. Upon being notified that he had 5 days to get rid of his cat, Complainant became highly agitated, went into "psychic shock" and started to fall apart. Tr. 57. On April 9, 1993, Respondents sent Complainant another letter stating that his continuing to keep the cat was in violation of apartment rules. G-5. Again, Complainant became very distressed and went into another "shock " period. He pleaded with Ms. Mead and Ms. Dutra to let him keep his cat. Tr. 58-59. Not persuaded, Ms. Dutra suggested that Complainant contact the Humane Society to see if he could find a good home for his cat. Tr. 197-98.

19. On May 6, 1993, Ms. Dutra directed Karen Mead to serve upon Complainant a Notice of Termination of Tenancy for Cause based on his continuing violation of House Rules regarding pets. G-6, Tr. 60, 199-200. This notice required him to vacate the apartment by June 6, 1993, and if he failed to do so, eviction action would be initiated. Upon receiving the notice, Mr. Evan became "pretty hysterical." Tr. 60.

20. Mr. Evan went again to the Humane Society. There someone helped him write a letter requesting permission to keep his cat. On May 7, 1993, he wrote Hank Fisher stating his belief that under the circumstances he should be allowed to keep the cat in his apartment. He stated that he suffered from both physical and mental problems, and that his pet was useful for pain therapy and relieving emotional stress and was "so healing to me." G-19. In that letter, he compared his cat to a seeing eye dog or hearing dog -- service animals which were essential to their owners.

21. On May 9, 1993 Complainant gave Karen Mead a note he addressed to "River Garden Apartments, Hank Fisher Properties and unknown determiners," in which he stated that their actions had caused him severe pain and distress and was resulting in the need for medical treatment and costs which would not have otherwise been required. Tr. 60. He again pleaded with them to stop the assault against his health and well-being. G-7. Tr. 61-62. Ms. Dutra responded to this letter on behalf of the addresses. She stated that "[t]here are several tenants that would like to have a pet but they no (sic) they can't. I'm sorry this has caused you problems, however you knew the rules when you moved in and signed your lease . . ." She ended the letter by stating that the 30-day notice would stand even if Mr. Evan got rid of the cat. G-8. Tr. 62-63. This letter caused Mr. Evan "to become more alarmed and more anxious." Tr. 63. He discussed the matter with Karen Mead. He told her that if he were evicted, he had no place to go except to live "under the bridge." Tr. 95. The pain and stress got progressively more severe -- it kept

building until he felt like he "was dying . . . literally I was being torn apart." Tr. 65, 95, 100. Ms. Mead asked if he could get a prescription for the animal from his doctor. Tr. 63.

22. Complainant became so alarmed and anxious after being told by Ms. Dutra that he would be evicted in 30 days whether he got rid of the cat or not, that he required emergency hospital treatment. On May 19, 1993, while at a Safeway, Complainant began feeling woozy and couldn't make it home. He was hyperventilating, very disoriented and going into spasm. He was "falling apart" and "could no longer maintain [him]self." Tr. 101. He was seen as an emergency patient at the Mendocino Coast District Hospital where Dr. Gallo, his treating physician, happened to be on duty. Dr. Gallo diagnosed him as suffering from acute anxiety and hyperventilation, and Dr. Gallo made the following entries:

> Patient is a 46 yr man who lives alone and gets great deal of support from his pet cat. Being evicted from his home if he does not get rid of cat. Has caused excessive anxiety and hyperventilation episode. Also [increased] pain from fibromyalgia. G-9.

According to Dr. Gallo, who had been treating Mr. Evan for several years, Complainant was the most anxious during this episode than he had ever seen him. Tr. 84.

23. On May 24, 1993 Complainant saw Dr. Gallo at an office visit. He had calmed down since his hospital treatment and medication. Dr. Gallo advised him to talk again to his landlord regarding the need for his cat and wrote a note to the landlord for him. Dr. Gallo's note which was penned on his prescription pad stated: "Patient receives significant emotional support from his pet cat, and loss of this animal would precipitate severe psychological stress. I recommend he should be allowed to keep pet in his apartment." This note is dated May 24, 1993. G-9. After receipt of Dr. Gallo's note, Ms. Mead wrote Mr. Evan reiterating that even if he got rid of his cat, the notice giving him 30 days to vacate his apartment would stand. G-10.

24. Desperately seeking help, Mr. Evan contacted the City Administrator, City of Fort Bragg, requesting that the City Council consider enacting legislation to prohibit rental policies which prohibit the keeping of household pets when those policies conflict with medical treatments involving animal bonding. In a letter to River Gardens dated June 7, 1993, written on behalf of Mr. Evan, the City Administrator addressed the issue. The City Administrator stated his opinion that adequate State and Federal regulations already existed relating to the matter and expressed his desire to see the matter between Mr. Evan and River Gardens resolved without further City intervention. G-11. On June

9, 1993, Respondent Fisher wrote to the City Administrator. Although he acknowledged the value of pet bonding, and his awareness that HUD and FHA required that in senior apartments, residents over 62 years old be permitted to have pets of reasonable size, he rejected what he saw as the letter's implication that the owners of River Gardens were required to allow residents to keep pets which served a medical purpose. G-12.

25. On that same day, June 9, 1993, Respondent River Gardens Apartments, filed a Complaint -- Unlawful Detainer action in the Mendocino County Justice Court against Mr. Evan (Civ. 93-060). The action sought immediate possession of the premises rented to Mr. Evan. G-13.

26. On June 16, 1993, Mr. Evan filed his Answer to the unlawful detainer. He obtained the services of a lawyer who helped him draft a response. In his Answer, Mr. Evan asserted as an affirmative defense that he "is a disabled person and his cat is his sole companion" and that as a disabled person, he was "entitled" to keep a pet, citing Title 12, § 1701r-1, pertaining to federally assisted rental housing for the handicapped. G-15.

27. On June 17, 1993, Mr. Evan wrote to Hank Fisher Properties. He stated his belief that Respondent's reliance upon the house rules denying his keeping his cat when it served a medical purpose discriminated against disabled persons. He stated that his pet cat was not just a luxury or amusement for him, but rather an integral part of an important medical regimen. He used the terms "therapeutic" cat -- "service animal." He pleaded with Mr. Fisher to sign a form or otherwise give his consent to allow him to keep his "medical treatment and housing" and to stop the unlawful detainer action filed against him. G-14.

28. Having received no response to his appeal to Mr. Fisher, on July 9, 1993, Mr. Evan filed a complaint alleging discrimination in housing because of both physical and mental handicap. He alleged that the management of River Gardens had not accommodated his handicaps, including fibromyalgia and the anxiety that results from it, by refusing to waive its no-pet policy even though he had provided management with medical statements that his cat helped alleviate his health problems. This complaint carried an official filing date of July 12, 1993. G-16.

29. On July 16, 1993, Respondent River Gardens Apartments was notified of the filing of Mr. Evan's complaint and the basis therefor. G-18. That same day, they voluntarily dismissed the Unlawful Detainer action and three days later executed an amendment to Mr. Evan's rental agreement to permit him to keep his cat in his apartment unit for "therapeutic" purposes. G-17.

30. Dr. Gallo, Complainant's treating physician, and Dr. Kenneth Merritt, an expert in clinical psychology and executive director of a social service agency which operates several residential programs for mentally ill people, both testified at the hearing to their opinion that Complainant derived significant therapeutic benefit from his pet cat, and that the threatened loss of his cat caused him significant stress. G-9, Tr.47, 173, 174.

31. Complainant incurred both emotional and physical damages from the threat of the loss of his cat or eviction if he kept his cat, and expenses in defending himself against the unlawful detainer actions. G-21; G-23; Tr.60-69, 95-101, 121, 141.

32. Complainant's cat was taken from him in January 1996 through no fault of Respondents. As of the date of the hearing, he had not replaced the pet. Tr.133.

DISCUSSION

It is unlawful to discriminate against any person in connection with the rental of a dwelling because of the handicap of such person. 42 U.S.C. § 3604(f)(2)(A). Handicap discrimination includes "a refusal to make reasonable accommodation in rules, policies, practices or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). *See also* 24 C.F.R. § 100.204. A reasonable accommodation is one which would not impose undue hardship or burden upon the entity making the accommodation and would not undermine the basic purpose the accommodation seeks to achieve. *U. S. v. Marshall,* 787 F. Supp. 872, 877 (W.D. Wis;. 1991); *Roseborough v. Cottonwood,* 1994 WL 695516, (N.D. Ill.).

A handicap is defined in the Act as a "physical or mental impairment which substantially limit one or more of . . . [a] . . . person's major life activities." 42 U.S.C. § 3602(h)(1). *See also* 24 C.F.R. § 100.201.

Respondents argue that the Charging Party and Intervenor have failed to make a prima facie showing of handicap discrimination. They argue, therefore, that the facts do not warrant a finding of handicap discrimination and that Complainant is not deserving of a monetary award.

Prima Facie case

In *HUD v. Ocean Sands,* Inc. 2 Fair Housing-Fair Lending (P-H) ¶ 25,015 (HUDALJ 1993), the court set out the four elements for a prima facie case under 42 U.S.C. §3604(f)(3)(B), when the claimant is currently residing in the dwelling. A prima facie case of handicap discrimination is made when:

(1) complainant suffers from a handicap as defined in 42 U.S.C. §3604(f)(3)(B);

(2) respondents knew of complainant's handicap or should reasonably be expected to know of it;

(3) accommodation of the handicap may be necessary to afford complainant an equal opportunity to use and enjoy the dwelling; and

(4) respondents refused to make such accommodation.

Once Complainant has satisfied these elements, Respondents may prevail if they can demonstrate that an accommodation of Complainant's handicap imposes an "undue financial or administrative burden" on Respondents or the accommodation requires a "fundamental alteration" in the nature of its program so that the accommodation is not reasonable." *HUD v. Ocean Sands.*

Complainant Has a Handicap as defined in the Act

Complainant has established that he suffers from a handicap. He has fibromyalgia, a chronic musculoskeletal condition which causes severe physical pain, and from mental anxiety resulting from this condition, and which substantially limits his ability to engage in activities of daily living without significant pain. At times his condition is so painful he cannot walk. Complainant has been determined by SSA to be disabled and receives social security disability benefits. In their Answer to the Charge, Respondents admitted that Complainant is handicapped as defined by the Act. Answer ¶1.

Respondents' Knowledge that Complainant was Handicapped

Complainant indicated on his rental application that he was disabled, that he occasionally used a wheelchair, that he had significant medical expenses related to his medical condition, and that his source of income was Social Security disability. G-1. Respondent Dutra reviewed Complainant's application in detail before approving his tenancy and was fully aware that he was handicapped. Tr. 212. Respondents acknowledge that they admitted to Complainant being handicapped in their Answer to Charge ¶3, however, they assert that the admission that he was handicapped did not admit to his being handicapped during the time he lived at River Gardens prior to July 19, 1993, when Respondents agreed he could keep his cat for "therapeutic" purposes. Their attempt to change position is not persuasive. There is no evidence which suggests a change in Complainant's medical condition between November 4, 1992 and July 19, 1993, which would support this argument. I find that Respondents knew or had reason to know that

Complainant was disabled and had a handicap within the meaning of the Act at the time he applied for housing at River Gardens.

Accommodation was Necessary to Complainant's Enjoyment and Use of His Apartment

Complainant has established that having his pet cat live with him greatly increased his enjoyment of his apartment and the quality of his life. Both Dr. Gallo and Dr. Merritt were of the opinion that Complainant derived a therapeutic benefit from keeping his cat. Complainant has therefore made a prima facie showing of need for exemption from the no-pet rule and being allowed to keep his cat in his apartment. The evidence supports finding that allowing Mr. Evan to keep his cat would accommodate Mr. Evan's handicap and allow him equal opportunity to enjoy and use his River Gardens apartment.

Respondents' Refusal to Accommodate Complainant

Complainant claims that Respondents refused to provide reasonable accommodation by allowing him to keep his cat in his apartment until they amended the rental agreement on July 19, 1993. Respondents claim that since Complainant's cat was never removed from his apartment, accommodation was never denied to him, or, in the alternative, that they accommodated Complainant as soon as they became aware that accommodation was necessary.

Once Complainant's need for accommodation became known, Respondents were required to attempt to accommodate him. *HUD v. Riverbay,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,080 (HUDALJ 1994). In this case, the question is when Respondents become aware of the need for accommodating Complainant's handicap. I find that Respondents, as of February 5, 1993, had knowledge that accommodation may have been necessary to afford Complainant equal opportunity to enjoy his apartment unit. This is based on Ms. Mead's prompting of Complainant to get a medical statement that his cat served a "therapeutic" purpose, and Ms. Dutra's own testimony that the content of the note later received from Ms. Duff was sufficient in her mind to raise the issue of the need for reasonable accommodation.

The evidence fails to show that prior to February 5, 1993, Respondents were aware that reasonable accommodation might be necessary. Although Respondents were aware of Complainant's handicap at the time he applied for rental because of his statements on the application, they were not aware of the nature of the handicap. Ms. Dutra testified that she thought it was improper for her to inquire into the nature of Complainant's disability. Additionally, there is no evidence that Complainant, in the

beginning of his tenancy, specifically requested accommodation, or in any way linked his need for his cat to a mental health therapy. I credit Ms. Dutra's testimony that from the beginning Mr. Evan's statements about his desire to keep his cat did not indicate to her that the cat served the purpose of a "service" animal or one providing a therapeutic need. Mr. Evan's statements about his need for a cat did not differ in any significant way from those of a nondisabled or nonhandicapped person who simply wanted to keep a pet in his apartment. Moreover, I credit Ms. Dutra's testimony that the need for such an animal was not obvious to her based upon Mr. Evan's appearance. Mr. Evan himself testified that he does not talk about his disability and tries hard not to appear disabled. Accordingly, it was not evidence of discrimination that Ms. Dutra initially insisted that the house rules be followed.

However, in and around February 5, 1993, Mr. Evan gave Respondents specific indications of the nature of his need for the cat. He told Ms. Mead he was disabled and needed his cat. At that time she understood he was expressing the need for a service animal -- she told him to get medical verification of the need therefor. From that time onward, Respondents had an obligation to seriously consider Complainant's request to waive the rules and to make inquiry into the legitimacy of his claim.

Respondents claim that they were not aware of the need for accommodation prior to July 19, 1993, and that it was reasonable for them to require more substantial documentation (post-hearing brief, p.6) is not persuasive. The fact of the matter is that Respondents took no action to verify Mr. Evan's claim. Ms. Dutra ignored the evidence Mr. Evan produced in support of his request and made it clear that he would be evicted regardless of what documentation he obtained. Finally, Respondents had no more supporting evidence on July 19, 1993, than they had on May 24, 1993, when they received Dr. Gallo's note. It was the filing of the discrimination complaint that caused them to grant accommodation.

The evidence is clear that Ms. Dutra did not consider providing reasonable accommodation to Complainant simply because she did not believe Mr. Evan had a handicap which required it. This was based almost entirely on the fact that Mr. Evan did not appear to have a handicap and had not asserted such a claim before he was approved for occupancy. By taking this position, Ms. Dutra rejected out-of-hand the opinions of Complainant's long term treating physician and his mental health counselor and showed a callous disregard for Complainant's health and well-being. It is equally clear that Complainant, a man of fragile mental state, was not aware until well after he moved into River Gardens that he could get an exemption or waiver of the no-pet rule under his circumstances. When he did become aware, he took all the steps within his limited means to persuade Respondent to waiver the rule. Respondents, on the other hand, are housing providers and should be held responsible for knowing the laws which relate to

the rights of handicapped persons. Accordingly, Respondents' assertions that they acted promptly in granting accommodation are not credible.

Conclusion on Liability

Complainant has met his burden of proving handicap discrimination for the period beginning on or about February 5, 1993, and ending July 19, 1993. Before February 5, 1993, Complainant has failed to prove element #(2), i.e. that Respondents had notice of his need for accommodation. And, on July 19, 1993, accommodation was afforded by Respondents.

The Charge alleges that Respondents River Gardens Apartments, a Limited Partnership, (owner), Ken Hunt, Ray Stone, Jr., and Henry Fisher (general partners of the owner), and Nancy Dutra (property manager), violated the Act as indicated above. To determine whether each of the named Respondents is liable for the discriminatory housing practices alleged herein, general principles of agency law are applicable. *See, e.g., Dillon v. AFBIC Development Corp.*, 597 F.2d 556, 562 (5th Cir. 1979) (Title VIII case). The general rule in fair housing cases is that a principal is legally responsible for the acts, conduct, and statements of its agent done within the scope of the agent's apparent authority. Schwemm, *Housing Discrimination*, § 12.3(2); *Cabrera v. Jakabovitz*, 24 F.2d 372, 385-89 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 205 (1994); *HUD v. Aylett*, 2 Fair Housing-Fair Lending. (P-H) ¶25,067 (HUD Secretary 1994). Further, the duty not to discriminate in housing is nondelegable. *Walker v. Crigler*, 976 F.2d 900, 904-05 (4th Cir. 1992).

Nancy Dutra authorized the warning and eviction notices to Complainant even after she had notice that he claimed his cat to be of therapeutic benefit to him. Accordingly, there is ample evidence to support finding that she was involved in the decision making in this case. She is held individually and personally liable for the discriminatory acts in this case.

Hank Fisher was involved in the decision whether to allow Complainant to keep his cat in his River Garden apartment. Mr. Fisher personally responded to the letter from the City Administrator, and communicated his decision that River Gardens was not required to allow Complainant to keep his cat. (G- 19). Accordingly, Mr. Fisher is found personally and individually liable for the discriminatory acts.

River Gardens, the owner of the apartments, is liable for violating the Act because it initiated the unlawful detainer action to evict Complainant. G-13. Moreover, River Gardens is liable for the actions of its agents and subagents. Further, the owners of River Gardens are liable.

The evidence shows that River Gardens contracted with Hank Fisher Properties to be the management agent of the subject property. Hank Fisher Properties, in turn, employed Respondent Dutra as the property manager and Karen Mead as the resident manager. Hank Fisher, Ken Hunt and Ray Stone are general partners of River Gardens. Although there is no evidence of the direct involvement of Mr. Hunt or Mr. Stone in the day-to-day operations of the company, or in the decision regarding whether Complainant should be allowed to keep his cat, Respondent Hank Fisher, a co-owner with Respondents Hunt and Stone, was personally involved in the decision making in this case, and liability against them is established based on the theory of agency. The duty to prevent discrimination cannot be delegated by a housing provider to his agent, or by an agent to his subagent. *Walker v. Crigler.* Accordingly, Respondents River Gardens Apartments, Hunt and Stone are responsible for the discriminatory conduct of Respondents Fisher and Dutra. This is so even though Ms. Dutra and Mr. Fisher may have acted in a discriminatory way without the other Respondents knowledge or consent.

The evidence establishes that Respondents violated § 804(f) of the Act. The evidence also establishes that Complainant suffered economic loss, emotional distress, physical injury and loss of civil rights as a result of Respondents' discriminatory conduct, and that injunctive and other equitable relief will be necessary to prohibit further discriminatory conduct. Finally, the evidence establishes that it is necessary for this tribunal to impose a substantial civil penalty to vindicate the public interest.

Remedy

Upon finding that a respondent has violated the Act, an administrative law judge shall order "such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief." 42 U.S.C. § 3612(g)(3). The Charging Party has requested compensation in the amount of $30,008.40 ($1,508.40 for out-of-pocket losses; $25,000 for emotional and physical injury; and $3,500 for loss of civil rights.) The Charging Party also request that the maximum civil penalty of $10,000 for each respondent be imposed as well as injunctive relief. The Intervenor seeks compensation for economic losses in the amount of $1,508.40; for emotional injury in the amount of $75,000; and for loss of civil rights in the amount of $10,000.

Respondents assert that Complainant has not been damaged in any sum whatsoever, and if he has been, those damages are a direct and proximate result of his own acts or omission to act. For the reasons already discussed, I reject Respondents' position and find that Complainant is entitled to some monetary award as discussed below.

Economic Losses

Complainant is entitled to compensation for any out-of-pocket expenses incurred as a result of the discriminatory actions by Respondents. *See HUD v. Burns Trust*, 2 Fair Housing-Fair Lending (P-H ¶25,073 at 25,682 (HUDALJ Sept. 1, 1994)).

Complainant seeks $200 he owes to an attorney who helped him draft his Answer to the Unlawful Detainer action. Tr. 69, 142, 146. He submitted a bill in that amount. G-21. This $200 is reasonable and will be awarded.

Complainant also alleges $208.40 for damages incurred as a result of a hospital visit in May 1993. The bill for the hospital visit is documented. G-23. I find that this hospitalization was related to acute anxiety brought on by Respondents' threatened eviction and award $208.40.

Complainant claims $800 for assorted refills of previously prescribed pain medications, the need for which he asserts was triggered by anxiety caused by Respondents' actions. Complainant did not produce any prescriptions or receipts in support of this claim. However, Dr. Gallo's clinical records indicate Complainant received prescriptions for additional pain medication during the relevant time period on at least five different occasions - February 23, 1993, May 19, 1993, June 15, 1993, July 20, 1993, and July 26, 1993. (G-9). On the basis of at least these five prescriptions I award as a reasonable amount the sum of $150.

Complainant also seeks damages for miscellaneous costs in the estimated amount of $100 to $150 for typing, photocopying, faxing and mailing costs related to his defense of the threatened eviction and in pursuing this charge. That he incurred some costs in this manner is credible, however Complainant was unable to produce any admissible documentation regarding these costs, or to describe with any detail what documents were typed, photocopied, faxed or mailed. I award $50.

Finally, Complainant claims an estimated $200 in telephone bills, the necessity for which was caused by Respondents' actions, including those associated with preparing for the hearing in this case. Again, he has provided no documentation, and no clear statement of how he calculated this amount. I award $50. This makes a total out-of-pocket award of $658.40.

Emotional Distress

Complainant is entitled to compensation for the emotional distress, physical injury and inconvenience he suffered as a result of Respondents' discriminatory actions. *See,*

e.g. Burns Trust, 2 Fair Housing-Fair Lending at 25,682, *HUD v. Blackwell*, 908 F. 2d 864, 872 (11th Cir. 1990) (hereinafter "*Blackwell II*"), *aff'g* 2 Fair Housing-Fair Lending (P-H) ¶25,001 (HUDALJ Dec. 21, 1989) (hereinafter "*Blackwell I*"). In this case, the Charging Party seeks compensatory damages for emotional distress and physical injuries of $25,000; the Intervenor $75,000.

Damages for emotional distress may be inferred from the circumstances of the case as well as proved by the testimony, *Blackwell*, 908 F. 2d. 871 (11th Cir. 1983). A Complainant's own testimony may be sufficient evidence to establish emotional distress and other intangible damages. *Williams v. Transworld Airlines, Inc.*, 660 F. 2d 1267, 1273 (8th Cir. 1981).

Because emotional injuries such as humiliation and distress are difficult to quantify, courts have held that precise proof of the actual dollar value of such injuries is not required. *E.g., Block v. R. H. Macy & Co.*, 712 F. 2d 1241, 1245 (8th Cir. 1983). "That the amount of damages in incapable of exact measurement does not bar recovery for the harm suffered." *Blackwell II*, 908 F. 2d at 872-873 (quoting *Marable*, 704 F. 2d at 1220. The amount should make the victim whole. *Blackwell I*, 2 Fair Housing-Fair Lending at 25,013. In ascertaining just what will make the complainant whole, judges are afforded wide discretion. Key factors in such a determination are the complainant's reaction to the discriminatory conduct and the egregiousness of the respondent's behavior. Schwemm, *Housing Discrimination*, § 25.3(2)(c) (1990).

In his testimony, Complainant described the emotional and physical damage he suffered, and continues to suffer, as a consequence of Respondents' discriminatory actions. Complainant suffered emotionally from the moment Respondents tried to separate him from his cat. He testified he was "shaken" by Respondents' request that he get rid of his cat. Three months later when he received a warning notice from Respondents about his cat, he was "shocked" and "upset." However, the cause of Complainant's distress during this period of time cannot reasonably be assigned to Respondents' discriminatory acts. As found above, Respondents did not become aware of Complainant's need for accommodation until after the February warning notice.

However, after Complainant informed River Gardens that he had a therapeutic need for his cat, and Respondents' can be said to have reasonable notice of the need for accommodation, they must be held responsible for the emotional distress and physical injury caused by their actions. Thus, when Respondent Dutra notified Complainant that he faced eviction in five days, despite her receipt of the note from Ms. Duff, she must be held responsible. Complainant "freaked" when he was told that he still had to get rid of his cat or face eviction. He became highly agitated and went into "psychic shock" which recurred a few days later when he got a second notice. When Complainant received a 30-

day notice of termination of his tenancy, he got "pretty hysterical." He told Hank Fisher that his actions had caused him severe pain and distress and caused him to need additional medical treatment. Notwithstanding, Respondents sent Complainant another letter stating that he would be evicted if he did not get rid of his cat. Complainant felt "defiled," "anxious" and "very, very alarmed." He felt that he was in the worst condition he had ever experienced. When Respondents did not relent, even after receiving a letter from the City Administrator indicating that they were violating the law, Complainant became "highly alarmed, highly agitated," and "fearful for [his] life." He almost went into a state of "delirium" when he was served with the unlawful detainer action.

Complainant's suffering was ongoing and increasing throughout the period peaking in May, June and July when the 30-day notice was served and eviction proceedings were filed. The intensity of the pain and anxiety which he felt over the course of months was credibly expressed. At one point in May he nearly collapsed from stress and had to go to the emergency room of the local hospital for treatment. Dr. Gallo corroborated Complainant's testimony that he was in crisis.

Complainant's medical condition made him especially susceptible to stress and anxiety. Perhaps another person would have been less affected by Respondents' actions or could have gotten past these episodes more quickly. However, Complainant's fragile emotional state does not diminish Respondents' liability for the consequences of their actions. The fact that a complainant may be unusually emotionally sensitive and incur great emotional harm from the discriminatory conduct does not absolve the respondent from responsibility for the greater emotional harm; *HUD v. DiCosmo*, 2 Fair Housing-Fair Lending (P-H) ¶25,094, 25,851 (HUDALJ Feb. 1, 1995).

Respondents assert that Complainant's assertions of emotional distress and damages arising from the threat of loss of his cat are completely inconsistent with Complainant's own testimony regarding the actual loss of his cat. Complainant testified that his cat was taken from his apartment in January 1996 just months before the hearing in this matter. Tr.133. Based on the degree of suffering he has claimed during the months of threatened loss, Respondents argue that one would reasonably expect that Complainant would have suffered even greater emotional distress from the loss of his pet. However, the evidence shows that from January 1996 to the date of the trial (April 30, 1996), Complainant made only one office visit to see Dr. Gallo and for a refill of a prescription. He suffered no crisis and had no hospitalization. Respondents assert that Complainant's alleged extent of his emotional distress is not credible when viewed in relation to his lack of distress at the actual loss of the cat in question. They urge a finding of no compensable emotional damages.

Respondents' position has substantial merit. However, to find that Complainant did not suffer emotional damages is to find that he was not credible in his testimony. I find that he was a credible witness. Further, to find that Complainant did not suffer emotional damages is to ignore the testimony of Dr. Gallo, the contemporaneous records of treatment made by Dr. Gallo, and the records of Complainant's emergency hospital treatment in May 1993, all of which I credit. These show that Complainant suffered acute anxiety attacks related to the threatened loss of his cat. At the time of his crisis in May 1993 Complainant testified that he felt like he was "dying, literally, I was being torn apart." Tr. 67. The medical records show that his suffering was severe.

I find that Complainant suffered from significant pain, anxiety and distress related to the continuing threatened loss of his pet cat which is compensable for the period from February 1993 to July 19, 1993. However, the Charging Party's request for $25,000 and the Intervenor's request for $75,000 in emotional damages due to the threat of the loss of his pet where Complainant was never separated from his pet and never forced to move, are both excessive. I award $5,000 for Complainant's emotional distress and physical suffering.

Loss of Civil Rights

The Charging Party seeks a minimum award of $3500, the Intervenor $10,000 for loss of civil rights. They assert that Respondents, by forcing Complainant to make a choice between keeping his home or his pet, restricted his right to choose where and under what conditions he could live. They assert further that Complainant had a right to enjoy his home without being threatened with eviction for having a therapeutic or service animal in his home, and that by their discriminatory actions, Respondents denied him those rights up until the amendment to the lease was signed.

Loss of civil rights is a separate, compensable injury under the Act. *See* 42 U.S.C. § 3612(g)(3). However, in *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), a case brought under 42 U.S.C. § 1983 for, *inter alia*, an alleged violation of First Amendment rights, the Supreme Court specifically held that where the basic statutory purpose of awarding damages is to compensate persons for injuries caused by the deprivation of constitutional rights, only nominal damages may be awarded, in the absence of actual damages, for vindication of a lost civil right. The Court ruled that a trier of fact may not award damages based on "subjective perception of the importance of constitutional rights as an abstract matter." *Id.* at 308. The Court noted that damages based on the abstract value or importance of constitutional rights are an unwieldy tool for ensuring compliance with the Constitution. Relying heavily on *Stachura*, the Sixth

Circuit Court of Appeals in *Baumgardner v. HUD ex rel. Holley*, 960 F. 2d 572, 583 (1992) set aside a $2,500 award by an administrative law judge for loss of civil rights in a Fair Housing Act case. The court held that the award was "an unwarranted, subjective, additional assessment beyond the proper measure of compensatory damages proven in this case." *Id.* Applying the rationale of *Stachura* and *Baumgardner* to the instant case, I award nominal damages for loss of civil rights of $1.00.

Civil Penalties

The maximum penalty that may be imposed upon a respondent who has not been adjudged to have committed any prior discriminatory housing practices is $10,000. Otherwise, it is $25,000. *See* 42 U.S.C. §33612(g)(3); 24 C.F.R. § 104.910(b)(3). In the instant case, the Secretary has asked for the imposition of a civil penalty of $10,000 for each of the Respondents' act of discrimination.

In addressing the factors to be considered when assessing a request for imposition of a civil penalty, the House Report on the Fair Housing Amendments Act of 1988 states:

> The Committee intends that these civil penalties are maximum, not minimum, penalties, and are not automatic in every case. When determining the amount of a penalty against respondent, the ALJ should consider the nature and circumstances of the violation, the degree of culpability, and any history of prior violations, the financial circumstances of that respondent and the goal of deterrence, and other matters as justice may require.

Evaluating the above-cited factors, it is evident that a substantial civil penalty is appropriate. While there is no evidence that Respondents have been adjudged to have committed prior discriminatory housing practices, the other four factors indicate that a substantial civil penalty is warranted.

With regard to the nature and circumstances of the violation, Respondents' refusal to reasonably accommodate Complainant's handicap during the period February 5 through July 19, 1993, was egregious. Their refusal to provide reasonable accommodation caused significant distress to Complainant, requiring emergency hospital treatment. Respondents persisted in their efforts to force Complainant to vacate his apartment or get rid of his cat even after they had been made aware of the therapeutic nature of his relationship with his cat. Instead of showing consideration for Complainant's handicap, his pleas were met

with hostility and more threats of eviction. Respondents persisted in their actions to evict, even after receiving Mr. Evan's letters of May 7 and May 9, 1993 in which he compared his need for his cat to a seeing eye dog or hearing dog -- service animals -- essential to their owners' health and safety. They persisted after receipt of the statement from Dr. Gallo, Complainant's treating physician, expressing the opinion that his cat served a therapeutic purpose and that loss of the animal would precipitate severe psychological stress. They persisted after receipt of the letter from the City Administrator setting forth the opinion that the law required a waiver of the no-pet rule when the pet involved was a service animal. And, they persisted after receipt of Complainant's June 16th Answer to the Detainer Action in which he described his cat as a "service animal" and cited provisions in the law supporting his right to keep such an animal. It was only after Complainant filed a housing discrimination complaint that Respondents agreed to dismissal of the eviction action and waiver of the "no-pet rule" to accommodate Mr. Evan's handicap. A significant civil penalty is warranted.

As to culpability, Respondents Dutra, Fisher and River Gardens Apartments actively engaged in the discriminatory housing practice. They were in direct contact with Complainant and each had numerous opportunities to correct the errors. Instead they persisted in trying to force Complainant to vacate his apartment.

Deterrence as a factor must also be considered. Respondents and other housing providers similarly situated, must be put on notice that engaging in any form of discrimination against handicapped tenants will not be tolerated. They must know that actions such as those taken in this case are "not only unlawful but expensive." *HUD v. Jerrard*, 2 Fair Housing-Fair Lending (P-H) ¶25,005, 25,092 (HUDALJ Sept. 28, 1990).

As to their financial circumstances, because evidence regarding such is peculiarly within their sphere of knowledge, Respondents have the burden of producing such evidence. If a respondent fails to produce credible evidence that militates against awarding the maximum civil penalty, this tribunal may award the maximum penalty without consideration of the Respondents' financial circumstances. In this case, there is no evidence of Respondents' ability or inability to pay a maximum civil penalty.

Considering all the above factors and the number of opportunities Respondents had to take the right action in this case, I assess a civil penalty of $5,000.

Injunctive Relief

The administrative law judge may order injunctive or other relief to make the complainant whole and protect the public interest in fair housing. 42 U.S.C. § 3612(g)(3). "Injunctive relief should be structured to achieve the twin goals of insuring

that the Act is not violated in the future and removing any lingering effects of past discrimination." *Marable v. Walker*, 704 F. 2d 1219, 1221 (11th Cir. 1983).

The purposes of injunctive relief in housing discrimination cases include the elimination of the effects of past discrimination, the prevention of future discrimination, and the positioning of the aggrieved persons as close as possible to the situation they would have been in but for the discrimination. *See*, *Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1036 (8th Cir.1 979), *cert. denied*, 445 U.S. 905 (1980). Once a judge has determined that discrimination has occurred, he has "the power as well as the duty to use any available remedy to make good the wrong done." *Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1975).

The injunctive relief prohibiting Respondents from violating any provision of the Act, including but not limited to the provision violated in this case and the provision prohibiting retaliation against persons exercising rights protected by the Act sought by the Secretary and by the intervenor is appropriate. Accordingly, it will be ordered below.

ORDER

Having concluded that Respondents violated the Fair Housing Act by discriminating against Durand Evan on the basis of his handicapped status, it is hereby

ORDERED that,

1. Respondents are hereby permanently enjoined from discriminating against Durand Evan and from retaliating against him for exercising his rights protected by the Act. Prohibited actions include, but are not limited to, all those enumerated in the regulations codified at 24 C.F.R. Part 100 (1989);

2. Respondents shall inform all their agents and employees of the terms of this Order and shall educate them as to the requirements of the Fair Housing Act;

3. Within 30 days of the date of this Initial Decision and Order is issued, Respondents shall pay damages in the amount of $5,659.40 to Durand Evan to compensate him for his loss and suffering occasioned by Respondents' discriminatory conduct; and

4. Within 30 days of the date of this Initial Decision and Order is issued, Respondents shall pay in the amount of $5,000 in civil penalties to the United States Department of Housing and Urban Development.

This Order is entered pursuant to 42 U.S.C. § 3612(g)(3) of the Fair Housing Act and the regulations codified at 24 C.F.R. §104.910, and will become final upon the expiration of 30 days or the affirmance, in whole or in part, by the Secretary within that time.

Constance T. O'Bryant

CONSTANCE T. O'BRYANT
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION AND ORDER issued by CONSTANCE T. O'BRYANT, Administrative Law Judge, in HUDALJ 09-93-1753-8, were sent to the following parties on this 12th day of November, 1996, in the manner indicated:

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