

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
Agnes M. Guard, individually and
as personal representative of the
Estate of George Guard,

Charging Party,

and

Agnes M. Guard,

Intervenor,

v.

Ocean Sands, Inc.,

Respondent.

HUDALJ 04-90-0231-1
Decided: November 15, 1993

Theresa L. Kitay, Esq.
For the Charging Party

George R. McLain, Esq.
For the Intervenor

James R. DeFurio, Esq.
For the Respondent

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

INITIAL DECISION ON REMAND AND ORDER

On October 4, 1993, the Secretary of the United States Department of Housing and Urban Development issued a Decision and Order that, in part, ordered me to reconsider the amount of damages awarded to Agnes Guard and the Estate of George Guard in my September 3, 1993, Initial Decision. This remand, issued pursuant to 42 U.S.C. § 3612(h)(1) and 24 C.F.R. § 104.930(a), specifically directed me to reassess the amount of damages awarded for emotional distress in light of existing case law.

I issued an Order on October 6, 1993, directing the parties to submit briefs by October 21, 1993. All parties made timely submissions.

Procedural Background

George and Agnes Guard,¹ a married couple, filed a complaint with the U.S. Department of Housing and Urban Development ("HUD" or the "Charging Party") alleging violations of the Fair Housing Act ("Act") based on the handicap of George Guard. 42 U.S.C. §§ 3601-3619. The Guards alleged that the Respondent Ocean Sands, Inc. ("Association" or "Ocean Sands") had denied their requests for reasonable accommodations and permission to make reasonable modifications to their condominium unit. These changes were made necessary by George Guard's mobility impairment.

HUD issued a Determination of Reasonable Cause and Charge of Discrimination and permitted Agnes Guard to intervene in her individual capacity. A hearing was held in Bradenton, Florida on May 10-12, 1993. On September 3, 1993, I issued an Initial Decision that, in part, awarded \$5,000 for emotional injury to George Guard, and \$8,500 for emotional injury to Agnes Guard.

Factual Background

¹Between the filing of the complaint and the issuance of the Charge, George Guard passed away. The Charge was issued on behalf of Agnes Guard both individually and as the representative of the Estate of George Guard.

In the Initial Decision, I found that the Respondent denied the Guards' reasonable requests to modify their condominium and certain parts of the condominium's common area to accommodate George Guard's mobility impairment. He had suffered a stroke and was not able to walk independently. Several problems flowed from this immobility. These included Agnes Guard's difficulty in putting her husband in their car's passenger seat, and the near impossibility of pushing Mr. Guard's wheelchair over a loose pebble lot at the condominium complex. The complex's physical layout prevented Mr. Guard, in his wheelchair, from being moved from the condominium buildings to the grounds in the back.

The Guards attempted to make Ocean Sands more accessible to Mr. Guard, but the Association delayed approval of most of the Guard's proposed modifications. I found that Respondent acted in a dilatory manner, over an extended period of time, in violation of the Act. Respondent did not want to make reasonable accommodations for the Guards and its delays successfully prevented any modification throughout the period of Mr. Guard's immobility until his death, some three years after discrimination based on handicap was forbidden by the Act. Additionally, the Guards were subjected to the Association's and unit owner's hostility for making their requests.

Respondent's violation of the Act caused the Guards severe emotional distress. Because his access to the property at Ocean Sands had been limited by Respondent's intentional delay, Mr. Guard's enjoyment of the pool area and the grounds overlooking the Gulf of Mexico was entirely curtailed. Access to these areas had provided happiness and invigoration in the aftermath of his disability. By effectively being confined to his unit, Mr. Guard felt frustration, distress, and the feeling that he was a burden on his wife. Ms. Guard also felt the frustration of being unable to help her husband, and the distress of being humiliated and castigated by her neighbors. The substantial distress suffered by the Guards severely impaired their final years together, and continued with respect to Ms. Guard.

Discussion and Conclusion

As discussed in my Initial Decision, damages for emotional distress are recoverable, and the incapability of precisely measuring such damage does not bar recovery. There must be a causal link between the Respondent's unlawful action and the alleged damage, and any award should make the Complainant whole. Within the wide discretion accorded to set emotional distress damages are two critical factors to consider: the egregiousness of the Respondent's behavior and the effect of that behavior on the Complainants. As the court stated in *Lee Morgan v. Secretary of Housing and Urban Development*, 985 F.2d 1451, 1459 (10th Cir. 1993), "more than mere assertions of

emotional distress" are required to support an award for that type of intangible damage. Rather, the record as a whole must demonstrate the need for the amount awarded.

Based on the two factors outlined above, Respondent argues that only a small award is merited for the Guards. In *Baumgardner v. HUD ex rel. Holley*, 960 F.2d 572 (6th Cir. 1992), the court upheld the Administrative Law Judge's ("ALJ") award of \$500 for emotional distress. There, the complainant was denied the opportunity to rent a house because he intended to share it with three other males. The complainant also testified that although he felt angry and hurt, he recovered quickly. Additionally, the court dismissed the argument that previous racial discrimination the complainant may have experienced wholly unrelated to the Respondent should augment the damages for emotional distress. Respondent argues that the instant case is analogous to *Baumgardner* because the Guards' emotional distress was caused in part by Mr. Guard's illness and in part by Respondent's conduct. The analogy is faulty and the argument is meritless. Mr. Guard's illness is not akin to a previous experience of discrimination. Rather, it is the very condition that brings him and his wife within the protection of the Act. Respondent takes its Complainant as it finds him, and is responsible for the emotional distress it caused the couple to suffer. Additionally, the Guards endured violations of the Act that unfolded over a long period of time, unlike the *Baumgardner* complainant

who endured a violation of quick duration. *Baumgardner* is entirely inapposite to this case, and in no way supports a claim for insubstantial damages.

Respondent also cites *HUD v. Lashley*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,039 (HUDALJ Dec. 7, 1992), for its position that its conduct was not egregious enough to merit a large award. In *Lashley*, an African-American family moved from their home after being the target of racial harassment, including an attempted firebombing of their house. In that decision, I awarded the family \$67,000 for emotional distress damage, the largest component being individual awards of \$25,000 and \$10,000. Respondent argues that the instant case is comparatively mild and does not justify a similarly large award. While the anecdotal impact of a firebomb may be immediately greater than Respondent's dilatory conduct, the effect on the Guards was similarly devastating. As I discussed in my Initial Decision, the final portion of George Guard's life was spent effectively imprisoned in his home while his wife tried unsuccessfully to make the condominium grounds accessible. *Lashley* ultimately supports the awarding of substantial damages when a Respondent's conduct is outrageous and the resultant emotional injury is deep.

Similarly, Respondent cites *HUD v. Dedham Housing Authority*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,015 (HUDALJ May 26, 1992). There, the respondent housing

authority refused to grant the complainant his own parking space near his apartment despite his chronic heart problems. The ALJ awarded complainant \$10,000--the entire amount sought by the Charging Party--for emotional distress. In the instant case, Respondent's conduct went beyond simple denial. Ms. Guard was harassed and ostracized by the condominium community for her attempts to make the grounds more wheelchair accessible. She not only suffered herself, but had to endure the suffering of her husband. Mr. Guard similarly had to endure his own distress as well as his wife's frustration. *Dedham* also supports a substantial damage award.

The other cases cited by Respondent are not sufficiently analogous because the conduct and effect in the instant case were far more severe. In *United States v. Lepore*, 2 Fair Housing - Fair Lending (P-H) ¶ 15,807 (M.D. Pa. Dec. 23, 1991), a complainant worried that she and her child would be displaced from their home until a restraining order was issued preventing her eviction. She was awarded \$500 in emotional distress. In the instant case, the Guards had more than a reasonable concern. They were denied the accommodations they were entitled to under the Act, and consequently were injured. In *HUD v. Lewis*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,035 (HUDALJ Aug. 27, 1992), where the respondent raised the complainant's rent and complainant eventually moved, respondent's conduct was not as egregious as the instant Respondent's campaign of delay.

The case law cited by the Charging Party is more relevant. In *Secretary of HUD v. Blackwell*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,001 (HUDALJ Dec. 21, 1989), *aff'd* 908 F.2d 864 (11th Cir. 1990), a complainant couple was awarded \$40,000 for their emotional distress. This distress was compounded by physical symptoms and disruptions of their children's schooling, as well as media coverage of their case. Though the psychological pain the Guards suffered was similar, there was no testimony indicating that their distress reached the outrageous levels endured by the complainant couple in *Blackwell*.

In *HUD v. Jerrard*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,005 (HUDALJ Sept. 28, 1990), complainant was evicted because her landlord disapproved of her friendship with African-Americans. She was awarded \$15,000 for emotional distress. Her life had been disrupted, she moved into public housing, and she faced the embarrassment of being ostracized by friends who would not visit her in public housing. The Guards felt similar pain. Even though they did not face the additional distress of being forced from their condominium, they were isolated both physically and socially by the Respondent's actions.

Similarly, in *HUD v. Tucker*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,033

(HUDALJ Aug. 2, 1992), where complainants were awarded \$50,000 each, the complainants were forced from their homes to live in reduced circumstances and became estranged from each other. The *Tucker* complainants feared for their safety and stayed in their 150 square foot room with their door locked. Though the Guards suffered great emotional distress due to the flagrant misconduct of Respondent, they were able to remain in their home and did not fear for their safety. The Guards lives were simply not disrupted as significantly as the complainants in *Tucker*.

Considering these cases, I have reassessed my award of damages. All parties submitted well-reasoned briefs which have assisted in this reevaluation. Many of the cases cited to me involved racial discrimination and the effects of such discrimination on complainants. While the experience of racial discrimination, with its historical and cultural antecedents, is different from the experience of handicap discrimination, the pain and distress caused by any type of housing discrimination is evaluated within the circumstances of each case. Any other approach to evaluating a non-racially based discriminatory injury would ignore the Congressional intent for the protection of all classes covered by the Act.

George and Agnes Guard were a particularly fragile couple, advanced in age and dealing with George's physical deterioration. They were a close couple who endured Respondent's unlawful actions in different ways. Therefore, my award will be to Agnes Guard individually, and to Agnes Guard as the personal representative of George Guard's estate. The Guards felt their emotional distress separately and uniquely. If I were to award damages to the Guards as a couple, Agnes Guard would not be compensated for any suffering following the death of her husband.

In reviewing the record as a whole, as I stated in my Initial Decision, Respondent's conduct was dilatory and caused great emotional distress to the Guards. Therefore, in light of relevant case law, I have reassessed my original awards and I award Agnes Guard \$12,500, and her husband's estate \$10,000.

ORDER

Within ten days of the date upon which this Order becomes final, Ocean Sands, Inc. shall pay Complainant Agnes Guard, in her individual capacity and as representative of the Estate of George Guard, as follows: \$10,000 for emotional injury to George Guard, and \$12,500 for emotional injury to Agnes Guard.

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 thirty (30) days or the affirmance, in whole or in part, by the Secretary within that time.

SAMUEL A. CHAITOVITZ
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION ON REMAND AND ORDER issued by SAMUEL A. CHAITOVITZ, Administrative Law Judge, in HUDALJ 04-90-0231-1, were sent to the following parties on this 15th day of November, 1993, in the manner indicated:

Chief Docket Clerk

REGULAR MAIL:

George R. McLain, Esq.
Harden & McLain
First Florida Bank Building
1800 Second Street, Suite 717
Sarasota, FL 34236

James R. DeFurio, Esq.
Becker & Poliakoff, P.A.
630 S. Orange Ave., 3rd Floor
P. O. Box 49675
Sarasota, FL 34230-6675

Theresa L. Kitay, Assistant Regional Counsel
U.S. Department of Housing and Urban Development
75 Spring Street, S.W.
Atlanta, GA 30303-3388

INTEROFFICE MESSENGER:

Roberta Achtenberg, Assistant Secretary
Office of Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 5100
Washington, D.C. 20410

Carole Wilson, Associate General Counsel
for Equal Opportunity & Administrative Law
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 10244

Washington, D.C. 20410

Harry L. Carey, Assistant General Counsel for Fair Housing
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 9238

George R. McLain, Esq.
Harden & McLain
First Florida Bank Building
1800 Second Street, Suite 717
Sarasota, FL 34236

James R. DeFurio, Esq.
Becker & Poliakoff, P.A.
630 S. Orange Ave., 3rd Floor
P. O. Box 49675
Sarasota, FL 34230-6675

Theresa L. Kitay, Esq.
U.S. Department of Housing and
Urban Development
75 Spring Street, S.W.
Atlanta, GA 30303-3388