

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
Mary Betton-Smith, Bonnitta Kidd,
Clifton Smith, LaQuis McMillan, DeMille
Perry, Alania Kollasch, Teala Holmes,
and Obidiah Videau,

Charging Party,

v.

Violet M. Gutleben and
John Paul Gutleben,

Respondents.

CORRECTED COPY

HUDALJ 09-92-1893-1
Decided: August 15, 1994

Fred M. Feller, Esquire
For the Respondent

Kathleen Pennington, Esquire
Jon Seward, Esquire
For the Government

Before: William C. Cregar
Administrative Law Judge

INITIAL DECISION AND ORDER

Statement of the Case

This matter arose as a result of a complaint filed by Mary Betton-Smith on behalf of herself and her family, Clifton Smith, LaQuis McMillan, DeMille Perry, Alania Kollasch, Teala Holmes, and Obidiah Videau ("Complainants") alleging discrimination based on race and familial status in violation of the Fair Housing Act, as amended,

42 U.S.C. §§ 3601, *et seq.* ("the Act"). On November 19, 1993, following an investigation¹ 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 a charge against Violet M. Gutleben and John Paul Gutleben ("Respondents") alleging that they had engaged in discriminatory practices in violation of 42 U.S.C. §§ 3604(b), (c), and 3617.

¹Ms. Smith declined to participate in conciliation. Tr. 1, pp. 190, 249.

A hearing was held in Oakland, California, on March 7-10, 1994. The parties' post-hearing briefs were to have been filed by May 13, 1994. I granted the Charging Party's two unopposed motions extending the date for submission of post-hearing briefs to June 6, 1994. In addition, the Charging Party filed a Notice of Supplemental Authority on June 10, 1994, to which Respondents filed a Response on June 16, 1994. This case is now ripe for decision.²

The Fair Housing Act makes it illegal to "discriminate in the terms, conditions, or privileges of sale or rental of a dwelling. . . because of race [or] familial status" or to "make. . . any. . . statement. . . with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race [or] familial status. . . or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. §§ 3604(b) and (c). Moreover, it is "unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of. . . any right granted or protected by" the Act. 42 U.S.C. § 3617.

The Charging Party alleges: (1) that Respondents' May and July 1992 eviction notices violated 42 U.S.C. § 3604(b) because they were based on Complainants' race and familial status; (2) that Respondents made various statements indicating racial and familial status discrimination in violation of 42 U.S.C. § 3604(c); and (3) that Mr. Gutleben interfered with and threatened Complainants' tenancy as proscribed by 42 U.S.C. § 3617. Respondents counter that the eviction notices were served for legitimate nondiscriminatory reasons, that any alleged discriminatory statements were not made in the context of "seeking a buyer or renter," and that any alleged interference is limited to Mr. Gutleben's words which are protected by the First Amendment to the Constitution of the United States.

Findings of Fact

Respondents and their Houses

1. Violet M. Gutleben ("Vicki Gutleben" or "Vicki") and John Paul Gutleben ("Paul Gutleben" or "Paul"), a formerly married white couple, owned two adjoining rental houses at 1917 and 1919 Stanford Street, Alameda, California ("1917" and "1919"). The

house at 1917 has four apartments: A and B on the first floor, and C and D on the second floor. The house at 1919 contains first and second floor apartments, A and B, respectively. Apartment 1919B has three-bedrooms. Tr. 1, p. 77; Tr. 2, pp. 51-52; Tr.

²In a footnote in its post-hearing brief, the Charging Party, for the first time, moved to amend the Charge to include discrimination based on "color." I deny this belated "motion" based on my January 7, 1994, Order requiring the filing of all motions by February 11, 1994.

3, p. 100.³

2. The houses are separated by a ten-foot wide driveway. The property line divides the driveway into two five-foot wide strips. Occupants of each of the two properties have egress over the other property's five feet. Tr. 4, pp. 135-36. A common fence surrounds the two properties; there is no physical boundary between the two lots. Tr. 2, pp. 106, 111. The mailboxes for 1917 are on the side of the building facing the driveway and 1919. Tr. 1, p. 111. The Boat House, a bar, abuts the property. Tr. 1, pp. 91-92.

3. Paul Gutleben was convicted of the felony of child molestation. As a consequence of his arrest and conviction, the Gutlebens were separated in December of 1991 and were divorced on November 6, 1992. R. Ex. 19; Tr. 3, pp. 100, 101; Tr. 4, p. 91. As a result of their divorce, an Interspousal Transfer Grant Deed was executed on October 23, 1992, and recorded on November 6, 1992. Thus, by November 6, 1992, Vicki had become the sole owner of 1919 Stanford Street and Paul had become the sole owner of 1917 Stanford Street. R. Ex. 18. A Marital Settlement Agreement provided that as of August 1, 1992, Vicki "had sole management and control" of 1919. C. P. Ex. 26, numbered p. 4.

³The following reference abbreviations are used in this decision: "Tr. 1," "Tr. 2," "Tr. 3," and "Tr. 4," followed by a page number for Transcript Volumes I, II, III, and IV; "C.P. Ex." for the Charging Party's Exhibit; and "R. Ex." for Respondents' Exhibit.

4. After Respondents' separation, Paul continued to frequent the Stanford Street properties. He had a workshop in the basement of 1917. He performed maintenance work on 1917 and collected mail almost daily. Mr. Gutleben often socialized with his son, Mark, and Mark's girlfriend, Dana Summers, a tenant at 1917. From April 1993 to July 1993, Mr. Gutleben dined almost nightly with Paul and Beverly Steele and their minor son, tenants at 1917B.⁴ Tr. 2, p. 71; Tr. 3, pp. 101-02, 125, 143, 208; Tr. 4, pp. 69, 153, 252. Mr. Gutleben moved into 1917B on or about December 24, 1993. Tr. 3, p. 100.

5. With the exception of Mr. Gutleben, since at least December of 1991, all of the Stanford apartments were occupied by families with children. Tr. 1, pp. 104-06, 198; Tr. 2, p. 8.

Ms. Gutleben's Lease to Mr. Gipson

6. As of January 1992, Vicki Gutleben exclusively managed, maintained, and rented the units at 1919 Stanford Street. Tr. 4, pp. 93, 114-16, 147-49, 152.

7. On April 8, 1992, Vicki Gutleben rented 1919B to Robert Gipson. Although Mr. Gipson is black, his features do not reveal his race. He states that often he is "not. . . perceived as being black." Tr. 4, p. 202; C. P. Exs. 1A and 1B.

8. Vicki Gutleben decided to rent to Mr. Gipson because he had "a good job, . . . a good income, [and] he was by himself." She inquired whether Mr. Gipson had small children and told him that they created additional wear and tear on an apartment. She also told him that she preferred not to have children in the upstairs unit, but that she knew that it was illegal to refuse, and that she could not act on her preference. Tr. 1, p. 238; Tr. 4, pp. 94, 221-23, 247. During HUD's investigation, Ms. Gutleben told the HUD investigator that she rented to Mr. Gipson because he was single and she wanted to avoid any problems with children in an upstairs apartment. Tr. 1, p. 238. She also testified as follows: "An upstairs apartment creates a lot of noise with a lot of people for the downstairs apartment. So I like to have children. . . downstairs rather than upstairs." Tr. 4, p. 135.

Complainants' Sublease

9. The lease between Vicki and Mr. Gipson states that "[l]essee shall not sub-let the demised premises, or any part thereof, or assign this agreement without the lessor's written consent." It also states that the apartment "shall be occupied by no more than 3 adults and children." R. Ex. 7. On or about April 15, 1992, Mr. Gipson subleased 1919B to Mary Betton-Smith. C. P. Ex. 2, R. Ex. 8. He intended to use one of the

⁴Mr. Gutleben leased to the Steeles for a discounted monthly rental, provided that they made him dinner and dined with him. Tr. 3, p. 143.

three bedrooms in the apartment for an office, while allowing Complainants to occupy the other two bedrooms. Tr. 1, p. 95.

10. Since April of 1992, Mary Betton-Smith ("Mary") has lived at 1919B with her son, Clifton Smith, who was six years old at the time of the hearing, and her grandchildren, Teala Holmes, DeMille Perry, and LaQuis McMillan, who were eight, five, and three, respectively, at the time of the hearing. Another grandchild, Latitia Nickerson (one year old) was born during Complainants' residency. Ms. Smith's oldest grandchild, Obidiah Videau ("OB"), also resided with Ms. Smith until May of 1993. Obidiah was 12 at the time of the hearing. Tr. 1, pp. 74-78, 141, 160; Tr. 2, pp. 38, 103, 132.⁵

11. Ms. Smith's daughter, Latitia, the mother of her five grandchildren, also resided at 1919B from July 1992 until November 1992. Another of Ms. Smith's daughters, Bonnitta Kidd, and her child, Alania Kollasch, lived with Ms. Smith at 1919B until October 1992. Alania was six at the time of the hearing. Tr. 1, pp. 74-78, 141, 160; Tr. 2, pp. 103, 132.

12. All of the Complainants are black. Alania is also Hispanic. Tr. 3, p. 38.

The May 2nd Eviction Notice

13. Soon after Complainants moved into 1919B, the tenant in 1919A, Judy Gushwa, told Ms. Gutleben that there were numerous unknown occupants in 1919B. She also complained to Ms. Gutleben about the noise from the upstairs apartment.⁶ Tr. 4, p. 97.

14. Responding to Ms. Gushwa's complaints, on May 2, 1992, Vicki went to 1919B, and knocked on the door. To Vicki's surprise, Ms. Smith, not Mr. Gipson, opened the door. Ms. Gutleben told Ms. Smith that because she had not rented the apartment to her, she would have to vacate. She also stated that "she hadn't expected to rent to anybody with kids." Tr. 1, p. 86; Tr. 4, p. 97.

15. Later that same day, Ms. Gutleben wrote an eviction notice to Robert Gipson informing him that he "and everyone else living with [him had] to vacate the premises on or before June 2, 1992." The written reason for the eviction was that "the

⁵In this decision, Ms. Smith's "children" refers to her son, Clifton, and her minor grandchildren.

⁶During approximately the first month that Complainants were in 1919B, Ms. Gushwa complained often to Ms. Gutleben about their noise. However, after that time, Ms. Gushwa and Ms. Smith resolved their problems. Ms. Gushwa also preferred Complainants as tenants to Mr. Gipson. She described Mr. Gipson as "a liar and a phony." Tr. 4, pp. 124, 130, 143-44.

front and back stairs must be replaced." R. Ex. 10B.

16. After receiving the eviction notice, Ms. Smith notified Mr. Gipson of the notice and her concern about remaining at 1919B. Mr. Gipson said that he would contact Ms. Gutleben on Ms. Smith's behalf. He spoke and wrote to Ms. Gutleben requesting that Complainants be allowed to remain. Ms. Gutleben informed Mr. Gipson that Complainants could remain. On May 3, 1992, Mr. Gipson called Ms. Smith and told her that she would not be evicted. Tr. 1, p. 89; Tr. 4, pp. 98-99, 185; R. Ex. 11.

17. During the course of one of Ms. Gutleben's visits to the premises, Ms. Smith asked her if she would lease the apartment directly to her. Ms. Smith claimed that Mr. Gipson was making unwanted sexual advances to her and her daughter. She also told Ms. Gutleben that she had given all of her money to Mr. Gipson, and that she had nowhere else to go. Ms. Gutleben agreed to speak with Mr. Gipson to discuss the possibility of his giving up his lease. During several conversations which ensued, Mr. Gipson tried to discourage Ms. Gutleben from renting to Ms. Smith by making disparaging remarks about her. He told Ms. Gutleben that Ms. Smith was selling illegal drugs and that she would say anything to assist herself and her family. Ms. Gutleben believed Ms. Smith and sympathized with her predicament. Accordingly, she told him that she would lease directly to Ms. Smith. Tr. 1, pp. 90-91; Tr. 4, pp. 104-06.

Mr. Gipson's Eviction Notice

18. Mr. Gipson continued to attempt to persuade Ms. Gutleben to change her mind. Not meeting with success, he sent Ms. Smith his own 30-day eviction notice which she received on July 19, 1992. Tr. 4, pp. 102, 107-08; 188-91; C. P. Ex. 28.

19. After receiving Mr. Gipson's notice, Ms. Smith called the Legal Aid Society, who referred her to Sentinel Fair Housing ("Sentinel"), a private, nonprofit, fair housing organization. Ms. Smith also contacted Ms. Gutleben to inquire again about renting from her. Ms. Gutleben again informed her that she would contact Mr. Gipson. Tr. 1, pp. 96-98, 200; Tr. 4, p. 107.

The July 21st Eviction Notice

20. After speaking with Mr. Gipson, Ms. Gutleben changed her mind. She called Ms. Smith to tell her that she had decided to rent to Mr. Gipson because he still wanted the apartment and he, not Complainants, had a lease. Ms. Gutleben told Ms. Smith that she was sending her another 30-day eviction notice. The notice was dated July 21, 1992, and gave "unlawful sub-letting" as the reason for the eviction.⁷ Tr. 1, pp.

⁷The Charging Party alleges that Ms. Smith and Ms. Gutleben discussed the possibility of Ms. Smith remaining at 1919B and that Ms. Gutleben stated that "the kids are a problem." C. P. Ex. 4. The Charging Party bases this allegation on a note that Ms. Smith wrote on the back of the envelope in which the eviction notice was sent. However, because Ms. Smith did not explain the context of the note or

96-98; Tr. 4, pp. 107-08; R. Ex. 16.

21. After receiving the notice from Ms. Gutleben, Ms. Smith called Sentinel on July 23, 1992, and spoke to Ms. Jeannette David. Ms. Smith told Ms. David that she felt that the eviction was racially motivated because Complainants were the only blacks in the building. Ms. David informed her that the eviction notice was legal because Complainants were illegally subletting the apartment. Tr. 1, pp. 100-01, 183-84, 213-14; R. Ex. 21. On or about July 28, 1992, Ms. Smith requested that Ms. David interview Ted Brown, a companion of Helen Goltz, a resident of 1917, because he could provide information about her eviction. Tr. 1, pp. 100-01, 183-84, 213-14; R. Ex. 21.

22. After she served the July 21, 1992, eviction notice on Ms. Smith, Ms. Gutleben again changed her mind and decided to let Ms. Smith, as opposed to Mr. Gipson, have the apartment.⁸ On July 30, 1992,⁹ Ms. Gutleben called Ms. Smith to let her know that she would give her a lease. Tr. 4, pp. 107-09. She felt sorry for her and her family and believed Ms. Smith's allegations concerning Mr. Gipson, but did not give credence to Mr. Gipson's allegations concerning Ms. Smith. Moreover, Ms. Gutleben's tenant in the downstairs apartment, Ms. Gushwa, preferred Complainants to Mr. Gipson. Finally, whereas Ms. Gutleben did not particularly like Mr. Gipson, she liked Ms. Smith and, other than this proceeding, the two women have had an amicable relationship.¹⁰

23. On Friday, July 31, 1992, Ms. David went to meet Mr. Brown at Ms. Goltz's apartment. Both Ms. Goltz and Mr. Brown told Ms. David that Respondents had come into their apartment on different occasions and said that they were going "to get rid of the nigger next door." Shortly before the end of the conversation, Ms. David noticed a man standing outside Ms. Goltz's window whom she believed to be listening to their conversation. Tr. 1, pp. 204-10; R. Ex. 21.

24. Ms. Goltz had filed a civil suit against the Gutlebens for harassment and a personal injury suit against them as a result of her falling off of the steps at 1917. She had frequent altercations with Mr. Gutleben and at one point she called the police to eject him from the property. She directed a media campaign to keep Mr. Gutleben off

⁸Even after Ms. Gutleben eventually selected Complainants as her tenants, Mr. Gipson continued to argue that he had a legal right to the premises because of his lease. Tr. 4, pp. 108-10.

⁹Ms. David testified that Ms. Smith stated that Ms. Gutleben offered her the lease the day of her meeting at Helen Goltz's apartment, July 31, 1992. However, the HUD investigator testified that Ms. Smith told him that Ms. Gutleben had offered her the lease on July 30, 1992, the day before the meeting. I find the HUD investigator's interview notes to be more reliable than that of Ms. David's testimony. The HUD investigator placed items in quotation marks in his notes in the investigative file when the words were exactly those spoken by the interviewee. These notes reflect that Ms. Smith recalled contacting Sentinel "about July 28th," but that Ms. Smith stated that Ms. Gutleben offered her a lease precisely "on July 30th." Tr. 2, pp. 27-28 (emphasis added). Ms. David's testimony regarding other incidents was inconsistent. For example, Ms. David originally testified that Ms. Smith never claimed that Paul Gutleben had made racial slurs. However, she subsequently contradicted herself, stating that Ms. Smith may have heard him make racial slurs. Compare Tr. 1, p. 213 with p. 233. Moreover, she testified to racial slurs that Ms. Goltz and Mr. Brown had allegedly heard from Respondents. However, she subsequently admitted that she got the impression that some of the "pretty vile" language that Mr. Brown was using may in fact have been Mr. Brown's own language, and not that of Respondents. Compare Tr. 1, p. 206 with p. 221.

¹⁰Ms. Smith testified that she found Ms. Gutleben sympathetic to her and her family's predicaments and that she has had a good relationship with Ms. Gutleben. Ms. Smith stated that she feels sorry for Ms. Gutleben and described her as "a victim" because other than one (unspecified) "derogatory statement" that Ms. Gutleben allegedly made, all of the problems emanated from Mr. Gutleben. Tr. 1, pp. 171-73, 179.

of the property because of his child molestation conviction. (Ms. Goltz was caring for two grandchildren who had been previously molested by another individual.) She also believed that Mr. Gutleben had installed a microphone in her apartment to listen to her conversations. The Gutlebens tried unsuccessfully to evict Ms. Goltz four times. One of those attempted eviction notices was dated July 25, 1992, approximately three days prior to Ms. Smith's request that Ms. David meet with Mr. Brown. Tr. 4, pp. 28-31, 36-37, 39, 42, 48, 50, 58-59, 63-65, 66, 74, 77, 80.

25. On Monday, August 3, 1992, Ms. David called Ms. Smith because she feared that the conversation in Ms. Goltz's apartment had been overheard by Mr. Gutleben and that Respondents might take a reprisal action against her. Ms. Smith informed Ms. David that Ms. Gutleben had already offered her a lease. Ms. David, believing that Ms. Gutleben's offer evidenced improper conduct, advised Ms. Smith to file a complaint with HUD. Tr. 1, pp. 209-10; R. Ex. 21.

26. On August 6, 1992, Ms. Smith signed a lease with Ms. Gutleben. Ms. Smith started paying rent as of August 1, 1992. Tr. 1, p. 103; R. Ex. 17. Ms. Smith always considered Ms. Gutleben to be her landlady. Tr. 1, pp. 179, 188-89.

Discriminatory Statements

27. Mr. Gutleben used the term "nigger" to refer to blacks. At his deposition, he stated that he told Helen Goltz "well we have some niggers moving in upstairs. That's all I ever said. Then I find out, boy, you don't call them that, they are black. This is all new to me having people move into there of another race." Tr. 3, p. 106. During the hearing, Mr. Gutleben's testimony included the following excerpt:

I had in high school a colored boy -- is that all right can I call him colored -- black or African Negro, sat next to me for four years. Believe it or not he was an A student, too. I never called him any names and we got along fine and he was a good athlete, too.

Tr. 3, p. 115. He also would refer to Complainants as "niggers" when speaking to his son Kenneth, the Steeles, and Dana Summers. Tr. 4, pp. 69, 252; Tr. 3, p. 192.

28. Mr. Gutleben described Ms. Goltz's bi-racial granddaughter to the HUD investigator as appearing "not normal." When the investigator asked him if he preferred not to rent to minorities, he stated that he "refused" to answer the question. Finally, he told the investigator that too many minorities had moved into the area and were taking jobs away from whites. He went on to say that all minorities receive welfare payments. Tr. 1, pp. 240-42.

29. Mr. Gutleben was upset that Complainants were living in 1919B. He told Mr. Steele that he did not want to live next door to "a bunch of niggers." Tr. 3, p. 147. He attempted to enlist Mr. Steele's assistance in convincing Ms. Gutleben to evict

Complainants. He requested that Mr. Steele act as "a spy" by befriending Ms. Smith to determine whether Complainants were destroying the apartment and to report back to him. Tr. 3, p. 151. He told Ms. Steele that, before he moved into 1917, he wanted "the niggers out." Tr. 3, p. 163. He frequently complained about the "niggers" next door and how they would deposit their possessions in his yard. Tr. 3, pp. 146-47. He also complained to Ms. Gutleben about Complainants' occupancy of 1919B. Tr. 4, p. 139.

30. Ms. Cortez was a tenant in 1917; she and her children are Mexican-American. When Complainants first moved into 1919B, Mr. Gutleben griped to Ms. Cortez that Complainant's family had "too many kids and he didn't like the idea." Tr. 2, p. 56. Mr. Gutleben constantly complained either about Ms. Smith's children or Lisa Cortez's children. He would blame them for any damage or disruption to the property. Tr. 2, p. 57.

31. In the summer of 1992, Ms. Smith overheard Mr. Gutleben make a statement to Dana Summers. Tr. 1, pp. 93, 107, 179-80. Mr. Gutleben was on his front steps complaining to Ms. Summers about crayon marks on the back wall of 1917. He stated "I bet you those little nigger kids next door did it." Ms. Smith was outside in the front of 1919, watching her children, when Mr. Gutleben made this statement. She confronted him and told him that Ms. Summers' daughter, Nicole, and not her children, drew on the back wall. Tr. 1, pp. 109-10, 113-14.

32. There were other such remarks sometime in 1992.¹¹ While he was standing out by his mailbox, Mr. Gutleben told Ms. Summers that "the little nigger kids next door" painted his son's car. Ms. Smith was outside in the front of 1919, watching her children when she heard this comment. Tr. 1, pp. 110-11, 114. Respondent also blamed Ms. Smith's children for a broken window. However, someone from The Boat House bar had thrown a bottle through the front window of 1917. While fixing the window, Mr. Gutleben told Ms. Summers, "I bet you the little nigger boy did it that lives next door." Ms. Smith was in her house when she heard this comment through her open window. She again confronted Mr. Gutleben and told him that her children

¹¹Ms. Smith was able to testify with certainty that only one incident, that involving 1917's back wall, occurred in the summer of 1992. The record is silent regarding when in 1992 the remaining incidents occurred. Tr. 1, pp. 110-15. Ms. Smith recalls that the back wall incident occurred in the summer of 1992 because it happened before Nicole Summers left 1917, which was "sometime during the school year." Tr. 1, p. 110. Although some of the other incidents involved Nicole, the record does not indicate whether Nicole was still a resident at 1917 or merely visiting when these incidents occurred. The Charging Party's brief is inconsistent on this point. *Compare* Charging Party's Brief, p. 46 & n. 81 *with* p. 54.

I credit Ms. Smith's testimony that Mr. Gutleben made these remarks. Mr. Gutleben's tenants, the Steeles, and indeed his own son, Kenneth, testified that Mr. Gutleben used the term "niggers" to describe Complainants. *See supra* finding no. 27. Moreover, there were instances when she testified against her interests. For example, she stated that she considered Ms. Gutleben to be a "victim" and she testified that Ms. Gutleben was sympathetic to her and her family. Tr. 1, pp. 171-73, 179.

did not break the window. Tr. 1, pp. 112-13. Finally, Respondent made another remark concerning a broken flower box. A friend of Ms. Summers had driven his truck into a brick flower box at 1917 and cracked the box. Mr. Gutleben said "I bet you the little

nigger boy did this, too." Ms. Smith was in her house when she heard the comment. Ms. Summers informed Mr. Gutleben that her friend had damaged the property. Also, Ms. Smith went outside to tell him that her children did not cause the damage. Tr. 1, pp. 114-15.

33. At the end of 1992, Mr. Gutleben made racial comments to OB. On one of these occasions OB was sitting on his porch with his sister, Teala, when Mr. Gutleben called him a "nappy-headed kid" and a "nigger." Tr. 2, pp. 39, 112-13. On another occasion when OB was in his backyard fixing his bicycle, he called OB a "little black kid." Tr. 2, pp. 114-15.¹² When he made these comments he was the sole owner of 1917; he no longer owned 1919. See *supra* finding no. 3; see *infra* note 25.

34. Teala overheard Mr. Gutleben refer to her family as "niggers" when he was speaking to Dana Summers.¹³ Tr. 2, pp. 148-50, 209. OB and Teala reported Mr. Gutleben's racial comments to Ms. Smith. Tr. 1, p. 107. In addition, Mr. Gutleben referred to Complainants as "niggers" in Alania's presence. C. P. Ex. 20A.

Damages

35. Prior to moving into 1919B Stanford, Ms. Smith was unable to provide stable, consistent housing for her family. She had previously lived in undesirable housing which included hotels or motels. Tr. 1, pp. 122-24; Tr. 2, pp. 172-73. The Stanford Street apartment was the nicest residence that she had rented. Prior to living in Alameda, she had resided in Oakland and she found the Alameda area preferable. The schools were good, the people friendly, and the area quiet. Tr. 1, pp. 122-24. Upon receiving the May 2nd eviction notice, Ms. Smith was concerned about where her family would live. She

¹²In the interest of confidentiality, I have considered information provided *in camera* concerning OB's credibility and the impact of Respondents' conduct on his emotional well being. I find OB to be a credible witness because his testimony was corroborated by his sister, Teala. In addition, other witnesses testified that Mr. Gutleben often made racially pejorative remarks. See *supra* note 11.

¹³Teala testified that Mr. Gutleben called her a "nigger" to her face. However, during her deposition she stated that she *overheard* him call her and her family "niggers" while Mr. Gutleben was speaking to Ms. Summers and that she was present when he directed racial epithets at OB. Because her deposition statement was corroborated by her statement to Dr. Valata Jenkins-Monroe, a clinical psychologist who examined Complainants, I credit her deposition statement rather than her testimony. Tr. 3, p. 40.

very much wanted to remain at 1919B. She had already paid Mr. Gipson rent and had no funds left for housing. ¹⁴ Tr. 1, pp. 122-24.

36. Ms. Smith "lives for" her grandchildren and children. She is the caretaker for Latitia's children because Latitia is addicted to illegal drugs and is unable to care for them. DeMille, LaQuis, and the baby, Latitia, have been in Ms. Smith's care since they were born. Ms. Smith has cared for Teala since she was one and for OB since he was four. OB's natural father abandoned him. Tr. 1, pp. 77, 187; Tr. 2, p. 195.

37. Because Ms. Smith had previously lived in predominantly black communities, she was unaccustomed to confronting racism and not well equipped to deal with it or to explain it to her children. Tr. 2, pp. 176, 178-79; Tr. 3, p. 14. Thus, when OB told his grandmother about Mr. Gutleben's epithets, Ms. Smith told OB to "let it go" or to "ignore it." Tr. 2, p. 117; C. P. Ex. 18A. She equates the term "nigger" with "stupid" and "ignorant." Tr. 1, p. 119. She wants to shield her children from such language. Tr. 1, p. 108.

38. Ms. Smith told OB to stay away from Mr. Gutleben. Although Ms. Smith did not prevent OB from going outside (because he did not often play near home), she did prevent the younger children from going outside to play when Mr. Gutleben was at the property. ¹⁵ Tr. 1, pp. 118, 187; Tr. 2, pp. 117-18, 122-23; C. P. Ex. 18B.

39. Ms. Smith suffers from depression. This preexisting depression results from severe stress in her life. First, she suffers from cervical strain; spasms in her shoulder, back, upper neck, and arm; high blood pressure; and arthritis. She takes prescription medicine for these conditions, as well as for depression. Tr. 1, p. 134. Second, she was injured while employed at Providence Hospital. The hospital terminated her because she was unable to work due to her injuries. Third, she is now pursuing a claim against the hospital. Tr. 1, pp. 135-37. Fourth, a "friend" of Ms. Smith robbed her and raped one of her daughters. Tr. 1, p. 120. Fifth, another of Ms. Smith's daughters died within the last three years. Tr. 2, p. 182. Sixth, in July of 1992, Ms. Smith spent five days in jail for receiving stolen property. Tr. 1, pp. 121, 147; Tr. 3, p. 32. I credit the unrebutted, expert testimony of Dr. Valata Jenkins-Monroe, a clinical psychologist who examined Complainants, that Ms. Smith's existing depression was increased because of the racial epithets. She experienced anxiety and guilt as a result

¹⁴Ms. Smith was unemployed when she first moved into 1919B; she is now employed as a nursing care provider. Tr. 2, pp. 179-80. She receives Aid to Families with Dependent Children. Tr. 1, pp. 178-79.

¹⁵I conclude that Ms. Smith's decision to keep her children indoors was for two reasons. She not only wanted to shield her children from racial abuse, but she also wanted to protect them from a known child molester. See *infra* p. 25.

of her inability to cope with racism. She also suffered from sleeplessness. Tr. 2, pp. 179, 181; Tr. 3, p. 28.

40. I further credit Dr. Jenkins-Monroe's testimony that OB was afraid of and intimidated by Mr. Gutleben's name calling. OB tried to avoid Mr. Gutleben. Tr. 2, p. 115. No other adult has ever called OB a "nigger." Tr. 2, p. 115. OB becomes withdrawn and depressed when speaking about Mr. Gutleben. In addition, his reaction to his encounters with Mr. Gutleben is "more dramatic" and "more intense" than OB's reaction to other problems in his life. Tr. 2, pp. 95-96. When discussing all of the stress in his life, he bites his nails only when speaking about Mr. Gutleben. Tr. 2, pp. 193-94. He has had nightmares about Mr. Gutleben coming to his house and threatening his family. He stated that he had these nightmares because "he's weird." Tr. 2, pp. 118-19. In responding to the sentence completion test administered by Dr. Jenkins-Monroe, four of OB's responses involved Mr. Gutleben, five related to OB's father's abandonment of him. C. P. Ex. 18D. He is embarrassed to discuss Mr. Gutleben's racial remarks with white people because he fears that they might think poorly of him. Tr. 2, pp. 95-96. In addition, OB has attempted to repress these incidents and his own reaction to Mr. Gutleben's remarks. Tr. 2, pp. 195, 213.

41. I also credit Dr. Jenkins-Monroe's testimony that Teala has "very negative self-esteem" and a "very negative self-concept" about her race. Tr. 2, pp. 202-08. She internalized Mr. Gutleben's comments about herself and her family, believing them to be true. Tr. 2, pp. 202-08, 217; C. P. Ex. 19A. To her, Mr. Gutleben was a powerful figure, whom she wanted to please. Tr. 2, pp. 204-05. During her interview with Dr. Jenkins-Monroe, Teala told her that, if she could, she would change Mr. Gutleben into a "nigger" so that he would understand that her family members' race is not their fault. C. P. Ex. 19A. In the sentence completion test that Dr. Jenkins-Monroe administered, Teala said that she would do anything she could to forget the time she was called a "nigger." C. P. Ex. 19B.

42. Alania is greatly conflicted about her mixed ethnicity. She views her Hispanic half as the "positive" side and her black half as the "negative" side. While she resided at 1919B, she was distressed because she could not go outside and play. Tr. 2, pp. 209-10, 218-19.

Discussion

Admissibility of Hearsay

Respondents object to the admission of Mr. Gutleben's racial remarks through the testimony of Dr. Jenkins-Monroe because they are hearsay. The Charging Party contends that the statements are admissible under Federal Rule of Evidence 803(4).

An exception to the rule prohibiting hearsay exists for "[s]tatements made for

purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Fed. R. Evid. 803(4). Rule 803(4) encompasses statements made concerning the nature and cause of the injury *provided* the statements are *relevant to diagnosis* or treatment regardless of whether the statements were made to a treating physician or an expert witness employed for trial. See Fed. R. Evid. 803(4) advisory committee's notes; 4 Jack B. Weinstein and Margaret A. Berger, *Weinstein's Evidence*, ¶ 803(4)[01] (1985).

Thus, the proper inquiry is whether Complainants' recounting of Mr. Gutleben's slurs are relevant for Dr. Jenkins-Monroe's diagnosis. A two-part test is used to answer this inquiry: first, whether it is reasonable for the diagnostician to rely on the information for diagnosis or treatment; and second, whether the declarant's motive is to receive diagnosis or treatment, rather than to fabricate testimony. See *United States v. Iron Shell*, 633 F.2d 77, 83-85 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); *Weinstein's Evidence*, *supra* at 803-147 -48.

It was reasonable for Dr. Jenkins-Monroe to rely on Complainants' report of the content and source of the slurs in order to render her opinion. Unlike a diagnosis of a physical injury, when an emotional injury is suspected, the diagnostician may need to ascertain both the source and content of the event which caused the claimed injury. For example, the effects on the declarant's psyche reasonably depend on both the content of the purportedly harmful remark and the speaker. In this case, OB's injury would differ significantly if the remarks had not been racial in nature, or if they were made by a stranger and not Mr. Gutleben. See *U.S. v. Provost*, 875 F.2d 172 (8th Cir.), *cert. denied*, 493 U.S. 859 (1989). *Weinstein's Evidence*, *supra* at 803-150.

The second prong requires an examination of the declarant's motive. The age of the minor Complainants provides an additional measure of trustworthiness because children are less likely than adults to maintain an improper motive when speaking to medical personnel. See *Roberts v. Hollocher*, 664 F.2d 200, 204 (8th Cir. 1981); *Iron Shell*, 633 F.2d at 83-85. Thus, the children's statements to Dr. Jenkins-Monroe are admissible.

Conversely, no such assumption of lack of improper motive applies to adult declarants' statements made to an expert witness retained for litigation. Ms. Smith knew when she met with Dr. Jenkins-Monroe that she had been employed for trial to assess the extent of Complainants' damages. Further, Ms. Smith questioned Dr. Jenkins-Monroe as to how the information that Ms. Smith provided would be used at the trial. Tr. 3, pp. 6-7, 10. Accordingly, I sustain Respondents' objection to hearsay statements made by Ms. Smith to Dr. Jenkins-Monroe.

The Charging Party has the burden of proving by a preponderance of the evidence that Respondents discriminated against Complainants "in the terms, conditions, or privileges of sale or rental of a dwelling. . . because of race [or] familial status." 42 U.S.C. § 3604(b). The Charging Party may prove discrimination by direct evidence of discriminatory intent. Direct evidence establishes a proposition directly rather than inferentially. Absent direct evidence, the Charging Party may prove racial animus by indirect evidence of discriminatory intent by establishing a *prima facie* case. Once HUD has done so, the burden of production shifts to Respondents to articulate a nondiscriminatory reason for their actions. The Charging Party then may prove that the asserted legitimate reasons are pretextual. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); see also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). However, pretext alone does not necessarily prove discrimination. The Charging Party still maintains the burden to demonstrate that an asserted reason, even though pretextual, evidences an intent to discriminate. See *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742; 125 L.Ed. 2d 407 (1993).

1. The May Eviction Notice

A. Familial Status Discrimination

A preponderance of direct evidence¹⁶ establishes that Respondents intended to discriminate against Complainants because of their familial status by attempting to evict them in May 1992. On May 2, 1994, the same day that she served the eviction notice, Ms. Gutleben informed Ms. Smith that "she hadn't expected to rent to anybody with kids." Ms. Gutleben's utterance is strong, direct evidence of her intent to discriminate against a family with children at the time that she served the notice. Other strong, direct evidence is her statement to the HUD investigator that she rented to Mr. Gipson because he was single and that she wanted to avoid any problems with children in an upstairs apartment. Additionally, when she rented to Mr. Gipson, she inquired whether Mr. Gipson had small children and told him that they created additional wear and tear on an apartment. Finally, she testified that in choosing tenants, she considers the location of the apartment and whether an applicant has children. "An upstairs apartment creates a lot of noise with a lot of people for the downstairs apartment. So I like to have children. . . downstairs rather than upstairs." Tr. 4, p. 135.

Ms. Gutleben's testimony demonstrates that, at the time she issued the May 2nd notice, her decision to evict Complainants was based on her assumption that children are likely to disturb downstairs tenants. The additional fact that Complainants had no legal right to occupy the premises, while a legitimate, nondiscriminatory reason for evicting them, does not overcome the strong, direct evidence of discriminatory intent.

¹⁶Because a preponderance of direct evidence establishes that Ms. Gutleben's eviction notice of May 2, 1992, was because of familial status discrimination, I do not analyze this violation under the *McDonnell Douglas-Burdine* test.

Accordingly, Ms. Gutleben's revealing admissions demonstrate by a preponderance of evidence that she would have excluded these children based on her preconceived views even though she had a legitimate reason to evict them. I, therefore, find that the May 2, 1992, eviction notice was served for discriminatory reasons.

B. Racial Discrimination

There is no direct evidence that Vicki Gutleben intended to evict Complainants because of their race. Although Mr. Gutleben made various statements which directly

evidence his racial animus, there is a dearth of evidence that he had any role in Ms. Gutleben's decision to serve the May 2, 1992, eviction notice. Indeed, the evidence supports the contrary conclusion. Ms. Gutleben credibly testified that after Respondents' December 1991 separation, she exclusively managed, rented, and maintained 1919 on her own without any assistance or input from Mr. Gutleben.¹⁷ While Mr. Gutleben may have complained bitterly to Vicki and others concerning Complainants' occupancy, there is no evidence that he, in any way, influenced his ex-wife's actions.

The Charging Party asserts that Ms. Gutleben made three statements which directly evidence racial discrimination. The evidence for these statements was provided by Helen Goltz. The first statement was purportedly made by Ms. Gutleben to

Ms. Goltz on May 2, 1992, when Ms. Gutleben borrowed a pen from Ms. Goltz to write the eviction notice. According to Ms. Goltz, Ms. Gutleben said that she was going "to get the niggers out." Tr. 4, pp. 22, 25. Ms. Goltz testified that on the same or next day, she repeated Ms. Gutleben's statement to Ms. Smith. Tr. 4, pp. 21, 25. Ms. Gutleben supposedly made a second racial statement in the backyard in the presence of Mr. Gutleben and Dana Summers. Ms. Goltz allegedly overheard Ms. Gutleben say "if it was in the South, the KKK would take care of it." Tr. 4, pp. 22, 24-25. Finally, Ms. Goltz allegedly overheard Vicki tell Paul that she was "going to get the niggers out." Tr. 4, p. 33.

¹⁷I credit Ms. Gutleben's testimony that she was solely responsible for 1919 Stanford Street as of 1992. Her testimony is corroborated by the facts that she alone rented to Mr. Gipson, and later rented to Ms. Smith; both considered Ms. Gutleben to be their landlady; neither had business dealings with Mr. Gutleben; and her sons dealt with her, and not their father, when they performed maintenance work on 1919. Tr. 3, pp. 170-71, 175-76, 180; see *supra* finding nos. 8 and 22.

I find Ms. Goltz completely lacking in credibility. She was clearly biased against the Gutlebens, and I conclude that her testimony regarding Ms. Gutleben's racial statements was a fabrication. On May 1, 1991, she fell off the back porch at 1917 and, as a result, she filed a civil suit and collected \$62,000 from the Gutlebens.¹⁸ After learning that Mr. Gutleben intended to move into 1917, she directed a media campaign to prevent the move, based on his child molestation conviction. (Ms. Goltz was caring for two grandchildren who had been previously molested by another individual.) She had frequent altercations with Mr. Gutleben, and, at one point, she called the police to eject him from the property. She even accused Mr. Gutleben of installing a microphone in her apartment to eavesdrop on her conversations.¹⁹ After four unsuccessful attempts by Respondents to evict Ms. Goltz, she eventually left on her own. Tr. 4, pp. 34-37, 39, 41, 49, 58-59, 77.

Ms. Goltz's testimony that Ms. Gutleben told her on May 2, 1992, that she was going "to get the niggers out" is simply implausible. First, it is extremely unlikely that Ms. Goltz repeated Ms. Gutleben's May 2nd remark to Ms. Smith on May 2nd, or 3rd, 1992. During their July 23, 1992, phone conversation, Ms. David specifically asked Ms. Smith why she thought the July eviction notice was racially motivated. Ms. Smith did not mention any racial slurs. She merely attributed her suspicion to the fact that she and her family were the only blacks in the building.²⁰ Second, Ms. Gutleben's purported statement that she was going to "get the niggers out" is not something she would acknowledge to a woman who was suing her. Third, no other witness who knew

Ms. Gutleben testified to hearing her make racially pejorative remarks at any time.²¹ Fourth, Ms. Goltz could not specifically remember any other conversation that she had with Ms. Gutleben, yet she was able to repeat her alleged racist statements, word for word. Tr. 4, p. 42.

Finally, Ms. Goltz's testimony was inconsistent. She testified that Ted Brown did not live in her apartment. However, she admitted that he was, in fact, there all the time,

¹⁸She claims that prior to her fall she made repeated requests of Mr. Gutleben to put up a guard rail along the back steps. Mr. Gutleben's purported response was "F__ _ you, I'm not going to do it." Tr. 4, pp. 35-36.

¹⁹According to Ms. Goltz, she confronted Mr. Gutleben with her belief that he had installed a microphone in her wall. She states that he called her "a crazy bitch." Tr. 4, p. 59.

²⁰Dr. Jenkins-Monroe testified that she "would expect" Ms. Smith not to have informed Ms. David of the racial comments. Tr. 3, p. 21. Despite Dr. Jenkins-Monroe's speculation to the contrary, I find it implausible that Ms. Smith would not have recounted the alleged racial comments (had she known about them and believed that they actually were made) to a Fair Housing counselor who specifically asked her the basis for her suspicion that the eviction was racially motivated.

²¹Ted Brown presumably could have corroborated much of Ms. Goltz's testimony. Respondents subpoenaed him, but he did not appear. Tr. 4, pp. 64-66.

he maintained a business phone in her apartment, and his business licenses listed her apartment as his address. Tr. 4, pp. 43-44. Because Ms. Goltz's testimony is not credible, there is no direct evidence establishing that racial discrimination motivated the May 2, 1992, eviction notice.

Although the Charging Party failed to prove racial animus by direct evidence, it demonstrated indirect evidence of discriminatory intent by establishing a *prima facie* case. Thus, the Charging Party proved that 1) Complainants belong to a protected class, 2) Respondents knew they belonged to a protected class, and 3) Respondents took an action concerning terms, conditions, or privileges of rental. Complainants are black. Ms. Gutleben was aware of their race when she met Ms. Smith on May 2nd. Finally, on May 2nd, Ms. Gutleben served the eviction notice on Complainants, an action affecting the "terms, conditions, or privileges" of rental. See *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982).

Respondents articulated two nondiscriminatory reasons for the eviction notice: first, that they needed to repair the stairs, and second, that after Ms. Gushwa complained about disturbances upstairs, Complainants were evicted for illegally subletting. The record demonstrates that the first reason is pretextual, but not the latter. Although the stairs were indeed in need of repair, the work was not performed until October of 1993, more than 18 months after the eviction notice.²² Moreover, Ms. Gutleben admitted to the HUD investigator that this proffered reason was false. However, I conclude that, but for Ms. Gutleben's improper motivation to exclude children, her decision to evict would have been legitimate and, not racially discriminatory. It is reasonable to expect a landlord to attempt to evict illegal occupants, particularly after receiving complaints about them from tenants. While pretextual to the extent it was intended to cover up her intent to exclude children, the eviction notice has not been shown to be a pretext for race discrimination. *St. Mary's Honor Center*, 113 S.Ct. 2742. Because Respondents have established a legitimate, nondiscriminatory reason for the May 2, 1992, eviction notice, the Charging Party has failed to demonstrate by indirect evidence that it was racially motivated.

2. The July Eviction Notice

The Charging Party alleges that both direct and indirect evidence establish that the July 21, 1992, eviction notice resulted from race and familial status discrimination. I disagree. The record does not contain any direct evidence of race discrimination.

²²Ms. Gutleben's son, Kenneth, rebuilt the front steps in October of 1993 and also painted the rear stairs. Before starting the project, he had advised his mother that it would be cheaper and safer if there were no tenants in the building at the time of repairs. Tr. 1, p. 90; Tr. 3, pp. 174-78, 185-86; R. Exs. 22A and 22B.

Although Mr. Gutleben made racially discriminatory statements, he did not influence Ms. Gutleben's actions, and therefore, I find no direct evidence of racial discrimination.

The supposed direct evidence of familial status discrimination relied upon by the Charging Party is that on or about July 21, 1992, Ms. Gutleben told Ms. Smith that the children were a problem. However, it failed to prove that she made this statement. See *supra* note 7.

The Charging Party also alleges that Ms. Gutleben's other statements concerning the May 2, 1992, notice constitute direct evidence that the July notice was served because of familial status. See *supra* p.14. However, the record establishes that by May 3, 1992, she changed her mind and canceled the eviction notice. Ms. Gutleben's cancellation of the May 2, 1992, eviction notice clearly demonstrates that, at that point in time, she no longer intended to discriminate against children. For the reasons discussed below, there has been no showing that her intent to exclude children revived.

Nevertheless, the Charging Party has established a *prima facie* case of both race and familial status discrimination. Complainants belong to two protected classes. They are black and they constitute a family with children. By serving the July eviction notice, Ms. Gutleben took an action affecting the "terms, conditions, or privileges" of rental.

Respondents have articulated a legitimate, nondiscriminatory reason for the July eviction notice, i.e., the unlawful sublease. Ms. Gutleben stated that Mr. Gipson wanted to evict Complainants because he wanted to move into the apartment. He informed Ms. Gutleben that he, and not Complainants, had the only legal right to the property because he still had a lease with Ms. Gutleben. Mr. Gipson went so far as to send Complainants his own eviction notice and he continued to press Ms. Gutleben. I conclude that Ms. Gutleben, caught between her desire to allow Complainants to remain, and Mr. Gipson's persistent entreaties, initially, and not unreasonably, chose the lawful tenant. Within a few days of serving the eviction notice, Ms. Gutleben decided to rent to Ms. Smith despite Mr. Gipson's legal entitlement. I credit her testimony that she did this because she was sympathetic to Ms. Smith's predicament. This fact is acknowledged by Ms. Smith, herself. See *supra* note 10. In addition, while Ms. Gutleben liked and had a good relationship with Ms. Smith, the same was not true for Mr. Gipson. Finally, the tenant in 1919A, Ms. Gushwa, had come to prefer Ms. Smith over Mr. Gipson, as an upstairs tenant.

The Charging Party asserts that Respondents' reason for the July eviction was pretextual for several reasons, none of which are persuasive. First, it alleges that by the summer of 1992, Mr. Gutleben planned to move into 1917 and he did not want Complainants as neighbors. As stated earlier, as much as Mr. Gutleben loathed the idea of Complainants' residency, there is no evidence that he influenced Ms. Gutleben's decisions concerning her management of 1919.

Second, the Charging Party alleges that because Ms. Gutleben's retraction of the eviction notice occurred within a few days of the effective date of the Gutlebens' Marital Settlement Agreement, the eviction was discriminatory. Respondents' Settlement Agreement gave sole control of 1919 Stanford to Ms. Gutleben as of August 1, 1992. The Charging Party argues that as of this date, Mr. Gutleben could no longer pressure his wife to evict Complainants. Presumably, she was then free to act as she pleased. The Charging Party's argument assumes that Mr. Gutleben initially was able to persuade his wife to evict Complainants, presumably because of racial animus. However, the evidence demonstrates that, despite the terms of the Agreement, Ms. Gutleben, and not her husband, maintained responsibility for 1919 for calendar year 1992 and she did not consult her husband concerning Complainants' residency or other matters relating to 1919. In addition, Ms. Gutleben retracted the eviction notice and allowed Complainants to remain *before* August 1, 1992, i.e., before the Agreement gave her sole control over 1919. See *supra* finding no. 22 and note 9.

Third, the Charging Party finds it significant that Ms. Gutleben's retraction occurred within close proximity to Ms. David's visit to the Goltz apartment. The Charging Party assumes that Ms. Gutleben's retraction was based on her knowledge of the visit, and consequently her knowledge that Ms. Smith had filed a fair housing complaint. The Charging Party, therefore, contends that because the retraction was made in response to the fair housing complaint, the previous eviction was discriminatory. The argument is flawed for numerous reasons. First, the Charging Party failed to prove that Ms. Gutleben rescinded the eviction after the meeting at Ms. Goltz's apartment. See *supra* finding no. 22 and note 9. Second, even if Ms. Gutleben did have knowledge of Ms. Smith's fair housing complaint when she offered her a lease, the Charging Party provides no more than mere speculation that Ms. Gutleben's knowledge of these events was the reason for the retraction. Third, even if it were the reason for the retraction, it does not necessarily follow that her prior decision to allow Mr. Gipson to remain was discriminatory. Accordingly, I conclude that the July eviction notice was served for a legitimate, nondiscriminatory reason.

Section 3604(c) Violations

The Charging Party alleges that Respondents violated 42 U.S.C. § 3604(c) by making various statements "with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race [or] familial status. . . or an intention to make any such preference, limitation, or discrimination." Statements by "a person engaged in the sale or rental of a dwelling" which convey that housing is unavailable to persons because of race or familial status and statements made to "any person" expressing a preference for or limitation on renters because of race or familial status are illegal. 24 C.F.R. § 100.75(b), (c)(1) and (2).

1. Statements Relating to Familial Status

Ms. Gutleben's statement to Ms. Smith that she hadn't intended to rent to families with children is a facially discriminatory statement. Ms. Smith was reasonable in interpreting it as expressing a dispreference for families with children. It was made by Ms. Gutleben to Ms. Smith, the head of a family with children, an occupant, and a future lessee of 1919B, and accordingly was made "with respect to the sale or rental" of 1919B.

The Charging Party alleges that Ms. Gutleben's comments to Mr. Gipson concerning her views on the damage or noise that children may cause constitute violations of 42 U.S.C. § 3604(c). I disagree. Although one portion of her comments may be interpreted to indicate a preference not to rent to children, she also informed Mr. Gipson that she could not act on such a preference because it would be violative of the law. Thus, her statement as a whole does not express an intent to discriminate based on familial status. Nor was it interpreted by Mr. Gipson to express such an intent. Tr. 4, pp. 221-23. Upon hearing her entire assertion, the "ordinary listener" would not interpret Ms. Gutleben's statement as evidencing a discriminatory intent to exclude families with children. See *HOME v. Cincinatti Enquirer, Inc.*, 943 F.2d 644, 646 (6th Cir. 1991); *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir.), cert. denied, 409 U.S. 934 (1972).

Mr. Gutleben also made a statement in violation of 42 U.S.C. §3604(c). Around the time that Complainants moved into 1919B, Mr. Gutleben complained to Ms. Cortez about "too many kids" at 1919B. He said that he did not like the idea of all these children living in the apartment. Because he was an owner of the property at the time, the statement was made with respect to the rental of his house to a tenant, also with children. The statement is reasonably interpreted as expressing his intent to discourage renting to families with children. See *HOME*, 943 F.2d at 646; *Hunter*, 459 F.2d at 215; see also *HUD v. Joseph*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,072 (HUDALJ June 2, 1994).²³

2. Statements Relating to Race

The Charging Party alleges that both Respondents made racially discriminatory statements in violation of 42 U.S.C. § 3604(c). The only evidence of racial statements

²³During this same conversation with Ms. Cortez, Mr. Gutleben told her that the tenant should have been a "light complected man," i.e., Mr. Gipson. The Charging Party alleges that this comment expressed a preference based on race. I disagree. Based on the content of Ms. Cortez's testimony, I find that the comment merely described the tenant to whom 1919B had been rented, and also expressed Mr. Gutleben's preference not to rent to families with children. Tr. 2, pp. 56-57.

by Ms. Gutleben was Ms. Goltz's testimony. Because Ms. Goltz is not a credible witness, the Charging Party failed to prove that Ms. Gutleben made these statements. For the same reason, the Charging Party failed to prove that Mr. Gutleben made such statements about Complainants to Ms. Goltz.²⁴

In the summer of 1992, Mr. Gutleben made a statement to Ms. Summers that violated 42 U.S.C. § 3604(c).²⁵ He accused Ms. Smith's children of drawing with crayons on the back wall of 1917. He referred to the children as the "little nigger kids next door." At the time, Ms. Smith was in the front of 1919 watching her children.

Mr. Gutleben was on the front steps of 1917. Ms. Smith overheard the statement, and was prompted to defend her children. Given their close physical proximity, I find that Mr. Gutleben intended that Complainants hear this statement. As a landlord, his use of the word "nigger" to black tenants conveys an intention not to rent to Complainants because of their race. Therefore, it indicates a "preference, limitation, or discrimination based on race." 42 U.S.C. § 3604(c); see *HUD v. Tucker*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,033, 25,392 (HUDALJ Aug. 24, 1992), *submission of appeal vacated*, No. 92-70697 (9th Cir. July 18, 1994) (unpublished order).

Respondents argue that because Mr. Gutleben's statement was not made "in the context of "seeking a buyer or a renter," his statement does not violate the statute. See Respondents' Brief at 26-27. I disagree. Indeed, Complainants were residents at the time he made this remark. However, at the time he made the statement, he was a landlord "engaged in the . . . rental of a dwelling." 24 C.F.R. § 100.75(b). The statement indicates a preference based on race, see *supra*, and because it was made by a landlord to his tenant, it was made "with respect to the . . . rental of a dwelling." 42 U.S.C. § 3604(c). Accordingly, Mr. Gutleben's statement to Ms. Summers in the presence of Complainants violated 42 U.S.C. § 3604(c).

42 U.S.C. § 3617 Violations

The Charging Party alleges that Mr. Gutleben violated 42 U.S.C. § 3617 by intimidating, coercing, and interfering with Complainants' residency at 1919B based on their race and familial status. To prove interference, the Charging Party must

²⁴Although Mr. Gutleben admitted to referring to Complainants as "niggers" during a conversation with Ms. Goltz, see *supra* finding no. 27, the Charging Party did not argue that this statement was a separate violation of 42 U.S.C. § 3604(c). In its post-hearing brief, the Charging Party refers to a similar statement recounted by Ms. Goltz. However, the record does not establish that this is the same remark which Mr. Gutleben recalls. See Charging Party's Brief, p. 45.

²⁵The Charging Party charges that Mr. Gutleben made another racially discriminatory statement to Ms. Summers that the "nigger kids" next door painted Mark Gutleben's car. Because the Charging Party failed to prove that this comment was made in the summer of 1992, while Mr. Gutleben was Complainant's landlord, it has failed to demonstrate that this statement violated 42 U.S.C. § 3604(c).

demonstrate that: 1) Complainants are members of a protected class, 2) they were attempting to enjoy a right protected under the Act, 3) Respondent intended to discriminate based on Complainants' race or familial status, and 4) Respondent interfered with Complainants' exercise of that right, i.e., a quiet enjoyment of their apartment, because of Complainants' race or familial status. See *People Helpers Foundation, Inc. v. City of Richmond*, 781 F. Supp. 1132, 1134 (E.D. Va. 1992). It is not necessary to be a housing provider in order to violate this section. See, e.g., *Sofarelli v. Pinellas County*, 931 F.2d 718 (11th Cir. 1991); *Evans v. Tubbe*, 657 F.2d 661 (5th Cir. 1981); *Barron v. Golen*, 2 Fair Housing-Fair Lending (P-H) ¶ 15,648 (N.D. Ohio Aug. 27, 1990). Thus, it is not critical that Mr. Gutleben ceased to own 1919 Stanford in November 1992 and, that after that time, he was merely Complainants' next door neighbor.

Complainants are members of a protected class by virtue of their race. The Act provides a right to enjoy housing free from interference because of discrimination. See *Stackhouse v. DeSitter*, 620 F. Supp. 208, 211 (N.D. Ill. 1985).

Mr. Gutleben's intent to interfere with Complainants' residency because of their race is established by the Steeles' testimony. Mr. Gutleben informed the Steeles that before he moved into 1917, he wanted "the niggers out" because he did not want to live next door to "a bunch of niggers." He attempted to enlist Mr. Steele's assistance in this endeavor. He requested that Mr. Steele "spy" on Complainants and assist Mr. Gutleben in persuading Ms. Gutleben to evict them. He also complained directly to Ms. Gutleben.

Moreover, his statements to OB and Ms. Smith demonstrate his intent to interfere with Complainants' residency because of their race. Without provocation, he called OB a "nappy-headed kid," a "nigger," and a "little black kid." Teala was present on one of these occasions. On two separate occasions, Mr. Gutleben, while in the presence of Ms. Smith, referred to Ms. Smith's children as "nigger kids." He complained to Ms. Summers that the "little nigger kids next door" drew on 1917's wall and painted his son's car. Because Ms. Smith was within earshot of Mr. Gutleben when he made these statements, I conclude that he intended that she hear them and that he intended for them to have the resulting effect on Ms. Smith. Conversely, I find that Mr. Gutleben did not intend for Ms. Smith to hear the two statements he made accusing the "little nigger boy" of breaking the window and the flower box because Ms. Smith was not outside at the time. Consequently, I find that he did not intend for these statements to interfere with Complainant's residency. In addition, the Charging Party failed to prove that Mr. Gutleben intended for Alania to hear him use the term "nigger," and consequently failed to prove that he intended to interfere with her quiet enjoyment of her home.

Mr. Gutleben's actions interfered with Complainants' residency because of their race. OB was deeply affected by Mr. Gutleben's racial slurs. He repressed them and is afraid to discuss them with other white people. He bites his nails only when discussing Mr. Gutleben, to the exclusion of the other stressful events in his life. OB has had nightmares about Mr. Gutleben. Teala was also affected by Mr. Gutleben's

comments. She internalized his comments about herself and her family, believing herself and her family to be "niggers." His comments made the children's home an unsafe place and interfered with their ability to reside there free from such menace. Mr. Gutleben's comments also interfered with Ms. Smith's right to enjoy her home free from such slurs. She was unable to cope with his conduct, and further unable to explain such actions to her children. She experienced anxiety and guilt as a result of his actions and suffered from sleeplessness. Thus, Mr. Gutleben interfered with Complainants' residency because of race.

Respondents concede that words alone can constitute a violation of the Act if those words threaten or intimidate based on race. They argue, however, that any comments made by Mr. Gutleben did not rise to that level because Mr. Gutleben never told Complainants that they had no right to live at 1919 or that they were unwelcome in the neighborhood. I disagree. Mr. Gutleben's comments conveyed the message that Complainants were not welcome on Stanford Street. The term "niggers" when used by a white person to refer to members of the black race is well recognized as being patently offensive. See *Woods-Drake*, 667 F. 2d at 1203 & n.10. Such a violation exists absent any outward threat of violence. See *United States v. City of Hayward, Cal.*, 805 F. Supp. 810, 813 (N.D. Cal. 1992) (A city's mere acceptance of a petition and referral to an arbitrator may violate 42 U.S.C. § 3617.); *United States v. Scott*, 788 F. Supp. 1555, 1562 (D. Kan. 1992) (Issuing a letter threatening to bring a lawsuit and filing of the suit constitute a violation of 42 U.S.C. § 3617.).

I find no violation based on familial status. A preponderance of evidence establishes that Mr. Gutleben's harangues against Ms. Smith's children were based on their disruptive conduct and trespass onto his property. The children would litter, leave toys out, put muddy hand prints on the walls, and pick and throw flowers. Tr. 1, pp. 109-10; Tr. 2, pp. 56-59, 69, 72, 76, and 77. Ms. Smith acknowledged that the children were often in the backyard of 1917 or in the driveway adjoining the two properties and that there was no place else for them to play. Tr. 1, pp. 106, 112, 188; Tr. 2, pp. 58-59. Therefore, the evidence does not establish that Respondent intended to discriminate based on Complainants' familial status.

Respondents assert that Mr. Gutleben's comments are constitutionally protected free speech. The Charging Party argues that I am precluded from addressing this contention. While it is true that an administrative law judge cannot declare a statute to be unconstitutional, that is not the question at issue here. See *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 936 n.4 (2d Cir. 1976). Merely because "an issue has constitutional implications does not *per se* oust an administrative law judge from jurisdiction to decide it." *HUD v. Grappone*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,059, 25,577 n.9 (HUDALJ Oct. 1, 1993). It is appropriate for me to rule on whether the application of the Act to a particular set of facts contravenes the Constitution. See *Plaquemines Port, Harbor and Terminal District v. Federal Maritime Com'n*, 838 F.2d 536, 544 (D.C. Cir. 1988); *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987), *cert. denied sub nom.*, *Syracuse Peace Council*

v. FCC, 493 U.S. 1019 (1990). In this regard, I note that the Act's restriction on racially pejorative speech is similar to Title VII's restriction on sexually harassing speech. See 42 U.S.C. § 2000e-2. It may, therefore, be considered a "secondary effect" of the Act's prohibition of interference with rights protected by the Act. See *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. -, 120 L.Ed. 2d 305, 321-22 (1992). Accordingly, I conclude that Respondents have failed to demonstrate that applying the Act to prohibit Mr. Gutleben's racial slurs contravenes the Constitution. For the reasons set forth, I conclude that Mr. Gutleben's racial comments interfered with Complainants in violation of 42 U.S.C. § 3617.

Remedies

Complainants are entitled to "such relief as may be appropriate, which may include actual damages. . . and injunctive and other equitable relief." 42 U.S.C. § 3612(g)(3). Moreover, Respondents may be assessed a civil penalty "to vindicate the public interest." *Id.*

The Charging Party seeks the following in damages for emotional distress: \$30,000 for Ms. Smith; \$50,000 for OB; \$35,000 for Teala; and \$25,000 for Alania. HUD also requests the following to pay for a year of therapy sessions to remedy that distress: \$3,900 (52 X \$75 an hour) for Ms. Smith, \$2,600 (52 X \$50 an hour) each for Teala and Alania. Further, HUD asks for \$5,000 each for Clifton and DeMille, and \$1,000 for LaQuis for the inconvenience they suffered because they could not play outside. Finally, HUD requests that total penalties amounting to \$20,000 be imposed against Ms. Gutleben and \$50,000 in total penalties be imposed against Mr. Gutleben.

Emotional Distress

As a threshold matter, there must be a showing that respondent's discrimination caused complainant's mental distress. *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977); *Morgan v. HUD*, 985 F.2d 1451, 1459 (10th Cir. 1993). "The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action; consequently, somewhat more conclusory evidence of emotional distress will be acceptable to support an award for emotional distress." *U.S. v. Balistrieri*, 981 F.2d 916, 932 (7th Cir. 1992) (citing *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981)). Moreover, racial discrimination against blacks, because it is one of the "relics of slavery" is the type of action that would reasonably be likely to humiliate or cause emotional distress. *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974).

In determining the awards in this case, I have considered Mary Betton-Smith's refusal to engage in conciliation discussions with Respondents, as well as awards for

emotional distress in other cases. See, e.g., *Barron v. Golen*, 2 Fair Housing-Fair Lending at ¶ 15,648 (White defendant who entered black tenant's apartment and told her that she was not welcome, that he had "no use for black trash," and that she would be "taking her chances" by remaining, was liable for \$20,000 in compensatory damages.); *HUD v. Nelson Mobile Home Park*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,063 (HUDALJ Dec. 2, 1993) (Respondent liable for \$30,000 in emotional distress damages for illegally denying housing based on familial status, and for stating that children were not allowed.), *appeal pending*, No. 93-5378 (11th Cir.). Finally, I have given considerable weight to

Dr. Jenkins-Monroe's opinion that OB suffered the most damage, followed by Teala, Ms. Smith, and Alania. In her opinion, Clifton Smith and DeMille Perry suffered no damages. Tr. 2, pp. 220-21. The record supports her conclusions.

Mary Betton-Smith

I award damages for the short period of time in which Ms. Smith believed that she would be evicted following the first eviction notice. Because the notice was rescinded the next day, her emotional distress as a result of this notice was slight. I also award Ms. Smith modest damages for the brief anxiety she experienced as a result

Ms. Gutleben's statement to her that she "hadn't intended to rent to kids."

Accordingly,

I award Ms. Smith the amount of \$75 for damages resulting from the May 2, 1992, eviction notice and the accompanying statement. Because he was an owner of 1919 in May of 1992, Mr. Gutleben is vicariously liable for this amount. See *Walker v. Crigler*, 976 F.2d 901, 904 (4th Cir. 1992); *United States v. Youritan Construction Co.*, 370 F. Supp. 643, 649 (N.D. Cal. 1973), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1975).

Once Ms. Smith was on the premises, she was entitled to live her life free of racial remarks made both to her and to her children. These remarks had the intended effect of making her feel unwelcome, and negatively impacted on her self-esteem. Having previously lived in predominantly black communities, she was ill-equipped for dealing with racial discrimination. She was made to feel "stupid," "ignorant," and "different." Tr. 1, pp. 119-20. Although she first tried to ignore the remarks, she was forced to confront the fact that she was being made to feel inferior because of her race, something she cannot change. She was also ill-equipped to cope with the effect of these remarks on her children. Thus, she experienced guilt because of her inability to explain racism to her children, and anxiety because of her inability to shield her children from this language. She did not want her children to think that they were different or inferior.

Mr. Gutleben's remarks caused Ms. Smith emotional distress, thereby intensifying her preexisting depression. The record reflects other causes for this depression. These include her physical condition, her limited financial circumstances,

the rape of one daughter, another daughter's substance abuse, the death of third daughter, and being the victim of a strong-armed robbery. In determining the appropriate damage award, I have considered that her depression was exacerbated, but not caused by, Mr. Gutleben's racial remarks.²⁶

I do not award her damages for emotional distress caused by her children being kept indoors. Because Mr. Gutleben was a convicted child molester, I find that Ms. Smith would have kept the children indoors even absent his propensity to make racial remarks. I base this conclusion on Dr. Jenkins-Monroe's testimony that she believed Ms. Smith to be a good care-provider who exercised good judgment in warning the children to keep away from "someone with that particular background." Tr. 3, pp. 49-53.

I have apportioned the damage award between Respondents. As co-owner of the properties during the summer of 1992, Vicki Gutleben is vicariously liable only for the one statement Paul Gutleben made that summer to Dana Summers that the "little nigger kids next door" were drawing with crayons on the back wall of 1917. Paul Gutleben is solely liable for damage resulting from the statement he made in the presence of Ms. Smith that the "little nigger kids next door" painted his son's car, as well as for the statements made to OB.

Accordingly, Vicki and Paul Gutleben are jointly and severally liable to Mary Betton-Smith in the amount of \$5,000 for the emotional distress inflicted by Paul Gutleben. Paul Gutleben is solely liable to Mary-Betton Smith for an additional \$10,000 for the emotional distress he inflicted on her from his statements to her and her children. This includes the distress she suffered in not being able to explain these statements to her children or to deal with the effects on the children.

Obidiah Videau

²⁶Dr Jenkins-Monroe testified that Ms. Smith's "chronic" depression has been "intensified" by Mr. Gutleben's remarks. Tr. 2, pp. 181, 228-29.

Obidiah Videau, was 10 or 11 years old at the time Mr. Gutleben called him a "nigger" and a "nappy-headed kid." The record demonstrates that these statements had a severe effect on his self-esteem and interfered with his sense of security at home.

OB was old enough to be able to distinguish the instances when his misconduct caused Mr. Gutleben to yell at him from instances in which Mr. Gutleben used unprovoked racial slurs to belittle and humiliate him. The slurs concerned his race, something which he cannot change. The effect of these slurs on his self-esteem is amply demonstrated by the evidence. He was unwilling to discuss these slurs openly. OB believed that white people would think poorly of him if he discussed the slurs with them. He was reluctant to describe them to his school counsellor or to testify about them in the court room. He bites his nails only when talking about Mr. Gutleben. Finally, his responses to the sentence completion test administered by Dr. Jenkins-Monroe demonstrate that Mr. Gutleben was nearly as much a concern to him as his abandonment by his father. C. P. Ex. 18D. These events also turned his home into a frightening, threatening place. He had nightmares about Mr. Gutleben threatening his family.²⁷

I recognize that OB suffered emotional distress arising from other factors including his abandonment by his father, his mother's drug use, and other matters discussed in an *in camera* session. However, I am persuaded by the testimony of

Dr. Jenkins-Monroe, as well as his school counselor, Mr. Peters, that OB's reaction to Mr. Gutleben was more intense than the other negative factors in his life, with the exception of his father's abandonment.

Because these statements were made at the end of 1992, after Paul and Vicki Gutleben became sole owners, respectively, of 1917 and 1919 Stanford, Mr. Gutleben is solely liable for the damage resulting from these statements. In consideration of these factors, Paul Gutleben is solely liable in the amount of \$25,000 for the emotional distress he inflicted upon Obidiah Videau.

Teala Holmes

Teala Holmes was 6 or 7 years old when she overheard Paul Gutleben calling her brother a "nigger" and a "nappy headed kid." When examined by Dr. Jenkins-Monroe, she had a "very negative" concept of her racial identity. Based on the testimony of Dr. Jenkins-Monroe, the responses that Teala gave during Dr. Jenkins-Monroe's interview with her, and Teala's sentence completion test, I conclude that Mr. Gutleben's remarks, at least in part, caused Teala's negative self-image. See

²⁷Dr. Jenkins-Monroe testified that Mr. Gutleben was threatening to OB, not only because he made racial remarks, but also because he was a child molester. She stated that he was unable to compartmentalize these two sources of fear. Tr. 2, pp. 197-98. I have considered this in my award of damages.

Tr. 2, pp. 207-08.

Dr. Jenkins-Monroe testified that to Teala, Mr. Gutleben was a powerful figure, whom she wanted to please. Tr. 2, pp. 204-05. During her interview with Dr. Jenkins-Monroe, Teala stated that, if she could, she would change Mr. Gutleben into a "nigger" so that he would understand that her family members' race is not their fault. C.P. Ex. 19A. In her sentence completion test, Teala said that she would do anything she could to forget the time she was called a "nigger." C.P. Ex. 19B. According to Dr. Jenkins-Monroe, she "internalized" Paul Gutleben's racial slurs and, indeed, at the time she was interviewed, believed herself to be a "nigger." Tr. 2, pp. 202-07, 217.

The record demonstrates that Mr. Gutleben's remarks had a severe, negative impact on the development of a very young, defenseless child. Dr. Jenkins-Monroe acknowledged that teasing at school may have contributed to Teala's lack of self-esteem and I have considered this testimony in determining the amount of the damage award. Tr. 2, p. 208.

Again, because the Charging Party did not prove when Mr. Gutleben made the racial slurs to OB in the presence of Teala, I must assume that Paul made them after Paul and Vicki became sole owners, respectively, of 1917 and 1919 Stanford. In consideration of the emotional damage Paul Gutleben inflicted on Teala Holmes, he is solely liable in the amount of \$20,000.

Alania Kollasch

The Charging Party seeks \$25,000 in damages for Alania's emotional distress. Alania did not testify and there is no other evidence concerning the circumstances surrounding the instance(s) when she overheard Mr. Gutleben use the term "nigger." Consequently, the Charging Party failed to prove that any such statements were intended to interfere with her enjoyment of her residence because of her race. Accordingly, I award her no damages.

Future Counseling Expenses and Inconvenience Damages

The Charging Party seeks future medical expenses of \$3,900 for Ms. Smith and of \$2,600 each for Teala and Alania for therapy sessions to remedy the effects of the emotional distress caused by Respondent. Mr. Gutleben's actions caused Ms. Smith's and Teala's emotional distress, and therefore Complainants are entitled to therapy costs to address that distress. Based on Dr. Jenkins-Monroe's testimony, I find that the expenses sought are reasonable and I award the costs as damages. Tr. 2, pp. 226-29.

Respondents Paul and Vicki Gutleben are jointly and severally liable for \$1,300 of Ms. Smith's expenses. Paul Gutleben is solely liable for \$2,600 of her expenses. Paul Gutleben is solely liable for \$2,600 for Teala's expenses. Because the Charging Party failed to prove that Mr. Gutleben violated Alania's rights under the Act, she is not entitled to damages.

The Charging Party also seeks damages for inconvenience to the other minor Complainants because they were not allowed to play outside while Mr. Gutleben was on the premises. Because I found that Ms. Smith would not have purposely exposed the children to a convicted child molester, even absent racial comments, I award no damages for inconvenience.

Civil Penalties

To vindicate the public interest, the Act also authorizes an administrative law judge to impose civil penalties upon respondents who violate the Act. 42 U.S.C. § 3612 (g)(3)(A); 24 C.F.R. § 104.910(b)(3). Determining an appropriate penalty requires consideration of five factors: (1) the nature and circumstances of the violation; (2) the goal of deterrence; (3) whether a respondent has previously been adjudged to have committed unlawful housing discrimination; (4) a respondent's financial resources; and (5) the degree of a respondent's culpability. See, *HUD v. Jerrard*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,005, 25,092 (HUDALJ Sept. 28, 1990); *HUD v. Blackwell*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,001, 25,014-15 (HUDALJ Dec. 21, 1989), *aff'd*, 908 F.2d 864, 872-73 (11th Cir. 1990); House Comm. on the Judiciary, *Fair Housing Amendments Act of 1988*, H.R. Rep. No. 711, 100th Cong., 2d Sess. at 37 (1988). The Charging Party seeks imposition of civil penalties against Ms. Gutleben in the amount of \$20,000 and against Mr. Gutleben in the amount of \$50,000.²⁸

Nature and Circumstances of the Violation and Culpability

The nature and circumstances of this violation merit the maximum civil penalty against Mr. Gutleben. His racial remarks to OB in the presence of Teala, and his remarks in the presence of Ms. Smith, were flagrant, without justification and were intended to force Ms. Smith and her family to leave the premises. Like the defendant in *Woods-Drake v. Lundy*, he "expressed his racial animus in the crudest terms," consistently referring to Complainants as "niggers." *Woods-Drake*, 667 F.2d at 1203. His remarks caused significant damage to Ms. Smith, OB, and Teala. However, Ms. Gutleben's statement to Ms. Smith that she had not intended to rent to a family with children and her issuance of the May 2, 1992, eviction notice were not serious because

²⁸The Charge of Discrimination does not put Respondents on notice that the Charging Party seeks more than \$10,000 in civil penalties against each Respondent. In a footnote in its brief, the Charging Party seeks to amend the Charge to permit it to seek the maximum civil penalty against each Respondent for each violation. I deny the Motion based on my Order of January 7, 1994. See *supra* note 2. Even if I granted the Motion, the Act does not permit more than a \$10,000 civil penalty against each Respondent unless they have been "adjudged to have committed any prior discriminatory housing practice." 42 U.S.C. § 3612(g). See also *HUD v. Johnson*, 2 Fair Housing-Fair Lending (P-H) ¶ ____ (HUDALJ July 26, 1994); *HUD v. Ocean Parks Condominium Ass'n Inc.*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,054 at 25,527-58 (HUDALJ Aug. 20, 1993), *petition for review docketed*, No. 93-5058 (11th Cir. Sept. 28, 1993).

their effects were almost immediately curtailed by her rescission of the eviction notice. Although she is vicariously liable for Mr. Gutleben's racial remark in the summer of 1992, she was in the process of divorcing her husband when he made this remark, and there is no demonstration that she had any control whatsoever over his behavior.

Deterrence

Mr. Gutleben still owns 1917 Stanford. Accordingly, there is a need to insure that he is deterred from committing further acts of housing discrimination. Substantial penalties send the message to violators that housing discrimination is not only unlawful, it is expensive. *Jerrard*, 2 Fair Housing-Fair Lending at ¶ 25,092. Because of the blatant, unmitigated nature of these violations, a maximum civil penalty is appropriate to deter Mr. Gutleben and other housing providers from committing similar acts. Because

Ms. Gutleben immediately retracted her eviction notice of May 2, 1992, and had no power to prevent her husband's misconduct, the imposition of a civil penalty against her would not serve the goal of deterrence. Indeed, housing providers should be encouraged to take immediate action to correct their mistakes.

Lack of Previous Violations

There is no evidence that Respondent in the instant case has previously been found to have committed an unlawful discriminatory housing practice.²⁹ Consequently, the maximum civil penalty that may be assessed against each Respondent is \$10,000, pursuant to 42 U.S.C. § 3612(g)(3)(A) and 24 C.F.R. § 104.910(b)(3)(i)(A).

Respondents' Financial Circumstances

Evidence regarding Respondents' financial circumstances is peculiarly within their knowledge, so they have the burden of introducing such evidence into the record. If they fail to produce credible evidence militating against assessment of a civil penalty, a penalty may be imposed without consideration of their financial circumstances. See *Campbell v. United States*, 365 U.S. 85, 96 (1961); *Jerrard*, 2 Fair Housing-Fair Lending at ¶ 25,092; *Blackwell*, 2 Fair Housing-Fair Lending at ¶ 25,015. Respondents have made no assertion that they are unable to pay a civil penalty, nor is there evidence that

²⁹The Charging Party contends that Mr. Gutleben's consent to a Stipulation and Order for Entry of Judgment in his child molestation proceeding before the Superior Court of California for the County of Alameda constitutes a prior violation of the Act. Indeed, the fourth cause of action of the Plaintiff's Amended Complaint alleges violations of the Act. However, the Stipulation and Order states that Mr. Gutleben admits to the first and sixth causes of action. It is silent regarding the fourth. Accordingly, the Charging Party's contention lacks merit and I do not decide whether consent to a stipulation admitting violations of the Act in a state court proceeding constitutes a judgment "of a prior discriminatory housing practice." 42 U.S.C. §3612 (g)(3)(A); 24 C.F.R. § 104.910(b)(3)(i)(A).

the imposition of the maximum civil penalty would cause them an undue hardship.

After consideration of these factors, I determine that imposition of a \$10,000 penalty is warranted against Mr. Gutleben. However, I decline to award a civil penalty against Ms. Gutleben.

Injunctive Relief

An administrative law judge may order injunctive or other equitable relief to make a complainant whole and protect the public interest in fair housing. 42 U.S.C. § 3612 (g)(3). The purposes of injunctive relief include the following: eliminating the effects of past discrimination, preventing future discrimination, and positioning 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. 1979), *cert. denied*, 445 U.S. 905 (1980); see also *Blackwell*, 908 F.2d at 874. Once a judge has determined that discrimination has occurred, he or she 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) (citations omitted). The injunctive provisions of the following Order serve all of these purposes.

Conclusion

The preponderance of the evidence shows that Respondents John Paul and Violet M. Gutleben discriminated against Complainants on the basis of race and familial status in violation of 42 U.S.C. §§ 3604(b) and (c) and 24 C.F.R. §§ 100.50(b)(2) and (4), 100.65(a), and 100.75(a). The evidence further shows that Respondent John Paul Gutleben discriminated against Complainants Mary Betton-Smith, Teala Holmes, and Obidiah Videau on the basis of race, in violation of 42 U.S.C. § 3617 and 24 C.F.R. § 100.400. Complainants Mary Betton-Smith, Teala Holmes, and Obidiah Videau suffered actual damages for which they will receive compensatory awards. Further, to vindicate the public interest, injunctive relief will be ordered, as well as a civil penalty against Respondent John Paul Gutleben.

ORDER

It is hereby ORDERED that:

1. Respondents John Paul and Violet M. Gutleben are permanently enjoined from discriminating with respect to housing because of race or familial status. Prohibited actions include, but are not limited to:

- a. refusing or failing to rent a dwelling, or refusing to negotiate for the

rental of a dwelling, to any person because of race or familial status;

b. otherwise making unavailable or denying a dwelling to any person because of race or familial status;

c. discriminating against any person in the terms, conditions, or privileges of the rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race or familial status;

d. making, printing, or publishing, or causing to be made, printed, or published, any notice, statement, or advertisement with respect to the rental of a dwelling that indicates any preference, limitation, or discrimination based on race or familial status;

e. coercing, intimidating, threatening, or interfering with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by the Fair Housing Act;

f. retaliating against Complainants Mary Betton-Smith, Clifton Smith, LaQuis McMillan, DeMille Perry, Alania Kollasch, Teala Holmes, and Obidiah Videau or anyone else for their participation in this case or for any matter related thereto.

2. Respondents their agents and employees shall refrain from using any lease provisions, rules, and regulations, and other documentation or advertisements, that indicate a discriminatory preference or limitation based on race or familial status.

3. Consistent with 24 C.F.R. Part 109, Respondents shall display the HUD fair housing logo and slogan in all advertising and documents routinely provided to the public. Consistent with 24 C.F.R. Part 110, Respondents shall display the HUD fair housing poster alongside any "for rent" signs posted in connection with any dwellings that they own, manage, or otherwise operate, as of the date of this Order and subsequent to the entry of this Order.

4. Respondents shall institute internal record-keeping procedures, with respect to any operation they own and any other real property acquired by them that are adequate to comply with the requirements set forth in this Order. These will include keeping all records described in paragraph 5 of this Order. Respondents will permit representatives of HUD to inspect and copy all pertinent records at any and all reasonable times and upon reasonable notice. Representatives of HUD shall endeavor to minimize any inconvenience to Respondents occasioned by the inspection of such records.

5. On the last day of every third period beginning, 30 days after this decision becomes final (or four times per year), and continuing for three years from the date this

Order becomes final, Respondents shall submit reports containing the following information to HUD's San Francisco Office of Fair Housing and Equal Opportunity, 450 Golden Gate Avenue, San Francisco, California 94102 provided that the director of that office may modify this paragraph of this Order as he or she deems necessary to make its requirements less, but not more, burdensome:

a. a duplicate of every written application, and a log of all persons who applied for occupancy at any of the properties owned, operated, managed, or otherwise controlled in whole or in part by Respondents indicating the race and familial status of each applicant, whether the applicant was rejected or accepted, the date on which the applicant was notified of acceptance or rejection, and, if rejected, the reason for such rejection. Respondents shall maintain the originals of all applications described in the log.

b. A list of vacancies at properties owned, operated, managed, or otherwise controlled in whole or in part by Respondents during the reporting period, including: the address of the unit, the date the tenant gave notice of an intent to move out, the date the tenant moved out, the date the unit was rented again or committed to a new rental, the date the new tenant moved in, and the race and familial status of the former and new tenant.

c. a copy of all rules, regulations, leases, or other documents provided to or signed by current or new tenants or applicants.

6. Within forty-five (45) days of the date on which this Order becomes final, Respondents John Paul and Violet M. Gutleben shall pay \$5,075 in actual damages to Mary Betton-Smith to compensate her for emotional distress; Respondent John Paul Gutleben shall pay \$10,000 in actual damages to Mary Betton-Smith to compensate her for emotional distress; Respondent John Paul Gutleben shall pay \$25,000 in actual damages to Obidiah Videau to compensate him for emotional distress; and Respondent John Paul Gutleben shall pay \$20,000 in actual damages to Teala Holmes to compensate her for emotional distress.

7. Within forty-five (45) days of the date on which this Order becomes final, Respondents John Paul Gutleben and Violet M. Gutleben shall pay \$1,300 to Mary Betton-Smith to compensate her for the cost of counselling; Respondent John Paul Gutleben shall pay \$2,600 to Mary-Betton Smith to compensate her for the cost of counselling; and Respondent John Paul Gutleben shall pay \$2,600 to Teala Holmes to compensate her for the cost of counselling.

8. Within forty-five (45) days of the date on which this Order becomes final, Respondent John Paul Gutleben shall pay a civil penalty of \$10,000 to the Secretary of

HUD.

This Order is entered pursuant to 42 U.S.C. § 3612 (g)(3) and 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 of HUD within that time.

WILLIAM C. CREGAR
Administrative Law Judge

Dated: August 15, 1994.

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION AND ORDER issued by WILLIAM C. CREGAR, Administrative Law Judge, in HUDALJ 09-92-1893-1, were sent to the following parties on this 15th day of August, 1994, in the manner indicated:

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