

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
Bobbie Burris,

Charging Party,

and

Bobbie Burris,

Complainant/Intervenor,

v.

Jess Aylett, Barbara Aylett, and
William Justin Memmott,

Respondents.

HUDALJ 08-90-0283-1

Decided: October 21, 1993

Andre G. Pineda, Esquire
For the Secretary

Kevin S. Reed, Esquire
Kerry Alan Scanlon, Esquire

For the Complainant

Larry S. Jenkins, Esquire
For the Respondents

Before: Paul G. Streb
Administrative Law Judge

INITIAL DECISION AND ORDER ON REMAND

STATEMENT OF THE CASE

On June 23, 1993, the Designee of the Secretary of the Department of Housing and Urban Development ("HUD" or "the Government") "set aside" the Initial Decision and Order in

this matter and remanded the case for further proceedings. This matter originated on September 12, 1990, when Bobbie Burris ("the Complainant") filed a complaint alleging that she had been discriminated against on the basis of race and color while attempting to rent a home. The complaint was filed and processed pursuant to the Fair Housing Act, as amended, 42 U.S.C. § 3601 *et seq.* ("Fair Housing Act" or "Act").

HUD investigated the complaint, and after deciding that there was reasonable cause to believe that discriminatory acts had taken place, issued a charge against Jess and Barbara Aylett ("Respondents") on September 30, 1992. The charge was subsequently amended to add allegations and to add William Justin Memmott as a Respondent. On November 24, 1992, the Complainant's motion to intervene as a party was granted. A hearing was held in Salt Lake City, Utah on January 27, 1993. The record closed on March 30, 1993, upon the receipt of briefs from all parties.

On May 24, 1993, an Initial Decision and Order was issued dismissing all charges against the Respondents. On June 7, 1993, the Government filed a motion with the Secretary to vacate and reverse the Initial Decision and to grant the relief requested. Complainant filed a similar motion on June 11, 1993. After the filing of additional pleadings, the Secretary's Designee issued an Order ("the Remand Order" or "RO") on June 23, 1993, "setting aside" the Initial Decision and remanding the case with instructions to "allow the testimony of [HUD Investigator] Jeffrey Frant and to reevaluate the credibility of the witnesses after hearing Mr. Frant's testimony." On July 20, 1993, the hearing was reconvened in Salt Lake City for the taking of Mr. Frant's testimony and for closing arguments. The record closed on August 2, 1993, upon receipt of the hearing transcript.

BACKGROUND

Jess and Barbara Aylett are married and reside in Sandy, Utah. Tr. 332-33.¹ William Justin Memmott is the 21-year-old son of Ms. Aylett. He is in the Air Force and resides in Monterey, California, but he resided with the Ayletts in August 1990. Tr. 217-18. The Ayletts and Mr. Memmott are White persons. In March 1989, Mr. Aylett executed a quitclaim deed granting to Mr. Memmott a duplex ("the duplex") located at 2384 South 1480 West, West Valley City, Utah. Ex. R-8. Mr. Aylett holds the mortgage on the duplex and manages it as a rental property. Tr. 256, 263-64, 311.

Bobbie Burris, who is a Black woman, resides in Salt Lake City, Utah. In August 1990, she was seeking to rent a home in West Valley City. On or about August 22, 1990,

¹ The following abbreviations are used in this decision: "Tr." for "Transcript of initial hearing"; "R Tr." for "Transcript of hearing on remand"; "Ex. G" for "Government's Exhibit"; "Ex. R" for "Respondents' Exhibit."

she noticed a "for rent" sign affixed to the duplex. Tr. 56-59. After receiving a tour of the duplex from a tenant, Ms. Burris called Mr. Aylett and expressed her interest in renting it. During their discussion of matters concerning the rental of the duplex, she told him that she was in a rent-subsidy program, and that he would have to sign some documents required by the program. Mr. Aylett told her that she should drop the documents off at his home, and that he would complete them. Tr. 59-60, 258. He did not mention this matter to his wife. Tr. 259.

Following this conversation, Ms. Burris drove to the Aylett home with her 21-year-old daughter, Stormie Manzanares. Ms. Burris explained to Ms. Aylett that she wanted to rent the duplex, and that she had brought rent-subsidy documents for Mr. Aylett to complete. Mr. Aylett was not at home, and Ms. Burris expressed a need to have the documents completed quickly so she could return them to the local housing authority. Consequently, Ms. Aylett invited Ms. Burris into the house and completed the documents for her. Tr. 61-67, 334-37. During their pleasant one-hour visit, Ms. Aylett and Ms. Burris realized that they had gone to high school together 20 years ago, and they reminisced about school and their classmates. Tr. 78. Ms. Manzanares was present during part of the conversation, but she returned to the car after a while and was not present when her mother left the house. Tr. 79. Mr. Memmott was present during part of the conversation, including the time when Ms. Burris departed. Tr. 110.

After her visit with Ms. Aylett, Ms. Burris delivered the completed documents to the local housing authority and arranged for an inspection of the duplex, which was conducted on September 6, 1990. Tr. 84, 90-91. Because numerous repairs were needed, the duplex failed the inspection. Ms. Burris notified Mr. Aylett and asked him to make the repairs. Tr. 85-88. Subsequently, Joe Trujillo, a light-skinned person whose race was not identified, applied to rent the duplex. Mr. Aylett accepted Mr. Trujillo's offer to rent the duplex with a reduced deposit in return for cleaning it and making some repairs. Tr. 83-92, 182-87. On September 9, 1990, when Ms. Burris called Mr. Aylett to ask him about the status of the repairs, he told her that he had rented the duplex to someone else. Tr. 83, 92.

ALLEGATIONS IN THE CHARGE

The charge alleged that, as Ms. Burris was leaving the Aylett home on August 22, Ms. Aylett told her that, "My husband will never rent to a Black person." The charge alleged further that Ms. Aylett also told Ms. Burris that, despite her race and color, Ms. Aylett would recommend her as a tenant to her husband.

The Government contended that Ms. Aylett's statement that her husband would never rent to a Black person constitutes a violation of 42 U.S.C. § 3604(c), which prohibits, among other things, the making of statements concerning the rental of a

dwelling that indicate any preference, limitation, or discrimination based on race or color. The Government contended that Ms. Aylett's statement that she would recommend Ms. Burris despite her race shows that Ms. Burris, because of her race and color, needed a special recommendation from Ms. Aylett to rent the duplex. The Government contended that the need for such a recommendation violates 42 U.S.C.

§ 3604(b), which prohibits, among other things, discrimination on the basis of race and color in the terms and conditions of rental.²

THE INITIAL DECISION

In the Initial Decision, I concluded that the Government did not meet its burden to prove the allegations in the charge by a preponderance of the evidence. In brief, the evidence presented at the initial hearing concerning the alleged statements was as follows. According to Ms. Burris, Ms. Aylett made the alleged discriminatory statements to her "out of the blue" while they stood at the door immediately prior to her departure. Ms. Burris testified that Ms. Aylett told her that, "My husband would never rent to Black people," but that she "would talk to him" and "make things okay." Tr. 80, 126. Her testimony was supported in part by Ms. Manzanares, who testified that, when her mother returned to the car, she said Ms. Aylett had stated that her husband would not rent to Black persons. Tr. 138. Ms. Aylett denied making the statements. Tr. 339. Her testimony was supported by Mr. Memmott, who was the only eyewitness to the conversation, and who testified that Ms. Aylett did not make the statements. Tr. 110, 136-37, 223-25; Ex. G-10, 11.

Based on my judgment concerning the credibility of the witnesses, I found that the testimony of Ms. Burris and Ms. Manzanares was not more believable than that of Ms. Aylett and Mr. Memmott. I rejected the Government's following arguments, which it offered in an attempt to show that Ms. Aylett had a reason to make the alleged statements. I rejected the Government's assertion that Ms. Aylett's making of the alleged statements was evidenced by racial bias on the part of the Ayletts. I found that the Government did not show that such bias existed, or that Ms. Aylett had any reason to believe that her husband would never rent to Black persons. In this regard, I pointed out that Mr. Aylett had rented properties to three Black families, and that, except for Ms. Burris, no other Black persons had applied to become tenants. Initial Decision at 4-6.

² Complainant contended at the outset of the proceeding that Respondents also discriminated against her on the basis of race and color in violation of 42 U.S.C. § 3604(a) by refusing to rent the duplex to her. As discussed below under the heading "Scope Of Issues," I did not consider that allegation because it was not included in the charge.

I rejected Complainant's contentions that because of her race and color, the Ayletts failed to give her an application, failed to repair the duplex, and denied her the opportunity to place a deposit to hold the duplex. I also rejected Complainant's contention that Mr. Aylett's membership in the Mormon Church showed that he was biased against Black persons. Initial Decision at 6-7.

I found that Ms. Aylett's actions both during and following Ms. Burris' visit were inconsistent with the notion that she made the alleged discriminatory statements. I concluded that Ms. Aylett had no reason to make the alleged statements. I found no merit to Complainant's argument that Ms. Aylett's making of the discriminatory statements was shown by the fact that Ms. Burris developed psychological problems as a result of this matter. I pointed out that the cause of those problems was not clearly identified as Ms. Aylett's alleged statements. Rather, the problems resulted mainly from Ms. Burris' inability to rent the duplex, which she believed was racially motivated, and which resulted in her moving into unsatisfactory housing.³ Initial Decision at 7.

THE REMAND ORDER

The Remand Order "set aside" the Initial Decision and remanded the case with instructions to "allow the testimony of [HUD Investigator] Jeffrey Frant and to reevaluate the credibility of the witnesses after hearing Mr. Frant's testimony." RO at 7. The Remand Order stated that I erred by sustaining Respondents' objection to Complainant's request to extend the hearing into a second day so she could present testimony from Mr. Frant, who was not present, concerning his interview with Respondents. RO at 7; Tr. 327-31. Complainant asserted that Ms. Aylett made statements during that interview showing both that the Ayletts were biased against Black persons and that Mr. Aylett had decided not to rent to Black persons because of problems with previous Black tenants. Mr. Frant's notes of that interview, which were admitted into evidence, showed that she had made such statements to him. Ex. G 24. Ms. Aylett denied making those statements. Tr. 368-69.

The Remand Order stated that by not permitting Mr. Frant to testify, I was "not able to observe his demeanor and therefore make a conclusion about his investigation of the case," including the "trustworthiness of the report" and the "reliability of [his notes]." RO at 5. The Remand Order stated that the following factors should be considered in determining the trustworthiness of the report: the timeliness of the investigation; the skill and experience of the investigator; whether the investigator held a hearing; and the investigator's impartiality. RO at 6.

FINDINGS ON REMAND

³ In view of my conclusions in the Initial Decision, I found it unnecessary to address the Government's arguments that Mr. Aylett is liable for his wife's actions because she was his agent, and that Mr. Memmott is liable because he owns the duplex. In view of my conclusions in the present decision, it remains unnecessary to address those arguments.

Statements During Interview

The Government did not prove by a preponderance of the evidence that Ms. Aylett made statements during the interview showing that she admitted the allegations in the charge, that the Ayletts were biased against Black persons, or that Mr. Aylett had decided not to rent the duplex to Black persons because of problems with previous Black tenants. The notes in question, which set forth Ms. Aylett's description of her conversation with Complainant, state in pertinent part as follows:

CPL [Ms. Burris] stayed for a long time, partly because R-wife [Ms. Aylett] & CPL discovered they were both in the class of 1969 at West High School in SLC [Salt Lake City]. They talked about mutual acquaintances in H.S. They talked about R-wife's experiences as a landlord in West Valley City. CPL wanted to know if R's [Respondents] would rent to Blacks. How would they feel about renting to Blacks. CPL said she had searched extensively for a good unit and had looked at a lot of places, mostly dumps. She was very excited about the high quality and amenities of R's 3BR unit. R-wife said that once they had a place that was bug-infested because of the renters, who were Black; that most of the Blacks R has rented to were from "back East," not from "around here" and that they were different, from Ghettos, bringing with them more problems. Some trashed their places. R-wife stated that, although they have had problems with Blacks in the past, [that] wouldn't affect R's decision whether to rent to CPL. CPL said that she would be an excellent tenant. R-wife told CPL that, "Yes, we've rented to many Blacks in the past." R-wife stated that her husband had not been around Blacks much. R-wife assure[d] CPL that it would be no problem; that she would give CPL a high recommendation because she had gone to school with CPL. R-wife speculated that CPL took what was said out of context and misconstrued it. R-wife denies saying anything about her husband never renting to Blacks.

Ex. G 24 at 2-3. Ms. Aylett testified at the initial hearing that she did not make the racially-charged statements attributed to her in the notes. Tr. 368-69. Ms. Aylett did not deny that she had related her conversation with Ms. Burris to Mr. Frant; she testified that the notes were simply inaccurate. Tr. 371. She recalled that when Ms. Burris asked her if they had rented to Black persons, she responded that they had rented to three Black families from "back East." Those families were from New Jersey, and Ms. Aylett testified credibly that she "[did not] even know if they have ghettos in New Jersey."

Tr. 369. Ms. Aylett's testimony is consistent with Ms. Burris' testimony that Ms. Aylett had said something about "Black people back East." Tr. 80-81. The Ayletts testified that one of their Black tenants was behind on his rent once and another caused minor damage to an apartment. However, Mr. Aylett testified that it was not unusual to have such problems with tenants of any race; and although he had evicted 10 tenants, none of them were Black. Tr. 265-68, 345; Ex. G 33 at 141-42.

Ms. Aylett did not recall saying that she told Ms. Burris that she would give her a recommendation. However, she denied that she made such a statement in the manner alleged in the charge, namely, that she stated that her husband will not rent to Black persons, but she would recommend Ms. Burris despite her race and color. Tr. 370-71. In fact, the notes themselves reflect that Ms. Aylett "denie[d] saying anything about her husband never renting to Blacks." Ex. G 24 at 3. Any statement by Ms. Aylett that she would recommend Ms. Burris as a tenant would be insignificant unless it had been preceded by a statement that her husband did not rent to Black persons. As discussed above, the gist of the Government's argument was that Ms. Burris needed a special recommendation because of Mr. Aylett's policy not to rent to Black persons.

Ms. Aylett's deposition testimony was consistent with her hearing testimony. Although Ms. Aylett did not question Mr. Frant's truthfulness at her deposition, she clearly questioned the accuracy of his notes. Ex. G 34 at 169. She was not asked directly if she made the statements in question, but when asked if she remembered making those statements, she responded negatively. Ex. G 34 at 166-67. Moreover, she stated that she did not understand why the notes contained those statements.⁴ Ex. G 34 at 169.

If, as the Government contends, the notes represent Ms. Aylett's admission to Mr. Frant of things she had said to Ms. Burris, it is likely that Ms. Burris would have remembered if Ms. Aylett had made racially-charged statements involving Blacks from "Ghettos" who had "bug-infested" places and who "trashed their places." However, she did not testify that Ms. Aylett made such statements; the only thing that she stated concerning that part of the conversation was that Ms. Aylett said something about "Black people back East." Tr. 80-81. Thus, the absence of testimony from Ms. Burris that Ms. Aylett made the statements in question to her lends support to Ms. Aylett's denial that she made those statements to Mr. Frant.

Mr. Frant's recollection of his interviews with the witnesses during this investigation was extremely limited. Even when aided by looking at his notes of the interviews, he had virtually no memory of the statements of the witnesses. Tr. 17, 19, 30-33. He did not recall anything that was said during his interview with the Ayletts. Tr. 31, 81. Thus, the only evidence that Ms. Aylett made the statements is the notes themselves.

Trustworthiness Of Notes

The Government has not demonstrated that the notes are sufficiently trustworthy to support a finding that Ms. Aylett made the statements in question. Mr. Frant was a very credible witness. Based on my observation of his demeanor, he testified in a straightforward and sincere

⁴ Mr. Aylett's testimony does not assist in resolving the conflict in the evidence. He testified at the hearing that he did not remember what was said during the interview with Mr. Frant. Tr. 292-94. He was not asked during his deposition if the notes in question were accurate. Ex. G 33.

manner. He completed the investigation in a timely manner. He did not hold an adversarial hearing because that is not part of HUD's investigatory process. It is undisputed that Mr. Frant is a highly qualified investigator. R Tr. 5-14. The Remand Order pointed out that, as an investigator, he was the "least biased" witness. RO at 4, 5.

However, the following factors, when viewed in their entirety, raise doubt as to whether Ms. Aylett made the statements in question in the notes. The interview was not tape-recorded, and the Ayletts were not asked to indicate their agreement with the accuracy of the notes by signing them. Separate interviews were not conducted with each of the Ayletts. Although Mr. Frant believed that his notes were accurate, he stated that the note-taking process was "extremely difficult" in view of the need to be attentive to the interviewees. R Tr. 80.

Further, the notes that contain the above quotation were not the same notes that Mr. Frant made during the interview. During the interview, Mr. Frant took "raw" notes, which were not offered into evidence. He later prepared the "formal" notes from which the above quotation is taken. He did not remember preparing the "formal" notes. He did not remember how long after the interview he waited before reviewing the "raw" notes that he took in longhand at the interview and preparing the "formal" notes that were contained in the investigative report. However, he believed that he accomplished that task within two days in accordance with his "standard practice." The "formal" notes include statements from his "raw" notes and additional matters from his recollection that he was unable to write down at the interview. R Tr. 55, 66, 81-82, 100.

Most of the narrative is in Mr. Frant's own words. R Tr. 65. He usually puts quotation marks around words that he is certain were said by an interviewee. However, the only words that he was certain were uttered by Ms. Aylett were those in quotation marks -- "back east", "around here", and "Yes, we've rented to many blacks in the past." R Tr. 64, 66. He did not recall if any of the other statements attributed to her in the notes were her exact words. R Tr. 85-86. If Ms. Aylett had made racially-charged statements involving Blacks from "ghettos" who had "bug-infested" places, and who "trashed their places," it is likely that Mr. Frant would have placed quotation marks around such highly significant remarks. However, he did not do so.

Mr. Frant exhibited some confusion concerning Ms. Aylett's statements when preparing his "formal" notes. He separated, by nearly 20 lines, what purports to be a question that Ms. Burris had asked Ms. Aylett -- "CPL wanted to know if R's would rent to blacks" -- with the response that Ms. Aylett supposedly gave Ms. Burris -- "R-wife told CPL that, `Yes, we've rented to many blacks in the past.'" He later drew a line on the page to connect the question and the answer. He could not explain how that happened. R Tr. 81-82.

Mr. Frant's testimony raises a question as to whether certain statements he made in the notes really mean what they appear to mean. Complainant had argued that the notes showed that Ms. Aylett believed that, based on bad experiences when renting to Black tenants, her husband had decided not to rent to Black persons again. Certain statements in the notes appear to support this argument. In this regard, the notes state that, "R-wife said that once they had a place that

was bug-infested because of the renters, who were Black;" and "R-wife stated that, although they have had problems with Blacks in the past, [that] wouldn't affect R's decision whether to rent to CPL." Ex. G 24 at 2-3. However, Mr. Frant testified that the notes did not deal with whether the Ayletts had had problems with Black tenants; rather, they reflected Ms. Aylett's general comments about her opinion of Black persons. R Tr. 34-35. Thus, his testimony is inconsistent with the apparent meaning of his notes.

Finally, there was a significant omission in Mr. Frant's investigation in this case -- he did not interview Mr. Memmott despite the fact that he was both a Respondent and an important witness. Ms. Burris' September 12, 1990 complaint to HUD identified Mr. Memmott as a Respondent. Ex. G 8. Mr. Frant admitted that he knew that Mr. Memmott was a Respondent, and that he did not interview him. R Tr. 57-58. Mr. Frant did not assert that he was unable to contact Mr. Memmott because he was in the military in California. Rather, Mr. Frant asserted that there were many issues in the case, and he was taking a "shortcut" by not interviewing Mr. Memmott in order to get to the heart of the case. He asserted that investigators have discretion to decide who will be interviewed. R Tr. 58, 105.

However, Ms. Burris' September 12, 1990 complaint made specific reference to the alleged statement that "[Mr. Aylett] would never rent to a Black person." Ex. G 8. Thus, Mr. Frant knew or should have known that the alleged making of that statement was a crucial issue. Furthermore, although investigators have some discretion concerning who will be interviewed, there are statutory and regulatory requirements that statements be taken from both Respondents and the witnesses to the alleged discrimination. In this regard, the final investigative report must contain, among other things, "the names and dates of contacts with witnesses," "a summary and the dates of correspondence and other contacts with the aggrieved person and the respondent," and "a summary of witness statements." 42 U.S.C. § 3610(b)(5)(A)(ii) and (iv); 24 C.F.R. § 103.230(a)(2) and (4).

Furthermore, "[i]n conducting investigations ... [HUD] will seek the voluntary cooperation of all persons ... to take and record testimony or statements of persons reasonably necessary for the furtherance of the investigation." 24 C.F.R. § 103.215(a). Those requirements were not met in this case.⁵

Mr. Frant also asserted that he did not interview Mr. Memmott because Mr. Aylett had told him that Mr. Memmott knew nothing about the facts of the case. R Tr. 18, 58-59. However, the statutory and regulatory requirements to interview Respondents and witnesses contain no exceptions for Respondents who are not familiar with the facts in a case. Moreover, it should have been clear to Mr. Frant from his investigation, including his interview with Ms. Burris, that Mr. Memmott had witnessed the conversation in question. Ex. G-10, 11. He was aware that several of Ms. Aylett's children, including a 14-year-old and a 12-year-old, had witnessed the conversation, but he did not determine their identity. R Tr. 59, 60-61, 104. Although he interviewed Ms. Burris' daughter, he did not attempt to identify and interview the children of Ms. Burris who had witnessed the incident. R Tr. 103. Eventually, Mr. Frant admitted that he should have interviewed all of the children who witnessed the incident. R Tr. 104. Mr. Frant's action of taking a "shortcut" and not interviewing a Respondent and other persons who were present during the incident shows that he was in a hurry during the investigation, and that he did not conduct the investigation in a skilled manner. These factors raise doubt as to whether he correctly understood and accurately recorded Ms. Aylett's statements.

In sum, Respondents do not have the burden to prove that Ms. Aylett did not make the statements in question in the notes. Rather, the Government has the burden to prove that she made those statements. The notes are the only evidence that Ms. Aylett made them. Several factors concerning the notes raise doubt as to whether Ms. Aylett made the statements in question. Ms. Aylett credibly and consistently denied making the statements in question. Her testimony was supported in part by that of Ms. Burris. Clearly, the notes have less probative value than Respondents' evidence concerning this issue. Therefore, the Government has not shown by a preponderance of the evidence that Ms. Aylett made those statements.

⁵ Even in the absence of those requirements, basic fairness dictates that Respondents and known witnesses be interviewed. Although the principal purpose of the Fair Housing Act is to vindicate the rights of persons who suffer discrimination in housing, "persons against whom complaints are made are entitled to fair treatment as well." *Kelly v. Secretary of HUD*, No. 92-4064, 1993 WL 323647 at *7 (6th Cir. Aug. 27, 1993). HUD intends that fairness be an essential element of the investigatory process. HUD has stated in this regard that, "HUD is neutral with respect to the parties" during an investigation. 54 Fed. Reg. 3263 (Jan. 23, 1989) (HUD's explanatory comments accompanying publication of regulations implementing 1988 Fair Housing Amendments Act).

Credibility Of Witnesses

Regarding the instruction in the Remand Order to "reevaluate the credibility of the witnesses after hearing Mr. Frant's testimony," it is clear that the testimony of Mr. Frant provides no basis for credibility findings that are different from those in the Initial Decision.⁶ Those findings were as follows:

I found Mr. Memmott to be the most credible witness. He was the only eyewitness to the conversation. He was present at the door, standing only three feet away, when Ms. Aylett allegedly made the statements. Tr. 136-37, 223. He could hear everything that was being said by Ms. Burris and Ms. Aylett. Tr. 223. Ms. Burris acknowledged that he had witnessed the alleged discriminatory remarks. Tr. 110; Ex. G-10, 11. However, Mr. Memmott was certain that his mother did not say that her husband would never rent to a Black person. Tr. 223-25. He testified that, if Ms. Aylett had made the statement, he would have confronted her about it because of his strong views against discrimination. Tr. 224-25.

Although the Government contends that Mr. Memmott is not credible, I disagree. The inconsistencies in his testimony pointed out by the Government are not sufficiently serious to impair his credibility. Based on my observation of his demeanor, I found him to be very frank and sincere. Despite the fact that he is a Respondent and Ms. Aylett's son, I found his testimony to be very convincing. Thus, I place great weight on his eyewitness testimony that Ms. Aylett did not make the alleged statement.

I also found Ms. Aylett's denial that she made the statements to be credible. Although the Government contends that Ms. Aylett is not believable, I disagree. Based on my observation of Ms. Aylett's demeanor, I found her testimony to be very sincere. The inconsistencies in her testimony pointed out by the Government are not sufficiently serious to impair her credibility.

Although there was nothing in the demeanor of Ms. Burris and Ms. Manzanares that reflected adversely on their credibility, I did not find their demeanor to be superior to that of Mr. Memmott and Ms. Aylett. While I disagree with Respondents' assertion that Ms. Manzanares' testimony was impaired by inconsistencies in her testimony, she was neither an eyewitness nor an

⁶ The parties elicited testimony from Mr. Frant in addition to that described above, but it consisted essentially of his reading from his notes of interviews with other witnesses, which were already in the record. No evidence was presented that persuaded me to change my credibility findings.

independent one. Tr. 149-50; Ex. R-10 at 123. In sum, the testimony of Ms. Burris and Ms. Manzanares is simply not more believable than that of Ms. Aylett and Mr. Memmott.

ID at 4-5. It should be emphasized that Respondents do not have the burden to prove that they are more credible than Ms. Burris and her daughter, and that Ms. Aylett did not make the statements in question. Rather, the burden to prove by the preponderance of the evidence that Ms. Aylett made the statements in question is on the Government. *See United States v. Balistrieri*, 981 F.2d 916, 930 (7th Cir. 1992), *cert. denied*, 62 U.S.L.W. 3244 (U.S. 1993). It should also be emphasized that none of the inconsistencies in Respondents' testimony were serious and there were no inconsistencies in the testimony of Ms. Aylett and Mr. Memmott concerning the central issue in this case -- whether Ms. Aylett made the statements alleged in the charge.

The Government pointed out what might be considered a minor inconsistency concerning Mr. Aylett in that he testified at the hearing that he did not recall if Ms. Aylett told him that she had completed the rent-subsidy documents for Ms. Burris, but he testified at his deposition that she did tell him that she had completed those documents. Tr. 260, 319; Ex. G-33 at 136. The Government pointed out what might be considered a minor inconsistency concerning Ms. Aylett in that she testified during her deposition that she did not recall if she told her husband that Ms. Burris was Black, but she testified at the hearing that she did tell him that she was Black. Ex. G 34 at 109; Tr. 376.

The Government also referred to Ms. Aylett's testimony that her husband did not delegate any "management responsibilities" to her concerning the duplex, that she did not "want to have anything to do" with the rental properties, that she told her husband that she did not "want to be bothered" with them, and that she wanted to sell them. Tr. 333, 349, 386. The Government argued that this testimony was inconsistent with her testimony that she takes "delegation responsibility" such as cleaning the duplexes, placing signs on them, and being available in case prospective tenants want to look at them. Tr. 357. Although those actions may be inconsistent with her desire not to be bothered by the duplexes, she did not testify inconsistently concerning whether she performed such duties. It is obvious from the context of the question and answer that she intended to distinguish between "management responsibilities" and "delegation responsibilities." Tr. 356-57.

Even assuming for the sake of argument that Mr. Frant's testimony had an adverse impact on the Ayletts' credibility, I would still find that Ms. Aylett did not make the statements alleged in the charge. This is because Mr. Frant's testimony was unrelated to Mr. Memmott's eyewitness testimony that Ms. Aylett did not make the statements in question. In this regard, he described the alleged statement as "something huge and ugly." Tr. 234. He testified candidly and persuasively concerning the reasons he was certain that his mother did not make the statement:

[I]f she had said something like that, I would have said

something to her. I don't approve of that type of thing at all. I don't care who they are. There's no grounds for saying something like that to somebody at all. It's just wrong, period....

[I]'ve seen how cruel people can be to other people, and I have actually in school -- the area we live in is a really nice area. My parents have a big house, but they don't have a lot of money, and when I was growing up in school, we couldn't afford the type of clothes that everybody else was wearing, and so I didn't fit in, and I didn't like to play sports all that much. I wasn't

Mr. Football. And so I was kind of shunned. You know, I had to -- I couldn't be in one of their cliques because I didn't fit in. I didn't -- I didn't -- I didn't -- what's the word I'm looking for? I didn't fit into their social norms as they called them, the way they wanted everything to be.

And so I was ridiculed. Because of that, and I remember how that feels. Even to this day it's debasing, and from [that] and the other things, the other views I had before that, they're just set in concrete, my views and my opinions, and the things I've ascertained that are wrong morally that people shouldn't do, and that is that I don't care what this person may look like or what type of behavior -- well, not behavior, but you just can't base opinions on somebody by the way they look. It's just wrong.

Some people can't help the way they are. I don't -- I don't condone friends I have that make fun of handicapped people. I think that's wrong. It's disgusting, and I say things to them. And had my own mother said something like, "We don't rent to black people," I would have said something to her.

Tr. 224-25. Although Mr. Memmott's status as the son of the Ayletts must be considered in judging his credibility, that factor alone does not render him unbelievable. Although Mr. Memmott's status as a Respondent must also be considered, that status does not adversely affect his credibility any more than Ms. Burris' status as a Complainant adversely affects her credibility.

There is no merit to the Government's contention that Mr. Memmott should not be believed because of inconsistencies in his testimony. The Government made the following arguments in this regard. It asserted that Mr. Memmott testified on cross-examination that he was not aware of the basic nature of the claim in this case until December 1992 when:

I was basically told that there was a -- what do you call it? -- suit for discrimination, but in 1990 I had no clue at all about any of this. HUD -
- I didn't even know what HUD was until December of last year.

Tr. 229-30. The Government claims that this testimony directly contradicts his affirmative answer to a previous question on cross-examination:

Mr. Memmott, when the complaint was first filed in this case, you were aware of what the basic allegations were in that complaint, were you not?

Tr. 227. Apparently, the Government bases its claim of inconsistency on the fact that the complaint was first filed in 1990 by Ms. Burris. However, there is no evidence to even suggest that Mr. Memmott grasped the distinction between the filing of a discrimination complaint by a Complainant and the filing of a "suit for discrimination" by HUD.

Next, the Government points out the following testimony of Mr. Memmott. He testified during cross-examination that he did not remember signing the return receipt card that HUD sent to him after the charge was filed. Tr. 228-29. He also testified that if he had signed for a complaint alleging that his family was involved in racial discrimination, he would have read it. Tr. 230. The investigative report shows that Mr. Memmott signed the return receipt card on September 29, 1990. Ex. R 1 at 7. The Government argues that based on Mr. Memmott's own testimony, he must have read the complaint, and consequently, it is not credible that he was not aware of the complaint before December 1992.

I disagree. Mr. Memmott's testimony that he would have read "a complaint alleging that his family was involved in racial discrimination" means that if he had seen a document identified as a discrimination complaint against his family, he would have read it. However, the record does not show that he saw such a document. Although he signed for a letter from HUD that apparently dealt with the complaint, he did not open or read it because Ms. Aylett told him that it did not concern him. Tr. 253-54. Thus, the only inconsistency is that Mr. Memmott's testimony in 1993 that he did not recall signing for a letter in 1990 was inconsistent with the fact that he did sign for it.

Finally, the Government points out that Mr. Memmott testified during cross-examination that he did not know he was record owner of the family's other rental properties prior to December 1992. Tr. 246. However, the record shows that he signed two deeds in 1989 signifying that he owned those properties. Mr. Memmott testified that he did not recall signing those documents. Tr. 246-50. Thus, the only inconsistency concerning this matter is that Mr. Memmott's testimony in 1993 that he did not know that he owned the properties until 1992, and that he did not recall signing the deeds was inconsistent with the fact that he signed the deeds in 1989.

Complainant argues on remand concerning Mr. Memmott's credibility that Mr. Aylett's December 12, 1990 statement to Mr. Frant that Mr. Memmott knew nothing about the "facts of the case" shows that Mr. Memmott did not witness the conversation in which his mother allegedly made the statement. However, there is no evidence that Mr. Aylett knew at that time whether or not Mr. Memmott had witnessed the conversation. In fact, when Mr. Memmott was questioned about Mr. Aylett's December 12 statement, he testified that no one had asked him if he had knowledge of the facts in the case, and that he did not tell

anyone that he did not have such knowledge. Tr. 235. In any event, it is clear from the statements of Ms. Burris, herself, that Mr. Memmott witnessed the conversation in question. Tr. 110; Ex. G-10, 11.

Scope Of Issues

Complainant contends that the Remand Order requires that I find a violation of 42 U.S.C. § 3604(a), which prohibits discrimination in the rental of property, if I find that Ms. Aylett made certain statements set forth below. This contention is based on a statement in the Remand Order that:

If the Respondents made [the following statements] ... and if they departed from their normal procedures to avoid renting to Ms. Burris, the Respondents would be liable for violations of 42 U.S.C. §§ 3604(a), (b), and (c) (hereinafter § (a), § (b), § (c)):

- (1) Mrs. Aylett said that her husband did not have much interaction with black people and that he would never rent to black people;
- (2) Since Ms. Burris and Mrs. Aylett went to high school together, even though Mr. Aylett does not rent to blacks, she would `talk to her husband' about renting an apartment to Mrs. Burris;
- (3) Mrs. Aylett also made remarks about the problems that she and her husband had when they rented units to black tenants.

RO at 2-3. There are two related issues which should be addressed in conjunction with Complainant's argument. The first is whether Respondents can be found in this proceeding to have violated § (a). The second is to what extent various statements and other matters are at issue in this case.

The above-quoted statement in the Remand Order can not reasonably be interpreted as requiring that I decide whether Respondents committed a violation of § (a) because HUD did not charge them with such a violation. In its charge, HUD alleged only that Respondents violated § (c). At the same time, HUD issued a formal determination that there was no reasonable cause that Respondents had violated § (a) by refusing to rent the duplex to Complainant. On December 7, 1992, Complainant requested HUD to reconsider that decision and to charge Respondents with violations of §§ (a) and (b). On January 11, 1993, HUD informed the parties that it had reconsidered the matter and had decided to move to amend the charge to include an allegation of a violation of § (b). I granted that motion.

In an Order dated January 25, 1993, I ruled as follows concerning the issues that would be considered in the initial hearing:

As Respondents have not been charged with a violation of [§ (a)], I will not be making findings concerning whether such a violation occurred. However, evidence that is relevant to the issues in this case (the alleged violation of [§§ (b) and (c)]) will not be excluded on the basis that it is also relevant to a violation of [§ (a)].

During a discussion of preliminary matters at the outset of the initial hearing, the Government asserted that, "The Secretary has determined that [a § (a)] violation is not a matter in this proceeding, and we do not intend to use the evidence to show that that in fact occurred." Tr. 10. Complainant then argued that HUD's decision not to charge Respondents with a violation of § (a) was reversible error, and Complainant requested that I decide whether such a violation occurred. I ruled that because HUD had not charged Respondents with such a violation either in the initial charge or its amendment, I had no authority to decide whether they had violated § (a). Tr. 15-23.

In her motion to vacate the initial decision, Complainant contended that HUD erred by failing to charge the Respondents with a violation of § (a), and she requested the Secretary to issue a final decision concluding that such a violation occurred. The Remand Order did not address that contention. It mentioned my ruling that a § (a) violation had not been alleged, but it did not discuss or reverse that ruling. It stated only that HUD's omission of that allegation was "inadvertent." RO at 3 n.1. The Remand Order contained separate sections entitled "Background," "Issue," "Discussion," and "Conclusion." The only issue listed was, "Did the ALJ err in excluding the testimony of HUD's investigator." RO at 5. Neither the "Discussion" nor the "Conclusion" sections of the Remand Order contained any analysis or findings concerning this issue. The statement on which Complainant relies was contained in the "Background" section. If the Remand Order was intended to reverse my ruling concerning the scope of the issues and decide that I should address the § (a) issue, it is reasonable to expect that that matter would have been discussed in the Remand Order, and that a specific instruction would have been given to address that issue on remand. However, the Remand Order contained no such discussion or instruction.

Furthermore, Respondents were on clear notice that they were not being charged with a violation of § (a), that they had to defend only against alleged violations of §§ (b) and (c), and that any evidence accepted into the record would be considered only with respect to those alleged violations, even if such evidence might also be relevant to a violation of § (a). To now decide whether Respondents violated § (a) would constitute a violation of the most elementary concepts of due process and justice. If the Remand Order required that I decide that issue, I would be constrained to do so, but the Remand Order can not be reasonably interpreted in that manner.

As the Remand Order points out, "[t]his case involve[s] a very simple factual issue, namely, whether certain statements were made." RO at 4. However, it is important to identify clearly the "statements" that are at issue. When HUD determines that there is reasonable cause to believe that discrimination has occurred, it must issue a charge containing a statement of the

facts upon which the reasonable cause determination is based. 42 U.S.C. § 3610(g)(2). HUD then must provide for a hearing "with respect to [the] charge." *Id.* § 3612(b).

The charge, as amended, alleges only that Ms. Aylett told Ms. Burris that her husband will never rent to a Black person, but that despite Ms. Burris' race and color, Ms. Aylett would recommend her as a tenant to her husband. Neither the charge nor its amendment alleges that Ms. Aylett made any of the other statements quoted above from the Remand Order or any of the statements listed in Mr. Frant's notes. Moreover, the charge does not allege that the Aylett's denied Ms. Burris the opportunity to place a deposit, failed to give her an application, failed to make repairs to the duplex, or that they took any of the other actions on which the Government introduced evidence in the initial hearing.

I afforded the Government great latitude in presenting evidence concerning those matters, and I addressed them in the Initial Decision, but it should be emphasized that they are not ultimate factual issues in this case. The only ultimate factual issue in this case is whether Ms. Aylett made the statements alleged in the charge. If the Government had proved that she made those statements, it would have prevailed. However, the Government would not necessarily have prevailed if it had proved only that she made the other statements, or that the Ayletts took the actions described above. Whether those other statements and actions occurred are subsidiary factual issues. If the Government had proved those subsidiary facts, such facts would have served only to increase the likelihood that Ms. Aylett had made the statements alleged in the charge. However, even assuming for the sake of argument that the Government had proved those subsidiary facts, I would find that the eyewitness testimony of Mr. Memmott that she did not make those statements is an insurmountable obstacle to the Government's effort to meet its burden of proof.

ORDER

It is hereby ORDERED that all charges against Respondents are DISMISSED. This Order is entered pursuant to 42 U.S.C. § 3612(g)(3) and 24 C.F.R. § 104.910; it will become final upon the expiration of 30 days or the affirmance, in whole or in part, by the Secretary within that time.

PAUL G. STREB
Administrative Law Judge