UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

The Secretary, United States Department of Housing and Urban Development, Charging Party, on behalf of: TAMARA FLOYD, Complainant, v. JAMES COLLIER, ELLA M. COLLIER, AND PHILDON COLLIER, Respondents.	16-AF-0127-FH-011 August 15, 2017

Appearances

For Complainant: Winfield Ward Murray, Attorney, United States Department of Housing and Urban Development, Atlanta, Georgia

For Respondents: Melvin L. Dansby, Attorney, East Point, Georgia

INITIAL DECISION AND ORDER

BEFORE: Alexander **FERNÁNDEZ**, United States Administrative Law Judge

On August 16, 2016, the Secretary of the United States Department of Housing and Urban Development ("HUD" or the "Charging Party") filed a *Charge of Discrimination* against James Collier, Ella M. Collier, and Phildon Collier (collectively "Respondents") alleging that Respondents impermissibly discriminated against Tamara Floyd ("Complainant") in violation of the Fair Housing Act, as amended, 42. U.S.C. §§ 3601 *et seq*. Specifically, the Charging Party alleges Respondents refused to negotiate with Complainant and made discriminatory statements by informing Complainant that they would not rent to persons with children. On September 12, 2016, Respondents filed their *Answer* to the *Charge*.

The hearing in this matter commenced on January 10, 2017, in Atlanta, Georgia.[1] In accord with an *Order* dated February 2, 2017, post-hearing briefs were submitted by the parties on March 10, 2017, and on March 28, 2017, reply briefs were filed by the parties. The Charging Party also filed a *Notice Regarding Civil Penalty* on March 31, 2017.[2]

APPLICABLE LAW

The Fair Housing Act. On April 11, 1968, President Lyndon B. Johnson signed the Civil Rights Act of 1968. Federal Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 73, 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3631). Title VIII of the Civil Rights Act of 1968 is commonly known as the Fair Housing Act ("FHA"). The FHA expanded on the Civil Rights Act of 1964, which prohibited discrimination regarding the sale, rental, and financing of housing based on race, color, religion, or national origin. Id. In 1988, Congress amended the FHA's protections, this time prohibiting discrimination based on familial status or disability.[3] Pub. L. No. 100-430, 102 Stat. 1619 (1988).

The FHA defines "familial status" as one or more individuals, under the age of 18, "being domiciled with: (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person." 42 U.S.C. § 3602(k). In extending protections under the FHA to families with children, a new protected class was established, as no other federal civil rights statute based on familial status had been enacted by Congress. H.R. REP. NO. 100-711 at 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2184. By extending protections under the FHA to families, Congress prohibited housing providers from making, printing, publishing, or causing to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on familial status, or intention to make any such preference, limitation, or discrimination. 42 U.S.C. § 3604(c). Pursuant to the FHA, it is also unlawful to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling because of familial status. 42 U.S.C. § 3604(a).

Contested at bar are two of the FHA's core prohibitions: (1) the making of discriminatory statements in the rental or sale of a property; and (2) the refusal to negotiate in the rental or sale of a property. 42 U.S.C. § 3604(a) and (c).

Discriminatory Statements. Violations under § 3604(c) include all written notices or statements by a person engaged in the rental of a dwelling that indicate a preference, limitation or discrimination because of familial status. See 24 C.F.R. § 100.75. Actions prohibited include

[1] Over the course of two days, the Court heard the testimony of: (1) Tamara Floyd, Complainant; (2) Patricia Platt, Equal Opportunity Specialist for HUD; and (3) Phildon Collier, Respondent. Respondent Ella M. Collier was produced as a witness but her testimony was excluded because her long-term and short-term memory are impaired.

[2] Pursuant to 24 C.F.R. § 180.670(b) an initial decision was to be issued within 60 days of the close of the record or May 30, 2017. However, due to limited government resources and, more specifically, a government-wide hiring freeze instituted pursuant to a Presidential Memorandum dated January 23, 2017, the decision in this case was delayed.

[3] Congress also amended the Act in 1974 to prohibit sex-based discrimination.

the use of words or phrases that convey that dwellings are not available to a particular group of persons because of familial status and expressing to prospective renters or any other persons a preference or a limitation on any renter because of familial status. 24 C.F.R. §§ 100.75(c)(1)-(2). This prohibition includes notices or statements that are made orally. 24 C.F.R. § 100.75(b); Stewart v. Furton, 774 F.2d 706, 707–08, 710 (6th Cir. 1985).

To prove a violation under § 3604(c) of the FHA, the Charging Party must present evidence that (1) the respondent made the statement; (2) the statement was made with respect to the rental of a dwelling; and (3) the statement indicated a preference, limitation, or discrimination against Complainant on the basis of her familial status. White v. HUD, 475 F.3d 898, 904 (7th Cir. 2007).

Refusal to Negotiate. A party alleging intentional familial discrimination has the burden of establishing a respondent's discriminatory treatment. Kormoczy v. HUD, 53 F.3d 821, 823 (7th Cir. 1995). In a discriminatory treatment analysis, a complainant's familial status need only be one significant factor in the respondent's decision for that decision to violate the FHA. Woods-Drake v. Lundy, 667 F.2d 1198, 1202 (5th Cir. 1982). To establish that familial status was a factor in the respondent's decision, the Charging Party may use either direct evidence of discriminatory intent or indirect evidence, from which discriminatory intent can be inferred. Kormoczy, 53 F.3d at 823-24.

Direct evidence is evidence that proves a fact without inference or presumption. HUD v. Gunderson, 2000 WL 1146699 at * n.6, (HUDALJ Aug. 14, 2000). If the Charging Party offers direct evidence that meets the preponderance of evidence standard, then the evidence is sufficient to support a finding of discrimination. Pinchback v. Armistead Homes Corp., 907 F.2d 1447, 1452 (4th Cir. 1990); Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004) ("A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part McDonnell Douglas analysis to get to the jury, regardless of whether his strong evidence is circumstantial."). However, if the Charging Party is unable to proffer direct evidence, then the Court applies a three-part test that is used in employment discrimination cases under Title VII of the Civil Rights Act. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Pfaff v. HUD, 88 F.3d 739, 745 n.1 (9th Cir. 1996) (stating that in fair housing cases, the court "may look for guidance to employment discrimination cases").

Standard of Proof. The standard of proof in FHA cases is a "preponderance of the evidence." Marr v. Rife, 503 F.2d 735, 739 (6th Cir. 1974). *Black's Law Dictionary* defines this as "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Black's Law Dictionary* (9th ed. 2009). A party proves a fact by a preponderance of the evidence when he proves that the fact's existence is more likely than not. Greenwich Collieries v. Dir., Office of Workers' Comp. Programs, 990 F.2d 730, 736 (3d Cir. 1993), aff'd sub nom. Dep't of Labor v. Greenwich Collieries, 512 U.S. 267 (1994); Fischl v. Armitage, 128 F.3d 50,

55 (2d Cir. 1997) (quoting 4 L. Sand, *Modern Federal Jury Instructions* ¶ 73.01, at 73-4 (1997) for definition of preponderance standard).

FINDINGS OF FACT

Respondent Phildon Collier managed rental properties owned by Respondents James and Ella M. Collier. One such rental property was located in East Point, Georgia ("Subject Property").

In early August of 2013, Complainant observed a "For Rent" sign in the window of the Subject Property. Complainant called the number listed on the sign to inquire about obtaining a rental application for the Subject Property. She spoke with Respondent Ella Collier. On August 12, 2013, Respondent Phildon Collier emailed a blank rental application to Complainant, and asked her to complete and mail it back to the address listed on the application. The next day, Complainant replied to Phildon Collier's email with a copy of a partially completed rental application attached.

Having received no response to her submission of the rental application, Complainant called the number listed on the "For Rent" sign on August 21, 2013. Again, Respondent Ella Collier answered the phone and spoke with Complainant. Complainant asked about the status of the application she submitted via email on August 13, 2013. Ms. Ella Collier asked Complainant about the information on her application. Specifically, Ms. Collier asked Complainant whether she was the applicant that had a teenaged son. After Complainant confirmed that she had a teenaged son, Ms. Collier informed Complainant that Respondents would not rent to anyone with children. Respondent Ella Collier then explained that decision was based on previous experiences.

Complainant had hoped to rent the Subject Property and was prepared to move in at or around the date her application was submitted. When Complainant contacted Respondents about the Subject Property, she was in a "toxic relationship" that caused her stress. After Respondents refused her application, Complainant suffered some emotional distress and incurred out-of-pocket losses because she could not rent the Subject Property.

Sometime in October of 2013, Complainant submitted a complaint regarding Ms. Collier's statements that was received by the HUD Office of Fair Housing and Equal Opportunity in Atlanta, Georgia. HUD investigated the allegations raised by Complainant and determined that Respondents previously placed restrictions on their rentals due to the familial status of tenants. For instance, Respondents entered into at least two lease agreements that explicitly prohibited children from occupying the properties with the following language:

> . . . to be occupied by the LESSEE and his/her wife/husband or companion only with a maximum of two occupants (NO CHILDREN) and to be used as a private dwelling for no other purpose.

DISCUSSION

The Court has considered all issues raised and all documentary and testimonial evidence in the record and presented at hearing. Those issues not discussed here are not addressed because the Court finds they lack materiality or importance to the decision.

I. Respondent Ella Collier made the statement at issue.

Respondents claim the Charging Party has failed to sufficiently prove that Respondent Ella Collier told Complainant that Respondents would not be renting the Subject Property to persons with children. Respondents argue Complainant's testimony is uncorroborated, because the only evidence is Complainant's call log and the conversation was not recorded or transcribed.

In order to prove a violation under § 3604(c) of the FHA, the Charging Party must first present evidence that Respondent Ella Collier made the statement at issue. White, 475 F.3d at 904. Such evidence must meet the preponderance standard. Pinchback, 907 F.2d at 1452.

At the hearing, the Court observed Complainant to be a credible witness. The call log supports the assertion that Complainant called a number that Respondents do not dispute is theirs, and had a conversation lasting approximately three minutes. Respondents admit that Respondent Ella Collier is responsible for answering calls from prospective tenants. And, evidence of no less than two leases containing language restricting occupancy to adults demonstrates that Respondents had a preference for tenants without children. Such evidence, when viewed collectively, is sufficient to support an inference that Respondent Ella Collier likely made the statement at issue.

Moreover, although Respondents denied that Respondent Ella Collier told Complainant that Respondents would not be renting to persons with children, Respondents failed to produce any evidence rebutting the Charging Party's evidence presented at the hearing.[4] Considering Complainant's testimony and the circumstantial, corroborating evidence offered in corroboration, the Court finds the Charging Party has met its burden to prove, by a preponderance of the evidence, that Respondent Ella Collier made the statement at issue. Greenwich Collieries, 990 F.2d at 736 ("A party proves a fact by a preponderance of the evidence when he proves that the fact's existence is more likely than not.").

II. The statement was discriminatory and in violation of the FHA.

The Charging Party claims Respondent Ella Collier's statement—that Respondents would not rent to anyone with children—is a violation of the FHA.

[4] During the hearing, Respondents' counsel attempted to call Respondent Ella Collier as a witness. However her testimony was not permitted based on Respondents' previous claims and their admission at the hearing that Ella Collier suffered an accident in 2009 that impaired both her long-term and short-term memory. In their *Answer*, Respondents claimed Respondent Ella Collier was not competent to participate in this proceeding and submitted a doctor's note in support. In their *Prehearing Statement*, Respondents also stated that Ella Collier suffers from dementia and "has no recollection of any of the circumstances surrounding the event."

The FHA prohibits the making of statements with respect to a rental of a dwelling that indicate a preference, limitation or discrimination because of familial status. 42 U.S.C. § 3604(c); 24 C.F.R. § 100.75(a). Discriminatory statements include using words that convey that dwellings are not available to a person because of familial status. 24 C.F.R. § 100.75(c)(1). The Court employs the "ordinary listener" standard when determining whether statements violate § 3604(c) of the FHA. Jancik v. HUD, 44 F.3d 553, 566 (7th Cir. 1995).

The Court need not employ the "ordinary listener" standard here. After confirming that Complainant was the applicant with a teenaged son, Ms. Collier did not suggest Respondents preferred families without children,[5] nor did Ms. Collier attempt to discourage Complainant's attempt to rent the Subject Property.[6] Instead, Respondent Ella Collier directly informed Complainant that Respondents would not rent to *anyone* with children. Such a statement blatantly indicates a preference, limitation or discrimination because of familial status. Accordingly, the Court finds Respondent Ella Collier violated the FHA by making this statement.

III. Respondents refused to negotiate housing because of Complainant's familial status.

The Charging Party claims Respondents violated the FHA by refusing to negotiate the rental of a dwelling at the Subject Property to Complainant because of her familial status.

In order to prove a violation under § 3604(a) of the FHA, the Charging Party must demonstrate that Complainant's familial status was a significant factor in Respondents' decision to refuse or deny rental of the Subject Property to her. Kormoczy, 53 F.3d at 923. To meet this burden, the Charging Party must prove Respondents acted with discriminatory intent either through direct evidence, or indirect evidence, from which Respondents' discriminatory intent can be inferred. Id. "Direct evidence is that which can be interpreted as an acknowledgement of the defendant's discriminatory intent" and proves a fact without inference or presumption. Id. at 824; Gunderson, 2000 WL 1146699, at * n.6. Such evidence consists of "only the most blatant remarks, whose intent could mean nothing other than to discriminate on the basis of some impermissible factor constitut[ing] direct evidence of discrimination." Dixon v. Hallmark Cos., Inc., 627 F.3d 849, 854 (11th Cir. 2012) (quoting Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1086 (11th Cir. 2004)).

Respondent Ella Collier asked Complainant whether she was the applicant that had a teenaged son because it was Respondents' intent to refuse prospective renters with children. Once Complainant confirmed that she was that applicant, Ms. Ella Collier informed Complainant that Respondents would not be renting to anyone with children. Ms. Collier explained the decision was based on Respondents' previous experiences and the conversation ended shortly thereafter without additional discussion. That refusal was a direct result of Complainant's

[5] See Jancik, 44 F.3d at 556 (characterizing advertisement indicating a preference for a "mature person" as being "problematic" because it suggests to an "ordinary" listener that the landlord had preference or limitation based on family status).

[6] See Fair Hous. Cong. v. Weber, 993 F. Supp. 1286, 1293 (C.D. Cal. 1997) (holding that a statement made to a prospective renter that families with small children "should" rent *only* first-floor entry apartments impermissibly communicates a preference on the basis of familial status even when such preference is based on legitimate safety concerns).

admission that she had a child in her household and constitutes direct evidence of discriminatory intent. See HUD v. Morgan, 2012 WL 4753915, at *11 (HUDOHA Sept. 28, 2012) (finding the respondent's statement that she "can and will" refuse to rent to a prospective tenant because of the tenant's familial status to be direct evidence of discrimination based upon an impermissible factor). Accordingly, the Court finds Respondents refused to negotiate the rental of the Subject Property to Complainant due to her familial status in violation of the FHA.

REMEDY

The Charging Party alleges Complainant is entitled to emotional distress damages in the amount of $8,500 and actual damages in the amount of $8,134. Additionally, the Charging Party is seeking a civil penalty of $16,000.

I. Emotional Distress Damages

The Charging Party claims Respondents' discriminatory housing practice was egregious and caused Complainant emotional distress. As a result, the Charging Party seeks emotional distress damages in the amount of $8,500.

Under the Fair Housing Act, an aggrieved party may recover damages for emotional distress as a consequence of a respondent's discriminatory acts. Blackwell, 2 Fair Housing-Fair Lending (Aspen) ¶ 25,001, 25,011 (HUDALJ Dec. 21, 1989); HUD v. Godlewski, 2007 WL 4578540, at *2 (HUDALJ Dec. 21, 2007). Such damages are available "in Fair Housing Act cases for distress which *exceeds* the normal transient and trivial aggravation attendant to securing suitable housing." Morgan v. HUD, 985 F.2d 1451, 1459 (10th Cir. 1993) (emphasis added) (citing Steele v. Title Realty Co., 478 F.2d 380, 384 (10th Cir. 1973)). The key factors in determining emotional distress damages are the complainant's reaction to the discriminatory conduct *and* the egregiousness of the respondent's behavior. HUD v. Parker, 2011 WL 5433810, at *7 (HUDALJ Oct. 27, 2011).

First, the Court considers the emotional impact of Respondents' discrimination on Complainant. Upon review of the record, the Court notes that the only evidence of Complainant's intangible injuries is her own testimony. There is no other evidence offered to prove or even corroborate Complainant's testimony concerning her emotional distress.

When offering testimony to support a claim for damages for emotional distress, a plaintiff must "sufficiently articulate" that she endured demonstrable emotional distress and "cannot rely on conclusory statements that [she] suffered emotional distress." Matarese v. Archstone Pentagon City, 795 F. Supp. 2d 402, 445 (E.D. Va. 2011) (citing Bryant v. Aiken Reg'l Med. Ctrs. Inc., 333 F.3d 536, 546 (4th Cir. 2003); see also Biggs v. Village of Dupo, 892 F.2d 1298, 1304 (7th Cir. 1990) ("When the injured party provides the sole evidence, he must reasonably and sufficiently explain the circumstances of his injury and not resort to mere conclusory statements."). "Although proof that a plaintiff either manifested physical symptoms or sought medical treatment is not required to establish an entitlement to emotional distress damages . . . a

plaintiff's subjective testimony, standing alone, is generally insufficient to sustain an award of emotional distress damages." Sachs v. Nunziante, 2016 WL 4506731, at *4 (E.D.N.Y. 2016).

Here, Complainant's testimony on the emotional distress she suffered covers a scant two pages of the hearing transcript and was ambiguous as to the degree and nature of the emotional distress she claims to have suffered. She testified,

> "I'm still dealing with physical situations."
>
> "That situation affected me tremendously due to the situation that I was in."
>
> "My medications at that time had to be altered. The dosages had to be altered."

Of Complainant's testimony, the only statements illustrative of her injury are as follows:

> "Emotionally, I mean, I was depressed severely. I had to take another medication, Xanax, at the time to [manage] my depression"
>
> "The medication I was on also, Prednisone, would alter my moods, so I would kind of stay to myself even at work, and that just wasn't me at all."

Although the Court finds Complainant's testimony credible, on its own, Complainant's testimony is general and conclusory. See Biggs, 892 F.2d at 1304 (acknowledging that "it can be hard to articulate emotional upset caused by treatment considered to be unfair" but affirming that "when the injured party provides the sole evidence [of mental distress], he must reasonably and sufficiently explain the circumstances of his injury and not resort to mere conclusory statements.").

Recently, the Court had the opportunity to review a case that, although not identical, was similarly postured. In HUD v. Woodard, the complainant and her friend, both of whom suffered from mental illnesses, arrived at the subject property prepared to move in when the respondent informed them that he would no longer rent to them because of their disabilities. HUD v. Woodard, HUDOHA 15-AF-0109-FH-013 (HUDOHA May 9, 2016). The respondent made several discriminatory statements related to mental disabilities in the presence of the complainant, her friend, and complainant's parents. Id.

The record of that proceeding demonstrated that the complainant experienced "bouts of crying, anger, emotional and physical withdrawal, and loss of motivation." Id. at *5. The complainant's "high-risk behaviors—such as over-eating, smoking, and drinking alcohol to excess—increased" as a result of the respondent's discriminatory conduct. Id. The complainant suffered panic attacks at work and while driving and testified that most of the symptoms lasted for six months, and others lasted more than a year, while the panic attacks never ceased. Id. The

complainant's testimony was corroborated by her father, mother, and sister. Id. The testimony and evidence in the Woodard case left no doubt that the respondent's discriminatory conduct caused significant emotional harm and warranted an award of $20,000 in emotional distress damages.

Unlike in Woodard, there is no in-depth discussion of the extent or even the duration of the emotional distress Complainant alleges she suffered. And, although Complainant claims Respondents' discrimination caused her both physical and mental injuries requiring medical care, the Charging Party produced no evidence to corroborate her testimony. Cf. Portee v. Hastava, 853 F. Supp. 597, 616 (E.D.N.Y. 1994) (District Court judgment setting aside an "excessive" compensatory damage award, in part, because a plaintiff "was not able to provide the jury with any medical records to substantiate his claims of emotional distress, despite having seen at least one doctor."). The Charging Party also failed to cite any case law that would support the amount sought for emotional distress in this case.[7]

Still, Complainant is not barred from total recovery simply because her testimony, alone, is insufficient to support the award she seeks. In order to determine whether any award for emotional distress is appropriate, the Court must also consider the egregiousness of Respondents' actions. See Sachs, 2016 WL 4506731, at *5 ("Thus when considering whether to award compensatory damages for emotional distress, a court should consider the discriminatee's emotional reaction to the discrimination and the circumstances of the discriminatory act, as the more inherently degrading or humiliating the unlawful action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action.")

"[E]gregious emotional distress claims generally involve either outrageous or shocking discriminatory conduct or a significant impact on the physical health of the plaintiff." Olsen v. Cty. of Nassau, 615 F. Supp. 2d 35, 47 (E.D.N.Y. 2009). Here, Complainant testified that Ms. Collier informed her that Respondents decided not to rent to anyone with children and explained that the decision was based on experiences with previous tenants. There is no evidence that Ms. Collier was rude to Complainant or that her statements were made in an offensive manner. The entire conversation, which included discussion of Complainant's rental application, lasted approximately three minutes. Although Respondent Ella Collier violated the FHA, there is no evidence that her conduct was "outrageous" or "shocking." Accordingly, Respondent Ella Collier's discriminatory conduct, though prohibited by the FHA, was not egregious. Cf. Matarese, 795 F. Supp. 2d at 447 (finding the defendants' conduct to be egregious where they failed to follow their own mold remediation protocol and, for years, dismissed the plaintiff's

[7] Indeed, in its Post-Hearing Brief, the Charging Party dedicates one sentence to the issue of "egregiousness" by stating, "[t]he record demonstrates that the Respondents' conduct was egregious, creating emotional distress for the Complainant." The Charging Party points to no evidence in the record supporting this statement. Moreover, no analysis is provided—no caselaw—just that one sentence. The conclusory manner with which the Charging Party treats the issue of "egregiousness" suggests an argument that any violation of the FHA that causes emotional distress is *per se* egregious. That proposition is not supported by case law. Cf. Woodard, HUDOHA 15-AF-0109-FH-013 at *8 (The court recognized the respondent's actions to be "particularly severe," because they "came late in the rental process." The respondent literally blocked the complainant's path to the front door "mere minutes away from [the complainant] beginning the move-in process." The complainant, who "had no opportunity to psychologically prepare for the shock and disappointment she experienced," was also subjected to the respondent's discriminatory comments—including a statement that the landlord "does not want to rent to someone who has a fault in their mental abilities"—directed at her and made in her and her family's presence. The court found this to be "arguably the most egregious form of fair housing violation.")

simple, accommodation requests that would have required little to no effort on their part); HUD v. Riverbay Corp., 2012 WL 1655364, at *1 (HUDOHA May 7, 2012) (noting the embarrassment and emotional distress caused by Respondents' discriminatory actions that included retaliation and awarding $30,000 in damages for intangible injuries); HUD v. Astralis Condo. Ass'n, 2009 WL 6869727 (HUDALJ Sept. 10, 2009) (finding that Respondent discriminatory conduct essentially trapped complainants in their homes and awarding $25,000 in damages for the humiliation, embarrassment, and emotional distress suffered).

Still, Complainant testified that she "was taken aback" and "was offended by the response, so to speak." The Court finds Complainant's emotional response to Ms. Collier's denial of Complainant's application was, in part, a result of Complainant's already delicate emotional state caused by the distress of having to remain in a "toxic relationship" because she could not move out of her current living situation and into the Subject Property.[8] Therefore, although Respondents' conduct was not egregious, they are responsible for exacerbating Complainant's emotional distress and her associated physical symptoms with their discriminatory actions and, as a result, must compensate Complainant for her injuries. See Godlewski, 2007 WL 4578553, at *5 (respondents "must take their victims as they find them").

Complainant failed to sufficiently articulate the nature and duration of her emotional distress. However, the Court finds the record adequately proves that Respondents' discrimination was the cause for some modicum of emotional distress. It is difficult to quantify the amount of damages that would compensate Complainant given the scant evidence presented at the hearing. Still, the Court is persuaded that Complainant felt, for an unspecified period of time, some emotional distress even though Respondents' behavior was not egregious. Accordingly, the Court finds an award of $3,000 for Complainant's emotional distress is warranted. See, e.g., United States v. Balistrieri, 981 F.2d 916 (7th Cir. 1992) (affirming a jury award of $2,000 per tester and noting that although the evidence of emotional distress was not strong, as it came from the testers' own testimony and was not corroborated, it was sufficient); Nekolny v. Painter, 653 F.2d 1164, 1172 (7th Cir. 1981) (finding that "a single statement by a party that he was depressed, a little despondent, or even completely humiliated" was not enough to establish injury, because the facts did not demonstrate egregious behavior).

II. Complainant's Actual Losses

The Charging Party also alleges that Respondents' discriminatory practice caused Complainant over $8,000 in actual damages. The amount sought includes $1,200 for Complainant and her son's food and lodging during their stay at a Motel 6; $334 for two months' storage fees; $6,000 for items in storage that were damaged by fire; and $600 for her son's transportation to and from school.

[8] The Court notes that although Complainant testified that she was prepared to move into the Subject Property at the time her application was submitted, by the time she was informed of Respondents' refusal, she no longer had the financial means to immediately move out of that "toxic situation."

A. Complainant's Alternative Housing Expense

The Charging Party claims Respondents are liable for $1,200 that Complainant incurred due to her one-month stay at a Motel 6 that occurred as a result of Respondents' refusal to negotiate the rental of the Subject Property.

"When an aggrieved party is forced to seek alternative housing due to unlawful discrimination, the proper measure of damages is a comparison between what would have been obtained but for the discrimination and a reasonably comparable dwelling." Morgan, 2012 WL 5463308, at *4 (Oct. 26, 2012) (Order on Secretarial Review citing Morgan v. HUD, 985 F.2d at 1458).

The Court cannot determine Complainant's out-of-pocket expense for alternative housing based on the record before it, because there is no evidence of "what would have been obtained but for the discrimination." The Charging Party had the burden to prove such expenses. See Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 158 (2d Cir. 1992) ("Damages, which are neither susceptible of mathematical computation nor liquidated as of the default, usually must be established by the plaintiff in an evidentiary proceeding in which the defendant has the opportunity to contest the amount.").

Neither party has proffered evidence of what Complainant's rent and related costs would have been had Respondents rented the Subject Property to her. Moreover, even if the Court were to estimate the cost of Complainant's rent based on the leases for other units, which range from $500 to $600 per month, the Charging Party has not submitted evidence of Complainant's costs for a "reasonably comparable dwelling." This is because Complainant's costs while staying at the Motel 6 included both lodging *and* food. Using the entire amount that is being claimed ignores the fact that Complainant would still have food expenses without Respondents' discriminatory practices. Although the Court is inclined to grant some out-of-pocket expenses to Complainant for alternative housing, the failure of the Charging Party to proffer evidence—or even an estimate—of such expenses requires too much speculation and guesswork on the part of the Court. It is not the Court's place to do the Charging Party's job for it. Accordingly, the Court declines to grant out-of-pocket expenses for Complainant's alternative housing expense.[9]

B. Complainant's Storage Expenses and Losses

The Charging Party claims Respondents are liable for the cost of Complainant's storage unit rental and her property loss due to the fire at the storage facility. Complainant testified that she lost nearly $6,000 in belongings and the Charging Party has submitted an itemized list that Complainant submitted shortly after the fire to an insurance company to recover for that loss.

[9] The Court acknowledges that the Charging Party need not document alternative housing costs with exacting specificity and when it fails to do so, the Court may make a reasonable estimate of such expenses. Krueger v. Cuomo, 115 F.3d 487, 492 (7th Cir. 1997). The Court attempted to estimate the cost of food that it could extract from the $1,200 claimed for food and lodging in order to compensate Complainant for her alternative housing expenses. However, using the GSA per diem for meals and incidental costs in Atlanta in 2013, the Court calculated a monthly cost for food that exceeded the total cost of Complainant's stay at the Motel 6. Even using this estimate, Complainant would not recover any out-of-pocket expenses for her alternative housing costs.

The Charging Party also submitted a copy of Complainant's account from the storage facility that stated the monthly rent for the unit.

To recover damages for Complainant under the FHA, the Charging Party must demonstrate that Respondents proximately caused Complainant's injury. City of Miami v. Citigroup Inc., 801 F.3d 1268, 1276 (11th Cir. 2015); HUD v. Hous. Auth. of Las Vegas, 1995 WL 678326, at *27 (HUDALJ Nov. 6, 1995) (citing Weyerhouser Co. v. Atropos Island, 777 F.2d 1344, 1351-52 (9th Cir. 1985)). Proximate cause exists when there is a "direct relation between the injury asserted and the injurious conduct alleged." Staub v. Procter Hosp., 562 U.S. 411, 419 (2011). However, if a "new force or power has intervened, sufficient itself to stand as the cause of resulting misfortune, an earlier source must be considered as too remote." Scheffer v. Washington City, 105 U.S. 249, 251 (1881). An intervening cause can "insulate the original actor from liability." Glenn v. Union Pac. R.R. Co., 262 P.3d 177, 195 (Wyo. 2011). Such a cause has an "independent origin that was not foreseeable." Procter Hosp., 562 U.S. at 420. An injury is foreseeable if a reasonable person would have anticipated that the injury was reasonably likely to flow from the breach of duty, i.e., the discrimination. Hous. Auth. of Las Vegas, 1995 WL 678326, at *27 (citing RESTATEMENT (SECOND) OF TORTS 452 (1965); Standard Oil Co. v. Matt McDougall Co., 381 F.2d 686 (9th Cir. 1967)).

After Respondents refused to negotiate the rental of the Subject Property due to Complainant's familial status, Complainant had to find alternative housing. Unfortunately, Complainant could not find housing comparable to the Subject Property and was forced to place many of her belongings in storage as the alternative housing could not accommodate them. This cost to Complainant was proximately caused by Respondents' discriminatory housing practice and adequately supported by evidence in the record.

However, the Court finds that Complainant's losses due to the fire at the storage facility are not directly related to Respondents' conduct. It is true that had Respondents rented the Subject Property to Complainants, she likely would not have needed to store her belongings in that ill-fated storage unit. However, it is the fire, and not Respondents, that caused Complainant to lose her belongings and no one could have anticipated that would happen. Similarly, Respondents could not have foreseen that Complainant would, unknowingly, let the insurance on the storage unit lapse barring any recovery for her belongings. Accordingly, the Court limits Complainant's out-of-pocket storage losses to $334 for two months of storage unit rent.

C. Transportation Expenses for Complainant's Son

Last, the Charging Party claims Complainant incurred approximately $600 in costs as a result of her son having to take public transportation to school. Complainant testified that the Subject Property was located in close enough proximity that her son could have ridden his bicycle to school. However, after Respondents refused to negotiate the rental of the Subject Property because of Complainant's son, Complainant was unable to find alternative housing close to her son's school. As a result, Complainant had to pay for her son to take public transportation to reach his school. Although the Charging Party has not submitted evidence to support Complainant's estimate of transportation costs, the Court finds Complainant to be a credible witness and her estimate to be reasonable.

III. Civil Penalty

Respondents may also be assessed a civil penalty to "vindicate the public interest." 42 U.S.C. § 3612(g)(3). The Court is authorized to assess a civil penalty against Respondents in an amount not to exceed:

> (1) $16,000, if the respondent has not been adjudged in any administrative hearing or civil action permitted under the Fair Housing Act or any state or local fair housing law, or in any licensing or regulatory proceeding conducted by a federal, state, or local governmental agency, to have committed any prior discriminatory housing practice.

24 C.F.R. § 180.671(a).

In determining the amount of the penalty, the Court considers the following factors: (i) whether Respondents have previously been adjudged to have committed unlawful housing discrimination; (ii) Respondents' financial resources; (iii) the nature and circumstances of the violation; (iv) the degree of that Respondents' culpability; (v) the goal of deterrence; and (vi) other matters as justice may require. 24 C.F.R. § 180.671(c)(1).

i. Previous Unlawful Housing Discrimination

Although the Charging Party has submitted copies of other leases indicating Respondents have engaged in discriminatory housing practices with other tenants, there is no evidence that Respondents have ever previously been adjudged to have committed any such discriminatory housing practice. Therefore, any civil penalty imposed upon Respondents may not exceed $16,000 for a violation. 42 U.S.C. § 3612(g)(3)(A); 24 C.F.R. § 180.671(a)(1).

ii. Respondent's Financial Resources

Evidence regarding Respondents' financial circumstances are within their knowledge and, therefore, Respondents have the burden to introduce such evidence into the record. Welch, 1996 WL 755681, at *8 (HUDALJ Dec. 2, 1996). Here, Respondents have not shown financial hardship. Therefore, Respondents' financial circumstances are not a constraint in determining the civil penalty to be assessed in this case. HUD v. Schmid, 1999 WL 521524, at *11 (HUDALJ Jul. 15, 1999).

iii. Nature and Circumstance of the Violation

The violations occurred during a telephone conversation that lasted approximately three minutes. During this conversation, Respondent Ella Collier asked Complainant if she had a teenaged son. Respondent Ella Collier's purpose for asking was because Respondents intended to discriminate based on the familial status of prospective renters. After Complainant acknowledged that she had a child, Respondent Ella Collier confirmed Respondents' discriminatory intent by telling Complainant Respondents would not rent anyone with children

because of past experiences. Although Respondent Ella Collier certainly made it clear that Complainant was being discriminated against due to her child, Respondent Ella Collier did not make any disparaging remarks and explained that Respondents' decision was due to a past experience and not due to any animus towards children. See HUD v. Schilling, 1993 WL 263667 at *12 (HUDALJ Jul. 15, 1993) (finding that the respondent did not act out of malice or prejudice, which "certainly tempers the hand of justice"). Still, "the outright refusal to rent is arguably the most egregious form of fair housing violation, as it completely denies an individual a valuable housing opportunity." Woodard, HUDOHA 15-AF-0109-FH-013 at *8. Accordingly, a severe sanction is warranted.

iv. Respondents' Degree of Culpability

Respondent Ella Collier solely committed the discrimination in this case when she told Complainant that Respondents would not rent to anyone with children. Respondents claim they are not culpable for discriminating against Complainant, because Respondent Ella Collier has dementia and Respondent Phildon Collier was the final decision maker. However, the Charging Party has submitted two leases that constitute evidence of Respondents' discriminatory housing practice. And, even if Respondent Ella Collier was acting on her own accord—which is a possibility not supported by the record—Respondents James Collier and Phildon Collier are still responsible for Ella Collier's actions as they entrusted her with the responsibility of answering phone calls of prospective renters. Accordingly, the Court finds Respondents are fully culpable for the discrimination in this case.

v. Deterrence

The Charging Party seeks a civil penalty of $16,000 to deter Respondents and other housing providers who may pursue similar discriminatory policies. Respondent Phildon Collier testified that he no longer manages properties on behalf of Respondents James and Ella Collier, because the Colliers have sold all of their rental properties. Thus, there is no existing need to deter Respondents from engaging in similar discriminatory practices in the future. Still, "[a]n award of some civil penalty is appropriate as a deterrence to others," and to put those "similarly situated to Respondent" on notice that violations of the FHA will not be tolerated. HUD v. Wooten, 2007 WL 2248087, at *6 (HUDALJ Aug. 1, 2007).

ORDER

Based on the foregoing, it is hereby **DECLARED AND ORDERED**:

1. Respondents James Collier, Ella Collier, and Phildon Collier have violated 42 U.S.C. §§ 3604(a) and (c);

2. Within sixty (60) days of the date on which this *Order* becomes final, Respondents shall pay to Complainant the sum of $3,934.00, consisting of $3,000 for Complainant's emotional distress, and $934 for Complainant's out-of-pocket expenses; and

3. Within sixty (60) days of the date on which this *Order* becomes final, Respondents shall pay to the Secretary a civil penalty in the amount of $8,000.

So **ORDERED**,

/s/

Alexander Fernández
United States Administrative Law Judge

Notice of appeal rights. The appeal procedure is set forth in detail in 24 C.F.R. § 180.675. This *Initial Decision* may be appealed by any party to the Secretary of HUD by petition for review. Any petition for review must be received by the Secretary within 15 days after the date of this *Order*. Any statement in opposition to a petition for review must be received by the Secretary within 22 days after issuance of this *Order*.

Service of appeal documents. Any petition for review or statement in opposition must be served upon the Secretary by mail, facsimile, or electronic means at the following:

U.S. Department of Housing and Urban Development
Attention: Secretarial Review Clerk
451 7th Street S.W., Room 2130
Washington, DC 20410
Facsimile: (202) 708-0019
Scanned electronic document: secretarialreview@hud.gov

Copies of appeal documents. Copies of any Petition for Review or statement in opposition shall also be served on the opposing party(s), and on the HUD Office of Administrative Law Judges.

Finality of decision. The agency decision becomes final as indicated in 24 C.F.R. § 180.680.

Judicial review of final decision. Any party adversely affected by a final decision may file a petition in the appropriate United States Court of Appeals for review of the decision under 42 U.S.C. 3612(i). The petition must be filed within 30 days after the date of issuance of the final decision.