

**UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF THE SECRETARY**

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

Shon'tonette Leary and Kerry Stevenson,

Complainants,

v.

John Graham,

Respondent.

FEB 5 2020

HUDOHA No. 19-JM-0014-FH-002

ORDER ON SECRETARIAL REVIEW

On January 21, 2020, the Charging Party submitted a Petition for Review (“Petition”), appealing the January 6, 2020, Initial Decision and Order (“Initial Decision”) issued by Chief Administrative Law Judge (“ALJ”) J. Jeremiah Mahoney. On January 28, 2020, the Respondent submitted a reply to the Petition (“Opposition”) asking the Secretary to affirm the ALJ’s Initial Decision. Respondent’s submission also served as a Cross-Petition to Charging Party’s Petition for Partial Secretarial Review. In the Initial Decision, the ALJ found that Respondent violated subsection 804(c) of the Fair Housing Act (“the Act”), by making discriminatory statements to Complainant with respect to the rental of a dwelling. The ALJ also found that Respondent violated section 818 of the Act by coercing, intimidating, threatening, or interfering with Complainant in the exercise or enjoyment of her rights. The ALJ found that Respondent did not violate subsections 804(a) and 804(d) when he refused to negotiate for the rental of his dwelling to Complainant and falsely represented to Complainant that the dwelling was unavailable. Lastly, the ALJ found that the “Mrs. Murphy” exemption applied, thus making Respondent not liable for violating subsections 804(a) and 804(d). The Initial Decision ordered the Respondent to pay \$21,000 in damages to Complainants, \$15,000 to Complainant and \$6,000 to Complainant Stevenson, and pay a \$5,000 civil penalty.

Upon review of the entire record in this proceeding, including the briefs filed with the Secretary, the Charging Party’s Petition is GRANTED IN PART for the reasons set forth below. Pursuant to 24 C.F.R. § 180.675(a), the ALJ’s January 6, 2020, Initial Decision and Order is

MODIFIED IN PART. Sections II-A, B and C are stricken from the Initial Decision and Respondent is ordered to pay \$60,000 in emotional distress damages to Complainant Leary and \$10,000 in emotional distress damages to Complainant Stevenson; and pay \$19,787 in civil penalties. Respondent's Cross-Petition is DENIED because it was not timely filed.

BACKGROUND

On October 17, 2018, the U.S. Department of Housing and Urban Development ("HUD" or "Charging Party") filed a Charge of Discrimination ("Charge") on behalf of Shon'tonette Leary ("Complainant") against John Graham ("Respondent") pursuant to the Fair Housing Act, 42 U.S.C. §§ 3601 et seq. ("the Act"). Complainant's son, Kerry Stevenson ("Mr. Stevenson"), was later added as a second complainant in this matter on the Charging Party's unopposed motion.

The Charging Party alleged that Respondent, as owner and landlord of a residential property in Paramus, New Jersey, violated the Act by (1) refusing to negotiate for the rental of a dwelling to Complainant because of her race or color, in violation of subsection 804(a); (2) making discriminatory statements to Complainant with respect to the rental of the dwelling, in violation of subsection 804(c); (3) falsely representing to the Complainant, because of her race or color, that the dwelling was unavailable, in violation of subsection 804(d); and (4) coercing, intimidating, threatening, or interfering with Complainant in the exercise or enjoyment of her rights under the Act, in violation of section 818. The Charging Party sought \$129,865.40 in damages, out of pocket losses and penalties, as well as injunctive and equitable relief against Respondent. Specifically, the Charging Party requested emotional distress damages in the amount of \$60,000 for Complainant Leary and \$45,000 for Complainant Stevenson; \$5,078.40 in out of pocket losses; and \$19,787 in civil penalties.

On November 16, 2018, Respondent filed its Answer to the Charge. The hearing was held on July 30, 2019. Post-hearing briefs were submitted on September 12, 2019, and reply briefs were submitted on September 25, 2019.

On January 6, 2020, the ALJ issued an Initial Decision. The ALJ found that Respondent violated subsection 804(c) of the Act, which prohibits housing providers from making, printing, or publishing, or causing to be made, printed, or published, any statement with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination. *Initial Decision* at 7-9. The ALJ also held that Respondent engaged in discriminatory conduct on account of Complainant's exercise of rights under the Act with the intent of deterring her from further pursuing those rights in violation of section 818. *Id.* at 18-19. The ALJ further held that Respondent did not violate subsections 804(a) and 804(d) because the Charging Party failed to prove, by a preponderance of evidence, that Respondent acted with requisite discriminatory intent in refusing to negotiate with Complainant and telling her that the apartment was already rented. *Id.* at 12-15. The ALJ found that Respondent was subject to the "Mrs. Murphy" exemption, making Respondent exempt from liability under 804(a) and 804(d). *Id.* at 15-18. The ALJ ordered the Respondent to pay \$21,000 in damages to Complainants, \$15,000 to Complainant and \$6,000 to Complainant Stevenson, and pay a \$5,000 civil penalty. *Id.* at 24-25.

In its Petition, the Charging Party argued that the ALJ erred in considering subsections 804(a) and 804(d) in the Initial Decision since he had also found that Respondent qualified for the “Mrs. Murphy” exemption and could not be held liable for violating subsections 804(a) and 804(d) of the Act. Therefore, the Charging Party requested that sections II-A., B, and C of the Initial Decision be removed from the Final Order. The Charging Party also requested that the Secretary order Respondent to pay damages totaling \$105,000 and assess the maximum civil penalty of \$19,787.

In its Opposition, the Respondent requested that the Secretary: 1) uphold sections II-A, B and C of the Initial Decision and Order as part of the Final Decision and Order; 2) confirm the ALJ’s determination as to the \$21,000 in damages or reduce those damages to \$16,000 by eliminating the damages to Complainant Stevenson; and 3) confirm the ALJ’s determination as to the assessed civil penalty of \$5,000 as an appropriate remedy.

DISCUSSION

I. The ALJ’s Analysis of Subsections 804(a) and 804(d) of the Act Was Unnecessary in Light of Court’s Finding that Respondent Met the “Mrs. Murphy” Exemption.

The Charging Party appealed the ALJ’s analysis and consideration of subsections 804(a) and 804(d) of the Act in the Initial Decision. The Court found that Respondent qualified for the “Mrs. Murphy” exemption and therefore could not be held liable for violating subsections 804(a) and 804(d) of the Act. *Initial Decision* at 15-18. The Charging Party argued that “there was no basis for the Court to even consider, much less opine on, any alleged violations of subsections 804(a) and (d)” if the Court found that Respondent was eligible for the Mrs. Murphy exemption. *Petition* at 4. The Charging Party has asked the Secretary, or his designee, to issue a final agency decision that excludes the Initial Decision’s Discussion sections II.A., II.B. and II.C., which discuss the alleged violations of subsections 804(a) and (d). *Id.* In its Opposition, Respondent asserted that the Court did not err in its discussion and conclusions in sections II-A, B and C; and the ALJ, as his duty to justice permits, addressed and rejected each of the allegations proffered by the Charging Party. *See Opposition.*

The “Mrs. Murphy” exemption is an affirmative defense, which states nothing in section 804 [42 U.S.C. § 3604] (other than subsection (c)) shall apply to - rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies such living quarters as his residence. 42 U.S.C. § 3603(b)(2). Thus, where applicable, the exemption excuses a covered owner-occupant from the anti-discrimination requirements of subsections 804(a) and (d). *Initial Decision* at 15.

When asserting the “Mrs. Murphy” exemption, Respondent had the burden to establish that all the factors of the exemption are met. *See United States v. Columbus Country Club*, 915 F.2d 877, 882 (3d Cir. 1990). In the Initial Decision, the Court determined that the Respondent is entitled to the benefit of the “Mrs. Murphy” exemption and thus cannot be held liable for violating subsections 804(a) or 804(d). *Initial Decision* at 15. Notwithstanding the Court’s finding regarding the “Mrs. Murphy” exemption, the ALJ offered a detailed analysis of

subsections 804(a) and (d) to determine whether the Charging Party established, by a preponderance of the evidence, the requisite discriminatory intent in refusing to negotiate with Complainant and telling her the apartment was already rented.

I find that any discussion, analysis, or ruling on Respondent's conduct under subsections 804(a) and (d) is unnecessary after determining that the "Mrs. Murphy" exemption applies and prohibits the possibility of liability under these subsections.¹ Therefore, I am striking sections II-A, B, and C from the Initial Decision.

Although the application of the "Mrs. Murphy" exemption is undisputed here, I find that the Court erred in its finding that Respondent lacked discriminatory intent when he denied Complainant Leary's request for housing. To allege discriminatory intent under the Act, a plaintiff may either offer direct evidence of discrimination or invoke the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting framework. *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1451 (4th Cir. 1990). Direct evidence encompasses conduct or statements that both (1) reflect directly the alleged discriminatory attitude, and (2) bear directly on the contested [housing] decision." *Petition at 6, citing Letke v. Wells Fargo Home Mortg., Inc.*, No. RDB-12-3799, 2015 U.S. Dist. LEXIS 38980, at *20 (D. Md. Mar. 27, 2015) (quoting *Laing v. Fed. Express Corp.*, 703 F.3d 713, 717 (4th Cir. 2013).

Respondent's uncontested statements – "apartment is rented" followed by "nigger free zone", "white power, white power"; "...I'll have my slave clean it for me"; and "K k k" – in response to Complainant's Leary's mere inquiry into the apartment Respondent advertised for rent on Craigslist constitutes direct evidence of discriminatory intent. *See Dixon v. The Hallmark Companies, Inc.* 627 F.3d 849, 855 (11th Cir. 2010) (courts have held that "fire early-he is too old" constitutes direct evidence of discrimination). Blatant remarks such as these, in relation to a housing inquiry, whose intent could mean nothing other than to discriminate on the basis of an impermissible factor, are direct evidence of housing discrimination. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir. 2004). Because direct evidence exists of Respondent's discriminatory intent, the McDonnell Douglas burden-shifting framework is not applicable. *Trans World Airlines v. Thurston*, 469 U.S. 111, 121, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985) ("The McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination.") Accordingly, the ALJ's conclusion regarding lack of discriminatory intent was clearly erroneous because the finding is contrary to HUD and federal court precedents. *See HUD v. Corey*, 2012 HUD ALJ LEXIS 17, *citing Dixon v. The Hallmark Companies, Inc.* 627 F.3d 849, 854 (11th Cir. 2010) (citing *B/E Aerospace, Inc.*, 376 F.3d at 1086).

II. The ALJ's Holding that Complainants are Entitled to \$21,000 in Emotional Distress Damages was Erroneous.

Where a respondent has been found to have engaged in a discriminatory housing practice, the ALJ may issue an order for relief which may include actual damages suffered by the aggrieved person. 42 U.S.C. § 3612. "It is well established that the damages [an aggrieved

¹ The Court found Respondent liable for making discriminatory statements in violation of 804(c) of the Act, which is not subject to the "Mrs. Murphy" exemption.

person] may be awarded under the Act include damages for embarrassment, humiliation and emotional distress caused by the acts of the discrimination.” See *HUD v. Godlewski*, 2007 HUD ALJ LEXIS 69, at *11 (HUDALJ July 6, 2007) citing *HUD v. Blackwell*, 1989 WL 386958, *16 (HUDALJ Dec. 21, 1989), *aff’d* 908 F.2d 864 (11th Cir. 1990). Courts have held that, because emotional distress is difficult to quantify, precise proof of the dollar amount of emotional distress is not required to support a reasonable award for such injuries. See *HUD v. Wooten*, 2007 HUDALJ LEXIS 68, * 8-9 (HUDALJ Aug. 1, 2007). Judges are afforded broad discretion in determining emotional distress damages, limited by the egregiousness of respondent’s behavior and the effect of the respondent’s conduct on the complainant. See *Wooten* at *9; *HUD v. Ocean Sands*, 1993 HUDALJ Lexis 89, *4 (HUDALJ Nov. 15, 1993).

A. The Court erroneously discounted damages due to lack of medical evidence.

The Charging Party argued that the ALJ erred by discounting Complainants’ emotional distress because of lack of medical evidence. See *Petition* at 10-11. Courts have recognized that damages from emotional distress may be proven by testimony. See *Bryant v. Aiken Reg’l Med. Ctrs., Inc.*, 333 F.3d 536, 546 (4th Cir. 2003) (“We have held that a plaintiff’s testimony, standing alone, can support an award of compensatory damages for emotional distress.”). Medical evidence concerning physical symptoms is not required for an award of emotional distress damages. See *Morgan v. HUD*, 985 F.2d 1451, 1459 (10th Cir. 1993).

Complainant testified that Respondent’s discriminatory conduct caused her to have a mental breakdown in October 2017. While hospitalized, she says she told medical providers both that Respondent’s racist statements had caused her mental breakdown and that it had been triggered by her son’s failure to pay rent. *Transcript* at 102-103. After being discharged, she saw a psychiatrist, who prescribed medications to help her sleep and soothe her anxiety. *Transcript* at 118-123. She also attended numerous therapy sessions with a licensed clinical social worker. *Id.* Notwithstanding Complainant’s testimony, the ALJ concluded that the Charging Party did not develop a compelling link between Respondent’s single instance of discriminatory conduct and Complainant’s mental breakdown and subsequent psychiatric treatment. *Initial Decision* at 21. The Court found that other subsequent events, such as Complainant’s eviction proceeding, appeared equally likely to have had a negative influence on her mental health and may have contributed to her psychiatric problems. *Id.*

As noted above, Courts have held that damages for emotional distress can be proved through testimony and medical evidence is not necessary to award such damages. Further, Respondents who discriminate in housing must take their victims as they find them and compensate them accordingly. See *HUD v. Godlewski*, 2007 HUD ALJ LEXIS 67, at *12 (HUDALJ December 21, 2007); see also *HUD v. Housing Auth. Of City of Las Vegas*, 1995 HUD ALJ LEXIS 31, at *82 (HUD ALJ Nov. 6, 1995). The fact that the Complainant had other life events during the same time period should not account for the decrease in the amount of damages the Court awards. Complainant’s testimony regarding her emotional distress, which resulted in a mental breakdown, as a result of Respondent’s discriminatory conduct is credible and should not be used to discount her damage award.

I find that the Court erroneously reduced Complainant's damages for lack of expert testimony regarding Complainant's medical history and the extent to which Respondent's discriminatory conduct accounted for her mental breakdown.

B. Respondent's discriminatory conduct was egregious.

The Charging Party argued that the Court failed to account for the egregiousness of Respondent's conduct; ignoring evidence of a causal link between Respondent's conduct and Complainants' injuries; and undervaluing Complainants' emotional distress in relation to comparable cases. *Petition* at 13-16. Respondent countered that the award amount of emotional distress damages to Complainant Leary is within the broad discretionary authority of the ALJ. *Opposition* at 9-16. Further, Respondent argued that the award for damages to Complainant's son is not supported by the evidentiary record because Mr. Stevenson was not seeking housing. *Id.* at 13-14.

Complainant, who is Black/African American, contacted Respondent based on Respondent's Craigslist advertisement for an apartment. At some point during the course of her inquiry, the following text message exchange occurred between Respondent and Complainant:

Complainant: Hello my name is Shon-tonette, do you have any pictures for the two-bedroom apartment?
Complainant: Can you text me the address also Saturday morning at 10 is that good?
Respondent: No thank you
Respondent: Do not make the cut
Complainant: What are you talking about
Respondent: Nigger free zone
Respondent: White power white power
Complainant: Learn to wash your ass you racist asshole go kill yourself bastard
Respondent: I'll have my salve clean it for me
Respondent: With her slave tone [sic]
Complainant: Go finish fucking your mother you retarded sick ass
Respondent: K k k

Initial Decision at 5.

The Court credited Complainant's testimony that when Respondent began sending the racist text message, she was angry, upset, and confused, but by the time he sent the final message, she was afraid because she believed he was threatening her by alluding to the KKK. *Initial Decision* at 21. She testified that the text message exchange was on her mind every single day afterward and left her feeling depressed, embarrassed, and scared. *Id.* She also indicated she could not bring herself to look for another apartment because she was depressed and did not want to experience the same sort of discrimination again. *Id.* Thus, the Court concluded that Respondent's discriminatory statements had a "lingering negative effect on Complainant's emotional state." *Id.*

While the Court found that the discriminatory statements had an impact on Complainant,

the Court failed to address the egregiousness of Respondent's conduct. In fact, the Court minimized Respondent's conduct as a "single instance" of discriminatory conduct. Respondent's use of the words "nigger", "slave", "white power" and "kkk" are highly egregious. The term "nigger" is a derogatory and offensive racial slur towards African Americans. Terms such as "white power" and "kkk" connote white supremacy. Complainant testified that she was afraid, embarrassed, humiliated and scared. *Transcript* at 79. Even if only said once, this is egregious conduct.

Complainant Stevenson lives with his mother, Complainant Leary. *Initial Decision* at 5. Complainant Leary informed Respondent that she was interested in the unit for herself and her son, Complainant Stevenson. *Transcript* at 34, 18-20. Complainant Stevenson learned of Respondent's conduct towards Complainant Leary in October 2017 when she suffered the mental breakdown. *Transcript* at 189, 12 - 190, 11. At that time, Complainant Leary showed him the text messages she received from Respondent. Complainant Stevenson testified that he was "scared ... felt threatened" because at the time he was working in Paramus, near Respondent's rental property. *Transcript* at 195. In addition, Complainant Stevenson testified that "it was scary ... because his mom always took care of everything." *Id.* Now, he had to take on more responsibility and console her when she had breakdowns. *Transcript* at 194, 15. As a result of Complainant Leary's mental state, Complainant Stevenson testified that he was terrified and scared because his mom always took care of everything and was always the strongest person he had met. *Transcript* at 194, 22 - 195, 5.

C. Emotional distress damages awarded are not in accordance with precedent.

In similar cases, courts have consistently awarded significantly higher compensation for emotional distress. In *HUD v. Kocerka*, the Court awarded \$50,000 and \$40,000 to Complainant Theresa, who is white, and her black husband, Complainant George White, Jr., respectively, for embarrassment, humiliation, and emotional distress they suffered as a result of respondent's unlawful discrimination in the denial of housing. *HUD v. Kocerka*, 1999 HUD ALJ LEXIS 3 (HUDALJ May 4, 1999). In *HUD v. Kocerka*, Complainant Theresa arranged to see a unit advertised for rent. *Id.* at *4. When she arrived with her black husband, at the scheduled meeting time, they were told that the apartment had been rented. *Id.* at *4-5. Complainant Theresa called the same number which she had previously called to ask whether the unit was still available and she was told that it was still available. *Id.* The person asked whether she was black or white. *Id.* at *5. He then informed he that he did not want blacks in the building. *Id.*

In *Banai v. HUD*, a black couple was looking for housing after their house suffered damage caused by Hurricane Andrew. *Banai v. HUD*, 102 F.3d 1203 (11th Cir. 1997). Complainants found a suitable property for rent that would accommodate Complainant Brinson's mobility impairment and was in close proximity to her physical therapist. *Id.* at *4. However, upon learning that the couple was black, the owners refused to rent the property to complainants because of their race. *Id.* at *4. The couple had to continue their search for housing while Complainant Brinson remained hospitalized, but none suited them because they could not accommodate Brinson's special needs resulting from her injuries. *Id.* at *5. The Court awarded the complainants \$35,00 each in compensatory damages for their injuries. *Id.* at *7. *See also Broome v. Biondi*, 17 F. Supp. 2d 211 (S.D.N.Y 1997) (jury award affirming \$114,000 to each

complainant for emotional distress when denied housing based on racial discrimination). The courts in both *Kocerka* and *Banai* awarded significantly higher compensation for racial discrimination than this case and neither of those cases involved the derogatory slurs present in this case.

The Court failed to consider the egregiousness of Respondent's conduct and the effect of such conduct when arriving at the low damage award of \$15,000 for Complainant Leary. "The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action." *Petition* at 13, *citing United States v. Balistreri*, 981 F.2d 916, 932 (7th Cir. 1992). As discussed earlier, the use of the word "nigger" and reference to "white power" and the "kkk" is the most degrading racial slur and fear-mongering based on a longstanding history of hate towards black people. Based on the case history and the egregiousness of Respondent's conduct in this case, I find an award of \$60,000 for Complainant Leary is reasonable.

The Court ordered Respondent to pay damages to Complainant Stevenson in the amount of \$6,000. The Charging Party asked for \$45,000 in damages for Complainant Stevenson. Complainant Stevenson lived with Complainant Leary in February 2017 and there was no indication in the record that he was going to cease living with his mother, should she find another residence. However, based on the record, it appears that Complainant Stevenson had no knowledge that Complainant Leary had inquired about renting the subject unit from Respondent; that she was denied the unit; and he lacked knowledge of Respondent's refusal to rent to Complainant Leary based on her race or color until she told him in October 2017.

Complainants may still be awarded damages for the distress they experienced as a result of witnessing the distress that the respondents' conduct caused their family members to suffer. *See HUD v. Kocerka*, 1999 HUD ALJ LEXIS 3. In *HUD v. Kocerka*, Complainants, a bi-racial couple, had three children, ages 1, 14 and 19 when they were denied housing based on race of the husband who is African American. *Id.* at *19. The two older children were informed of the discrimination at the time it occurred and, as a result, were exposed to racism in spite of their parents' best efforts to shield them from it. *Id.* at *19-20. Upon learning of the discriminatory incident, the eldest daughter shared her mother's grief, hurt and distress caused by the incident. *Id.* at *20. The son became angry over the incident and spoke of seeking revenge and became a bitter young man, frequently seeing racial unfairness in his daily affairs where it did not always exist. *Id.* The court found that additional damages were appropriate because of the emotional distress family members suffered from seeing the close relatives' emotional distress. *Id.* at *21-22. The ALJ found it reasonable to award the parents in the case \$90,000 in total. *Id.* at *25.

In this case, Complainant Stevenson suffered a similar emotional distress through witnessing the emotional distress of his mother. As shown above, Complainant Stevenson felt real fear when seeing his mother in emotional distress. *Transcript* at 194-195. Complainant Stevenson also testified that as a result of his mother's mental breakdown, he had to take on more responsibilities. *Id.* at 195, 2-4. In addition, he expressed concern about working near the location of the subject rental property. *Transcript* 195, 9-19. Based on this, Complainant Stevenson is entitled to compensatory damages.

However, I do not believe that \$45,000 is appropriate damage amount for Complainant Stevenson. Complainant Stevenson did not experience the discrimination first-hand by Respondent and only learned about it over 6 months later. On the other hand, the Court's award of only \$6,000 is too low and does not account for the egregiousness of the conduct and the impact the entire situation had on Complainant Stevenson. Therefore, I find that damages in the amount of \$10,000 for Complainant Stevenson is reasonable.

D. Respondent's Cross-Petition is denied.

In his submission, Respondent Cross-Petitioned Charging Party's Petition for Partial Secretarial Review requesting that the Secretary deny damages to Complainant Stevenson. Pursuant to 24 C.F.R. § 180.675, petitions for review must be received by the Secretary within 15 days after issuance of the Initial Decision. Respondent filed its Cross-Petition for Partial Secretarial Review on January 28, 2020, more than 15 days after the issuance of the Initial Decision. Therefore, I find Respondent's Cross-Petition for Partial Secretarial Review untimely and I will not review the substance of Respondent's arguments.

III. The ALJ's Assessment of Only a \$5,000 Civil Penalty Was Erroneous.

After finding that a respondent engaged in a discriminatory housing practice, an ALJ may vindicate the public interest and assess a civil penalty against the respondent. 42 U.S.C. § 3612(g)(3). In determining the appropriate penalty, the ALJ is to consider six factors: (1) whether the respondent has previously been adjudged to have committed unlawful housing discrimination; (2) respondent's financial resources; (3) the nature and circumstances of the violation; (4) the degree of that respondent's culpability; (5) the goal of deterrence; and (6) other matters as justice may require. 24 C.F.R. § 180.671(c). In this case, the ALJ assessed a \$5,000 civil penalty. The Charging Party appealed the ALJ's assessment of a \$5,000 civil penalty, arguing that the ALJ erroneously concluded that Respondent's actions are not "the sort of willful, malicious conduct that demands a maximum penalty." *Petition* at 7. The Charging Party asked for the maximum civil penalty of \$19,787. The Respondent argued the interaction between Complainant Leary and Respondent was a short series of back and forth text messages and nothing more; and that if the language used was so egregious, then why is it accepted, perhaps even encouraged, common parlance within the [rap] music industry. *Opposition* at 14-15.

The Court found no evidence Respondent had previously committed unlawful housing discrimination. *Initial Decision* at 22. Respondent presented no evidence pertaining to his financial resources, nor did he argue that imposition of the Charging Party's proposed civil penalty would result in financial hardship. *Id.* In the absence of any evidence to the contrary, I am unable to conclude that Respondent's financial condition adversely affects his ability to pay the maximum civil penalty. With respect to Respondent's degree of culpability, the Court concluded that Respondent engaged in intentionally racist behavior in making the discriminatory statements. *Id.* at 23. The Charging Party did not raise any argument with respect to this factor. Therefore, I will not opine or disturb the Court's finding as to culpability.

Based on the remaining factors, after carefully reviewing the record and legal precedent, I

find that Respondent's violations of the Act are particularly egregious and warrant the maximum civil penalty of \$19,787 in order to vindicate the public interest and act as a deterrent.

A. Nature and Circumstances of the Violations.

The Charging Party argued that the ALJ wrongly minimized the violations when he labelled them as nothing more than a "single, apparently isolated incident of discriminatory conduct consisting of words alone." *Petition* at 17. Although the Court found that the Respondent's discriminatory statements were "outrageous, blatantly racist, and made without regard for the impact they would have on Complainant," the ALJ held this case did not warrant awarding the maximum penalty. *Initial Decision* at 22-24.

The record shows that Respondent made highly offensive and racist remarks to Complainant in response to her mere inquiry into the apartment he advertised for rent. The record reflects that Complainant sent a text message to Respondent introducing herself, requesting pictures of the unit and asking when she could see the apartment. *Id.* at 5. In response, Respondent indicated that the "apartment is rented"; "nigger free zone"; "white power white power"; "I'll have my slave clean it for me ... with her slave tone [sic]"; and "K k k." The Court's characterization of these text messages as "words alone" minimizes the inflammatory and demeaning nature of the words. The word "nigger" is highly offensive and demeaning, evoking history of racial violence, brutality, and subordination. *Petition* at 17.

In similar cases where the word "nigger" was uttered, the Court imposed the maximum penalty. In *HUD v. Blackwell*, where a homeowner refused to sell to an African American couple and used the word "nigger" when describing African Americans, the ALJ imposed the maximum civil penalty. *HUD v. Blackwell*, 1989 HUD ALJ LEXIS 15 at *56 aff'd sub nom *Sec'y ex rel Herron v. Blackwell*, 908 F.2d 864. See also *HUD v. Fund*, 2008 HUD ALJ LEXIS 46 (HUDALJ Jan. 31, 2008), at 56 (maximum civil penalty awarded where the respondents had refused to rent to an African American woman because of her race).

I find that the nature and circumstances of the violation are highly egregious and warrant maximum penalty.

B. Deterrence

The Court found that given that the Court had already adjudged Respondent liable for \$21,000 in damages, and given that he is not a large commercial member of the real estate industry, the Court believed that sufficient deterrence can be achieved through imposition of a penalty below the maximum amount. *Initial Decision* at 24. The Charging Party argued that the ALJ has confused damages and penalties, as the same type of relief. *Petition* at 19.

The goal of deterrence could not be more important ... where people's race, with nothing further, was used as a reason to bar them from the housing they desired. *HUD v. Kocerka*, 1999 HD ALJ LEXIS 3, *29. Twenty years after the passage of the Act, there was undisputable evidence that racial discrimination in housing was still rampant in this country ... Thus, there is a continuing need for deterrence, and a substantial civil penalty serves that very important goal."

Id. Deterrence is used to put those similarly situated to [Respondent] on notice that violations of the Fair Housing Act will not be tolerated. *HUD v. Parker*, 2011 HD ALJ LEXIS 15, *31 (HUDALJ October 27, 2011). In *HUD v. Parker*, the ALJ ordered the maximum penalty of \$16,000 against a real estate agent who told the complainant that, based on complainant's race, it was not a "good idea" to move into a particular neighborhood. 2011 HUD ALJ LEXIS 15, at *31-32. See also *HUD v. Blackwell*, 908 F.2d 864 (11th Cir. 1990) (Court of Appeals affirmed maximum penalty of \$10,000 at the time, where property owner refused to sell to potential African American buyer).

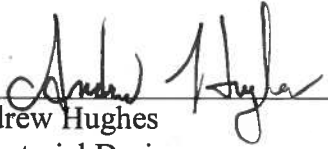
The words used by Respondent towards Complainant Leary are rooted in a deep history of racial intolerance, hatred and fear. Similarly situated individuals, should be on notice that this type of conduct is egregious and unacceptable. Respondent and any other persons who might otherwise act similarly will be discouraged from doing so if the maximum civil penalty is imposed here. Therefore, I find that the maximum penalty of \$19,787 is warranted in this case.

CONCLUSION

Upon review of the entire record in this proceeding, including the briefs filed with this office, and based on an analysis of the applicable law, the Charging Party's Petition for Review is GRANTED IN PART and the ALJ's Initial Decision and Order is MODIFIED IN PART. Sections II.A., II.B. and II.C. are stricken from the Initial Decision and Respondent is ordered to pay \$60,000 in emotional distress damages to Complainant Leary and \$10,000 in emotional distress damages to Complainant Stevenson; and pay \$19,787 in civil penalties. Respondent's Cross-Petition is DENIED because it was not timely filed.

IT IS SO ORDERED.

Dated this 5 day of February, 2020



Andrew Hughes
Secretarial Designee