

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: January 5, 1994

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 SECOND REMAND

STATEMENT OF THE CASE

On November 19, 1993, the Designee of the Secretary of the Department of Housing and Urban Development ("HUD" or "the Government") "set aside" the October 21, 1993 Initial Decision And Order On Remand in this matter, entered judgment for the Government and the Complainant/Intervenor, and remanded the case for further adjudication. This matter originated on September 12, 1990, when Bobbie Burris ("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.

On May 24, 1993, an Initial Decision and Order ("Initial Decision 1" or "ID 1") was issued dismissing all charges against the Respondents. Both the Government and the Complainant petitioned the Secretary of HUD to reverse that decision and to grant the relief requested. On June 23, 1993, the Secretary's Designee issued an Order ("Remand Order 1" or "RO 1") "setting aside" Initial Decision 1 and remanding the case for further adjudication. On July 20, 1993, the hearing was reconvened in Salt Lake City for the taking of additional testimony and for closing arguments.

On October 21, 1993, an Initial Decision And Order On Remand ("Initial Decision 2" or "ID 2") was issued dismissing all charges against the Respondents. The Government and the Complainant petitioned the Secretary to vacate that decision and grant appropriate relief. On November 19, 1993, the Secretary's Designee issued a Decision And Order ("Remand Order 2" or "RO 2") that "set aside" Initial Decision 2, entered judgment for the Government and Complainant, and remanded the matter for a period of 60 days for additional findings concerning liability and for an assessment of damages.

BACKGROUND

Jess and Barbara Aylett are married and reside in Sandy, Utah. Transcript of initial hearing ("Tr.") 332-33. William Justin Memmott is their 21-year-old son. 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. Respondents' exhibit ("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, 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.

INITIAL DECISION 1

In Initial Decision 1, 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; Government's exhibits ("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. 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 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 1 at 4-5. 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. ID 1 at 4-6.

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. ID 1 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. ID 1 at 7.

Complainant had 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. I did not consider that allegation because it was not included in the charge. Consequently, I dismissed all of the charges.

REMAND ORDER 1

In Remand Order 1, the Secretary's Designee "set aside" Initial Decision 1 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 1 at 7. Complainant had asserted that Ms. Aylett made statements during an interview with Mr. Frant 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 were admitted into evidence. Ex. G-24. Complainant requested to extend the hearing into a second day so she could present testimony from Mr. Frant, who was not present at the hearing, concerning his interview with Respondents. Tr. 327-31.

The Secretary's Designee found that I erred by sustaining Respondents' objection to that request. RO 1 at 7. The Secretary's Designee found that Respondents surprised Complainant's counsel by contradicting their deposition testimony concerning the accuracy of Mr. Frant's notes. He also found that the parties had estimated that the hearing would last one and one half days, which would have occurred had the hearing not continued until 8:39 p.m., and that hearings do not usually proceed that late. Thus, Complainant should have been allowed to present Mr. Frant as a witness. RO 1 at 5.

The Secretary's Designee found 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 1 at 5. He 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 1 at 6. He found that the omission from the charge of an allegation that Respondents violated 42 U.S.C. § 3604(a) was inadvertent. RO 1 at 3 n.1.

INITIAL DECISION 2

In Initial Decision 2, I found that 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.

For the following reasons, I found that the Government did not prove that Ms. Aylett made the racially-oriented statements attributed to her in the notes. The notes were the only evidence that Ms. Aylett made them. For several reasons, the notes were not sufficiently trustworthy to constitute a preponderance of the evidence in light of the contrary evidence. For example, although Mr. Frant placed quotation marks around words that he was certain were uttered by a Respondent, he did not place them around the racially-oriented words that he felt reflected Ms. Aylett's unfavorable view of Black persons. He exhibited confusion when preparing his formal notes from the "raw" notes that he took during the interview. His testimony concerning the meaning of Ms. Aylett's statements was inconsistent with the meaning of his notes. Contrary to statutory and regulatory requirements to interview Respondents and witnesses to the alleged discrimination, Mr. Frant took a "shortcut" and did not interview Mr. Memmott; he admitted that he should have interviewed him. Also, Ms. Aylett credibly and consistently denied making the statements in question; her deposition testimony was consistent with her hearing testimony. Her testimony was supported in part by that of Ms. Burris. Consequently, I found that the notes had less probative value than Respondents' evidence concerning this issue. ID 2 at 6-10.

Regarding the instruction in Remand Order 2 "reevaluate the credibility of the witnesses after hearing Mr. Frant's testimony," I found that his testimony provided no basis for credibility findings that were different from those in Initial Decision 1. I found 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. ID 2 at 11-15.

Even assuming for the sake of argument that Mr. Frant's testimony had an adverse impact on the Ayletts' credibility, I stated that I would still find that Ms. Aylett did not make the statements alleged in the charge. That was because Mr. Frant's testimony was unrelated to Mr. Memmott's persuasive eyewitness testimony that Ms. Aylett did not make the statements in question. I found that although Mr. Memmott's status as the son of the Ayletts must be considered in judging his credibility, that factor alone did not render him unbelievable. I found that although Mr. Memmott's status as a Respondent must also be considered, that status did not adversely affect his credibility any more than Ms. Burris' status as a Complainant adversely affected her credibility. ID 2 at 12-13.

I rejected Complainant's argument that Remand Order 1 required that I find a violation of 42 U.S.C. § 3604(a) if I found that certain allegations of discriminatory statements and actions by the Ayletts, which were not alleged in the charge, had been proven. I found that, even assuming for the sake of argument that those allegations had been proven, I would find that the eyewitness testimony of Mr. Memmott that Ms. Aylett did not make the statements alleged in the charge was an insurmountable obstacle to the Government's effort to meet its burden of proof. Consequently, I dismissed all of the charges. ID 2 at 15-18.

REMAND ORDER 2

In Remand Order 2, the Secretary's Designee found that Ms. Aylett made the statements alleged in the charge. Therefore, he concluded that 42 U.S.C. § 3604(b) and (c) had been violated. He found that Complainant's allegation that the Respondents had violated 42 U.S.C. § 3604(a) was not within the scope of this proceeding because HUD's Associate General Counsel for Equal Opportunity and Administrative Law had issued a decision on September 30, 1992, finding no reasonable cause to believe that such a violation had occurred. RO 2 at 2.

The Secretary's Designee stated that the Secretary may overrule an Administrative Law Judge's decision and substitute his own findings and conclusions if his findings are supported by substantial evidence. He found that Mr. Frant's notes of his interview with the Ayletts were trustworthy and were therefore admissible as evidence. He found that Mr. Frant was an experienced investigator who conducted the investigation in a timely manner and who had no reason to fabricate the notes. He found that, in my analysis, I had criticized Mr. Frant's conduct of the investigation and had imposed a

higher obligation on Mr. Frant than was either required by law or regulation, or warranted by the facts. For example, he found that there was no statutory or regulatory requirement to interview Mr. Memmott as a Respondent. RO 2 at 12-18.

The Secretary's Designee found that much of what was related in Mr. Frant's notes was corroborated elsewhere in the record, thus adding substantially to the assertion that his notes accurately conveyed the substance of the interview. He found that Mr. Frant did not interview Mr. Memmott because he was misled by Mr. Aylett into believing that Mr. Memmott had no knowledge of the pertinent facts, and because he had no independent reason to believe that Mr. Memmott was an important witness. Thus, Mr. Frant did not abuse his discretion to decide which witnesses' testimony would be helpful to the case. The Secretary's Designee concluded as follows:

The investigator's notes show that Ms. Aylett made racially-charged statements to the investigator. This suggests, at least to some extent, bias against African-Americans on her part. More importantly, the notes are circumstantial evidence that Ms. Aylett had a reason to believe, at the time she met with Ms. Burris, that because of a previous experience with a former Black tenant, her husband would not rent to Black people. Mr. Aylett himself explained that his wife may have had that incident in mind if she made the statement to the investigator.

RO 2 at 15-18.

The Secretary's Designee found that I had placed "far too much weight" on Mr. Memmott's testimony. He found that Mr. Memmott was not paying close attention to the exchange between Ms. Aylett and Ms. Burris at the front door when the statements alleged in the charge were made. He found that Mr. Memmott was unable to recall other racially-related statements that his mother made "at the very same time and place." Thus, he found that "the fact that [Mr. Memmott] did not recall Ms. Aylett making the statement at issue in this case ... is of little, if any, probative value." RO 2 at 18.

The Secretary's Designee found that I had not placed enough significance on the fact that Mr. Memmott, as a Respondent, had a personal stake in the outcome of the case, and that he had a personal and financial interest in exonerating his parents. Also, he found that there were inconsistencies in Mr. Memmott's testimony that raised questions concerning his credibility. He found that the most notable inconsistency involved his testimony about whether African-Americans had frequently visited his parents' home. RO 2 at 18-19. After reviewing the evidence, the Secretary's Designee concluded as follows:

Based on the evidence as a whole, I find that the testimony of Ms. Burris as to whether Ms. Aylett told her that her husband would not rent to Blacks but that Ms. Aylett would recommend her is more credible than the testimony of

Ms. Aylett or Mr. Memmott. The ALJ's decision to give great weight to Mr. Memmott's testimony and little weight to Mr. Frant's notes is not supported by the evidence as a whole. Indeed, the evidence as a whole leads to the conclusion that Mr. Frant's notes are entitled to great weight while Mr. Memmott's testimony is of little, if any, probative value.

RO 2 at 20. Accordingly, he found that the charges were sustained by a preponderance of the evidence, and he remanded the case with instructions "to determine whether Ms. Aylett was acting as an agent of the other two Respondents and to determine the amount of damages to be assessed in this case." RO 2 at 20.

LIABILITY OF MR. MEMMOTT

The Government contends that Mr. Memmott was the owner of the duplex, and, as such, he is liable for the violations of the Act by his agents, the Ayletts. I disagree. In March 1989, Mr. Aylett executed a quitclaim deed granting the duplex to Mr. Memmott. Ex. R-8. However, Respondent Memmott argues that he did not become owner of the duplex by virtue of that action. He correctly points out that delivery of a deed is essential to a conveyance of property. *Winegar v. Froerer Corp.*, 813 P.2d 104, 110 (Utah 1991). Although Mr. Aylett eventually told Mr. Memmott in December 1992 that he had executed the deed, he did not give the deed to Mr. Memmott or even show it to him. Mr. Aylett continued to retain all of the burdens and benefits of ownership. He continued to hold and pay the mortgage and pay the taxes; he also retained the rental income. Tr. 218-19, 269-70, 310-12. Therefore, I find that Mr. Aylett retained legal ownership of the duplex because he did not deliver the deed to Mr. Memmott. Consequently, Mr. Memmott has no liability in this case because he did not own the duplex and the Ayletts were not his agents.

LIABILITY OF THE AYLETTES

The Secretary's Designee has found that Ms. Aylett made the statements in question. Thus, she committed a violation of 42 U.S.C. § 3604(c), and she is liable for the damages caused by it.

I find that Mr. Aylett, as owner and manager of the duplex, is also liable for that violation because Ms. Aylett was acting as his agent when she committed the violation. Ms. Aylett admitted that she took "delegation responsibility" from her husband for certain duties concerning the duplex. One of those duties was to show the duplex to prospective tenants. Tr. 357. This shows that she was authorized by her husband to engage in communication with prospective tenants concerning rental matters. That is the type of activity that she was performing during her contact with Ms. Burris. Therefore, I find that she was acting within the scope of the authority that had been delegated to her by her husband when she made the statements to Ms. Burris in violation of the Act. Consequently, Mr. Aylett is liable for her violation of the Act. See *United States v.*

Balistrieri, 981 F.2d 916 (7th Cir. 1992), *cert. denied*, 114 S.Ct. 58 (1993) (apartment owner liable for discrimination of rental agent).

I find that Mr. Aylett committed the violation of 42 U.S.C. § 3604(b). That provision makes it unlawful "[t]o discriminate against any person in the ... conditions ... of ... rental of a dwelling ... because of race [or] color" While § 3604(c) prohibits the making of discriminatory statements, § 3604(b) prohibits the imposition of discriminatory conditions of rental. It is evident from Ms. Aylett's statements that Ms. Burris was discriminated against because a condition -- the need for a recommendation from Ms. Aylett -- was imposed on her due to her race and color. Although the condition was evidenced by Ms. Aylett's statements, it was imposed by Mr. Aylett. It is undisputed that Mr. Aylett selected the tenants for the duplex. It is evident from Ms. Aylett's statements that her husband imposed the racially discriminatory rental policy, that she did not have the power to select Ms. Burris, and that the need for a recommendation was due to her husband's discriminatory policy. Thus, I find that Mr. Aylett violated 42 U.S.C. § 3604(b) in that he discriminated against Ms. Burris because of her race and color by imposing a racially discriminatory rental policy that required a recommendation from his wife for a Black person to be considered as a tenant. Consequently, Mr. Aylett is liable for the damages caused by that violation.

REMEDIES

The Ayletts' violations of the Fair Housing Act entitle the Complainant to appropriate relief under the Act, which may include actual damages and injunctive relief. 42 U.S.C. § 3612(g)(3). A civil penalty may also be imposed. *Id.* The Complainant seeks \$100,000 for emotional distress and \$33,000 for future medical expenses. The Government also seeks civil penalties totaling \$8,000 and injunctive relief.

Damages For Emotional Distress And Humiliation

The Complainant asserts that she suffered a mental disorder, emotional distress, and humiliation because of the Respondents' misconduct. Injuries such as those are compensable under the Fair Housing Act. Damages for those injuries can be proven by testimony and inferred from the circumstances of the case. *See, e.g., Secretary of HUD v. Blackwell*, 908 F.2d 864, 872 (11th Cir. 1990).

Causation

At the threshold of the consideration of damages is the issue of whether the Ayletts' violations of the Act actually caused Ms. Burris to suffer injury. Relief may only be awarded for "actual damages suffered by the aggrieved person". 42 U.S.C. § 3612(g)(3). Resolution of this issue must be governed by the Supreme Court's mandate that the Fair Housing Act be construed broadly. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). Consideration must also be given to "the broad remedial intent of Congress embodied in the Act." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982).

Complainant contends that the violations caused her to suffer a mental disorder, emotional distress, and humiliation. Respondents contend that any injury was caused by other factors, not by the violations. I agree with the Complainant.

Respondents first argue that any injury resulted from Ms. Burris' not getting the duplex, not from Ms. Aylett's statements, because Ms. Burris did not complain of injury or suffer from it until she learned that she did not get the duplex. In December 1992, Dr. Gloria Leah Johnson-Powell, a psychiatrist and a professor at Harvard Medical School, interviewed Ms. Burris and conducted several tests to determine her mental condition. Ex. G-35 at 5, 10-11, 14, 20-21. Her diagnosis was that Ms. Burris was suffering a chronic depressive disorder of moderate severity with some anxiety. Ex. G-35 at 21, 92. Dr. Johnson-Powell concluded that the depressive disorder was caused by several factors -- Ms. Burris' perception that she did not get the duplex because of her color; her belief that her subsequent failure to be promoted at work was based on her color; and her belief that she was "trapped by discrimination" in three inadequate homes that she occupied after she did not get the duplex. Ex. G-35 at 22-28, 56-57, 134-35.

Initially, the statements had some adverse effect on Ms. Burris, but it was not substantial because her reaction was tempered by her hope that Ms. Aylett would obtain an exception for her because they had been classmates. She testified that:

[E]ven though I didn't show it, I felt hurt when she said that, because nobody's ever told me that to my face before. So I did feel hurt and humiliated kind of when she said that, but I didn't show it because she told me that she would talk to her husband.

Tr. 82. She also testified that she did not take the statements in a "negative or threatening way" because Ms. Aylett said she would talk to her husband. Tr. 82, 110-11. Furthermore, Ms. Burris stated that she "wasn't going to say anything to her [about the statements] to wreck the chances of me getting the apartment." Tr. 83. According to Ms. Manzanares, Ms. Burris told her about the statements immediately after they were made, but Ms. Burris nevertheless felt "absolutely certain that she had a deal with the Ayletts" to rent the duplex. Ex. G-14.

It is true that the statements, standing alone, did not cause Ms. Burris' depressive disorder. Dr. Johnson-Powell testified that Ms. Burris would not have had any psychological problems if she had been able to rent the duplex. Ex. G-35 at 125, 127. Ms. Burris also expressed that view. Tr. 110-11, 123. However, Ms. Burris testified that when she learned that she did not get the duplex, she remembered Ms. Aylett's statement that her husband would never rent to a Black person, and she "never forgot it." Tr. 94. She testified that when she thought back on the statement:

I felt angry, hurt, belittled. It made me think that I wasn't good enough. It made me think that I had to be White to rent from them, and that hurt.

...

[W]hen somebody says something to you like that and its never happened before, it does hurt a lot. Nobody's ever told me to my face before . . . that I couldn't have something because of my color.

Tr. 95, 103. Dr. Johnson-Powell also explained that Ms. Burris did have a negative reaction, albeit delayed, to the statement:

At first she . . . was trying to be very, very pleasant with [Ms. Aylett] and accepting whatever she said. But I think she had the expectation that because she knew her from high school and everything else, that she was going to get the apartment, and that's why she proceeded with all of the things that she did. But later in reflecting on it, it made her angry to think that they could have said that openly and actually go about not giving her the apartment primarily because she was African-American [W]hen it occurred [to her] that she did not get the apartment, she realized that that statement was dead right, dead true, that he wasn't going to rent to Blacks.

Ex. G-35 at 128.

Given Ms. Aylett's statement that her husband "will never rent to a Black person," Ms. Burris' perception that she did not get the duplex because of her color was a reasonable one. Although Ms. Aylett also stated that she would recommend her as a tenant to her husband, it was clear from her statements that her husband selected the tenants. Thus, when she did not get the duplex, it was reasonable for Ms. Burris to conclude that Ms. Aylett did not succeed in obtaining an exception for her from her husband's discriminatory policy. Ms. Aylett's statements were the sole reason for Ms. Burris' perception of discrimination. Therefore, it is reasonable to conclude that the statements were the cause of that perception, and that they were a cause of the depressive disorder.

Ms. Burris' belief that she was "trapped by discrimination" in poor living conditions immediately following her failure to get the duplex is an obvious consequence of her reasonable belief that she did not get the duplex because of her race and color. When Ms. Burris sought to rent the duplex, she was living in a rented house that was dilapidated. The floor was slanted, the foundation needed to be replaced, and there were major plumbing problems. Ex. G-35 at 24. The duplex did not have such problems. Ms. Burris viewed it as a "very nice place" that had three bedrooms, a living

room with a fireplace, a kitchen with a dinette area, and two and one half bathrooms. Tr. 58-59.

When she did not get the duplex, she used her subsidized housing voucher to escape the problems with the house, but she was not able to obtain a home that was comparable to the duplex. She found a two-bedroom apartment, but it was "a lot smaller" than the duplex, and it was located in a neighborhood that "wasn't as good" as that of the duplex. Tr. 115. The apartment was not large enough for her son to bring his friends home. If she had been able to rent the duplex, her son could have used its third bedroom to socialize with his friends without interfering with her own socialization process. Ex. G-35 at 23, 25.

Ms. Aylett's statements were the sole reason for Ms. Burris' reasonable belief that her need to live in homes that were not as good as the duplex resulted from Mr. Aylett's discriminatory policy. Dr. Johnson-Powell attributed "most" of Ms. Burris' depressive disorder to the statements because Ms. Burris felt that she was "denied access to a suitable housing situation that was pleasant and pleasing," and subsequently she had to live in unsatisfactory housing. Ex. G-35 at 124. Therefore, it is reasonable to conclude that the statements were the cause of Ms. Burris' belief that she was "trapped by discrimination" in two unsatisfactory homes immediately following the incident, and that the statements were a cause of the depressive disorder.

However, I agree with Respondents that there is no causal connection between the statements and Ms. Burris' dissatisfaction with her living conditions after she moved out of the apartment. One year after living in the apartment, she moved back into the dilapidated house in which she was living when she sought to rent the duplex. She did so to enable her son to go to school in the city, and to help her boyfriend with several problems -- a broken leg, a condition of paranoid schizophrenia, and a drug problem. Tr. 116, 188-20. She later purchased that house through a city program that enabled her to buy it for a low price but required her to rehabilitate it herself. Ex. G-35 at 24. Ms. Burris was frustrated because she did not have sufficient funds to make the major structural and plumbing repairs that the house required. Ex. G-35 at 24. However, her frustration with the house cannot reasonably be attributed to Ms. Aylett's statements. Rather, that frustration resulted from her decision to move into and purchase the house with knowledge of its condition -- a decision that was based on her desire to help her son and her boyfriend.

Obviously, Ms. Burris' non-promotion was not caused by Ms. Aylett's statements. After she did not get the duplex, Ms. Burris twice sought to be promoted at work and believed that she did not obtain a promotion because of her color. Ex. G-35 at 56-57, 118-20. Ms. Burris testified that she had gotten over those incidents, and that they did not affect her the same way Ms. Aylett's statements did, because she was not told that she did not get the promotion because of her color. Tr. 101-02. Although Dr. Johnson-Powell agreed that Ms. Burris' non-promotion was not troubling her at the time of the interview, she made it clear that the non-promotion contributed substantially to

Ms. Burris' depression. Ex. G-35 at 56-57, 118-20.

Respondents argue that there were additional causes of Ms. Burris' depression that Dr. Johnson-Powell failed to consider. Specifically, Ms. Burris was divorced twice; her first husband engaged in drug abuse and abused her emotionally; her second husband had extramarital affairs; her current boyfriend made a threat of violence that made her fear for her life and live with a friend for a while. However, Ms. Burris denied that those events affected her in the same manner as the statements did, and it is unclear when each of those events occurred in relation to the statements. Tr. 101-02, 116-20, 122-23, 128. Most importantly, it is clear from Dr. Johnson-Powell's testimony that her evaluation of Ms. Burris was designed to reveal the factors that caused her depression, and that the evaluation did not show that those events caused her to have a depressive reaction. Ex. G-35 at 112-17; Tr. 120. Dr. Johnson-Powell explained as follows why Ms. Burris was able to avoid suffering a depression because of events such as those:

[I]f you're in a bad marriage and you don't like what's going on, you can get out, get a divorce, get rid of them. But you can't get rid of your dark skin. You're trapped; there's no way to hide it.

Ex. G-35 at 161-62.

Respondents contend that Dr. Johnson-Powell's testimony in general lacks weight because she interviewed Ms. Burris for only two hours; she has appeared as an expert witness in only 10 housing discrimination cases; the majority of cases in which she has appeared as an expert witness were child sex-abuse cases; and she lacks knowledge of the subject of racial discrimination in the Salt Lake City area. I do not agree that those factors have any significant effect on the weight of Dr. Johnson-Powell's testimony. Respondents conceded that her credentials were "very impressive." Ex. G-35 at 84. Dr. Johnson-Powell gave Ms. Burris several tests in addition to conducting the interview. Most importantly, there is no medical evidence to contradict her diagnosis. Although Respondents also argue that Dr. Johnson-Powell's diagnosis was not based on accurate facts, they have not identified any significant fact that was misinterpreted.

Injury

Ms. Burris reaction to the statements was manifested in several ways. Her relationship with her family was adversely affected for a while. She did not interact with them very much, and she did not cook or do the laundry for them for one or two weeks. Tr. 96. Her relationship with other persons was also affected. She testified that now she does not like to go anywhere. Tr. 95. Previously, she used to go out frequently with her cousin to clubs, but now she does not "want to be around a lot of people anymore." Consequently, she also avoids crowded restaurants. Tr. 97-98. She feels uncomfortable being around White people in particular. Tr. 100. She has also experienced a loss of both sleep and appetite. Tr. 99-100. Sometimes she wakes up

early in the morning and thinks about Ms. Aylett's statements. Tr. 99. Thinking about the statements sometimes makes her wish that she was not Black. Tr. 129.

Ms. Burris' testimony concerning her symptoms was confirmed by both Ms. Manzanares and Dr. Johnson-Powell. Ms. Manzanares observed that, although her mother rarely shows her emotions, she became extremely upset when she learned that she did not get the duplex. She also observed that her mother has become more withdrawn and does not socialize like she did formerly. Dr. Johnson-Powell's testing of Ms. Burris revealed that several physical symptoms accompanied the depression that she suffered -- difficulty sleeping, ruminating at night, loss of appetite, and decrease in socialization. Ex. G-35 at 30.

Ms. Burris' testimony concerning her reaction to the statements is also supported by her background and personality. Ms. Burris, who is approximately 41 years old, had not experienced discrimination prior to this incident. She attended an integrated high school where she had several White friends. Her boyfriend is White. Tr. 57; Ex. R-10 at 13-15, 38-39. Dr. Johnson-Powell found from her testing that Ms. Burris is not the type of person who believes that racism is everywhere and that every problem she encounters is caused by discrimination. Ex. G-35 at 53-56. Thus, she was sensitive to Ms. Aylett's statements.

Dr. Johnson-Powell explained that her diagnosis of "depressive disorder of moderate severity" meant that Ms. Burris could go to work, but she had difficulty on a daily basis handling her personal responsibilities. Ex. G-35 at 92-93. The seriousness of the disorder is evidenced by Dr. Johnson-Powell's concern that Ms. Burris' condition would cause her to have excessive outbursts of anger or feelings of frustration that would result in a suicide attempt. Ex. G-35 at 63. The seriousness of the disorder is also shown by the facts that it still existed more than 15 months after the statements were made, and that Ms. Burris needs to receive treatment for it. Dr. Johnson-Powell determined that Ms. Burris needs individual psychotherapy once or twice per week for at least one year. She also suggested that Ms. Burris take anti-depressants. Ex. G-35 at 67-70.

Although other factors contributed to the disorder, the statements were its initial cause. Her failure to get promoted occurred after she did not get the duplex. Ex. R-10 at 135. Moreover, Dr. Johnson-Powell found that Ms. Burris' non-promotion "did not seem to be troubling her" at the time of the interview. Ex. G-35 at 124. Dr. Johnson-Powell found that what was troubling her most at that time was her lack of money to restore the house that she had bought. Ex. G-35 at 120. However, Dr. Johnson-Powell attributed "most" of Ms. Burris' depressive disorder to the statements because Ms. Burris felt that she was "denied access to a suitable housing situation that was pleasant and pleasing" and subsequently had to live in unsatisfactory housing. Ex. G-35 at 124.

Upon consideration of the above matters, I conclude that Ms. Burris is entitled to a very substantial damage award to compensate her for the mental disorder that she

suffered as a result of the Ayletts' violations of the Act. However, the entire amount sought cannot be awarded because other factors contributed to the disorder. I conclude that \$80,000 is the appropriate amount to compensate Ms. Burris for her injury. Because that injury resulted from both Ms. Aylett's statements and Mr. Aylett's discriminatory rental policy that was evidenced by the statements, they are both liable for those damages.

Damages For Future Medical Expenses

As discussed above, Dr. Johnson-Powell determined that Ms. Burris needs individual psychotherapy once or twice per week for at least one year. She suggested that Ms. Burris take anti-depressants. Ex. G-35 at 67-70. Dr. Johnson-Powell strongly recommended that Ms. Burris and her son undergo family therapy together at least once per week for one year "because children of depressed parents end up having some difficulties in terms of self-efficacy and a sense of learned helplessness." Ex. G-35 at 67-70.

Dr. Johnson-Powell's determination of Ms. Burris' need for treatment is reasonable in light of the interview and testing that were conducted. Although, as discussed above, there were other factors that contributed to the depressive disorder, Ms. Aylett's statements were its initial and major cause. Therefore, I conclude that it is appropriate to require Respondents to pay for the therapy that is needed to return Ms. Burris to her normal mental condition that existed prior to the making of the statements.

However, the recommendation that Ms. Burris and her son enter family therapy appears to be based solely on the possibility that her son will encounter psychological problems. There is no evidence that the son was interviewed or tested to determine if he needs therapy. In any event, Ms. Burris' son cannot be compensated for any injury that he may have suffered as a result of Respondents' violations because Respondents were not placed on notice that damages would be sought for him. He was not a party in this proceeding, and Respondents were not notified that damages were being sought on his behalf until the post-hearing briefs were filed. See *Balistreri*, 981 F.2d 916 (defendants entitled to sufficient notice of the persons for whom the Government sought damages).

Dr. Johnson-Powell estimated the cost of the recommended therapy in the Salt Lake City area to be \$125-\$150 per session. She recommended that the sessions be conducted by a psychiatrist in view of the need for monitoring of the medication. Ex. G-35 at 69. Because it is very important that Ms. Burris receive treatment that is sufficient to enable her to return to her normal mental condition, the maximum effort should be made in this regard. Accordingly, I conclude that \$15,600 is the appropriate amount of damages for Ms. Burris' future medical expenses (104 psychotherapy sessions at \$150 per session). As discussed above, both of the Ayletts are liable for those damages.

Civil Penalty

The Government seeks civil penalties of \$3,000 against Ms. Aylett, \$4,000 against Mr. Aylett, and \$1,000 against Mr. Memmott. Civil penalties may be imposed on violators of the Act to vindicate the public interest. 42 U.S.C. § 3612 (g)(3)(A); 24 C.F.R. § 104.910(b)(3). As Mr. Memmott is not liable for a violation of the Act, no civil penalty may be imposed on him.

The maximum civil penalty that may be assessed against persons who have not previously committed an unlawful discriminatory housing practice is \$10,000. See 42 U.S.C. § 3612(g)(3)(A); 24 C.F.R. § 104.910(b)(3)(i)(A). However, the maximum penalty should not automatically be imposed in every case. See H.Rep. No. 711, 100th Cong., 2d Sess. at 37 (1988). The following factors should be considered in determining the appropriate civil penalty: (1) the nature and circumstances of the violation; (2) the degree of the Respondent's culpability; (3) the Respondent's financial resources; (4) the goal of deterrence; and (5) other matters as justice may require. See H.Rep. No. 711, 100th Cong., 2d Sess. at 37 (1988).

Ms. Aylett

Ms. Aylett's violation of 42 U.S.C. § 3604(c) caused Ms. Burris to suffer serious injury. Undoubtedly, Ms. Aylett was not aware of the extent of the injury that Ms. Burris would suffer, but she should have been aware that some injury could result, especially if her husband did not make an exception from his discriminatory policy and rent the duplex to Ms. Burris.

Ms. Aylett's statement that her husband would never rent to Black persons indicated a preference, limitation, and discrimination based on the race and color of prospective tenants in violation of 42 U.S.C. § 3604(c). However, that statement did not reflect that Ms. Aylett practiced or endorsed any such preference, limitation, or discrimination. Rather, that statement attributed the preference, limitation, and discrimination to Mr. Aylett.

Although Ms. Aylett was fully culpable for the act of making the statements, there is no evidence that Ms. Aylett intended to injure Ms. Burris. Ms. Burris testified that she did not believe that Ms. Aylett meant anything by the statements or that Ms. Aylett knew what she was saying. Tr. 112. The Government concedes that Ms. Aylett did not make the statements "deliberately or maliciously." Government's Brief at 65.

In Remand Order 2, the Secretary's Designee found that Ms. Aylett made racially-charged statements to the investigator, and that this "suggests, at least to some extent, bias against African-Americans on her part." RO 2 at 18. However, there is no evidence that Ms. Aylett exhibited bias against Ms. Burris or that she assisted in implementing a policy not to rent the duplex to Black persons. In fact, Ms. Aylett's statement that, despite her race and color, she would recommend Ms. Burris as a tenant to her husband shows that her intent was to assist Ms. Burris in obtaining the duplex

despite her belief that her husband would not rent to Black persons. Ms. Aylett also took other actions showing that she wanted Ms. Burris to obtain the duplex. She invited Ms. Burris into her home, completed the rent-subsidy documents on her own initiative, told her husband that Ms. Burris would make a good tenant, and told Mr. Trujillo that the duplex had been rented. Tr. 78, 108, 186, 260-61, 335, 346-47; Ex. R-10 at 52.

There is a goal to deter persons from making statements that violate the Act and cause injury. However, Ms. Aylett's statements had one beneficial effect; they alerted Ms. Burris that, if she did not get the duplex, it may have resulted from racial discrimination. Because there was no evidence concerning Ms. Aylett's current financial resources, I have not considered that factor. Upon consideration of all pertinent factors, I conclude that a \$500 civil penalty is appropriate for Ms. Aylett's violation of the Act.

Mr. Aylett

Mr. Aylett violated 42 U.S.C. § 3604(b) in that he discriminated against Ms. Burris because of her race and color by imposing a racially discriminatory rental policy that required a recommendation from his wife for a Black person to be considered as a tenant. As a result, Ms. Burris suffered substantial damages. As owner and manager of the duplex, he was fully culpable for imposing that policy. He owns a contracting business and operates several duplexes as rental properties. He did not contend that his financial resources prevented him from paying the civil penalty sought by the Government. Obviously, there is a need to deter him and other persons from engaging in similar violations of the Fair Housing Act in the future. Consequently, I will impose the \$4,000 civil penalty requested by the Government.

Injunctive Relief

An administrative law judge may order injunctive or other equitable relief to make a complainant whole and protect the public interest in fair housing. 42 U.S.C. § 3612(g)(3). "Injunctive relief should be structured to achieve the twin goals of insuring that the Act is not violated in the future and removing any lingering effects of past discrimination." *Blackwell*, 908 F.2d at 875 (quoting *Marable v. Walker*, 704 F.2d 1219, 1221 (11th Cir. 1983)). I conclude that the injunctive relief sought by the Government and detailed in the following order will achieve these goals.

ORDER

1. Respondents Jess Aylett and Barbara Aylett are permanently enjoined from discriminating against Bobbie Burris or any other individual based on race or color. Prohibited actions include, but are not limited to, all those enumerated in 24 C.F.R. Part 100 (1993).

2. Respondents Jess Aylett and Barbara Aylett shall institute record-keeping of the operation of any rental properties that they own or manage. The record-keeping shall be adequate to comply with the requirements set forth in this order. Respondents

Jess Aylett and Barbara Aylett shall permit representatives of HUD to inspect and copy all pertinent records at reasonable times after reasonable notice.

3. Consistent with 24 C.F.R. Part 110, Respondents Jess Aylett and Barbara Aylett shall display the HUD fair housing poster along side any "for rent" signs posted in all the duplexes, and any future properties, owned or managed by them.

4. On the last day of every third month beginning June 1, 1994, and continuing for three years, Respondents Jess Aylett and Barbara Aylett shall submit reports containing the following information covering the previous three months. The reports shall cover all of the duplexes and any future rental properties owned or managed by the Ayletts. The reports shall be sent to HUD's Denver Regional Office of Fair Housing and Equal Opportunity, First Interstate Tower North, 13th Floor, 633 17th Street, Denver, Colorado 80202-3607. The director of that office may modify this paragraph as deemed necessary to make its requirements less, but not more, burdensome.

a. a duplicate of every written application, and a written description of every oral application, for all persons who applied for occupancy in all properties owned or managed by the Respondents, including a statement of the person's race, whether the person was rejected or accepted, the date of such action, and, if rejected, the reason for the rejection;

b. a list of vacancies at all properties owned or managed by the Respondents, including the departed tenant's race, the date of any termination notifications, the date that the tenant moved out, the date that the unit was next committed to rental, the race of the new tenant, and the date that the new tenant moved in;

c. current occupancy statistics indicating which of the properties owned or managed by the Respondents that are occupied by Black persons;

d. sample copies of advertisements published or posted during the reporting period, including dates and what, if any, media was used, or a statement that no advertising was conducted;

e. a list of all persons who inquired in any manner about renting one of the properties owned or managed by the Respondents, including their names, addresses, and the dates and dispositions of their inquiries; and,

f. a description of any rules, regulations, leases, or other documents, or changes thereto, provided to or signed by any tenants or applicants.

5. Within 35 days of the date on which this order becomes final, Respondents Jess Aylett and Barbara Aylett shall pay actual damages to Ms. Burris in the amount of

\$95,600 (\$80,000 for emotional distress and humiliation plus \$15,600 for future medical expenses).

6. Within 35 days of the date on which this order becomes final, Respondent Jess Aylett shall pay to the Secretary of HUD a civil penalty of \$4,000, and Barbara Aylett shall pay to the Secretary of HUD a civil penalty of \$500.

7. Within 60 days of the date on which this order becomes final, Respondents Jess Aylett and Barbara Aylett shall submit a report to HUD's Denver Regional Office of Fair Housing and Equal Opportunity, as well as to HUD's Office of General Counsel - Fair Housing Division, setting forth the steps that they have taken to comply with the provisions of this order.

8. The charge against Respondent William Justin Memmott is DISMISSED.

FINALITY

This order is entered pursuant to 42 U.S.C. § 3612(g)(3) and the regulations codified at 24 C.F.R. § 104.910 and will become final upon the expiration of 30 days or the affirmance, in whole or in part, by the Secretary within that time.

_____/s/____

PAUL G. STREB
Administrative Law Judge

