

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
Dionne Staples,

Charging Party,

v.

HUDALJ 05-90-0879-1
Decided: December 1, 1994

Michael P. Kelly and
John T. Kelly

Respondents.

Robert G. Kelly, Esquire
For the Respondents

Frederick M. Morgan, Jr., Esquire
For the Intervenor

Kathleen M. Pennington, Esquire
For Charging Party

Before: Thomas C. Heinz
Administrative Law Judge

INITIAL DECISION ON REMAND

On August 26, 1992, I issued a decision in this case concluding that Respondents violated §§ 804(a), (b), and (c) of the Fair Housing Act as amended (42 U.S.C. §§ 3604 (a), (b), and (c)). The decision awarded damages of \$10,430.76 to Complainant Dionne Staples, enjoined Respondents from future violations of the Act, imposed several record-keeping requirements, but declined to impose any civil penalties because the damages had been increased by HUD's "unexplained delays" in processing the case. *HUD v. Kelly*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,034, 25,363 (HUD A.L.J. Aug. 26, 1992). Respondents appealed the decision to the United States Court of Appeals for the Sixth

Circuit, which issued its decision on August 27, 1993, in *Kelly v. HUD*, 3 F.3d 951 (6th Cir. 1993). The

Court of Appeals affirmed the liability findings and injunctive provisions of the decision below, vacated the damages award, and remanded the case to the Secretary:

for the purpose of conducting conciliation with a qualified conciliator other than Charles Jung, who has had no previous contact with this case. If conciliation fails, the case will be returned to the ALJ for reconsideration and such further proceedings as may be required in light of this opinion; but in no case should damages be assessed for the period during which HUD completely neglected this case.

3 F.3d 957-58.

I have been informed by letter dated July 18, 1994, from the Secretary's Assistant General Counsel of the Midwest that the additional conciliation efforts required by the Court have failed, leaving the parties at an impasse. The damages issue must therefore be reconsidered.

The original decision ordered Respondents to pay Complainant a total of \$10,430.76 as compensation for the damages she suffered in six separate categories: \$1,250 for the cost of more expensive alternative housing; \$1,680 for higher commuting costs to and from work; \$120 for miscellaneous travel expenses; \$3,402.81 for additional commute time; \$477.95 for time spent looking for alternative housing and prosecuting the case; and \$3,500 for emotional distress and lost housing opportunity. *Kelly*, 2 Fair Hous.-Fair Lend. at 25,365. Complainant's tangible damages began in late April 1990 when she moved into alternative housing as a result of the discrimination she had suffered, and ended 25 months later with the trial. *Id.* at 25,360. Out of damages totalling \$10,430.76, only \$6,452.81 is at issue on remand because the remainder was not calculated using an accrual period.¹

The Sixth Circuit Court vacated the damages award so that the case could be conciliated for the second time, not because the Court found that the award was unsupported by substantial evidence. Now that HUD's conciliation efforts have failed again, I have reconsidered the damages award in the original decision and have

¹Complainant's awards for emotional distress and lost housing opportunity (\$3,500) and for time spent looking for alternative housing and pursuing her claim (\$477.95) were not based on an accrual period.

concluded, based on the evidence of record, that the damages award remains justified for the reasons stated in the original decision. However, the Court, anticipating that

conciliation might again fail, ordered that upon reconsideration "in no case should damages be assessed for the period during which HUD completely neglected this case." 3 F.3d at 958.

In the face of the Court's order, the Charging Party and the Intervenor argue on remand that the *Kelly* decision is inconsistent with Supreme Court precedent, Ninth Circuit case law, the language and purpose of the Act, and analogous case law under Title VII. These are appropriate arguments to pose in an appellate court, but not in this forum in this case, because I am constrained to follow the dictates of the *Kelly* decision. *See Sullivan v. Hudson*, 490 U.S. 877, 886 (1989) (deviation from the appellate court's remand order in subsequent administrative proceedings is itself legal error, subject to reversal on further judicial review); *In re Wella A.G.*, 858 F.2d 725, 728-29 (Fed. Cir. 1988); *Mefford v. Gardner*, 383 F.2d 748, 758-59 (6th Cir. 1967).

Although the Sixth Circuit Court did not expressly identify "the period during which HUD completely neglected this case," and the original decision included no finding that HUD had "completely neglected" the case for any period, the Court must be deemed to have reached its conclusion based on a review of the evidence in the record before it at the time of its decision. Because I am not free to reach a contrary conclusion, I must attempt to determine the period of complete neglect that the Court perceived when it issued its decision.

The offending period must lie within the 655-day period between the date Complainant filed her complaint with HUD and the date HUD issued the Charge of Discrimination ("Charge"), because the Court found no fault with HUD's handling of the case during any other period. Section 3610 of the Act requires HUD to complete the investigation of a housing discrimination complaint, attempt to conciliate the complaint, make a reasonable cause determination of the merits of the complaint, and, where the evidence warrants, issue the Charge within 100 days of the filing of the complaint, "unless it is impracticable to do so." 42 U.S.C. § 3610. Complainant Dionne Staples filed her complaint with HUD on May 17, 1990. The investigation and efforts to conciliate the complaint concluded on October 2, 1990, 138 days after she filed her complaint. Seventeen months (517 days) later, on March 2, 1992, HUD issued the Charge.² Because

²Section 3612(g) of the Act (42 U.S.C. § 3612(g)) requires the ALJ to commence the hearing "no later than 120 days following the issuance of the charge, unless it is impracticable to do so." In this case the trial began on May 27, 1992, 86 days after issuance of the Charge.

the Court concluded that "these delays were inexcusable," the decision could be interpreted to hold that with respect to the 655-day period between the filing of the

complaint and HUD's issuance of the Charge, Complainant's damages cannot accrue for more than the first 100 days. 3 F.3d at 958. For several reasons, I decline to adopt that interpretation.

Damages Accrue Beyond 100th Day After Complaint Filed

If the Court had intended to limit the accrual period for damages to 100 days--a simple proposition--it could have easily said so. Instead, the Court announced the "completely neglected" standard. Further, if the Court intended to limit the accrual of damages to the first 100 days after Complainant filed her complaint with HUD, it necessarily follows that the Court had the remaining 555 days in mind when it referred to "the period during which HUD completely neglected this case" (given that the offending period must lie within the 655-day period at issue on remand). But the record clearly shows that during those 555 days, HUD completed the investigation, made a reasonable cause determination, and filed the Charge. That obviously does not constitute a period of complete neglect.

Moreover, a strict 100-day limitation for the accrual of damages in this case would contravene HUD's regulatory interpretation of the Fair Housing Act, first published in 1989. The statute requires HUD to comply with the 100-day limit "unless it is impracticable to do so." Although Congress did not define "impracticable," HUD's interpretation of that provision may be found in the Preamble to the regulations implementing the Fair Housing Amendments Act of 1988. The Preamble addresses comments filed with the Department after publication of the proposed regulations. It states in part:

Other commenters argued that the regulation must clearly identify the circumstances under which it will be impracticable to complete the investigation or issue a reasonable cause determination within the 100-day period. These commenters suggested that impracticability be defined as extraordinary circumstances in the specific case and that the rule should state that the routine processing of other cases will not be grounds for a finding of impracticability. The range of circumstances that could legitimately cause delay in a case is numerous [*sic*], and HUD is not prepared to identify all possible circumstances that would

make it "impracticable" to take the described actions within the prescribed time period. Moreover, even if HUD were to articulate all such circumstances, it would not preclude the consideration of the demands upon HUD's resources caused by other docketed cases. Such a definition would fail to recognize that even the best-managed case inventory system may not possess the excess capacity to respond to extraordinary demands upon resources.

24 C.F.R. Subtitle B, Ch. I, Subch. A, App. I (1994), page 900. In other words, in 1989 HUD construed "impracticable" to include, among other things, circumstances where faster processing is precluded by the complexity of the particular case at hand as well as situations where the size of the overall caseload prevents processing within the 100-day limit. The Charging Party asserts on remand that a large caseload precluded HUD from processing this case any faster than it did. HUD's regulatory interpretation of the Act "commands considerable deference" because HUD has the primary responsibility for implementing and administering the Act. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 107 (1979). As the Supreme Court has explained:

[Once a] court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)(footnotes omitted).

HUD's regulatory interpretation of "impracticable" appears reasonable and permitted by the statute. Imposing a strict 100-day limit for the accrual of Complainant's damages in this case would contravene that interpretation. See "Charging Party's Memorandum Pursuant to the Administrative Law Judge's August 16, 1994 Order," pp. 15-17. As the Sixth Circuit Court has not explicitly rejected HUD's interpretation of "impracticable" as set out in the Preamble to the regulations, I decline to adopt an interpretation of the Court's decision that would have that effect.

Furthermore, whether or not it was "impracticable" for HUD to process this case faster was not litigated in the trial below. No evidence was introduced on the issue, the

parties did not brief the question, and I made no findings on the point.³ I found that HUD's delays were "unexplained." Consistent with the Sixth Circuit Court's decision in *Baumgardner v. HUD ex rel Holley*, 960 F.2d 572 (6th Cir. 1992), the question at trial was whether Respondents were "substantially prejudiced" by HUD's delays, not whether faster processing was "impracticable."

The Sixth Circuit Court has not ruled that a complainant in a Fair Housing Act case will suffer a reduction in compensatory damages if the charging party does not submit evidence to justify a case-processing period that goes beyond 100 days. The remand in *Kelly* was not predicated on a failure of proof, and in the *Baumgardner* decision the Court stated that "an implied 'good cause' basis exists for extending the investigation beyond 100 days." *Id.* at 578. Moreover, the Court in *Baumgardner* did not reduce the compensatory damage award on the ground that HUD had impermissibly delayed presenting the case for adjudication, even though 497 days elapsed from the filing of the complaint until the trial in that case. Instead, citing HUD's "mismanagement of the complaint," the *Baumgardner* Court reduced the civil penalties that had been imposed by the ALJ. *Id.* at 583.⁴ The compensatory damages that had been awarded by the ALJ were reduced by the Court for want of evidentiary or legal support, not because HUD's mismanagement had caused the damages to accrue for too long a period. *Id.* at 580-83.⁵

If the damages suffered by the Complainant in the instant case during the 655 days

³The issue apparently was not litigated in the Circuit Court either. According to the Intervenor, the parties did not brief the question whether the victim of a civil rights violation must suffer a reduction in proven compensatory damages if the Government committed procedural errors during the period preceding the issuance of the Government's complaint. See "Response of Intervenor, Dionne Staples, to the Court's August Briefing Order," p.2.

⁴In the original decision in the instant case I found that HUD's delays had increased Complainant's compensatory damages, causing substantial prejudice to Respondents. In light of *Baumgardner*, I imposed no civil penalties. *HUD v. Kelly*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,034, 25,363 (HUD A.L.J. Aug. 26, 1992).

⁵The *Kelly* Court appears to have been under the misapprehension that HUD personnel involved in processing that case had willfully ignored the Court's guidance as set out in *Baumgardner*. Citing its earlier decision, the Court in *Kelly* stated that it was "surprised and distressed to have another Fair Housing Act case from Cincinnati in which HUD has ignored time requirements.... Apparently the Cincinnati office of HUD just doesn't get it." 960 F.2d at 954-955. It should be noted that the Charge of Discrimination in *Kelly* was issued on March 2, 1992, and the *Baumgardner* decision was handed down nearly a month later, on March 31, 1992. The HUD personnel who processed the instant case up to the filing of the Charge could not benefit from lessons contained in the *Baumgardner* decision before that decision was issued.

that elapsed from the date she filed her complaint until the Charge was filed must be limited to those damages that accrued during the first 100 days, then her damages would accrue over a total of only seven months rather than the 25 months determined in the original decision (655 days-100 days = 555 days = 18 months - 25 months = 7 months). *HUD v. Kelly*, 2 Fair Hous.-Fair Lend. (P-H) ¶ 25,034, 25,361 (HUD A.L.J. Aug. 26, 1992). The portion of her award at issue here would then have to be reduced by 72 percent from \$6,452.81 to \$1,806.77 ($\$6,452.81/25 \text{ months} = \$258.11/\text{month} \times 7 \text{ months} = \$1,806.77$). Absent clear instructions from the Court, I decline to adopt an interpretation of the Court's decision that would deprive Complainant of more than \$4,600 in actual, proven, tangible damages. The Court has affirmed the conclusion in the original decision that Complainant was victimized by Respondents. If the Court's decision is interpreted to preclude accrual of damages for more than 100 days after Complainant filed her complaint, then the Complainant will be victimized twice, first by the Respondents, the second time by government officials charged with vindicating and protecting her rights. Furthermore, such an interpretation would hand Respondents a windfall. They have already escaped imposition of a civil penalty of approximately \$3,000 because of HUD's processing delays. *Id.* at 25,363. They should not reap an additional benefit of more than \$4,600 based on those same delays. I therefore conclude that the Sixth Circuit Court did not intend to limit the accrual of Complainant's damages to the first 100 out of the 655 days it took HUD to present the case for adjudication.

Period of Complete Neglect Cannot Be Identified

What limitation, then, did the Court have in mind? Because the decision did not specify the offending period, I ordered the parties on August 16, 1994, to "[i]dentify, with citations to the record, the beginning and ending dates of the period(s) during which HUD 'completely neglected' the case initiated by Complainant Staples." In response, the Charging Party and the Intervenor contended that the case was never completely neglected, while the Respondents argued "that the case was completely neglected by HUD from the date of its filing through and including this date." "Response of Michael P. Kelly and John T. Kelly to Court Order Dated August 16, 1994," p.2. It is obvious, of course, that HUD has not completely neglected this case from its beginning; this litigation would not have occurred if it had. It is likewise obvious that HUD did not completely neglect the case for the entire 655-day period at issue on remand. During that time, HUD conducted an investigation, attempted to conciliate the complaint, made a reasonable cause determination, and filed the Charge. After a careful reexamination of the record reviewed by the Sixth Circuit Court of Appeals, I am unable to identify any specific period during which HUD "completely neglected" this case.

The Charging Party has submitted several affidavits from HUD officials

responsible for processing housing discrimination complaints. The purpose of this evidence is to demonstrate that, contrary to the conclusion of the Court, there was never a period during which HUD "completely neglected" this case. The affidavits have become a part of the record because Respondents did not object to their admission, but I decline to evaluate them.⁶ To be sure, the Court directed that on remand I should conduct "such further proceedings as may be required in light of this opinion," but the Court cannot possibly have intended that I should reopen the record to receive and evaluate evidence submitted for the purpose of proving or disproving conclusions that the Court has already reached. The Court has unequivocally concluded that "HUD completely neglected this case" for an unidentified period, and that HUD's "delays were inexcusable." 3 F.3d at 957-58. These conclusions cannot be rebutted on remand.

In sum, the *Kelly* decision does not identify the period when HUD "completely neglected this case," the parties did not identify the offending period upon request, and I have been unable to do so. Although Complainant's damages award must be reduced to comply with the order of the Court, I conclude that under these circumstances the award should be reduced only a nominal amount. Therefore, the portion of the damages award at issue on remand will be reduced by \$1 to \$6,451.81.

Award of Additional Damages on Remand Inappropriate

On remand the Charging Party and the Intervenor request augmentation of Complainant's earlier damages award to reflect additional damages she allegedly suffered after the trial. However, the decision in *Kelly* cannot be fairly read to contemplate an increase in the damages award. Quite the contrary: the Court clearly intended that the damages award would be reduced on remand. In other words, the request to augment Complainant's damages award falls outside the scope of the Court's remand order.

Furthermore, increasing the damages award on remand would penalize Respondents for appealing an unfavorable decision. Unless Respondents were clearly on notice that they ran the risk of paying a higher damages award if they failed to win a total

⁶These affidavits address an issue fraught with danger. Opening the door to litigation on the question of whether or not faster case processing was "impracticable" would have unavoidable and untoward consequences. Judges would be asked to decide whether a case was "simple" or "complex"; whether HUD indeed had a case "overload" as claimed; whether staffing was adequate for the number of cases handled; whether supervision was proper; whether personnel were competent; whether priorities were properly set; and whether the Congress made responsible budgetary decisions that provided sufficient funds to HUD for the proper administration and enforcement of the Fair Housing Act. In my judgment, these kinds of issues should be excluded from the judicial forum as much as possible. Otherwise, judges will become entangled in the micromanagement of executive agency affairs.

reversal of the case on appeal, they should not suffer a penalty for exercising their appeal rights. Respondents cannot be found to have had the requisite notice when they appealed the original decision, inasmuch as the Charging Party and the Intervenor cite no law under the Fair Housing Act for the proposition that damages may continue to accrue against a respondent during appellate litigation. Accordingly, the request by the Charging Party and the Intervenor to augment Complainant's damages award to reflect additional damages allegedly suffered after trial will be denied.

Interest on Damages Award Appropriate

The Charging Party and the Intervenor also request an award of interest on Complainant's damages award. The Sixth Circuit Court has held that the purpose of a compensatory damage award in a civil rights case is to "make the claimant whole, that is, to place him in the position he would have been in but for discrimination." *Racimas v. Michigan Department of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984). While the parties have been engaged in appellate litigation, inflation has undermined the value of Complainant's damages award. Interest on that award will restore its value as of the date of the final decision in 1992, and when paid, will help make Complainant whole. Because this proceeding is the administrative corollary of a Fair Housing Act proceeding in a United States district court, the requested interest will be awarded according to the terms and conditions of 28 U.S.C. § 1961, which governs the award of interest on money judgments recovered in civil cases in district courts.

Suggested Reassignment of Case

Respondents suggest "that this case should be reassigned or that Judge Heinz should recuse himself." "Response of Michael P. Kelly and John T. Kelly to Court Order Dated August 16, 1994," p. 8. Respondents cite no reason to support this suggestion, and there is none.

ORDER

It is hereby ORDERED that:

1. Respondents are permanently enjoined from discriminating against Complainant, any member of her family, and any tenant or prospective tenant, with

respect to housing because of familial status, and from retaliating against or otherwise harassing Complainant or any member of her family. Prohibited actions include, but are not limited to, all those enumerated in the regulations codified at 24 C.F.R. Part 100 (1991).

2. Respondents and their agents and employees shall cease employing any policies or practices that discriminate against families with children, including any policy that prohibits or discourages people with children 18 years or younger from living in any residential rental real estate owned or operated by Respondents. Specifically,

Respondents and their agents and employees shall cease telling prospective tenants that no more than one child may live in a two-bedroom apartment at 6300 Montgomery Road, Cincinnati, Ohio.

3. Consistent with 24 C.F.R. Part 109, Respondents shall display the HUD fair housing logo and slogan in all advertising and documents routinely provided to the public. Consistent with 24 C.F.R. Part 110, Respondents shall display the HUD fair housing poster in a prominent place in a common area at 6300 Montgomery Road, Cincinnati, Ohio, and in any rental office where Respondents, either singly or together, conduct a housing rental business.

4. Respondents shall institute internal recordkeeping procedures with respect to the operation of 6300 Montgomery Road and any other real properties owned or managed or acquired by Respondents adequate to comply with the requirements set forth in this Order. Respondents will permit representatives of HUD to inspect and copy all pertinent records at any and all reasonable times and upon reasonable notice. Such representatives of HUD shall endeavor to minimize any inconvenience to Respondents from the inspection of such records.

5. On the last day of each six-month period beginning January 1, 1995, and continuing for three years from the date this Order becomes final, Respondents shall submit reports containing the following information to HUD's Chicago Regional Office of Fair Housing and Equal Opportunity, 626 West Jackson Boulevard, Chicago, Illinois 60606-6765:

a. A log of all persons who applied for occupancy at 6300 Montgomery Road during the six-month period preceding the report, indicating the name and address of each applicant, the number of persons to reside in the unit, the number of bedrooms in the unit for which the applicant applied, whether the applicant was rejected or accepted, the date on which the applicant was notified

of acceptance or rejection, and if rejected, the reason for such rejection.

b. A list of vacancies during the reporting period at 6300 Montgomery Road, including: the address of the unit, the number of bedrooms in the unit, the date Respondents were notified that the tenant would or did move out, the date the tenant moved out, the date the unit was rented again or committed to a new rental, and the date the new tenant moved in.

c. A list of all people who inquired, in writing, in person, or by telephone, about the rental of an apartment, including their names and addresses, the date of their inquiry, and the disposition of their inquiry.

d. A list of all tenants upon whom Respondents served a termination of tenancy notice, including the tenant's name, apartment number and address, date of such service, a statement of each reason for the termination notice and whether the tenant terminated the tenancy and the date of such termination.

e. A description of any changes in rules, regulations, leases, or other documents provided to or signed by current or new tenants or applicants (regardless of whether the change was formal or informal, written or unwritten) made during the reporting period, and a statement of when the change was made, how and when tenants and applicants were notified of the change, whether the change or notice thereof was made in writing, and, if so, a copy of the change or notice.

6. Within ten days of the date on which this Order becomes final, Respondents shall pay actual damages to Complainant Dionne Staples of \$10,429.76, plus interest at 3.13 percent, compounded annually and computed daily from September 25, 1992, until paid.

7. Within ten days of the date this Order becomes final, Respondents shall inform all their agents and employees in the business of renting housing of the terms of this Order and educate them as to such terms and the requirements of the Fair Housing Act. All new employees shall be likewise informed no later than the evening of their first day of employment.

8. Respondents shall submit a written report to this tribunal within 15 days of the

date this Order becomes final detailing the steps taken to comply with this Order.

9. The request by the Charging Party and the Intervenor for an award of damages to Complainant covering the period between May 27, 1992, and June 1, 1993, is denied.

This Order is entered pursuant to the decision of the Sixth Circuit Court of Appeals in *Kelly v. HUD*, 3 F.3d 951 (6th Cir. 1993), and the regulations codified at 24 C.F.R. § 104.910, and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary of HUD within that time.

/S/

THOMAS C. HEINZ
Administrative Law Judge

Dated: December 1, 1994.