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 Sheila White, Charging Party, and Sheila White, Complainant-Intervener, on her own behalf and as the Next Friend of her Minor children, Theodore White and Kenyetta Sadler, v. Gertie Wooten, Respondent.	HUDALJ No. 05-98-0045-8 Decided: August 1, 2007

Leslie V. Matlaw, Esq.,
For the Intervenor

Courtney Minor, Esq.,
Thomas Massouras, Esq., and
Barbara Sliwa, Esq.,
For the Charging Party and the Aggrieved Person

Before: ARTHUR A. LIBERTY
Chief Administrative Law Judge

DECISION ON REMAND

This Office issued a decision in this matter on December 3, 2004. The decision was not modified or reversed by the Secretary, and became the final Agency decision on January 3, 2005. Thereafter, Complainant-Intervener (hereinafter "Intervener") filed an appeal of the Agency decision in federal circuit

court.

The U. S. Court of Appeals for the Seventh Circuit (hereinafter "Seventh Circuit") issued a decision on the Intervener's appeal on February 2, 2007 (*White v. HUD*, 475 F.3rd 898 (7th Cir. 2007)). In that decision, the Seventh Circuit affirmed the Agency's denial of Intervener's motion to amend her complaint, and reversed the determination that there was no violation of the Fair Housing Act as to Intervener's § 3604(c) claim. *Id.* at 908.

Intervener filed a Motion for a Ruling on Complainant's Damages and the Agency's Civil Penalty with this Office by facsimile on May 16, 2007, with an amendment filed by facsimile on May 17, 2007. However, this Office did not have jurisdiction over the matter at that time.

Jurisdiction vests with this Office in Fair Housing Act cases only when: a) a complaint is filed and neither party elects to proceed in U. S. District Court (42 U.S.C. § 3612(b); 24 C.F.R. § 180.410(a) and (b)(3)); b) the matter is remanded by the Secretary upon motion of either party after a decision (42 U.S.C. § 3612(h); 24 C.F.R. § 180.67(a) through (g)); or c) the matter is remanded by a U. S. Circuit Court of Appeals (42 U.S.C. § 3612(i) and (k)).

The Acting Chief Docket Clerk of this office confirmed with the Clerk of the Seventh Circuit by telephone on May 17, 2007, that there were no orders or decisions issued by the Seventh Circuit subsequent to February 2, 2007. The Clerk of the Seventh Circuit also verified that the Court's decision on February 2, 2007, did not include a directive or mandate to this Office for any further

proceedings or actions. A reading of the Court's decision and its Judgment – With Oral Argument confirmed the lack of any such mandate. Lacking any such remand, mandate, or directive, this Office did not have jurisdiction to render a decision on damages under 42 U.S.C. § 3612(i) and (k).

On May 21, 2007, this Office issued a Notice of Lack of Jurisdiction in response to Intervener's Motion. On June 13, 2007, the Charging Party filed a Motion for a Ruling on Damages and Civil Penalty, asserting arguments similar to those filed by Intervener. On June 25, 2007, this Office issued a Notice of Lack of Jurisdiction in response to the Charging Party's Motion, again because the Seventh Circuit did not remand the case to this Office for further action and this Office therefore did not have jurisdiction under 42 U.S.C. § 3612(i) and (k).

On July 10, 2007, the Charging Party filed with the Secretary a Petition for Review of the Notice of Lack of Jurisdiction. In response to the Charging Party's Petition, the Secretary issued an Order on Secretarial Review on July 24, 2007, in which the Secretary remanded this case to this Office for a decision on the issues of damages and civil money penalties. Because the Secretary remanded this case to this Office for a decision on damages and civil money penalties, this Office now has jurisdiction over this case on these issues, pursuant to 42 U.S.C. § 3612(h) and 24 C.F.R. § 180.67(a) through (g). This Decision on Remand ensues.

Remedies

The Fair Housing Act provides that where a respondent has engaged in a discriminatory housing practice, an order may be issued "for such relief as may be

appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief." 42 U.S.C. § 3612(g)(3). A civil penalty may also be imposed. *HUD v. Cabusora*, HUDALJ 09-90-1138-1, March 23, 1992.

The purpose of an award of actual damages in a fair housing case, as in litigation generally, is to put the aggrieved person in the same position as he would have been absent the injury, so far as money can. *Schwemm, Housing Discrimination: Law & Litigation*, p. 25, and cases cited therein. Actual damages in housing discrimination cases are not limited to out-of-pocket losses, but may also include damages for intangible injuries such as embarrassment, humiliation, and emotional distress caused by the discrimination. *See e.g. HUD v. Blackwell*, HUDALJ 04-89-0520-1, Dec. 21, 1989, aff'd, 908 F. 2d 864 (11th Cir. 1990) (hereinafter "*Blackwell I*"). Damages for emotional distress may be based on inferences drawn from the circumstances of the case, as well as on testimonial proof. *Blackwell I.* Because emotional injuries are by nature qualitative and difficult to quantify, courts have awarded damages for emotional harm without requiring proof of the actual dollar value of the injury. *See, Marable v. Walker*, 704 F.2d 1219, 1220 (11th Cir. 1983); *Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1245 (8th Cir. 1983).

The Charging Party requests an award to Intervener of $10,000 for emotional distress caused by Respondent's discriminatory statement to Intervener when she called to inquire about the apartment for rent. Intervener concurred in

the requested amount in her Post-Hearing Brief, but in her recent Corrected Motion for a Ruling requests $7,500 instead.[1] In support of the amount of award requested, Charging Party cites cases which involved denial of rental because of familial status in violation of § 3604(c). In addition, Charging Party requests $2,000 for each of Intervener's children for emotional distress caused by their mother's emotional distress in response to the discriminatory statement and by having to continue to live in an uncomfortable house. Intervener does not concur with the Charging Party's requested amount. Intervener instead originally requested $4,000 for each of her children in her Post-Hearing Brief, and more recently, in her Corrected Motion for Ruling, she requests $1,250 for each child. Intervener also requests damages in an unspecified amount for the inconvenience of the prosecution of her complaint. In addition, Charging Party requests a civil money penalty of $2,500, while Intervener requests one of $11,000, and asks for injunctive relief.

Tangible Losses and Inconvenience

Neither Charging Party nor Intervener has presented evidence of tangible costs or losses, or provided evidence of amounts involved in any inconvenience alleged. Intervener testified that taking off work to come to the initially-scheduled hearing, that was then rescheduled, was an inconvenience. (Tr, p. 108-10.) She

[1] Intervener also originally requested additional emotional distress damages based upon the later phone calls Respondent made to Intervener's grandfather, giving rise to Intervener's § 818 allegation. However, both this forum and the Seventh Circuit rejected Intervener's motion to amend her complaint to add this § 818 claim and it is thus not part of this case. Damages on this issue are thus moot and Intervener has not recently requested them.

also testified that she had to take time off work to attend both hearing dates, and that she was not paid for that time. (Tr. p. 111-13.) She also testified that she incurred parking expenses related to attending the hearings, but did not know how much they were. (Tr. p. 179.) However, she provided no evidence or testimony about the amounts involved in any of these losses or inconveniences. (Tr. p. 111-13.)

In her Post-Hearing Brief, Intervener states that "Complainant-Intervener developed as much proof as this court would allow . . . . This court cut short SHEILA's attempt to make her record on this point . . . ." Intervener's Post-Hearing Brief, p. 9 [capitalization in original]. However, this characterization of what transpired at the hearing is incorrect. Near the end of the hearing, when counsel was questioning Intervener on her costs and inconvenience, it was clear that Intervener did not know the amounts and that the issue was not prepared well enough at that point for efficient testimony. Therefore, the ALJ specifically provided the Intervener the opportunity to present any statements and evidence of inconvenience, costs, and amounts in conjunction with her post-hearing brief. (Tr. p. 179-80.) Intervener indicated she would do so and stated that she hoped to include receipts as well. (*Id*.) She expressed no reluctance to do so, nor did she indicate that she was dissatisfied with this option for developing her evidence on the issue. (*Id*.) The ALJ also specifically stated that Intervener need only attest in the submission that her statements on such issues were the truth; she did not have to go to the additional trouble to have them notarized. (*Id*.) Intervener thus had

ample opportunity to provide any evidence she wished to provide on this subject.

However, in her post-hearing submission Intervener did not provide any statements or evidence to support actual costs, losses, or inconvenience. The Charging Party also did not attempt to develop damages on this subject, either during the hearing or in its Post-Hearing Brief. Therefore, damages for these types of harm have not been proved in this case.

Emotional Distress

Courts have long recognized the indignity inherent in being on the receiving end of housing discrimination. Courts have also 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, e.g.*, Heifetz and Heinz, *Separating the Objective, the Subjective, and the Speculative: Assessing Compensatory Damages in Fair Housing Adjudications*, 26 J. Marshall L. Rev. 3, 17 (1992). Judges are afforded wide discretion in ascertaining emotional distress damages, limited by the egregiousness of the respondent's behavior and the effect of that behavior on the complainant. *HUD v. Sams*, HUDALJ 03-92-0245-1 (Mar. 11, 1993). Application of these factors has produced awards for emotional distress ranging from $150, awarded to a party who "suffered the threshold level of cognizable and compensable emotional distress" to $175,000. *See, e.g., HUD v. Murphy*, HUDALJ 02-89-0202-1, *et al* (Jul. 13, 1990); *HUD v. Edith Marie Johnson*, HUDALJ 06-93-1316-8 (Jul. 26, 1994).

In *HUD v. Dellipaoli*, HUDALJ 02-94-0465-8 (Jan. 7, 1997), the Administrative Law Judge awarded $500 for emotional distress, based upon the respondent's discriminatory statement regarding familial status. In that case, the respondent was exempt from the requirements of the Act to rent to all classes of people because the apartment was one located inside the respondent's residence. However, the respondent was also banned by § 3604(c) from stating a preference on the basis of prohibited factors, such as familial status. Respondent nonetheless made a statement indicating a preference for renters without children. Based on this statement, the complainant was awarded $500 in emotional distress damages, because the statement expressed a discriminatory preference and upset the complainant.

As in *Dellipaoli*, Respondent's behavior in the instant case is not considered egregious, but there is greater significance to the statement in the instant case, involving an apartment building, than to the statement in *Dellipaoli*, involving the respondent's own home.

In a more recent case with similar facts, the complainant was informed that he could not rent an apartment because he had a four-year-old son who would stay with him some weekends. *HUD v. Gruen*, HUDALJ 05-99-1375-8, Feb. 27, 2003. In *Gruen*, the complainant testified that in response to these statements he became "very upset," "angry," and "insulted." *Id.* He was very hurt by the rejection, frustrated, and lost hope of finding an apartment as well situated to meet his needs. In addition, he was further hurt each time he saw units in the same apartment

building being advertised. *Id*. The ALJ recognized that these facts placed the complainant in *Gruen* at a level of emotional harm that was "neither at a mere threshold of what is cognizable and compensable nor of the most egregious in nature that we consider in this forum." *Id*. The ALJ found an award of $10,000 for emotional distress to be reasonable on such facts. *Id*.

The facts of the instant case are very similar to those in *Gruen*. Like the complainant in *Gruen*, Intervener testified that she was "very upset," "angry," and "insulted." (Tr. 56-7, 59, 61.) She stated that she had to take some time after the first phone conversation to calm down, needing her co-workers' help. (Tr. 57.) She also testified that she lost hope of finding an apartment thereafter, based in part upon her fears that having children would cause others to refuse to rent to her. (Tr. 60.) And she testified that she was further hurt and dismayed when she saw the apartment advertised again later, especially when she called, changed the composition of her family during the call, and was then accepted. (Tr. 61, 67.)

Considering the facts of this case, and in view of the facts and awards issued in similar cases, I find that an award of $10,000 to Intervener for emotional distress is appropriate in this case.

Intervener also testified that her children suffered emotional distress due to the statements Respondent made during the Intervener's calls inquiring about the apartment for rent. The testimony shows that the children did suffer some emotional distress resulting from Respondent's discriminatory statements, in that their mother snapped at them, was more prone to be angry, they were confused

and upset as a result, and they were worried and upset due to their mother's behavior resulting from the statements and their effect on her. (Tr. 67-8.)

However, the evidence also shows that the children were only marginally impacted, and for only a short while. The testimony demonstrates that they were too young to really understand what was going on, and once they knew that their mother was not upset with *them*, they recovered most of their equilibrium. Therefore, I find that an award of $1,000 per child for emotional distress is appropriate.

Civil Penalty

To vindicate the public interest, the Act also authorizes an administrative law judge to impose a civil penalty upon a respondent who has been found to have discriminated in violation of the Act. 42 U.S.C. § 3512(g)(3)(A); 24 C.F.R. § 104.910(b)(3). However, assessment of a civil penalty is not automatic. The House Report indicates that in ascertaining the amount of the civil penalty, this tribunal "should consider the nature and circumstances of the violation, the degree of culpability, any history of prior violations, the financial circumstances of the Respondent and the goal of deterrence, and other matters as justice may require." H.R. Rep. N. 711, 100th Cong. 2d Sess. at 37 (1988). *See also HUD v. Jerrard*, HUDALJ 04-88-0612-1, Sept. 28, 1990. The Charging Party seeks a civil penalty of $2,500 and Intervener seeks $11,000. I conclude that a modest civil penalty is warranted.

<u>Nature and Circumstances of the Violation</u>

The nature and circumstances of Respondent's violations do not merit imposition of the maximum possible penalty. Respondent's unlawful discrimination apparently was not motivated by malice toward the Intervener personally or toward families with children in general, but rather was the result of a baseless concern that single parents would be unable to manage financially. In the telephone call with Intervener, Respondent appeared concerned that a single parent would have difficulty being able to afford to pay the rent, which would harm the Respondent's ability to pay her mortgage on the building. Vocalization of this issue led to the discriminatory statement violation in question. The evidence shows that Respondent was an elderly person and was unable to handle her financial and other affairs without help. She was sometimes confused and was concerned about her ability to pay her mortgage. Further, the harm done to Complainant, although significant, was not extreme. However, Respondent is a housing provider who should have known, well after the Fair Housing Act was amended, that the Act prohibits discrimination against families with children. Accordingly, a modest civil penalty should be imposed in this case.

Degree of Culpability

There is no evidence that Respondent was a real estate broker, or that she owned more than the one building. However, the little evidence in the record on Respondent indicates that she had little experience with rental transactions. The evidence does not demonstrate that she acted with careless disregard for the Fair Housing Act. *See Morgan v. HUD*, 985 F. 2d 1451 (1993).

History of Prior Violations

There is no evidence that Respondent has been adjudged to have committed any previous discriminatory housing practices.

Respondent's Financial Circumstances

Evidence regarding Respondent's financial circumstances is peculiarly within her knowledge, so she has the burden of producing such evidence for the record. If she fails to produce credible evidence which would tend to mitigate against assessment of a civil penalty, a penalty may be imposed without consideration of financial circumstances. *See Campbell v. United States*, 365 U.S. 85, 96 (1961); *Blackwell I*. The extent of Respondent's assets and liabilities is not known and Respondent did not present evidence which establishes that payment of the maximum civil penalty would cause her financial hardship. Accordingly, I find that the record does not support a finding that Respondent could not pay the maximum civil penalty without suffering undue hardship.

Goal of Deterrence

An award of some civil penalty is appropriate as a deterrence to others. Those similarly situated to Respondent must be put on notice that violations of the Fair Housing Act will not be tolerated. Owners must be put on notice that the making of discriminatory statements to prospective tenants during rental negotiations will

not be tolerated. Based on consideration of the above five elements, I conclude that a civil penalty of $2,500 is warranted.

Intervener seeks an $11,000 civil penalty against the Respondent, the maximum for a first offense. Maximum penalties should be reserved for the most egregious cases, where willful conduct causes grievous harm, that is, where all factors argue for the maximum penalty. This case does not fall into that category. A civil penalty of $2,500 will vindicate the public interest.

Injunctive Relief

The administrative law judge may order injunctive or other equitable relief to make the complainant whole and to protect the public interest in fair housing. 42 U.S.C. § 3623(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." *Marable v. Walker*, 704 F. 2d at 1219, 1221 (11th Cir. 1983). The purposes of injunctive relief in housing discrimination cases include: eliminating the effects of past discrimination, preventing future discrimination, and positioning the aggrieved persons as close as possible to the situation they would have been in but for the discrimination. *See Park View Heights Corp. v. City of Black Jack*, 605 F. 2d 482, 485 (7th Cir. 1975)(citation omitted). The relief is to be molded to the specific facts of the case.

The Charging Party seeks injunctive and other equitable relief in light of the violation. It asks that Respondent be permanently enjoined from discriminating

against families with children in violation of § 3604(c). In support of this request, the Charging Party asks that Respondent be required to submit copies of applications, notices of vacancies, familial status information, and similar data to HUD for a period of three years after this decision.

However, the Respondent is now deceased.[2] She will therefore be unable to rent housing in future, nor will she be able to commit discrimination in future. The requested injunctive relief does not serve to rectify any past harm or to deter others. Therefore, this remedy is moot and injunctive relief shall not be ordered in this case.

CONCLUSION AND ORDER

The preponderance of the evidence establishes that as a result of Respondent's unlawful action, the Intervener and her children have suffered injuries which must be remedied by an award of compensatory damages. In addition, to protect and vindicate the public interest, a civil penalty must be imposed against Respondent. Accordingly, the following Order is entered.

ORDER

Having concluded that Intervener Sheila White and her children, Kenyetta Sadler and Theodore White, suffered injuries resulting from Respondent's

[2] Ms. Wooten died intestate on April 12, 2006. (Charging Party's Motion for a Ruling, June 13, 2007, ¶ 3, and Exhibit A thereto, Social Secuirty Administration Death Master File print-out.)

discriminatory statement in violation of 42 U.S.C. § 3604(c) of the Fair Housing Act, it is hereby **ORDERED** that:

1. Within thirty (30) days of the date on which this Order becomes final, Respondent shall pay actual damages in the amount of $12,000 to Intervener and her children to compensate Intervener and her children for emotional distress and humiliation;

and

2. Within thirty (30) days of the date on which this Order becomes final, Respondent shall pay a civil penalty of $2,500 to the Secretary, United States Department of Housing and Urban Development.

This Order is entered pursuant to 42 U.S.C. § 3612(g)(3) of the Fair Housing Act 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 within that time.

Dated: August 1, 2007

/s/

ARTHUR A. LIBERTY
Chief Administrative Law Judge