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 City of Albany Office of Equal Opportunity & Fair Housing, Charging Party, v. Dominick Cubello, Respondent.

HUDALJ 02-96-0585-8
Decided: June 5, 2000

Thomas J. Gabriels, Esquire
For Respondent

Iris Springer, Esquire
For the Charging Party

Before: William C. Cregar
Administrative Law Judge

INITIAL DETERMINATION AND ORDER

Introduction

This case arose under the Fair Housing Amendments Act of 1988 ("the Act"). *See* 42 U.S.C. §§ 3601-3619. After an investigation, the Department of Housing and Urban Development ("HUD") issued a Finding of Reasonable Cause and a Charge of Discrimination on August 24, 1999. Respondent, Dominick Cubello, failed to file an answer to the Charge of Discrimination.

On October 22, 1999, the Secretary of HUD ("the Secretary") filed a Request to Enter Default Judgment. Respondent again failed to respond. Accordingly, a Default Judgment and Order was issued on November 3, 1999, finding that Respondent violated 42 U.S.C. §§ 3604(a) and (c). Because the facts in the Charge are deemed admitted, a hearing was held on December 21, 1999, for the limited purpose of taking evidence on the appropriate relief to be awarded. *See* 24 C.F.R. § 180.420(b). The parties filed post-hearing briefs on issues concerning damages.

Findings of Fact[1]

1. Complainant, City of Albany Office of Equal Opportunity & Fair Housing, is a city agency that promotes fair housing and the equal availability of housing. Charge, ¶ 6.[2]

2. Respondent is the owner of 40 North Allen Street, Albany, New York, which consists of two apartments ("North Allen"). Respondent owns about 25 other properties. Of these, about six are partially or completely rented. The other properties consist of empty lots, boarded up buildings, buildings under construction, vacant units, and his own residence.[3] Tr. 167-76; C.P. Ex. 1. Respondent is indebted to the City of Albany for over $50,000 in back taxes. Tr. 191.

3. In May of 1996, Jacqueline Beltran and Lisa Folkes met with Respondent to inquire about renting North Allen. Charge, ¶ 8; Tr. 36.[4] At the time, Ms. Beltran had one child and was pregnant; Ms. Folkes had seven children. Charge, ¶ 8.

4. Respondent refused to rent the subject property to Ms. Beltran and Ms. Folkes, but offered them another property at 119 Dover Street. The women were not interested in renting the Dover Street property because they did not like the neighborhood. Tr. 177-79.

5. Complainant attempted to assist the women in their efforts to rent the subject

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[1]Because I entered a Default Judgment and Order, with the exception of paragraph 7, *see infra* note 3, I find the allegations set forth in the Charge to be proved. I have made additional findings based on the record.

[2]"Charge" refers to the Charge of Discrimination; "Tr." refers to the hearing transcript; "C.P. Ex." refers to exhibits introduced by the Charging Party; and "R. Ex." refers to exhibits introduced by Respondent.

[3]Pursuant to a default judgment, I am normally bound to find the allegations of the charge as proved. However, I do not find that Respondent owns 25 "other rental units" as alleged in paragraph 7 of the Charge. The Charging Party placed a list of Respondent's properties into evidence in order to prove his financial solvency. At the hearing, Respondent successfully demonstrated that only a fraction of his properties are available for rental and actually rented.

[4]In May of 1996, Ms. Beltran and Ms. Folkes filed complaints against Respondent. The women failed to pursue their allegations and the complaints were closed. Charge, ¶ 9; Tr. 27, 78.

property. Charge, ¶ 8.

6. Paula Wilkerson, Complainant's staff assistant, telephoned Respondent, identified herself, and inquired on the women's behalf about the subject property. Charge, ¶ 10; Tr. 29, 38, 44.

7. Respondent replied to Ms. Wilkerson that he did not want to rent to anyone with "too many children, because they would ruin" his property. Charge, ¶ 11. Respondent also stated that he would "rather see the apartment vacant than to rent to someone with too many children who would destroy the property." *Id.*

8. Ms. Wilkerson attempted to mediate the dispute between Respondent and Ms. Beltran and Ms. Folkes. Respondent declined to participate in the mediation. Tr. 35, 78. Ms. Wilkerson was unable to quantify the time involved in these attempts. Tr. 93.

9. Ms. Wilkerson conducted an initial intake of the women's complaint. She was unable to quantify the time involved in her work. Tr. 89; R. Ex. 1.

10. Ms. Wilkerson met with Ms. Beltran and Ms. Folkes "for a couple of hours" to clarify their complaints. Tr. 93.

11. Ms. Wilkerson had telephone conversations with Respondent and Ms. Beltran and Ms. Folkes. She was unable to quantify the time involved with these contacts. Tr. 93; R. Ex. 1.

12. Ms. Wilkerson and Angela Dixon, Complainant's Director at the time, met with representatives from the United States Department of Justice ("DOJ") to discuss the case. Ms. Wilkerson estimates that these meetings lasted for "a couple of hours." Tr. 97, 65.

13. Although she was unable to recall the length of the conversations, Ms. Wilkerson testified that she had "more than ten" conversations with HUD representatives. Tr. 128. During these conversations, Ms. Wilkerson provided HUD with information concerning the allegations of discrimination. Tr. 64, 128-29.

14. Ms. Wilkerson had numerous telephone conversations with Ms. Beltran and Ms. Folkes who frequently called to determine the status of their complaints. Tr. 37, 143. Other than estimating that each telephone call lasted for "a few minutes," Ms. Wilkerson was unable to quantify the time she spent on these conversations. Tr. 87, 148.

15. On numerous occasions, Ms. Wilkerson discussed the case with Ms. Dixon. Ms. Wilkerson was unable to quantify the time involved in these discussions. Tr. 149-50.

16. One weekend day in either June or July of 1996, for an unspecified number of hours Ms. Wilkerson and Ms. Dixon visited both the North Allen and Dover Street properties. At the North Allen property, they viewed the interior of the first floor through the porch windows. They drove by the Dover Street property, but did not stop to inspect it. Tr. 33-34, 38, 39-40, 70-71, 90-91.

17. In the summer of 1996, Ms. Wilkerson went to the Albany City Building Department to make inquiries concerning Respondent's property. Tr. 65-66, 75-76. The purpose of her inquiries was not clear. *Compare* Tr. 76-77 *with* Tr. 65.

18. From 1996 until May of 1998, Ms. Wilkerson's annual gross salary was $28,000. Tr. 33, 55. It increased to $38,500 in May of 1998. Tr. 63. From 1996 until 1998, Ms. Dixon's annual gross salary was $55,000. Tr. 62.

Discussion

Because I entered a Default Judgment and Order, Respondent has been adjudged to have violated 42 U.S.C. §§ 3604(a) and (c). The Charging Party seeks $10,000 to compensate Complainant for staff time and resources that were extended in investigating and attempting to conciliate this case; $5,000 for diversion of resources and frustration of its purpose; $12,500 "to enhance a testing program and to extend the outreach program in an effort to educate the public on Fair Housing issues" - referred to by Ms. Wilkerson as a "benefit to the community;" $11,000 for a civil penalty; and appropriate injunctive relief. Secretary's Motion to Default Order (Nov. 17, 1999).

A fair housing organization may recover damages for out-of-pocket costs incurred in the investigation and processing of a housing discrimination complaint. *See, e.g., Chicago v. Matchmaker Real Estate Sales Center, Inc.,* 982 F.2d 1086 (7th Cir. 1992), *cert. denied,* 508 U.S. 972 (1993); *Davis v. Mansards,* 597 F. Supp. 334 (N.D. Ind. 1984). However, an award of damages must be specifically proved and based on evidence. *See, e.g., Wood v. Day,* 859 F.2d 1490, 1492-93 (D.C. Cir. 1988); *Bills v. Hodges,* 628 F.2d 844 (4th Cir. 1980).

The record lacks credible evidence of more than minimal damages. The Charging Party originally sought $10,000 for Complainant's out-of-pocket expenses. *See* Secretary's Motion to Default Order (Nov. 17, 1999). Yet at hearing, after Complainant's representative took a half hour break to compile some figures, she concluded that the amount of out-of-pocket expenses was closer to $19,000.
See Tr. 59-60, 63, 113-14. Neither of these estimates is based on any documentation, logs, or concrete evidence. Rather they are based solely on Ms. Wilkerson's memory of

events, her self-described "guesses," and other speculations. *See, e.g.,* Tr. 49-57, 62-63, 114, 150.[5]

1. Out-of-pocket damages

Because of the absence of significant quantifiable damages, I am constrained to award only the minimum amount which I can reasonably ascertain to have been expended by Complainant on this case. I find that one day's worth (eight hours) of compensation for Ms. Dixon's time is appropriate. Complainant is entitled to a half of a day's compensation for Ms. Dixon's visit to Respondent's properties and a half of a day's compensation for the time that Ms. Dixon spent discussing the case with Ms. Wilkerson and representatives from HUD and DOJ. Accordingly, Complainant is entitled to $220 ($27.50 hourly rate x 8 hours = $220) for Ms. Dixon's time.

Complainant is entitled to two day's worth (16 hours) of compensation for Ms. Wilkerson's time, consisting of a half of a day's salary for visiting Respondent's properties, and a day and a half of salary for her mediation attempts and discussions with Ms. Wilkerson, Ms. Folkes and Ms. Beltran, and representatives from HUD and DOJ. This amount of compensation totals $224 ($14 hourly rate[6] x 16 hours = $224) for Ms. Wilkerson's efforts. Thus, Complainant is awarded a total of $444 ($220 + $224) for out-of-pocket damages.

2. Frustration of purpose, diversion of resources, and "benefit to the community"

[5]The record is replete with exchanges such as the following:
Question by the Charging Party's representative: And do you have an estimate of how many hours were. . . extended in trying to resolve this complaint?
Response by Ms. Wilkerson: I'm *really not sure how much time* it has taken, but it has been since May of 1996. Tr. 43 (emphasis added).

[6]Because the Charging Party did not provide adequate evidence of specific dates or times after April 1998 that Ms. Wilkerson worked on this case, I have used the lower annual salary of $28,000 to compute the hourly wage.

A fair housing organization may, in appropriate circumstances, recover damages for frustration of purpose/diversion of resources. *See Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d at 1099; *HUD v. Properties Unlimited*, 2 Fair Housing-Fair Lending (Aspen) ¶25,009 at 25,149-50 (HUDALJ Aug. 5, 1991). However, there is no specific evidence to support a separate award for these alleged damages. *See* Tr. 44, 121. In addition, the Charging Party failed to demonstrate that Respondent's actions resulted in a decrease in the number or efficacy of Complainant's testing and outreach programs. *See* Tr. 153-54. Thus, Respondent is not liable for any such damages. The claimed award to "benefit to the community" (Tr. 140) would not make Complainant whole, but rather would constitute a windfall to Complainant. Therefore, it is not legally supportable as a damage award. *See HUD v. Ross*, 2 Fair Housing-Fair Lending (Aspen) ¶25,075 at 25,701 (HUDALJ July 7, 1994); *HUD v. Jancik*, 2 Fair Housing-Fair Lending (Aspen) ¶25,058 at 25,568 (HUDALJ Oct. 1, 1993), *aff'd*, 44 F.3d 553 (7th Cir. 1995).

3. Civil penalty

The Charging Party requests the maximum civil penalty of $11,000 be assessed in this case. *See* 42 U.S.C. § 3612(g)(3)(A); 24 C.F.R. § 180.670(b)(3)(iii). Determining an appropriate penalty, requires consideration of the following factors: (1) the nature and circumstances of the violation; (2) whether Respondent has previously been adjudged to have committed unlawful housing discrimination; (3) the degree of Respondent's culpability; (4) the goal of deterrence; and (5) Respondent's financial circumstances. *See HUD v. Blackwell*, 2 Fair Housing-Fair Lending (Aspen) ¶ 25,001 at 25,014-15 (HUDALJ Dec. 21, 1989), *aff'd*, 908 F.2d 864 (11th Cir. 1990); House Comm. on the Judiciary, *Fair Housing Amendments Act of 1988*, H.R. Rep. No. 711, 100th Cong., 2d Sess. at 37 (1988).

Based upon consideration of the five factors, I determine that although a penalty is warranted, this case does not justify imposition of the maximum penalty. First, the nature and circumstances of the violation do not warrant the maximum penalty. In this instance, Respondent refused to rent to Ms. Beltran and Ms. Folkes, stating that they had too many children. Respondent, however, has rented to other families with children. *See* Tr. 173, 199. Second, there is no evidence that Respondent, who has multiple rental properties, has been adjudged to have committed housing discrimination in the past. Third, Respondent is culpable for his actions based upon his failure to answer the Charge. Although Respondent pleaded lack of familiarity with the English language and the legal process, the record contradicts his assertions. Respondent has been a landlord for a number of years. He has represented himself in court in eviction proceedings and other matters, without use of a translator or an attorney. *See* Tr. 199-02. Fourth, the goal of deterrence requires that Respondent be put on notice that he cannot refuse to rent property based on the number of children in an applicant's family. However, a minimum penalty will deter such action. Finally, the record demonstrates that although Respondent has multiple properties, most of them are a drain on his financial resources. Although currently six of his properties are rented, he owes back taxes to the city on many of the other properties. After weighing the five factors, I find that a $1,000 civil penalty is justified.

4. Injunctive relief

An administrative law judge may order injunctive or other equitable relief. *See* 42 U.S.C. § 3612(g)(3). Injunctive relief should be designed to eliminate the effects of past discrimination and prevent future discrimination. *See Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1036 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980); *see also Blackwell,* 908 F.2d at 874. The injunctive provisions of the following Order serve these purposes.

Conclusion

Respondent has been adjudged to have violated 42 U.S.C. §§ 3604(a) and (c). Complainant will be compensated for its damages. Further, to vindicate the public interest, injunctive relief will be ordered and a civil penalty will be assessed against Respondent.

ORDER

It is hereby ORDERED that:

1. Respondent, Dominick Cubello, is permanently enjoined from discriminating

with respect to housing because of familial status.

2. Within forty-five (45) days of the date this Order becomes final, Respondent shall display the HUD Fair Housing logo and slogan in all advertising and documents routinely given to the public.

3. Within forty-five (45) days of the date this Order becomes final, Respondent shall display the HUD Fair Housing logo alongside any "for rent" signs that he might post in connection with any dwellings that he owns, manages, or operates as of the date of this order and no less than five years following this date.

4. Within forty-five (45) days of the date this Order becomes final or as soon thereafter as HUD's Office of Fair Housing and Equal Opportunity can arrange for it, Respondent shall attend one fair housing/equal opportunity training session.

5. Within forty-five (45) days of the date this Order becomes final, Respondent shall create and maintain a log of future approved and denied rentals by individuals with children and submit a copy of the log to HUD every six months for a period of two years.

6. Within forty-five (45) days of the date this Order becomes final, Respondent shall pay Complainant, City of Albany Office of Equal Opportunity & Fair Housing, $444 in out-of-pocket damages.

7. Within forty-five (45) days of the date this Order becomes final, Respondent shall pay a civil penalty of $1,000 to the Secretary of HUD.

This Order is entered pursuant to 42 U.S.C. § 3612(g)(3) and 24 C.F.R. §§ 180.670 and 180.680, and will become the final agency decision thirty (30) days after the date of issuance of this initial decision.

/s/

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WILLIAM C. CREGAR
Administrative Law Judge

Dated: June 5, 2000