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 Delores Hughes, Michael Miller, Jr., and Calvin Jones, Jr., Charging Party, v. Wayne Colber, Respondent.	CORRECTED COPY HUDALJ 05-93-0510-1 Decided: February 9, 1995

Wayne Colber, *Pro Se*

Elizabeth Crowder, Esquire
For the Charging Party

Before: Constance T. O'Bryant
Administrative Law Judge

INITIAL DECISION AND ORDER

Statement of the Case

This matter arose as a result of a complaint filed by Delores Hughes, Michael Miller, Jr. and Calvin Jones, Jr. ("Complainants"), alleging discrimination in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601-3619. On July 29, 1994, following an investigation and a determination that reasonable cause existed to believe that discrimination had occurred, the Department of Housing and Urban Development ("HUD" or "the Charging Party") issued charges against Respondents, Wayne Colber and Rental Property Management, Inc., alleging that they had engaged in discriminatory housing practices in violation of Sections 804(c) and 805 of the Act, 42 U.S.C. §§ 3604 (c), 3605. The charges alleged that Respondents violated the Act by, *inter alia*, stating to Delores Hughes, with respect to the rental of a dwelling, that "you have too many children,"

indicating a preference or limitation based on familial status in violation of 42 U.S.C. § 3604(c). They also alleged that Respondents violated the Act by denying to Delores Hughes and her family a rental brokerage service by not allowing her to apply for an apartment because of the number of children in her family in violation of 42 U.S.C. § 3605.

Respondents did not answer the charges. The Charging Party moved for a default judgment. Neither Respondent responded to the request. By Order dated October 24, 1994, a default judgment was entered against Respondent, Wayne Colber.[1] Respondent Colber, was adjudged to have violated 42 U.S.C. § 3604(c).[2] On November 1, 1994, the Order was amended to include a finding of violation of 42 U.S.C. § 3605, as well. The October 24, 1994, Order limited the hearing to the issue of the appropriate relief to be awarded.

A hearing was held on November 1, 1994, in Milwaukee, Wisconsin. Although Respondent was provided notice of the date, time and place of the hearing, he failed to appear. At the close of the hearing, the Charging Party was given the opportunity to file a written brief. The brief was filed on December 19, 1994.

[1]By the same Default Judgment and Dismissal Order, I dismissed the charge against Rental Property Management, Inc. I ruled that the Complaint, on its face, was insufficient to sustain the charge against Rental Property Management, Inc. On October 31, 1994, the Charging Party filed a "Motion to Reconsider and Vacate Dismissal Order. . ."; however, it subsequently declined to pursue the motion.

[2]Through inadvertence my Order entered a default judgment only as to violation of § 3604(c). The Charging Party had sought a default judgment as to violations of both §§ 3604(c) and 3605. At the hearing, the Charging Party's motion for reconsideration of my ruling was granted and the Order was modified to include entry of default judgment as to both violations.

Respondent filed a number of posthearing motions, all of which were denied.[3] Respondent did not seek leave to file a posthearing brief on the issue of damages.

Findings of Fact

1. The Complainants are Delores Hughes and her two minor sons, Michael Miller, Jr. and Calvin Jones, Jr, who were at the time in question, aged 2 years and 2 months, respectively.

2. Respondent Wayne Colber was the rental agent for the subject unit. He is the President and sole owner of Rent Search Property Management, Inc. Tr. 30.[4]

3. Respondent Colber is a licensed real estate agent. Tr. 30.

4. The subject property is a four-unit building located at 6615 West Center Street in Wauwatosa, Wisconsin. The unit at issue was advertised as a spacious two-bedroom apartment in the subject property. Tr. 29

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[3]On November 7, 1994, Respondent Colber filed a "NOTICE OF MOTION AND MOTION TO REOPEN," in which he requested that the "proceedings be reopened and that any decision made on November 1, 1994, be set aside." He believed testimony could be presented in mitigation of damages. He alleged that he did not receive the notice of the specific place or time of the hearing. However, Respondent was given notice of the specific place, date and time of the hearing by Order dated October 17, 1994.

On December 1, 1994, Respondent filed two additional Motions: a "Motion to Reconsider and Vacate Default Judgments of October 21, 1994, and November l, 1994," and a "Request for Intervention." The Government opposed both motions.

With regard to the Motion to Reconsider and to Vacate Default Judgments, Respondent alleged that he did not receive the Notice and Order dated August 25, 1994, which set the date and time of the hearing, nor the Notice dated October 17, 1994, which provided the location, date and time at which the hearing would be held. This Motion was denied by Order dated December 2, 1994. Respondent's alleged nonreceipt of notice of the date, time and location of the hearing, even if true, did not excuse his failure to answer the complaint (his receipt of which was documented) and his failure to respond to the Charging Party's Motion for Default Judgment (receipt of which he did not deny). Further, I do not credit Respondent's assertion of nonreceipt of the Orders of August 25, 1994, and October 17, 1994.

[4]The following reference abbreviations are used in this decision: "Tr." followed by page number for Transcript and "CP-Ex" for the Charging Party's Exhibit.

5. In October 1992, Ms. Hughes was looking for an apartment because the lease at her residence was about to expire. She was living in a 30-unit complex which was "pretty huge" and quite noisy at times, and she wanted something a little smaller, not too far from her mother. Tr. 15. She was assisted in her search by a housing organization, but she also looked through the newspaper ads herself. Tr. 16.

6. On October 26, 1992, Ms. Hughes responded to an advertisement in the Milwaukee Journal listing the subject unit for rent by telephoning the number listed therein. Tr. 17, 20. The person who answered identified himself as only "Wayne".[5] It was not until later that Ms. Hughes learned his full name was Wayne Colber. Tr. 27.

7. Respondent Colber inquired of Ms. Hughes how many children she had. When Ms. Hughes responded that she had two children, Mr. Colber told her that she had "too many children" for the unit and then hung up on her. Tr. 20. She thought he was rude. Tr. 22.

8. Ms. Hughes called the housing organization she was acquainted with and spoke to a woman named Margaret to whom she recounted her telephone conversation with Respondent. Margaret asked her to call the number again and try to get the man's name. Ms. Hughes called back and talked to the same person who identified himself as "Wayne." He asked her again how many children she had and again told her that she had "too many kids" and hung up. Tr. 21-22.

9. Ms. Hughes' complaint was tested through two telephone calls placed the next day by testers from the Metropolitan Milwaukee Fair Housing Council. The test results were gathered by Daniel John Stotmeister, an Equal Opportunity Specialist and Fair Housing Investigator with HUD. Tr. 30.

10. The first tester called on October 27, 1992, and inquired about the unit that was being advertised. She spoke to a person named Wayne.[6] She, too, was asked how many children she had. She responded that she had a set of twins, 12 months old.

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[5]Ms. Hughes called the number twice. On the first call she did not get the name of the person who answered. Shortly thereafter she called back and asked his name. He told her it was "Wayne." Tr. 22.

[6]There was no objection by Respondent to the hearsay evidence introduced through Mr. Stotmeister. Respondent was neither present nor represented.

Mr. Colber responded to the effect that that was a problem, that two children were too many for the unit, but perhaps an exception could be made. If the children were older, he said, like one and three, that would definitely be a "no," but since they were twins and they were both so young, an exception maybe could be made. He would check with the owner. The tester said she would call back the next day. The tester called back on October 28, 1992, and was told that the owner had said "no." Tr. 30-32.

11. Tester number two called on October 27, 1992, in response to the same ad and spoke to a person named Wayne. She told him, in response to his inquiry, that she was calling on behalf of herself, her husband, and a child. He asked the age of the child, to which the tester gave the age as 6 years. Respondent then stated that he only showed the apartment by appointment and would be glad to make an appointment to show her the unit. The tester stated she would call back later to make an appointment. Tr. 31-32.

12. The subject unit was a two-bedroom apartment in a four-unit building. Tr. 15, 18. Ms. Hughes needed a two-bedroom unit for herself and her two sons. Tr. 18.

13. Ms. Hughes thought the subject unit was in an "ideal" location because it was on a direct route to her parents' house, and because she spent a lot of time with her mother. Tr. 18.

14. Ms. Hughes had looked at more than 10 units over a period of about two months before finding the listing for the subject apartment. Tr. 19.

15. The subject apartment in the four-unit building was especially desirable to Ms. Hughes who was looking for a smaller complex and one less noisy than the one in which she lived. She was then living in a 30-unit complex. Tr. 15, 18.

16. Ms. Hughes was "in shock" after speaking with Respondent. She was especially hurt by his statement that she had too many children, because after her second child was born, she had a tubal ligation to limit the number of children she had. Tr. 25, 20. His statement made her feel that maybe she should have had the surgery after her first child or that she should have had no children at all. Tr. 25.

17. Ms. Hughes was discouraged from looking further for housing because of Respondent's discriminatory statement and his rude behavior in hanging up on her. She did not look again for a couple of days. Tr. 22. She was fearful of another rejection. Tr. 24.

18. Ms. Hughes searched for housing for two months after being rejected by Respondent. Tr. 24.

19. Ms. Hughes ultimately found and rented a two-bedroom, single family house. It is 15 to 20 minutes from her mother's house, whereas the subject unit is about 10 minutes away. Tr. 24.

20. The apartment in question rented for $450.00 per month in October of 1992. The house Ms. Hughes subsequently rented cost $460.00 per month. Tr. 24.

21. Between October 26, 1992, when she spoke with Respondent, and the middle of December 1992, when she found her present house, Ms. Hughes paid her mother $20.00 per month to babysit for her while she searched for a new place. Tr. 24.

22. On January 22, 1993, Ms. Hughes filed a complaint with HUD, alleging familial status discrimination. At that time, the respondent was identified as "Wayne Doe c/o Rent Search Property Management," because Ms. Hughes did not know Mr. Colber's last name. CP-Ex.1, Tr. 29.

23. On April 30, 1993, Ms. Hughes filed an amended complaint, in which she identified the person she believed to have discriminated against her as "Wayne Colber, President, Rent Search Property Management, Inc." CP-Ex. 2

24. On May 24, 1993, Ms. Hughes filed a second amended complaint. CP-Ex. 3.

Remedies

The Charging Party asserts that Respondent's discrimination caused Ms. Hughes and her two sons to suffer considerable damages, including economic loss, emotional distress and loss of housing opportunity. Accordingly, the Charging Party seeks to compensate Complainants for actual and intangible damages. The Charging Party seeks $280.00 for out-of-pocket costs; $6,000.00 for Ms. Hughes' emotional distress; and $2,500.00 for lost housing opportunity. The Charging Party also prays for injunctive relief and the imposition of $5,000.00 in civil penalties against Respondent.

Economic Loss

I find that Ms. Hughes is entitled to $280.00 as compensation for the out-of-pocket losses she incurred as a result of Respondent's unlawful failure to consider Complainants for rental of the unit in his building. The $280.00 is the sum of the difference in the rent at Respondent's unit and the unit she subsequently acquired ($10/month x 24 months), plus

the cost of babysitting service her mother provided while she continued to search for an apartment ($20/month x 2 months).

Emotional Distress and Humiliation

It is well established that the damages that may be awarded under the Act include damages for embarrassment, humiliation and emotional distress caused by acts of discrimination. Such damages can be inferred from the circumstances, as well as proven by testimony. *HUD v. Blackwell*, 2 Fair Housing-Fair Lending (P-H), ¶ 25,001 at 25,011 (HUDALJ December 21, 1989), *aff'd*, 908 F.2d 864 (11th Cir. 1990). Because these intangible type injuries cannot be measured quantitively, courts do not demand precise proof to support a reasonable award of damages for such injuries. See *Marable v. Walker*, 704 F.2d 1219, 1220 (11th Cir. 1983); *Block v. R.H. Macy & Co. Inc.*, 712 F.2d 1241, 1245 (8th Cir. 1983).

The Charging Party presented evidence that Ms. Hughes was shocked, hurt, and discouraged by Respondent's discriminatory action and that it took a toll on her. Ms. Hughes testified that Respondent "was really rude" and that she "felt real hurt." Tr. 22. She was, for a time, discouraged from looking for a place of her own and felt like she should move back home with her mother; however, she knew her parents' place was too small for her family. Tr. 23. She was "scared" to continue to look. She wondered if every other renter was going to treat her the same way. It took her a couple of days to get enough nerves to commence the search again. Tr. 22. It was particularly hard on Ms. Hughes because she thought that she had acted responsibly by taking action to limit the number of children she had. Just two months earlier, after her second child was born, she had a tubal ligation. Tr. 22. Now she was being told that two children were too many. Mr. Colber's statement to her made her feel that she should not have had the second child, or maybe not had any children at all. Tr. 25.

The goal of a damage award in a housing discrimination case is to try to make the victim whole. The awards of damages for emotional distress in these cases range from a relatively small amount (*see, e.g., HUD v. Murphy*, Fair Housing-Fair Lending (P-H) 25,002, 25,079; $150.00 awarded to a party who "suffered the threshold level of cognizable and compensable emotional distress,") to substantial amounts (*see, e.g., HUD v. Edith Marie Johnson, HUDALJ 06-93-1316-8 (July 26, 1994);* award of $175,000.00). For the usual and ordinary complainant, the standard employed to assess the amount of compensatory damages for such intangible injuries is the reaction by one considered a reasonable complainant to the respondent's discriminatory actions. That reaction will necessarily vary with the degree of egregiousness of the respondent's conduct. However,

respondents who discriminate in housing must take their victims as they find them and

judges must take into consideration the susceptibility to injury of the particular complainant. [7]

In this case, Ms. Hughes is entitled to compensation for the emotional distress caused by Respondent's statement. His statement to her that she had "too many kids" coupled with his hanging up on her dealt a serious blow to her confidence that she would be treated fairly. She suffered hurt and humiliation. She was especially sensitive to the matter of the number of children she had because of her recent surgery, which made his actions all the more painful. Her reaction was reasonable under the circumstances. I conclude that she is entitled to compensation for emotional distress, embarrassment and humiliation in the amount of $6,000.00.

Lost Housing Opportunity/Inconvenience

The Charging Party asserts that Complainants were injured in this case from denial of their right to choose where and under what conditions they would live. It seeks an award of $2,500.00 for lost housing opportunity. *Charging Party's Brief, p. 9.* The evidence provided in support of this injury tends to show factors of inconvenience. They point to the fact that the location of Respondent's advertised unit was closer to Ms. Hughes' mother's house than the one she subsequently found.[8] It was about a 10 minute, "straight shot" to her mother's place, as opposed to the 15 to 20 minute commute from the house she later rented. Tr. 20. Further, Respondent's refusal to consider the Complainants for application resulted in Ms. Hughes spending an additional two months looking for suitable housing. I agree that Ms. Hughes should be compensated for this intangible injury.

[7] Alan W. Heifetz and Thomas C. Heinz, *Separating the Objective, the Subjective and the Speculative: Assessing Compensatory Damages in Fair Housing Adjudications,* 26 J. Marshall L. Rev. 3, 21-22 (1992).

[8] She frequently visted her mother and often used her as a babysitter. Tr. 24.

However, except for the added distance from her mother's place, Ms. Hughes did not testify to any dissatisfaction with the unit she ultimately rented. She had wanted to move to a place smaller and quieter than where she had been living. It appears the house she rented satisfied these goals. Under these circumstances, I conclude that Ms. Hughes and her two sons should be compensated for their inconvenience and lost housing opportunity in the amount of $500.00.

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). A maximum penalty of $10,000.00 may be assessed if a respondent has not been adjudged to have committed any prior discriminatory housing practice. 42 U.S.C. § 104.910(b)(3)(i)(A). The House Report accompanying the Act 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, the goal of deterrence, and other matters as justice may require." H.R. Rep. N. 711, 100th Cong. 2d Sess. 37.

Evidence regarding Respondents' financial circumstances is peculiarly within their knowledge, so they have the burden of producing such evidence for the record. If they fail to produce credible evidence which would tend to militate against assessment of a civil penalty, one may be imposed without consideration of financial circumstances. See *Campbell v. United States*, 365 U.S. 85, 96 (1961), *HUD v. Blackwell*, 2 Fair Housing-Fair Lending (P-H) ¶¶ 25,001, 25,015 (HUDALJ Dec. 21, 1989), *aff'd* 908 F.2d 864 (11th Cir. 1990). Mr. Colber did not appear at the hearing; thus, he did not present any testimony to indicate that payment of the maximum civil penalty would cause him financial hardship. Nor did he present any other evidence that would tend to militate against awarding the maximum civil penalty against him. Thus, the record does not contain any evidence that Respondent could not pay a civil penalty without suffering undue hardship.

In this case, there is no evidence that the Respondent has been adjudged to have committed any previous discriminatory housing practices. Thus, the maximum civil penalty that may be assessed against Respondent in this case is $10,000.00. 42 U.S.C. § 3612(g)(3)(A) and 24 C.F.R. § 104.910(b)(3)(i)(A).

The next factor to be considered is the nature and circumstances of the violation. The Respondent's action was serious. From the evidence, it was not an isolated act. When Ms. Hughes called back the second time, Mr. Colber behaved in the same fashion as the first. He asked her how many children she had, and then, after telling her she had too many children, hung up on her. Further, one of the testers was similarly rejected because she represented that she had two children (twins). Tr. 31.

Also to be considered is the Respondent's culpability. The Respondent is a real estate broker and operates his own rental service, as well as a property management business. Based on his position, the direct nature of Respondent's statement demonstrates a careless disregard of the Fair Housing Act, of which Respondent should be familiar.

Under the circumstances of this case, the goal of deterrence will be furthered by an award of a civil penalty. Those similarly situated as the Respondent must be put on notice that discriminatory actions against families with children will not be tolerated.

Based on consideration of the above five elements, I conclude that to vindicate the public interest and to meet the goal of deterrence, a substantial penalty should be assessed. I conclude, further, that the amount sought by the Charging Party of $5,000.00 is a reasonable penalty.

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. § 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 II*, supra, 908 F. 2d at 874 (quoting *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). The relief is to be molded to the specific facts of the case.

Injunctive relief is necessary to ensure that the Respondent does not engage in discriminatory housing practices in the future. The appropriate injunctive relief for this case is provided in the Order below.

CONCLUSION AND ORDER

On the basis of default judgments, it has been determined that Respondent discriminated against the Complainants Delores Hughes and her minor sons, Michael Miller, Jr. and Calvin Jones, Jr., in violation of 42 U.S.C. §§ 3604(c) and 3605.

The evidence also establishes that as a result of Respondent's unlawful actions, the Complainants have suffered injuries which must be remedied by an award of compensatory damages. In addition, to protect and vindicate the public interest, injunctive relief is necessary and a substantial civil penalty must be imposed against the Respondent. Accordingly, the following Order is entered.

ORDER

Having concluded that Respondent Wayne Colber discriminated against Complainant Delores Hughes and her two sons, in violation of 42 U.S.C. §§ 3604(c) and 3605 of the Fair Housing Act, and the regulations codified at 24 C.F.R. § 100.60(a)(2)(3), it is hereby **ORDERED** that:

1. Respondent is permanently enjoined from discriminating with respect to housing. Prohibited actions include, but are not limited to:

a. making, printing, or publishing any statement or advertisement, with respect to the sale or rental of a dwelling, that indicates any preference, limitation, or discrimination based on familial status;

b. discriminating against any person in making available any residential real estate-related transaction, or in the terms or conditions of such a transaction, because of familial status; and

c. otherwise making unavailable or denying a dwelling to any persons because of their familial status.

2. Within thirty (30) days of the date on which this Order becomes final, Respondent shall pay actual damages in the amount of $6,280.00 to Complainant, Delores Hughes. This award consists of $280.00 in out-of-pocket costs and $6,000.00 as compensation for Complainant's Hughes' emotional distress and humiliation.

3. Within thirty (30) days of the date on which this Order becomes final, Respondent shall pay damages in the amount of $500.00 for loss of housing opportunity to the Complainants Delores Hughes, Michael Miller, Jr., and Calvin Jones, Jr.

4. Within thirty (30) days of the date on which this Order becomes final,

Respondent shall pay a civil penalty of $5,000.00 to the Secretary, United States Department of Housing and Urban Development.

This **Order** is entered pursuant to 42 U.S.C. § 3612(g)(3) and 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.

/s/

CONSTANCE T. O'BRYANT
Administrative Law Judge