

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 John Dimizzo,

Charging Party, and

John Dimizzo,

Intervenor,

v.

Wesley K. Flowers, AIMCO Residential
Group L.P., Security Pacific Properties

Respondents.

HUDALJ 09-99-0004-8
Decided: January 22, 2001

Richard J. ALEXANDER, Esq.,
For Respondents AIMCO and
Security Pacific Properties

Steven L. COLLIER, Esq.,
For the Aggrieved Party/Intervenor

R. Faye AUSTIN, Esq. and
Marc ROTHBERG, Esq.,
For the Secretary and
The Aggrieved Party

Before: ROBERT A. ANDRETTA
Administrative Law Judge

INITIAL DECISION

This matter arose as a result of a Complaint filed on or about October 13, 1998, by John Dimizzo, an “aggrieved person” under the Fair Housing Act, as amended, 42 U.S.C. §§ 3601 - 19 (“the Act”), alleging discrimination on the basis of handicap in violation of the Act. On May 31, 2000, the Assistant General Counsel of the Department of Housing and Urban Development (“HUD”) issued a Cause Determination and a Charge of Discrimination, on behalf of the Secretary of HUD (“the Secretary”) and the Aggrieved Party, in which it is alleged that the Respondents discriminated by refusing to rent a dwelling to the Aggrieved Party.

A hearing was held in San Francisco, California, on Tuesday, October 3, 2000. The parties’ post-hearing briefs were ordered to be filed by November 22, 2000. The parties’ post-hearing briefs were timely filed, and this case therefore became ripe for issuance of an Initial Decision on the last-named date. It is adjudicated in accordance with Section 3612(b) of the Act and the regulations of the Department of Housing and Urban Development that are codified at 24 CFR Part 104, and jurisdiction is thereby obtained.

Statement of Facts

1. The Aggrieved Party, John Dimizzo, suffers from bipolar disorder, which was first diagnosed at the age of fifteen. (T 31).¹ Bipolar disorder is caused by a chemical imbalance of the nervous system’s neurotransmitters. The disorder causes severe mood swings with other symptoms such as paranoia, lack of sleep and poor appetite. (T 105-06).

2. Respondent Security Pacific Properties was, at all times relevant, the general managing partner of a limited partnership that owned the subject dwelling property, Alexander Residence (“the property”). Answer ¶ 6.

3. Respondent Wesley K. Flowers was, at all times relevant, the property manager and an employee of Insignia Residential Group, the management company for the property. ² Answer ¶ 4.

¹ References to the transcript of the hearing are made with a “T” and the transcript page number(s). The Secretary’s exhibits are identified with an “S” and the exhibit number. The Respondents’ exhibits are identified with an “R” and the number. Other references are made in plain language; *e.g.*, Answer ¶ 5.

² Respondent Flowers failed to answer the Charge of Discrimination, respond to an Order To Show Cause dated August 30, 2000, or to appear at the hearing.

4. Respondent AIMCO Residential Group, L.P., is the successor in interest to Insignia Residential Group and remained as manager of the property at least through November 29, 2000. Answer ¶ 5.

Facts of the Case

5. On January 7, 1998, the Aggrieved Party submitted a "pre-application" that placed him on the waiting list for a rental unit at the property, which is a San Francisco residential hotel. (S 1). By letter dated April 15, 1998, Mr. Dimizzo was informed that the property was "now qualifying the next 10 applicants on the waiting list." (S 2). In response, Dimizzo submitted a "rental application" dated April 23, 1998, which among other things, identified his former residence as Maria Manor. (S 3). On June 30, 1998, Maria Manor provided a "Landlord Verification" to the Alexander residence, addressed to Respondent Flowers, stating that Dimizzo had conflicts with residents and staff. (S 4).

6. On July 3, 1998, Respondent Flowers sent a form letter to Dimizzo in which he rejected the latter's rental application because of a "negative landlord reference." (S 5). Attorney Susan Mizner of The Bar Association Of San Francisco, Homeless Advocacy Project, responded to Flowers on Dimizzo's behalf by letter dated July 31, 1998. The letter informed Flowers that Dimizzo suffered from "bipolar affective disorder" and that when the Aggrieved Party lived at Maria Manor, "he received the wrong medication," but was currently properly medicated "so that there should not be any further difficulties with his behavior." The letter concluded with a request to provide Mr. Dimizzo "with the Reasonable Accommodation of disregarding his behavior during the period he lived at Maria Manor." (S 6).

7. In another letter dated August 10, 1998, Flowers rejected Dimizzo's application for the stated reason that Dimizzo's "credit record did not meet our screening criteria." The letter further gave its recipient 14 days within which to contest the rejection. (S 8). An August 6, 1998, credit history report revealed that Dimizzo had two unpaid bills. The first bill, incurred in November 1993, was for \$443 and totaled \$621 with interest. (S 7). The bill was from Willamette Valley, Oregon, for ambulance service that had been provided to Dimizzo. (T 62). The second bill, dated in July 1997, was from Pacific Bell telephone company in the amount of \$63. (T 7).

8. The Aggrieved Party attempted to contact Respondent Flowers within the requisite fourteen days through telephone messages and a letter, but Flowers did not respond. On one occasion Flowers hung up on Dimizzo when the latter identified himself. (T 59-60). In a letter to Ms. Mizner dated September 9, 1998, Flowers stated that Dimizzo had been rejected for a negative credit reference, which he failed to timely contest, and had been "placed in rejections." (S 9). Ms. Mizner responded to Flowers's

letter in her own of September 11, 1998. She explained that the ambulance bill was from a period during which Dimizzo had medical insurance, that he had never received the bill and was unaware the cost was not covered. She also pointed out that, since the ambulance bill was from 1993 it would have been on Dimizzo's record in 1996 when he was admitted without problem to Maria Manor, which was owned and managed by the same Respondent entities. Finally, she stated that the credit issue was a "pretext" for denying Dimizzo residence at the property, and she requested again that Dimizzo be accepted as a resident. Mizner's letter further requested a response from Flowers within ten days. (S 10). No response was ever received, Dimizzo was not admitted into residence at the property, and he subsequently filed his discrimination complaint with HUD.

Discussion

The first order of business at the hearing was to dispose of a pending Motion For Default Judgement against Respondent Flowers based on his failure to respond to the preliminary pleadings or to appear at the hearing. *See* note 2. There was no opposition to the granting of the Motion, and an Order To Show Cause why he should not be found in default stated that failure to respond would constitute consent to the entry of a default decision. Accordingly, and for good cause shown, the Motion was granted, and Respondent Flowers was found to be in default. (T 10). Accordingly, he is liable for his discriminatory actions against the Aggrieved Party. 24 CFR 180.420; *See also* Fed. R. Civ. P. 55.

Respondent Flowers, who was the property manager involved with the subject application to rent, is directly liable for his discriminatory actions which have been admitted by him as a result of his default. Because Flowers is found liable, the remaining Respondents are also liable for the discrimination of his action. Respondent AIMCO is liable for Flowers's actions because it is the successor in interest to Insignia, which employed Flowers during all times relevant in this case, and an employer is liable for the actions of its employees. *See, e.g., Walker v. Crigler*, 976 F.2d 900 (4th Cir. 1992); *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1974). Respondent Security Pacific is liable as the owner of the property for the discriminatory acts of its agents, AIMCO and Flowers. *See, e.g., Jankowski Lee & Associates v. Cisneros*, 91 F.3d 891, 896 (7th Cir. 1996); *Cabrera v. Jakchovitz*, 24 F.3d 372, 387-88 (2nd Cir. 1994). Moreover, at the beginning of the hearing, counsel for Respondents AIMCO and Security Pacific Properties stated that "everything [Flowers] did was in the course and scope of his employment," that under California law the remaining Respondents "would be responsible for his damages," and that the remaining Respondents "accept responsibility for Mr. Flowers' actions." (T 9). Thus, I find all the Respondents jointly and severally liable for the stated violation of the Act. *Id.*

REMEDIES

The Secretary requests that the Aggrieved Party be compensated for emotional suffering in the amount of \$15,000. To vindicate the public interest, the Secretary also requests that the Respondents be assessed a civil penalty of \$8,000. The Aggrieved Party/Intervener seeks reimbursement of out of pocket costs in the amount of \$340 and he requests \$45,000 as compensation for emotional distress. Finally, the Secretary requests an order for injunctive relief to ensure that Respondents will not again discriminate in the rental of housing. *See* 42 U.S.C. § 3612(g)(3). Specifically, the Secretary requests that the Respondents should be permanently enjoined from violating the Act and required to keep records on inquiries by potential applicants who are disabled, report quarterly to HUD on their rental activities, and provide training to all management and office staff on handicap discrimination. The Intervener joins in the request for injunctive relief.

Compensatory Damages

The Act provides that where an administrative law judge finds that a Respondent has engaged in a discriminatory practice as charged, the judge shall issue an order "for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person." 42 U.S.C. § 3612(g)(3). The damages may be awarded as compensation for actual expenses and for the emotional injury caused by the violation. *HUD v. Wilkowski*, FH - FL ¶25,045 (HUDALJ, May 18, 1993).

Actual Expenses

The Aggrieved Party/Intervenor seeks to recover the increased cost of renting hotel rooms for one week per month during the subject period. Mr. Dimizzo was homeless for four months, starting when his application to the Alexander was rejected in early July and ending when he moved into alternative housing in late October 1998. He testified that approximately once every month while he was homeless he rented a hotel room for a week, which was all he could afford on his SSI income. The hotel room stays cost an average of \$135 per week.

Had Dimizzo been accepted at the Alexander, his rent would have been 30 percent of his income for project-based Section 8 housing. His income was \$712 per month. Therefore his rent at the Alexander would have been \$214 per month or \$7.15 per day. So the weekly rent at the Alexander would have been \$50. Therefore, for the hotel stays, Dimizzo was paying \$85 per week in excess of what he would have paid per week at the Alexander. Since his homelessness was prolonged for four months by the discriminatory rejection, and since he rented a hotel room for approximately one week during each

month of homelessness, Dimizzo should be compensated \$340 for the added costs of alternative housing, and this amount will be included in the Order that follows at the end of this decision.

Emotional Injury

The Aggrieved Party's major elements of damage were the emotional impact of being rejected because of the condition from which he suffers through no fault of his own, the humiliation and frustration of being treated in such an uncivilized manner while trying to appeal the rejection, and the despair of four months of homelessness ultimately caused by Respondent Flowers's rejection and refusal to consider his appeal. Proof of emotional damage and humiliation is established by testimony and can be inferred from the surrounding circumstances. *Johnson v. Hale*, 940 F.2d 1192 (9th Cir. 1991); *Marable v. Walker*, 704 F.2d 1219, 1220 (11th Cir. 1983). Housing discriminators must take their victims as they find them, and damages are based upon the injuries actually suffered by the Aggrieved Party, not by those which would be imputed to an ordinary or reasonable person. *HUD v. Pheasant Ridge Associates Ltd.* 2 FH-FL (Aspen) ¶25,123 (HUDALJ, 10-25-96). The Aggrieved Party's pre-existing emotional condition is to be taken into consideration in determining the level of emotional distress and an amount of compensation that would be appropriate. *HUD v. Jerrard*, 2 FH - FL (P - H) ¶ 25,005, 25,091 (HUDALJ, Sept. 28, 1990).

The Aggrieved Party was homeless when he was rejected by Respondent Flowers. Because of his low income status, Respondents' conduct kept him homeless. No one who has never been homeless can fully appreciate the level of stress and discomfort caused by homelessness, but any reasonable person knows that it is a state to be avoided at all costs and testimony about its effects bolsters that view. Mr. Dimizzo had to sleep in shelters and spend his days on the streets.

Every subsidized housing provider that Dimizzo applied to had a long waiting list. The Alexander was the first where his name came on the list to be considered for residency. He was rejected and blocked from voicing a valid appeal that should easily have reversed the rejection. Any healthy person would begin to despair at such a situation, but Mr. Dimizzo already suffered from bouts of clinical depression, and so his situation of emotional distress was exacerbated. He went into a "deep, dark, depression," and he was "struck with a sense of doom."

Mr. Dimizzo's psychiatrist, Doctor D. Wolk, confirmed that Dimizzo exhibited symptoms of clinical depression while he was homeless, that these symptoms were more severe than his patient normally suffered, and that they continued throughout the homelessness period. Dimizzo went to the doctor about his symptoms of depression and

complained on each visit about his homelessness and its effect upon him. The doctor found him to be "disturbed and hypersensitive." He gave his patient a prescription for Prozac to treat the depression, but Dimizzo was forced to discontinue its use due to adverse side effects. The testimony of both the doctor and the patient in this case corroborate the claim of an extreme level of stress induced by the actions of Respondent Flowers.

The conduct of the discriminator is also relevant to determining the level of emotional distress that the discrimination has caused. *Littlefield v. McGuffy*, 954 F.2d 1337, 1341. Flowers told Dimizzo that he would never be accepted with his negative landlord reference. When Dimizzo tried to explain the negative events in the reference and how it was caused by incorrect medication, Flowers would not listen and threatened to call the police. After contact from Attorney Mizner put Flowers on notice that he could be in violation of the Act, he attempted to cover up his true motivation by issuing the second rejection based on a bad credit reference rendered clearly bogus by Flowers's own handling of previous similar reports. In spite of his letter's including an invitation to appeal the decision, Flowers refused to speak with Dimizzo, failed to return Dimizzo's phone calls, and hung up on the applicant on the one occasion that he got through to him on the phone.

Flowers's conduct compounded the distress suffered by Mr. Dimizzo. He treated Dimizzo with hostility because of a negative report on Dimizzo's conduct that was later explained as being the result of improper medication. Thus, Dimizzo was treated with hostility on the basis of his disability. He was treated poorly and missed out on a housing opportunity that would have solved his homelessness problem based upon prejudice by a person who did not know him, but who evidently concluded that the disability made him an undesirable person to take in as a tenant. I find that this would have increased the Aggrieved Party's depression and despair.

The Secretary has asked for \$15,000 in compensation for the emotional damage caused to the Aggrieved Party, but the Intervenor himself has asked for \$45,000 for this part of the damage to him. In determining the damages for emotional suffering I turn for guidance to my own case four years ago, *HUD v. Pheasant Ridge, supra*, because its similarities to the present case make it instructive. *Pheasant Ridge* concerned two mentally disabled siblings who were prospective tenants at the Respondents' rental complex. Each of them pre-applied for housing, was placed on a waiting list, and later completed a final rental application. The Respondents rejected the applications and rebuffed the Aggrieved Parties' attempts to resolve the matter.

There, as here, I considered the fact that "courts do not demand precise proof" of emotional damage as well as the concept, as here, that "as with other types of injury

cases, housing providers must take their victims as they find them.” In *Pheasant Ridge* the two siblings suffered extreme disappointment over their rejection, and the Respondents’ refusal to discuss the matter with them exacerbated their anxiety and stress, one of them more than the other. I found that “it is not hard to imagine the frustration, even anguish, that being treated in this manner would cause,” and that in the case of one of the two siblings the Respondents “discriminated against a person with a pre-existing condition that was much exacerbated by their discriminatory conduct.” Thus, one Aggrieved Party was awarded \$10,000 for emotional distress, and the more adversely effected one was awarded \$30,000. The *Pheasant Ridge* analogy to the instant case is with the more effected sibling. Thus, the same \$30,000 will be awarded in the Order.

Civil Penalty

To vindicate the public interest, the Secretary is entitled to a civil penalty. 42 U.S.C. § 3612(g)(3). To determine the appropriate civil penalty the following factors should be considered: (1) a previous finding of discriminatory housing practice committed by the Respondent; (2) the liable Respondents’ financial resources; (3) the nature and circumstances of the violation; (4) the degree of culpability; (5) the goal of deterrence ; and (6) other matters as justice may dictate. 24 CFR § 180.671 (2000).

There is no evidence that Respondents have previously violated the Act. However, Respondent Flowers’s actions were intentional and callous. His August 10 rejection of the Aggrieved Party for alleged poor credit was a pretext for discrimination. Mr. Dimizzo and Ms. Mizner attempted to amicably resolve the matter with Flowers in accordance with his own stated procedure, but he ignored them. Further, Flowers knew, or should have known, that his rejection of Dimizzo’s application for tenancy and his subsequent ill treatment of him would cause Dimizzo significant mental suffering. Moreover, it is necessary to deter owners and managers of housing from discriminating against the very people who need it most. Finally, Respondents AIMCO and Security Pacific do not contest their financial ability to pay a civil penalty of up to \$11,000, nor do they show any reason for not imposing the Secretary’s requested amount. (S 16, 18). Therefore, Respondents will be required to pay a civil penalty of \$8,000 in the Order below. *See, Pheasant Ridge, supra.*

Injunctive Relief

That part of the Fair Housing Act that is codified at 42 U.S.C. § 3612(g)(3) also authorizes the Administrative Law Judge to order injunctive or other equitable relief. Injunctive relief may be imposed to ensure that the Respondents will not again discriminate on the basis of handicap status. To that end, the Charging Party has requested that I enter a permanent injunction against Respondents that restrains them

from further violations of the Act and appropriate affirmative relief to protect against recurrence of the Respondents' discriminatory conduct. This request is well taken. However, the Charging Party has not provided any guidance as to the nature of the relief requested beyond stating that the Respondents should be permanently enjoined from violating the Act and required to keep records on inquiries by potential tenants who are disabled, report quarterly to HUD, and provide training to all management office staff on handicap discrimination. Thus, injunctive relief of this forum's own design will be set forth as part of the Order that follows.

ORDER

Having concluded that Respondents Wesley K. Flowers, AIMCO Residential Group L.P., and Security Pacific Properties violated provisions of the Fair Housing Act that are codified at 42 U.S.C. §§ 3604(f)(1) as well as the regulations of the U.S. Department of Housing and Urban development which are codified at 24 CFR 100.202 (a) (2000), it is hereby

ORDERED that,

1. Respondents are permanently enjoined from discriminating against the Aggrieved Party, or any other person, with respect to housing, because of handicap, and from retaliating against or otherwise harassing them or any of their families.
2. Respondents shall institute record-keeping of the operation of the Alexander and all their similar rental properties which is adequate to comply with the requirements set forth in this Order, including keeping all records described in paragraph 3 of this Order. Respondents shall permit representatives of HUD to inspect and copy all pertinent records at reasonable times after reasonable notice.
3. On the last day of every third month beginning March 31, 2001, and continuing for three years, Respondents shall submit reports containing the following information regarding the previous three months, for all properties listed for sale or rent by Respondents, to the Office of the Regional Counsel, U.S. Department of Housing and Urban Development, 450 Golden Gate Avenue, P.O. Box 36003, San Francisco, CA 94102, provided that the Regional Counsel may modify this paragraph of this Order, as deemed appropriate to make its requirements less, but not more, burdensome:
 - a. a duplicate of every written application, and a written description of every oral application, for all persons who applied for occupancy of all Respondents' listed units, including a statement of each person's handicap

status, whether the person was rejected or accepted, the date of such action, and, if rejected, the reason for the rejection;

b. a list of vacancies at all Respondents' managed housing units, including the departed person's handicap status, the date of termination notification, the date moved out, the date the unit was next committed to occupancy, the handicap status of the new occupant, and the date that the new occupant moved in;

c. current occupancy statistics indicating which of Respondents' listed housing units are occupied by handicapped individuals or groups including at least one handicapped individual;

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

e. a list of all persons who inquired in any manner about renting or buying one of Respondents' listed housing units, including their names, addresses, handicap status, and the dates and dispositions of their inquiries; and

f. a description of any rules, regulations, leases, or other documents, or changes thereto, provided to or signed by any applicants for rental or purchase of housing units listed by Respondents.

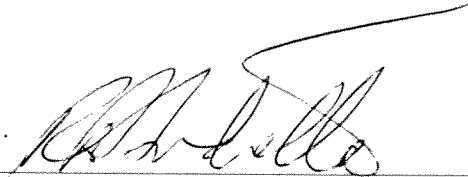
4. Respondents shall inform all their agents and employees, including any officers and board members of their businesses, of the terms of this Order and shall educate them as to these terms and the requirements of the Fair Housing Act.

5. Within forty-five days of the date on which this Initial Decision and Order is issued, Respondents shall pay damages in the amount of \$30,340 to John Dimizzo to compensate him for the costs that resulted from Respondents' discriminatory activity.

6. Within forty-five days of the date that this Initial Decision and Order becomes final, Respondents shall pay a civil penalty of \$8,000 to the Secretary, United States Department of Housing and Urban Development.

7. Within fifteen days of the date that this Order becomes final, Respondents shall submit a report to HUD's Office of the Regional Counsel in San Francisco, California that sets forth the steps it has taken to comply with the other provisions of this Order.

This Order is entered pursuant to the applicable section of the Fair Housing Act, which is codified at 42 U.S.C. Section 3612(g)(3), and HUD's regulation that is codified at 24 CFR 180.680, and it will become final upon the expiration of 30 days or the affirmance, in whole or in part, by the Secretary for Housing and Urban Development within that time.

A handwritten signature in black ink, appearing to read 'Robert A. Andretta', is written over a horizontal line.

Robert A. Andretta
Administrative Law Judge