

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
Aulani Thompson,

Charging Party,

v.

Donald E. Schilling and
Faye Humphreys,

Respondents.

HUDALJ 04-92-0440-1

Decided: July 15, 1993

Ronald A. Newcomer, Esquire
For the Respondents

Raymond C. Buday, Esquire
Steven J. Edelstein, Esquire

Theresa L. Kitay, Esquire
For the Secretary and the Complainant

Before: Robert A. Andretta
Administrative Law Judge

INITIAL DECISION

Jurisdiction and Procedure

This matter arose as a result of a complaint filed on March 5, 1992, by Aulani Thompson ("Complainant"). The complaint was filed with the U.S. Department of Housing and Urban Development ("HUD") and alleges violations of the Fair Housing Act, 42 U.S.C. ' 3601, *et seq.*, as amended by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 120 Stat. 1626 (1988) ("Fair Housing Act" or "Act") based on familial status.¹ It is adjudicated in accordance with ' 3612(b) of the Act and HUD's regulations that are codified at 24 CFR Part 104, and jurisdiction is thereby obtained.

The Complaint, which also contained allegations of race discrimination, was originally filed on November 5, 1991, with the Lexington Fayette Urban County Human Rights Commission, a local government agency responsible for enforcement of the local fair housing ordinance. At that time, the Commission did not have jurisdiction over complaints of familial status discrimination. (T 272).² Thus, the entire complaint was referred to HUD for disposition. On September 21, 1992, HUD's Atlanta Office of Regional Counsel issued a Determination Of No Reasonable Cause as to Complainant's allegations of race discrimination.

On October 5, 1992, following an investigation of the allegations and a determination that reasonable cause existed to believe that discriminatory housing practices had taken place, HUD's Regional Counsel issued a Determination Of Reasonable Cause And Charge Of Discrimination against Schilling Properties, Inc., Donald E. Schilling, and Faye Humphrey ("Respondents")³ alleging that they had

¹ The term "familial status" is defined in the Act, at 42 U.S.C. ' 3602(k), as

... one or more individuals (who have not attained the age of 18 years)
being domiciled with --

- (1) a parent or another person having legal custody of such individual or individuals; or
- (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

² The transcript of the hearing is cited with a capital T and a page number. The Secretary's exhibits are identified with a capital S and an exhibit number; those of the Respondent are identified with an R.

³ When used herein in its singular form, "Respondent" refers to Respondent Schilling.

engaged in discriminatory practices on the basis of familial status in violation of ' ' 804(a), (b), and (c) of the Act, which are codified at 42 U.S.C. ' ' 3604(a), (b) and (c) and incorporated into HUD's regulations that are found at 24 CFR 100.60 and 100.75 (1989). A hearing was conducted in Georgetown, Kentucky on January 26, 1993, and the parties were ordered to submit post-hearing briefs by March 15, 1993. That time was extended to June 1, 1993 because of delays in production of the transcript, and the briefs were then timely submitted. Thus, this case became ripe for decision on this last named date.

On June 3, 1993, on the basis of an unopposed Motion by the Secretary, Schilling Properties, Inc. was dismissed as a party since evidence presented during the hearing established that there is no nexus between the corporation and the issues raised in this case. (T 171-72).

Findings of Fact

The dwelling⁴ that is involved in this case is apartment C-3, a one-bedroom unit in an eight-unit building located at 1744 Jennifer Road, in Lexington, Kentucky. The building is one of a complex of eleven buildings, known as the Green Hills apartments, that Respondent Schilling has owned since July 1974. (T 40). Each of the eleven buildings contains eight apartments. Buildings A, B, and C contain eight one-bedroom apartments, and buildings D through K consist of seven two-bedroom apartments and a single one-bedroom apartment. Apartment 3 in each of these buildings is the one-bedroom unit. (T 147).

Apartment C-3 was vacant on October 31, 1991, the first date of the events that created this case. Apartment C-4 was occupied by one Mrs. Woods who had been in residence for some years. Woods was in her seventies, very ill, and bedfast. (T 165). Because of her old age, infirmity, illness, and apparent impending death, Respondent Schilling had promised that, to give her comfort and peace in her final weeks, he would not place any children in apartment C-3 next to hers. (T 115-178). Woods died in January or February of 1992. (T 166). Children have resided in apartment C-3 both before the incidents of this case and after Woods's death. (T 166). In fact, studies conducted regarding 1990 to present indicate that children live throughout Green Hills Apartments, including in building C. (Response [sic] Supplemental Response To Interrogatories).

Complainant Aulani Thompson is a single parent of daughters who were aged 13 and 16 years in the autumn of 1991. (T 14). At that time, Complainant and her daughters

⁴ A "dwelling" includes "any building, structure, or portion thereof which is occupied as, or intended for occupancy as, a residence by one or more families." 42 U.S.C. ' ' 3602(b).

were sharing an apartment with a friend in Lexington. This arrangement was unacceptable for a number of reasons, and Complainant therefore determined to find another place to live. (T 15, 91).

Thompson receives approximately \$600 per month in disability payments and Aid to Families with Dependent Children as her total income. (T 91). In October of 1991 she was unemployed, and her previous employment was sporadic. (T 74-77). Thompson testified that she is 38 years old and has a tenth-grade education. She has had only three jobs in her life for an aggregate of seven months. She states that she is unable to hold down a job because of physical and psychological conditions. She suffers from severe depression, is unable to sleep at night, sleeps during the day, has difficulty eating, cannot function in the house, and has been in this condition for at least ten years. (T 55-76). She has also been suicidal on at least two occasions prior to the incidents of this case.

(T 121-23). In spite of her condition and her visits to physicians, Thompson refuses to take her prescribed medications in the belief that she is better off without them. (T 121).

Complainant's brother and sister-in-law, Richard and Charlette Thompson, had helped Thompson financially in the past and were willing to do so in October 1991 so that she could live in a better place with her daughters. (T 92). The three determined that Thompson could afford to pay "two something" for an apartment, and maybe up to \$325 per month with the help of Richard and Charlette. (T 92). Along with providing financial assistance, Charlette also accompanied Complainant whenever she looked at prospective housing because "Aulani is kind of timid and we just wanted to make sure that no one was going to run over her or try and pull something over on her." (T 90).

The Thompsons soon discovered that Aulani's limited income severely restricted the choice of housing for herself and her daughters. With a housing budget at or below \$300, many of the apartments she looked at were too expensive. Even when she could afford a one-bedroom apartment, she was turned down a number of times because the owners would not permit her to rent a one-bedroom apartment for three people. (T 16, 93). In one incident, Aulani called about a one-bedroom apartment and made an appointment to meet the owner outside the building. At the end of the conversation, she told the owner about her two daughters. The three Thompsons then waited a prolonged period of time for the owner before calling again, only to learn she had changed her mind on the basis of the number of children involved. (T 130).

In the evening of October 31, 1991, Charlette and Aulani Thompson visited the Green Hills Apartments. (T 140). At the Green Hills office they were met by Respondent Schilling, who asked if he could help them. (T 17-18, 94). He was distracted and in a hurry because he was late getting to a funeral parlor where he was to be a pall bearer for the funeral of one of his best friends the next morning. (T 154). One of the women said they wanted to rent an apartment, and he asked how many would be living in it. (T 155). When Aulani responded that it was for two people, he asked if that would be for herself and her husband. She stated that it would be for herself and her child. (T 155).

Thereupon, Schilling introduced the two women to Respondent Faye Humphrey, the Green Hills Assistant Manager, and told her to show the Thompsons a one-bedroom apartment. (T 155). Humphrey showed them apartment C-3. (T 20, 200).

Aulani and Charlette immediately liked the apartment. (T 20). Charlette testified that "it was really clean, it was really nice and I just felt so good because it was something that my sister-in-law could afford. It was nice for a change." (T 95). The apartment was ready for occupation, it was in a quiet neighborhood, and was close to Complainant's older daughter's school. (T 20). Humphrey quoted the rent for apartment C-3 as \$295 per month. (T 20, 95). The women discussed where the bus stops are and Humphrey volunteered information regarding what schools serve the area. (T 21, 96).

After viewing the apartment, they all returned to Humphrey's apartment, and Aulani and Charlette stated their interest in apartment C-3. Charlette wrote a check for \$50 as a deposit on the apartment. (T 98, R 1). This having been done, Aulani told Humphrey that she had two daughters and stated their ages. (T 22, 97). Humphrey indicated that Schilling might want to make the rent a bit higher because of an expectation of greater water use, but she did not give any reason to believe Aulani could not rent the apartment. (T 23).

Because of all their recent bad experiences trying to rent a one-bedroom apartment for the three-member family, Charlette remained unconvinced. She was "shocked" that they had not been turned down. She wanted to clarify for herself that it was indeed acceptable for Aulani and the two daughters to live in the one-bedroom apartment. Accordingly, she asked Humphrey whether she was certain that the three could rent the apartment, and Humphrey reiterated that the only problem she anticipated was that Schilling would want to make the rent higher to allow for greater water use. (T 6, 98). She advised the Thompsons to call Schilling the next morning. (T 6, 102). Charlette decided not to commit to the apartment until after the talk with Schilling, and so she took back the deposit check. (T 101-102). The Thompsons left saying again that they were very interested in the apartment, and Humphrey told them that it would be advertised the next day in the newspapers. (T 102). According to the Secretary, Humphrey "never asked any questions about Aulani's daughters, and never indicated that Green Hills had any kind of occupancy policy limiting the number of people per unit." (T 22-24, 95-96, 100; Secretary's Post-Hearing Brief, p. 6). However, in a written statement to the Lexington Fayette Urban County Human Rights Commission, Humphrey asserted that she could not put two teenagers in apartment C-3, and offered Complainant apartment D-3 instead. (S 3).

Later that evening, Charlette became concerned that Aulani might miss an exceptional housing opportunity. She determined that she and her brother could help with any reasonable additional rent. Therefore, she got out of bed and returned to the Green Hills Apartments. (T 102-103). Humphrey was not at home, but her adult daughter accepted the check that Charlette had written earlier. (T 103).

The next morning, Schilling was at the apartments for a short period before attending the funeral when Charlette called to clarify the additional rent for the water service to apartment C-3. (T 104). He told Charlette then that he could not let Aulani live in that apartment with two teenagers because of the then ill Mrs. Woods and his promise to her. (T 106). He also made mention of the fact that Aulani had originally stated that she had one daughter. (T 105-106). He told Charlette that he had another one-bedroom unit available, which, in response to Charlette's questions, he said was just as nice as C-3. (T 106). Charlette then agreed on the phone to leasing the other one-bedroom apartment. (T 107).

Later that morning, Richard Thompson drove Aulani back to the Green Hills Apartments, and, while doing so, told her that Charlette had returned the \$50 check as a deposit. (T 25). He did not tell her about the conversation between Charlette and Schilling. (T 108). When they got to Green Hills, Schilling had already departed to attend his friend's funeral. A secretary, named Margaret Hill, greeted them. She told them that she was going to show them another apartment, D-3, rather than C-3, and did so. (T 147).

Apartment D-3 is the same size, and has the same floor plan, as C-3. However, when she saw it, Aulani was disappointed with D-3 because its condition was not as good as that of C-3. Hill told her it would be \$325 per month. She was not happy with the cleanliness and condition of D-3, but she preferred taking it to continuing her frustrating search for housing elsewhere. Therefore, Aulani told Hill that she would accept D-3 and that she would return in the afternoon with her first month's rent. She was not asked to fill out any forms. (T 31-32).

Complainant and her brother then joined Charlette at the Thompsons's mother's home, where they described apartment D-3 to Charlette.⁵ Charlette, whom Schilling had told that the apartment was "nice," was "enraged" and reacted angrily to the news about D-3. (T 112). She insisted that her sister-in-law cancel the agreement to take apartment D-3 and retrieve the deposit check that she had brought to the Green Hills Apartments the previous night. (T 35).

Aulani called Hill, but Hill knew nothing of the check and asked Aulani to call Schilling later. (T 36-37). Aulani did so later, and told Schilling that she wanted to cancel the agreement for D-3 and gain a return of the deposit check. Schilling was annoyed and spoke rudely to Aulani before hanging up on her. (T 41). Charlette wanted to call him back, but Aulani insisted on doing it herself. She did so, and she was rude in turn to

⁵ There are major inconsistencies between Aulani's and Richard's descriptions of apartment D-3. However, they agree that it was in disrepair and dirty. (T 280-83).

Schilling. (T 42).

Complainant was later able to find a one-bedroom house in Lexington. It was in disrepair, and had mice and roaches. (T 45). The neighborhood is dangerous, with prostitutes and drug dealers on the streets. (T 46, 137).

Applicable Law

Congress enacted the Fair Housing Act to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers [which] operate invidiously to discriminate on the basis of impermissible characteristics." *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir.), *cert. denied*, 422 U.S. 1042 (1974). The Act was designed to prohibit "all forms of discrimination, [even] simple-minded." *United States v. Parma*, 494 F. Supp. 1049, 1053 (N.D. Ohio), *aff'd in relevant part*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 465 U.S. 926 (1982).

On September 13, 1988 Congress amended the Act to prohibit, *inter alia*, housing practices that discriminate on the basis of familial status. 42 U.S.C. ' ' 3601-19. In amending the Act, Congress recognized that "families with children are refused housing despite their ability to pay for it." H.R. Rep. No. 711, 100th Cong., 2nd Sess. (1988) ("House Report"). In addition, Congress cited a HUD survey that found 25% of all rental units exclude children and that 50% of all rental units have policies that restrict families with children in some way. See Marans, *Measuring Restrictive Rental Practices Affecting Families With Children: A National Survey*, Office of Policy, Planning and Research, HUD, (1980). The HUD survey also revealed that almost 20% of families with children were forced to live in less desirable housing because of restrictive policies. Congress recognized these problems and sought to remedy them by amending the Fair Housing Act to make families with children a protected class.

Accordingly, the amended Act and HUD regulations make it unlawful to, *inter alia*:

(1) refuse to ... rent after making a *bona fide* offer, or to refuse to negotiate ... for the rental of, or otherwise make unavailable or deny, a dwelling to any person because of ... familial status 42 U.S.C. ' 3604(a); 24 CFR 100.50(b)(1) and (3), and 100.60(b)(1) and (2).

(2) discriminate against any person in the terms, conditions, or privileges of ... rental of a dwelling, or in the provision of services or facilities in connection therewith, because of ... familial status 42 U.S.C. ' 3604(b); 24 CFR 100.50(b)(2) and 100.65 (1990).

(3) make, print, or publish, or cause to be made, printed, or published, any notice [or] statement ... with respect to the ... rental of a dwelling that indicates any preference, limitation or discrimination because of ... familial status, ... or an intention to

make any such ... limitation or discrimination. 42 U.S.C. ' 3604(c); 24 CFR 100.50(b)(4) and 100.75 (a)-(c).

(4) represent to any person because of ... familial status ... that any dwelling is not available for ... rental when such dwelling is in fact so available. 42 U.S.C. ' 3604(d); 24 CFR 100.50(b)(5) and 100.80.

The Act provides two exemptions for "housing for older persons" from its bar against discrimination on the basis of familial status. These exemptions are for housing for persons 62 years of age or older and housing for persons 55 years of age or older, and each exemption has its own tests. These exemptions are not applicable in this case.

Discussion

The burden of proof test to be applied in housing discrimination cases brought under the Fair Housing Act was first stated in *HUD v. Blackwell*, Fair Housing - Fair Lending (P-H) & 25,001, 25,005 (HUDALJ No. 04-89-0520-1, Dec. 21, 1989) (hereinafter cited as *Blackwell*). This statement of law was upheld by the United States Court of Appeals in *Secretary, HUD On Behalf Of Heron v. Blackwell*, 908 F.2d 864 (11th Cir. Aug. 9, 1990) ("Blackwell II"). It is that the well-established, three-part test, shifting the burden of proof from the plaintiff to the defendant, and back again, that is applied by the federal courts to employment discrimination cases which are brought under Title VII of the Civil Rights Act, as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), should also be applied to housing discrimination cases that are brought before this forum. See, e.g., *Politt v. Bramel*, 669 F. Supp. 172, 175 (S.D. Ohio 1989). See also, Schwemm, *supra*, 323, 405-10 & n. 137.

The shifting burdens of proof format from *McDonnell Douglas* is designed to assure that the "plaintiff [has] his day in court despite the unavailability of direct evidence." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1984), citing *Loeb v. Truxton, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979) (disapproved on other grounds in *Trans World Airlines, Inc.*, *supra*). Therefore, in *HUD v. Murphy*, Fair Housing-Fair Lending (P-H), & 25,002 (HUDALJ July 13, 1990), it was further established that where Complainant and the Government can produce direct evidence of discrimination, the shifting burdens of proof analysis set forth in *McDonnell Douglas* need not be applied. Citing *Trans World Airlines, supra*, at 121; see also *Teamsters v. U.S.*, 431 U.S. 324, 358, n. 44 (1977).

In this case, the statements made by Respondent Schilling to Complainant and her sister-in-law show that he intended to discriminate against families with children with regard to renting apartment C-3, and they constitute direct evidence of Respondent's discrimination on the basis of familial status. He testified that he had decided against renting apartment C-3 to anyone with children, that he told that to Aulani and Charlette, and that, in fact, that is why he refused to rent the apartment to Aulani. (T 143-44; R 2). He gave as his reason that children are noisy, and that he had promised Woods he would

not allow children to live in apartment C-3 so long as she lived in C-4.

Statements evidencing a landlord's stereotypical beliefs about a protected group are direct evidence of that landlord's intent to discriminate against members of that group. *Secretary of HUD v. Leiner*, 2 Fair Housing-Fair Lending (P-H), & 25,021 (HUDALJ Jan. 3, 1992). In *Leiner*, involving a complaint of race discrimination as well as familial status discrimination, the respondent submitted an answer that included the statement, "We cannot effort [sic] to rent apartments to persons who appear to be a bed [sic] risk. I know from experience that single women do not pay rent." *Leiner* at 25,262. The administrative law judge in that case concluded that this, and other statements made by the respondent, constituted evidence of stereotyping of single mothers, blacks, and Hispanics, and established that the reasons for not renting to the respondent were that she was a single mother and black. *Id.*, at 25,264.

Schilling's statements to Charlette regarding children were of the same generalized nature as those in *Leiner*. (T 105, 148-49). Moreover, he testified to his intent to exclude children from apartment C-3. In light of these unambiguous statements of discriminatory intent, Respondent can only escape liability if he is entitled to one of the statutory exemptions to the Fair Housing Act. However, as previously stated, these exemptions are neither claimed nor applicable.

Instead, Schilling appears to claim some form of exemption based on the humanitarian intent with regard to preserving Woods's peace and quiet during her waning days. Unfortunately, the Fair Housing Act does not contain exemptions for "good faith" or "reasonable" responses to circumstances not enumerated in the Act. See *Secretary of HUD v. DiBari*, 2 Fair Housing-Fair Lending (P-H), & 25,036 (HUDALJ Sept. 23, 1992). In *DiBari*, a respondent landlord stated his refusal to rent to families with little children because of the possibility of their being harmed by lead-based paint that he was certain was present throughout his apartments. State law would require him to undertake expensive deleading processes if any of his apartments were to be occupied by children under six years old, and he had no money to invest in that way in his buildings. To avoid the expense and possible law suits, and to protect the health of prospective tenants, the landlord refused to rent his apartments to families with young children. I found that DiBari's refusal to rent to families with children violated §§ 804(a) and 804(c) of the Act, and that he was not exempted from that liability because "... health and economic considerations are not included in the Act's exceptions" to liability for discrimination on the basis of familial status. *Id.*, 25,377. In like manner, Schilling's concern for the health and comfort of Mrs. Woods does not fall within a recognized exception to the Act's prohibition of familial status discrimination.

Respondent could have screened prospective tenants to eliminate those who would disturb the quiet sought by Mrs. Woods. See *Secretary of HUD v. Downs*, 2 Fair Housing-Fair Lending (P-H), & 25,011, at 25,179 n.23 (HUDALJ Sept. 20, 1991). (A landlord's right to rent only to qualified tenants is undisturbed by the Fair Housing Act, and

a legitimate qualification of rental may be that a tenant is quiet.) However, the exclusion of children from apartment C-3, for no reason other than that they are children, and that children are *per se* noisy, is not a legitimate, nondiscriminatory basis for refusing to rent the apartment to Complainant. The Fair Housing Act does not permit such a general exclusion of a particular protected group because of a landlord's stereotypical beliefs about the conduct of members of that group.

Ultimate Conclusions

The Secretary has established that Respondent Schilling denied Complainant the opportunity to obtain housing for herself and her daughters in Respondent's apartment C-3 because he did not allow children to be residents in the property.⁶ By not allowing residence by two teenage children, Respondent Schilling has violated the provisions of the Fair Housing Act that are codified at 42 U.S.C. ' 3604(a). By making statements indicating a preference not to have teenage children as tenants in the apartment, both Respondents have violated the provisions of the Fair Housing Act that are codified at 42 U.S.C. ' 3604(c).

Remedies

Section 812(g)(3) of the Act provides that where an administrative law judge finds that a respondent has engaged in discriminatory practices, the judge shall issue an order "for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or equitable relief." 42 U.S.C. ' 3613(g)(3). That section further states that the "order may, to vindicate the public interest, assess a civil penalty against the respondent." The maximum amount of a civil money penalty is dependent upon whether the respondent has been adjudged to have committed prior discriminatory practices. Where the respondent has not been adjudged to have committed any prior discriminatory practices, any civil money penalty assessed against the respondent cannot exceed \$10,000. See *also* 24 CFR 104.910(b)(3) (1990). Otherwise, the maximum allowable civil money penalty is \$25,000.

The government, on behalf of itself and the complainant, has prayed for: (1) an award of damages to compensate Complainant for her emotional distress in the amount of \$7,500; (2) injunctive relief to address the public interest in eliminating housing discrimination against families with children and in educating housing providers about

⁶ The fact that Respondent offered apartment D-3 to Complainant as an alternative to C-3 is not exculpatory. In fair housing cases, "the issue is not whether any housing was made available to [the complainant], but whether she was denied the housing she desired on impermissible grounds." *United States v. Badgett*, 976 F.2d 1176 at 1179 (8th Cir. 1992), citing *Secretary of HUD v. Riverbend Club Apartments*, HUDALJ No. 04-89-0676-1 (Nov. 15, 1991).

their responsibilities and obligations under the Fair Housing Act; and (3) a civil penalty of Respondent Schilling in the amount of \$5,000, and a civil penalty of Respondent Humphrey in the amount of \$25.

Damages

The Fair Housing Act provides that relief may include actual damages suffered by the Complainant. 42 U.S.C. § 3612(g)(3). In this case, the government, on behalf of Complainant, claims that Complainant was inconvenienced by having to settle for less nice housing in a worse and less well located neighborhood. In *Baumgardner v. HUD*, 2 Fair Housing-Fair Lending (P-H), & 25,006 (HUDALJ Nov. 15, 1990) where the damages for inconvenience were requested and awarded by this forum on the basis of additional searching for housing, the Sixth Circuit Court of Appeals determined that inconvenience is an intangible injury and suggested that it should not be made as a claim separate from any claim for emotional distress.⁷ Thus, there will be no separate award for inconvenience in this case.

⁷ 960 F.2d 572 (6th Cir. 1992).

The Secretary also claims that Complainant has suffered embarrassment, humiliation, and emotional distress as a result of Respondent's actions. In addition to actual damages, a Complainant is entitled to recover for these categories of damage. See, e.g., *Blackwell, supra*, at 25,001; *Parker v. Shonfeld*, 409 F. Supp. 876, 879 (N.D. Ca. 1976). Because these abstract injuries are not subject to being quantified, courts have ruled that precise proof of the actual dollar value of the injury is not required. *Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1245 (8th Cir. 1983); *Steele v. Title Realty Co.*, 478 F. 2d 380, 384 (10 Cir. 1973).

The administrative law judge assigned to decide a case of housing discrimination is accorded wide discretion in setting damages for emotional distress, and is guided in determining the size of the award by the egregiousness of the Respondent's behavior and the Complainant's reaction to the discriminatory conduct. R. Schwemm, *Housing Discrimination Law*, 260-62 (1983). Awards for emotional distress in relevant federal case law range far and wide, depending on the circumstances.⁸ Therefore, a review of federal cases is not very helpful as guidance here.

However, awards of damages for emotional distress have been made by this forum in housing discrimination cases, and these can be looked to for some guidance. In *Blackwell*, \$40,000 was awarded to a black couple for the embarrassment, humiliation, and emotional distress of having been denied a house because of their race. This was a clear case of open and blatant racial discrimination perpetrated by a real estate agent. In *Murphy, supra*, awards of \$150, \$400, \$800, \$1,000, and \$5,000 were made for emotional distress and loss of civil rights, with the award of \$150 being made to a party who "... suffered the threshold level of cognizable and compensable emotional distress." (at 25,057). In *HUD v. Guglielmi and Happy Acres Mobile Home Park, Fair Housing - Fair Lending (P-H)*, & 25,070 at 25,079, (HUDALJ Sept. 21, 1990) I awarded \$2,500 to the Complainant where I found that the Respondents had "... contributed significantly to [Complainant's] actual and perceived loss of civil rights, feelings of embarrassment and humiliation, and general emotional distress" for the better part of a year, and in *HUD v. Baumgardner, Fair Housing - Fair Lending (P-H)*, & 25,094 at 25,101, I awarded \$500 to a young man who had been discriminated against on the basis of sex "because men are messy tenants". He did not appear to be a man of vulnerable constitution, but he said that he was angry, hurt, and frustrated by the denial of the house he wanted and that it was a source of anger and distress for a few months. In *HUD v. Jeffre, Fair Housing -*

⁸ See, e.g., *Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241 (8th Cir. 1983) (\$12,402 award for plaintiff's mental anguish, humiliation, embarrassment and stress); *Grayson v. S. Rotundi & Sons Realty Co.*, 1 Fair Housing-Fair Lending (P-H) para. 15,516 (E.D.N.Y. Sep. 5, 1984) (compensatory damage awards of \$40,000 and \$25,000 for two plaintiffs' embarrassment and humiliation); *Parker v. Shonfeld, supra* (\$10,000 compensation award for embarrassment, humiliation, and anguish); *Phillips v. Hunter Trails Community Ass'n.*, 685 F.2d 184 (7th Cir. 1982) (allowance of \$10,000 to each plaintiff at a time when that court had never before exceeded \$5,000). Cf. *Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303 (7th Cir. 1985) (in employment discrimination case, jury award of \$75,000 as compensatory damages for plaintiff's mental distress found excessive, and \$35,000 awarded based upon the record).

Fair Lending (P-H), & 25,020, (HUDALJ Dec. 18, 1991) *et seq.*, I awarded \$500 for inconvenience, \$1,500 for emotional injury, and \$2,500 for loss of housing opportunity to a complainant who had been denied an apartment for herself and a minor daughter on the basis of her familial status. Finally, in *HUD v. DiBari, supra*, I awarded \$200 for emotional distress to a woman of strong constitution who had been denied an apartment because of the Respondent's fear of harm to her child from lead-based paint.

Complainant says that she was upset, shocked and angered over being denied the opportunity to rent Respondent's apartment and her sister-in-law testified that Complainant suffered a major set-back in her previously weak emotional state. As noted above, in determining the size of an award for emotional distress, the judge should be guided by the egregiousness of the Respondent's behavior and the Complainant's reaction to the discriminatory conduct. Here, Respondent did not discriminate on the basis of race, handicap, or any other category likely to raise a great deal of frustration and anger. Although he was wrong to do so, he excluded Respondent to protect the comfort and welfare of an old, dying tenant. This was an act devoid of malice or prejudice. See *HUD v. Edelstein*, Fair Housing - Fair Lending (P-H), & 25,018 (HUDALJ Dec. 9, 1991). While it angered Complainant to be denied the apartment, she was not exposed to the additional stress that evolves from an act that does involve malice or prejudice. She was, in fact, offered the alternative housing in D-4 which was not up to the standards of the apartment she wanted.

Complainant's pre-existing vulnerable constitution must also be taken into consideration. In a fair housing case, "discriminators must take their victims as they find them; that is, damages are measured based on the injuries actually suffered by the victim, not on the injuries that would have been suffered by a reasonable or by an ordinary person." *Secretary of HUD v. Kelly*, 2 Fair Housing-Fair Lending (P-H), & 25,034 at 25,362 (HUDALJ Aug. 26, 1992). In this case, Respondents found a victim who is poor and powerless, and who suffered deeply from a weak emotional state.

Complainant has a history of depression and even suicidal periods. (T 47-48). Just prior to the search for housing described in this case, however, her condition had improved significantly. (T 113). She was happy about the prospect of renting apartment

C-3, and she looked forward to showing her brother and daughters the new place where she and the daughters would live. (T 26, 43, 48). After the incident at Green Hills, Aulani's condition regressed to how it had been before. (T 113-14, 137).

On the other hand, nothing was offered by the Secretary to show that Aulani's deteriorated emotional state was based solely upon the events at the Green Hills Apartments. There was much testimony showing that these events were just the latest in a long string of failures to find housing based upon Complainant's having two minor daughters. Indeed, one of the most aggravating of the previous refusals took place the night before their visit to Green Hills, when a prospective landlady left the Thompsons waiting in a car, with no explanation, because she had decided against renting to a

woman with two teenagers. Thus, while considering the effect of these facts upon Aulani's previous emotional state, I am bound also to consider the earlier actions of other prospective housing providers and the contribution that their like treatment of Complainant made to her emotional distress.

The discrimination against Complainant took a form similar to that committed against the complainants in *Baumgardner*, *Jeffre* and *DiBari*. In all three cases, the complainants were denied the opportunity to lease in a short conversation. In *Baumgardner*, I held that the emotional injury from such an action is not limited to the length of time of the conversation, but continues for an indefinite time thereafter. In *Baumgardner*, the complainant did not appear to be a person of vulnerable constitution, and he said himself that the emotional distress caused by the Respondent "was kind of easy to get over." In that case, I awarded \$500 for emotional distress. In *Jeffre*, the Complainant also did not appear to be a person of vulnerable constitution, but I found that her injury was greater because she is a single parent responsible also for the well-being of a child rather than a single adult. I also found that, although the government did not make such a claim, the child's uneasiness can only be compensated under these circumstances through compensation to the parent, and I awarded \$1,500 for emotional injury. In *DiBari*, my award of only \$200 had a great deal to do with the above-described lack of malice in Respondent's intent and the Complainant's strong constitution.

In light of the above discussions concerning intent, and in light of Complainant's vulnerable constitution, keeping the previous actions toward Complainant by other housing providers in mind, \$1,500 in compensation for Complainant's emotional injury is deemed reasonable and will be awarded in the Order below.

Injunctive Relief

Section 812(g)(3) of the Fair Housing Act also authorizes the administrative law judge to order injunctive or other equitable relief to make the complainant whole and to protect the public interest in fair housing. "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*, at 874 (quoting *Marable v. Walker*, 704 F.2d 1219, 1221 (11th Cir. 1983)).

The purposes of injunctive relief in housing discrimination cases include the elimination of the effects of past discrimination, the prevention of future discrimination, and the positioning of 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 1033, 1036 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980). Once a judge has determined that discrimination has occurred, he has "the power as well as the duty to use any available remedy to make good the wrong done." *Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1975) (citation omitted).

Here, injunctive relief is requested by the Secretary to ensure that Respondent will not conduct himself in like manner. To that end, the Secretary has requested that the Respondent be ordered to cease certain activities and undertake certain other actions. Very few of these requests are reasonable and appropriate under the totality of the circumstances of this case. The evidence shows that Respondents do not generally discriminate. The eight buildings have black and white families of all sizes throughout. Even apartment C-3, now that Woods is gone, has a family with children in it. The case at hand constitutes the only one known incident of discrimination, and even that discrimination was committed for a positive, albeit erroneous, purpose. Accordingly, the injunctive relief imposed will fall far short of that requested by the Secretary, and the specific provisions of injunctive relief are set forth in the Order issued below.

Civil Penalty

The Secretary has also asked for the imposition of civil penalties of \$5,000 on Respondent Schilling and \$25 on Respondent Humphrey. This penalty of Schilling is for one-half the amount that can be imposed upon a respondent who has not been previously adjudged to have committed discriminatory housing practices. See 42 U.S.C. 3612(g)(3)(A); 24 CFR 104.910(b)(3). In addressing the factors to be considered when assessing a request for imposition of a civil penalty, the House Report on the Fair Housing Amendments Act of 1988 states:

The Committee intends that these civil penalties are maximum, not minimum, penalties, and are not automatic in every case. When determining the amount of a penalty against respondent, the ALJ should consider the nature and circumstances of the violation, the degree of culpability, and any history of prior violations, the financial circumstances of that respondent and the goal of deterrence, and other matters as justice may require.

While Respondent openly stated his refusal to rent apartment C-3 on the basis of familial status, he did not do so because of the malice or prejudice indicated in other cases. Rather, he had a humanitarian reason for doing so. Although the effect of his actions -- denying Complainant and other unknown people the housing they sought -- was serious, the act itself was not. See *HUD v. Edelstein*, at 25,242.⁹ The fact that Respondent was motivated by concerns for the well-being of Mrs. Woods, who was aged and ill, does not preclude the imposition of a civil penalty, but it certainly tempers the hand

⁹ In *Edelstein* a \$5,000 civil penalty was imposed despite recognition that the unlawful discrimination "apparently was not motivated by malice toward the Complainant personally or toward families with children in general, but rather was the result of a baseless universal policy ostensibly designed to preclude injuries to children." In *Edelstein*, the administrative law judge stated that even if safety concerns may in some cases justify attempts to discourage a prospective tenant from renting, the respondent in that case failed to demonstrate that his concerns were well-founded. In *DiBari*, Respondent's policy was not baseless since his apartment buildings are old enough that they must contain lead-based paint.

of justice. Thus, consideration of the nature and circumstances of the violation does not demand a major penalty.

Further as to culpability, Respondent is a small landlord as opposed to some large corporate entity. It is reasonable to believe that he did not know that excluding people with children from a single apartment out of his 88 units is illegal under an Act that became effective during the year prior to the events in this case. It is totally unreasonable to believe that he would be familiar with the nuance of difference between the acceptable situation in *Downs* as compared to what he did in this instance.¹⁰ While ignorance is not a complete defense, it is not inappropriate to consider it when determining culpability. Thus, Respondent's level of culpability does not demand a stiff penalty.

There is no evidence that the respondents in this case have been adjudged to have committed any prior discriminatory housing practice. Consequently, the maximum civil penalty that may be imposed in this case is \$10,000. Moreover, that Respondents have not been previously adjudged to have violated the Act, and indeed, have been shown to be in substantial compliance with the Act, is additional reason to temper the government's reaction to this violation, which was committed soon after the effective date of the Act by persons not adjudged to be much cognizant of changes to the civil law.

The next factor to be considered in calculating a civil penalty is the respondents' financial circumstances. Because evidence regarding their financial circumstances is peculiarly within respondents' knowledge, respondents in Fair Housing cases have the burden of producing such evidence. *Blackwell*, at 25,015; *Jerrard*, at 25,092. In this case, Respondents put forth no information regarding their financial circumstance, although

we know that Respondent Humphrey cleans house for Respondent Schilling so as to earn a little more than she does helping out at Green Hills.

As noted above, the congress also desired that a civil penalty be imposed in part to achieve the goal of deterring like conduct. To ensure that Respondents and others get the message and understand that discriminatory tenancy restrictions are outlawed by the Act, a civil penalty should be assessed. In that way, housing providers will realize that conduct such as Respondents' is "not only unlawful but expensive." *HUD v. Jerrard*, Fair Housing - Fair Lending (P-H) & 25,005, at 25,092 (Sept. 28, 1990). However, under the circumstances listed above, the penalties imposed do not need to be high to deter these respondents and others. In fact, all of the considerations directed by the congress point

¹⁰ In *Downs*, the administrative law judge held that a landlord's right to rent only to qualified tenants is undisturbed by the Fair Housing Act, and a legitimate qualification of rental may be that a tenant is quiet. Here, the prospective landlord did not make inquiries regarding a specific tenant, but decided without basis that any children would be unacceptable because of his promise to Woods.

toward a low assessment of civil penalties. Accordingly, a penalty of \$200 will be imposed on Respondent Schilling, and a penalty of \$25 will be imposed on Respondent Humphrey by the Order that follows.

ORDER

Having concluded that Respondents, Donald E. Schilling and Faye Humphrey, violated provisions of the Fair Housing Act that are codified at 42 U.S.C. ' ' 3604(a), and (c), as well as the regulations of the U.S. Department of Housing and Urban Development that are codified at 24 CFR 100.60 and 100.75, it is hereby

ORDERED that,

1. Respondents are permanently enjoined from discriminating against Complainant, Aulani Thompson, or any member of her family, with respect to housing, because of race, color, or 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 CFR Part 100 (1989).

2. Consistent with 24 CFR Part 110, Respondent Schilling shall display the HUD fair housing poster in a prominent common area in all the buildings in which he maintains rental units.

3. Respondent Schilling shall inform all his agents and employees, including resident managers, of the terms of this Order and shall educate them as to these terms and the requirements of the Fair Housing Act.

4. Within forty-five days of the date on which this Initial Decision and Order is issued, Respondent Schilling shall pay damages in the amount of \$1,500 to Complainant to compensate her for the losses that resulted from his discriminatory activity.

5. Within forty-five days of the date that this Initial Decision and Order is issued, Respondent Schilling shall pay a civil penalty of \$200 and Respondent Humphrey shall pay a civil penalty of \$25 to the Secretary, United States Department of Housing and Urban Development.

6. Within fifteen days of the date that this Order is issued, Respondents shall submit a report to HUD's Atlanta Regional Office of Fair Housing and Equal Opportunity that sets forth the steps they have taken to comply with the other provisions of this Order.

This Order is entered pursuant to ' 812(g)(3) of the Fair Housing Act, which is codified at 42 U.S.C. ' 3612(g)(3), and HUD's regulations that are codified at 24 CFR 104.910. It will become final upon the expiration of thirty days or the affirmance, in whole

or in part, by the Secretary within that time.

/s/

Robert A. Andretta
Administrative Law Judge

Dated: July 15, 1993.

