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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 Blanton B. Holley, Charging Party v. Thomas C. Baumgardner, Respondent.

HUDALJ 05-89-0306-1

Mark L. Resler, Esquire
For the Respondent

David H. Enzel, Esquire, and
Memmi M. Stubbs, Esquire
For the Secretary and
the Charging Party

Before: Robert A. Andretta
Administrative Law Judge

INITIAL DECISION

Jurisdiction and Procedure

This matter arose as a result of a complaint filed by Blanton B. Holly ("Complainant"), alleging that he had been denied rental accommodation on the basis of his and his prospective roommates' gender (male) in violation of the Fair Housing Act, 42 U.S.C. Sections 3601, *et seq*., as amended by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1626 (1988) ("Fair Housing Act" or "Act"). This matter is adjudicated in accordance with Section 3612(b) of the Act and the regulations of the Department of Housing and Urban Development ("HUD") that are codified at 24 CFR Part 104, and jurisdiction is thereby obtained.

On April 6, 1990, following an investigation of the allegations and a determination that reasonable cause existed to believe that a discriminatory housing practice had taken place, HUD's General Counsel issued a Determination Of Reasonable Cause And Charge Of Discrimination against Thomas C. Baumgardner ("Respondent") alleging that he had engaged in discriminatory practices on the basis of sex in violation of Sections 804(a), 804(c), and 804(d) of the Fair Housing Act. A trial was conducted on July 10, 1990, in Cincinnati, Ohio, and post-hearing briefs were timely submitted by September 12, 1990. Thus, this case became ripe for decision on this last named date.

Findings of Fact and Applicable Law

Throughout all times relevant to this proceeding, Respondent Thomas C. Baumgardner, has been the owner of the four-bedroom, single-family house that is the subject of this proceeding and is located at 2343 Victory Parkway, Cincinnati, Ohio. Respondent is a real estate agent, but his primary business is to rent his own properties, including the subject property, a few other houses, and approximately 75 apartment units in five locations. He has rented the subject house periodically since 1983, but has also used it during some periods as his own office. (T 269-271)[1]

The Charging Party, Blanton Holley, is a male resident of Cincinnati who has lived in a

[1] Capital letter T stands for the transcript of the trial, and the number refers to the transcript page. The Secretary's exhibits are cited with a capital S and an exhibit number, and the Respondent's exhibits are cited with a capital R and an exhibit number.

suburb called Walnut Hills for about three years. He works at Good Samaritan Hospital in the nutrition department. (T 29-30) In January 1989, he was looking for a three- or four-bedroom dwelling in the Walnut Hills area for himself and two friends, Michael Hill and Duane Evans. At that time, he and Hill were sharing a two-bedroom apartment and Evans was about to leave his apartment. (T 30, 42) Holly and his two friends saw that the subject house was for rent. They liked its appearance and location, and decided to inquire about renting it. (T 64)

On January 19, 1989, Complainant called the telephone number that was listed on a rental sign on the front lawn of the house and spoke to a person who identified himself as the owner, and who I find to have been Respondent. When Complainant expressed an interest in renting the house, Respondent described it to him and told him the monthly rental and the estimated utility bills. Respondent asked what Complainant would intend to do with the house, and Respondent told him that he and two other adult males would live in it. (T 31-32) On being asked whether the three men were professional or students, Respondent told Complainant that they were all employed. (T 32,54) At that point, Respondent stated that he did not want to rent to males because his experience was that they did not keep a clean house. (T 32, 66, 312)[2] Complainant asked whether Respondent would visit his apartment, which was close by, for the purpose of seeing that he and his roommate maintain a clean home, but Respondent refused. (T 32)

Respondent also refused to allow Complainant and his friends to see the house. He got angry at Complainant's persistence, telling Complainant that he was no longer interested in renting the house, but would take it off the market and keep it for himself instead. He then terminated the conversation. (T 33, 313) Complainant later noted not only that the rental sign was still in place in the front yard, but also that details regarding the house had been added to it. (T 36) The rental sign remained in the yard for some weeks.

On the recommendation of one of his prospective roommates, Complainant placed a call for assistance to an organization called Housing Opportunities Made Equal ("HOME") where he spoke to a "client services person" named Carol Coaston. She filled out a "Client Intake Sheet" and told Complainant that HOME would take care of the situation. (T 55)

[2] Respondent stated that he does not remember saying to a caller that "men are messy" (T 312) However, Complainant testified credibly that Respondent had said to him that he was "not interested in renting to males" because "it had been his experience" that "males are messy and unclean, they leave dirty dishes in the sink, and they encourage roaches, and I'm not ready for that." (T 32) Complainant later credibly testified regarding the phone call with nearly identical words being attributed to Respondent.

HOME is a private fair housing organization in Cincinnati with the stated mission of implementing the fair housing laws for people in the covered classes. It has a staff of twenty-five and is funded primarily by United Way and the City of Cincinnati. It has also received block grants from suburban counties. (T 68-69) HOME's Test Coordinator is Ms. Ernestine Engstrand who organized tests to determine whether the house was available for rent and whether males and females were receiving equal treatment in applying to rent it. (T 85)[3]

The first test was conducted on January 20, 1989, the day after Complainant spoke on the phone with the Respondent. Ms. Annie Ricks, a female tester, talked to Respondent on the phone, telling him she was interested in the house for herself, her daughter and her two granddaughters. He told her she could view the house by having a painter that was working there let her in. She did so on January 23. (T 125, 127, 131) She made no further contact with Respondent.

A second test was conducted on February 13, 1989, and involved three single females wishing to share the house. Tester Charlene Bren called Respondent to ask about renting the house for herself and two female roommates. Respondent stated that he was considering using the house as his office, but that if they wanted it he would rent it to them instead. He showed the house to Bren and two other testers the next day. During the tour of the house, Respondent again stated his thoughts about keeping the house for his own use but that if they wanted it he would rent it to them. (T 106-107) Bren and her colleagues did not get back in touch.

The next test was conducted on March 7, 1989, by a single male named James Sales. When he called to ask whether he might see the house, a women answered the phone and stated that "he had decided to convert it to offices." (S 11) The plan for this test was for Mr. Sales to seek the house for himself and two male roommates, but, before being able to state his needs, he was told the house was not available. (T 80) In a final test, a female tester stated that she wanted the house for herself and her husband. She was given an appointment to see the house, but no one appeared at the appointed time to let her in. (T 82) Respondent never did convert the house to his own use. Some time in March or April, 1989, he rented it to two women with children. (T 136) Clearly, Respondent continued to attempt to rent the house after his refusal to make it available to the Complainant and his friends. (T 291) On the basis of these tests, both HOME and HUD reached the conclusion that Respondent treated male and female rental applicants differently on the basis of their sex. (T 81, 117)

Complainant considers himself and his friends to be clean in their living habits, and Respondent's refusal to deal with them on the assumption that they would be messy tenants offended, hurt, insulted, and angered the Complainant. (T 33) Complainant was also inconvenienced by Respondent's conduct. Since the three men had not found suitable accommodations by the time Evans had to leave his apartment, he moved in with the other two, notwithstanding that their apartment had only two bedrooms. Complainant and one of his friends were forced to share a bedroom. While this was meant to be only temporary, while they continued to search for a three-bedroom or larger unit, and more particularly, because they still hoped to rent Respondent's house, they continued in this manner for a couple of months. (T 42, 56)

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[3] No testimony was offered to indicate that the HOME staff tried first to intercede with Baumgardner to gain access to the house for Complainant and his friends.

Complainant's search for alternative suitable accommodation was not successful. He viewed a four-bedroom apartment which the men found to be unsuitable because it was run down, housed a lot of children, and was noisy. (T 41, 50). They looked at a three-bedroom condominium, but it was too expensive. Complainant made about twenty phone calls during a three-month period to inquire about housing in the surrounding area, but nothing was suitable. (T 41) Eventually, the three men gave up their quest for a shared home, and Complainant now lives alone and is not interested in renting the Respondent's house. (T 59, 66)

Mr. Baumgardner's first contact from HUD was receipt in the April 3, 1989, mail of a complaint concerning an individual in another state that had evidently been sent to him in error. He ignored it. HUD's investigator, Charles Jung, initiated his investigation of Holley's complaint in August of 1989. He called Baumgardner on the phone one time, but found him to be "uncooperative." (T 178) Jung never called Baumgardner again and never used HUD's subpoena power to gain information. (T 193) Instead, he used HOME's testing and a single contact with Holley as the basis for his own Final Investigative Report.

Title VIII of the Civil Rights Act of 1968, as amended, makes it unlawful to discriminate in the rental of housing on the basis of sex. Title VIII was amended in 1974 to prohibit sex discrimination. Pub. L. N. 93-383 (Aug. 22, 1974). The intent of the 1974 amendment is to end housing practices based upon sexual stereotyping. R. Schwemm, *Housing Discrimination Law*, at 373 (1983) (hereinafter cited as Schwemm); *Hearings on S. 1604 before the Senate Subcommittee on Housing and Urban Affairs* at 1228, 93rd Cong. 1st Sess. (July 27, 1973).

Section 804 of the Fair Housing Act makes it unlawful, *inter alia*:

> (a) To refuse ... to negotiate for the ... rental of, or otherwise make unavailable or deny, a dwelling to any person because of ... sex ....
>
> * * * * *
>
> (c) To make, print, or publish ... any ... statement ... with respect to the ... rental of a dwelling that indicates any preference, limitation, or discrimination based on ... sex, ... or an intention to make any such preference, limitation, or discrimination.
>
> (d) To represent to any person because of ... sex ... that any dwelling is not available for inspection ... or rental when such dwelling is in fact so available.

42 U.S.C. Sections 3604(a), (c), and (d). While the Act exempts certain types of housing from coverage of the law, Respondent is not entitled to and does not claim to be entitled to these exemptions. *See* 42 U.S.C. Sections 3603, 3607.

In 1989, HUD promulgated regulations which describe the nature of conduct that is unlawful under Section 804 of the Act. *See* 54 Fed. Reg. 3232 (Jan. 23, 1989); 24 CFR 100.50(a) (1989). These regulations state that the prohibited actions include:

> 1. refusing to rent a dwelling to any person because of sex. 24 CFR 100.60(b)(2);

2. engaging in any conduct relating to the provision of housing that otherwise makes unavailable or denies dwellings to persons because of sex. 24 CFR 100.70(b);

3. discouraging any person from inspecting or renting a dwelling because of sex. 24 CFR 100.70(c)(1);

4. using words or phrases which convey that dwellings are not available to a particular group of persons because of sex. 24 CFR 100.75(c)(1);

5. expressing to prospective renters or any other persons a preference for or limitation on any renter because of sex. 24 CFR 100.75(c)(2); and

6. providing false or inaccurate information regarding the availability of a dwelling for rental to any person, regardless of whether such person is actually seeking housing, because of sex. 24 CFR 100.80(b)(5).

Discussion

Respondent's first defense is his claim that numerous violations of mandatory provisions of the Act by HUD itself deprived him of his due process rights and, accordingly, the case should be dismissed. More specifically, he complains that HUD failed: (1) to send him a copy of the Complaint against him within ten days of the date it was filed; (2) to attempt conciliation of the case; (3) to complete its investigation within 100 days and notify him of the reasons for the delay in the investigation within 100 days; and (4) to send him a copy of the Final Investigative Report (FIR), with exhibits, after he requested it in writing.

The regulation codified at 24 CFR 103.50(a) requires the Secretary to serve notice of a Complaint upon a Respondent within ten days of the filing of the Complaint. In this case the initial Complaint that was sent to Respondent was not only untimely, but was also the wrong one. Respondent could easily have brought this to HUD's attention, but chose to ignore the incorrect Complaint. Thus, he did not receive a copy of the Complaint against him until nearly half a year after it was filed. It was provided on his request, and he received it before HUD's investigation was begun.

The regulation codified at 24 CFR 103.400(c)(1) requires the General Counsel to complete an investigation and make a determination of reasonable cause within 100 days of the filing of the Complaint, unless it is impracticable to do so. The investigator, Mr. Jung, testified that it had been impracticable for HUD to complete its investigation of Holley's complaint within 100 days, and the Secretary attempted at the hearing to pin the delay on Mr. Baumgardner's uncooperativeness. These reasons are frivolous, as were the investigator's attempts to communicate with Respondent. The FIR was late because of HUD's procrastinations and

mismanagement of the complaint, and any uncooperativeness could have been remedied with subpoenas. In the end, Respondent did not receive a copy of the FIR until June 14, 1990; *i.e.*, about a year and a half after the filing of the Complaint.

The Department should have complied with its own regulations, but its non-compliance is not grounds for dismissal of the action. The regulations that were not properly complied with relate to the Department's investigatory functions; not to its right to maintain an action in this forum. The applicable regulations contain no statute of limitations or jurisdictional prerequisites. *See HUD v. Murphy*, Fair Housing - Fair Lending (P-H) para. 25,002 (HUDALJ 02-89-0202-1, July 13, 1990) at 25,018, n. 2 (hereinafter cited as *Murphy*). Thus the case cannot be dismissed on the basis of these procedural shortcomings.

The regulations codified at 24 CFR 103.300(a) state that, during the period beginning with the filing of the Complaint and ending with the filing of a charge or a dismissal, the Assistant Secretary shall, to the extent feasible, attempt to conciliate the complaint. *See also* 42 U.S.C. Section 3610(b)(1) (1989).[4] 42 U.S.C. Section 3610(d) provides for the confidentiality of those efforts, unless their revelation is authorized by the parties. *See also* 24 CFR 103.330(b); Fed. R. Evid. 408. Here, Respondent claims that no bona fide conciliation was ever attempted by the Department, and he offered into evidence a video tape of Respondent's meeting with the conciliator to prove his point. However, since the Department does not consent to the revelation of the contents of its conciliation efforts, this claim cannot be explored here. The sealed videotape has not been viewed in this forum, and is part of the record.

HUD's Chief Administrative Law Judge, Alan W. Heifetz, articulated the burden of proof test to be applied in housing discrimination cases brought under the Fair Housing Act in *HUD v. Blackwell*, Fair Housing - Fair Lending (P-H) para. 25,001 at p. 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*, No. 90-8061 (11th Cir. Aug. 9, 1990). It is that the well-established three-part test 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. That burden of proof test is as follows:

> First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence .... Second, if the plaintiff sufficiently establishes a prima facie case, the burden

[4] The time for effective conciliation was when the events took place. Complainant believed he had gone to HOME to get help with renting the house. He stated a number of times that at various points in time he still held hopes that HOME would straighten the matter out for him. He never called Respondent back to try to change his mind because he thought the matter was being taken care of by an organization whose mission is to deal with such matters. On the contrary, HOME did nothing but prepare for litigation from the very first day. On that day it sent out its first tester. There was never any indication that HOME did anything to intercede with Respondent in an attempt to get Complainant and his friends into the house that they wanted. HUD attempted conciliation with Respondent on July 27, 1989, but it failed. It is hard to imagine how conciliation efforts a half year after the events in a case such as this could have any hope for success. It was never Complainant's goal to get himself embroiled in litigation or to collect damages from Respondent. He wanted to live in the Victory Parkway house, and neither HOME nor HUD helped in a manner designed to accomplish that goal.

> shifts to the defendant to "articulate some legitimate, undiscriminatory [sic] reason" for its action .... Third, if the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance that the legitimate reasons asserted by the defendant are in fact mere pretext ....

Politt, supra, at 175, *citing McDonnell Douglas, supra*, at 802, 804.

The shifting burdens of proof format from *McDonnell Douglas*, which is spelled out above, 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 *Murphy, supra*, 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, there is direct evidence that Respondent violated the Fair Housing Act by making statements to Complainant that indicated a preference or limitation on the basis of sex. There is also direct evidence that he violated the Act by refusing to negotiate with Complainant for the rental of the house and by representing that the house was not available for inspection or rental when it in fact was. Thus, while the three-part, shifting burden, method of analysis is always applicable, it is not necessary to employ its rigors here.

Mr. Holley credibly testified that he called Respondent to inquire about renting the house for himself and two other men, and that, during this conversation, the Respondent said that he was not interested in renting to a group of men because his past experience was that men are messy and unclean, and they cause roaches. He further said that he was not willing to deal with that sort of rental and that he would instead take the house off the market and use it for his own purposes. He refused to allow Complainant to inspect the house or even to interview him further. He told Complainant that he would remove the house from the rental market to use it as his office, but he kept it on the market and eventually rented it to other people.

Respondent neither admitted nor denied that he had made these statements. He took the position at trial that he was not sure he was recalling the right conversation. However, his own recall was ample to show that he was. Moreover, Respondent had told HUD attorney Richard Bennett that he had rented to other groups of men in the past and that they had been messy. At trial, Respondent admitted telling Mr. Bennett about his previous adverse experience with a group of men in another house and that, because of the prior bad experience, he tends to be more thorough in his investigation of prospective tenants and tries to be more observant of their character and demeanor. Testimony by the HOME employees regarding their intake of the case and their testing further supports Complainant's version of the facts. Moreover, the evidence shows that Respondent had, in fact, had problems with groups of male tenants in the past.

Thus, I conclude that Respondent violated the Fair Housing Act by making statements to Complainant that indicated a preference, limitation, or discrimination based on sex. He also violated the Act by refusing to rent or negotiate for the rental of the house and by representing that the house was no longer available when it, in fact, was.

Ultimate Conclusions

By refusing to make his house available for rental by Complainant and his prospective roommates because they are men, Respondent has violated the provisions of the Fair Housing Act that are codified at 42 U.S.C. Section 3604(a) and the regulations of the Department that are codified at 24 CFR 100.60(b)(2) and 24 CFR 100.70(b).

By stating that he was not prepared to deal with renting his house to a group of men and by not allowing Complainant and his prospective roommates to inspect the house, Respondent has violated the provisions of the Fair Housing Act that are codified at 42 U.S.C. Section 3604(c) and the regulations of the Department that are codified at 24 CFR 100.70 (c)(1) and 24 CFR 100.75(c)(1) and (2).

By representing to Complainant that the house was no longer available for rent but, rather, that he would use it himself for his own purpose when, in fact, the house did continue to be available for rent, Respondent has violated the provisions of the Fair Housing Act that are codified at 42 U.S.C. Section 3604(d)and the regulations of the Department that are codified at 24 CFR 100.85(b)(5).

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. 2613(g)(3). That section further states that the "order may, to vindicate the public interest, asses a civil penalty against the respondent." *Id*. The maximum amount of a civil money penalty is dependent upon whether the respondent has been adjudged to have committed prior discriminatory housing practices. *Id*. Where, as in this case, the respondent has not been adjudged to have committed any prior discriminatory housing practices, the civil money penalty assessed against the respondent cannot exceed $10,000. *Id; see also* 24 CFR 104.910(b)(3) (1989).

The government, on behalf of itself and the Complainant, has prayed for: (1) damages of $10,000 to compensate Mr. Holley for his economic loss, emotional distress, and loss of civil rights; (2) the imposition of a $5,000 civil penalty; (3) injunctive relief to include prohibiting Respondent from engaging in future discrimination in the rental of his units of a nature that is the same as or similar to that which was the subject of this case and from retaliating against Complainant or any member of his family; and (4) injunctive relief in the form of positive actions to be taken by the Respondent to assure HUD that he conducts his rental business without discrimination.

1. Economic Losses

Under the Fair Housing Act, successful complainants are entitled to damages for any inconvenience suffered as a result of a respondent's discriminatory actions. *Blackwell*, at 25,010.[5] When it became necessary for Duane Evans to move out of his apartment and the

[5] In *Blackwell*, the Complainants were unable to get a loan to replace a totally damaged car because of a pending mortgage loan application, and the judge held that they were entitled to compensation for the

three men had not yet secured the subject house or a reasonable alternative, he moved in with Complainant and Michael Hill for the interim period. Since their apartment had only two bedrooms, the three men were required to live in crowded circumstances. The fact that they eventually all went their separate ways does not change the fact that the extra move and the inconvenient living was a direct result of Respondent's discriminatory action; *i.e.*, had he properly made the house available to them, it is almost certain, and I take it to be so, that the three men would have moved into the house and would have had plenty of room with no need for interim accommodations.

For some period after Respondent's refusal to make the house available, Complainant and his prospective roommates continued their search for the type of house they had decided that they wanted to share. Calls were made and locations were visited to no avail. Moreover, Complainant was required by the situation to seek help and redress. To do so, he visited HOME and HUD, filled out forms, dealt with staff, and, ultimately, took the necessary actions to pursue this proceeding. All of this cost Complainant time and effort.

Respondent's denial of equal housing opportunity has further cost Complainant by denying him the opportunity to live where and how he had decided to do so. He wanted the neighborhood because he was accustomed to it, it is convenient to his work place, and he likes its shops and other conveniences. More importantly, he wanted to share a large house, rather than a confining apartment, so as to enjoy the access to greater space. Finally, it would have been economically advantageous to all of the men to move in together since the rent for the house was less than the rent for their two apartments. Complainant's share of the rent would have been less per month than he now pays for an apartment in which he lives on his own. While these amounts were not specifically stated, and there are limits to how long they can be attributed to Respondent's action, it is clear that Complainant's financial status has been effected and he should be compensated for it.

"inconvenience and hassle" of not having a second car. He awarded them $820.00, calculated at $5.00 per day for 164 days. Similarly, he awarded $250.00 to the family that had been required to move out of the subject house for the benefit of the Complainants for their inconvenience in having to pack and relocate so soon after having moved in. At 25,010 and 25,011.

The government made no attempt to present evidence of direct financial harm to the Complainant, nor did it attempt to break out what part of the amount it claims as compensation for Complainant is due to direct costs and inconvenience as opposed to emotional distress and loss of civil rights.[6] Nonetheless, keeping in mind that Complainant should not suffer for the government's shortcomings any more than he should do so for those of the Respondent, and based upon consideration of the factors mentioned and described above, I conclude that the Complainant is entitled to an award of $2,000.00 in compensation for his economic losses, including inconvenience.

2. Emotional Distress

The Government seeks damages for Mr. Holley as compensation for the emotional distress caused by Respondent's act of discrimination. It is well established that the amount of compensatory damages which may be awarded in a civil rights case is not limited to money losses or other damages directly incurred, but includes intangible damages suffered as a result of the discriminatory activity. *See, e.g., Parker v. Shonfeld*, 409 F. Supp. 876, 879 (N.D. Ca. 1976). These damages can be shown by testimony and other evidence and can also be inferred from the circumstances of the case. *See Marable, supra*, at 1220; *Gore v. Turner,* 563 F.2d 159, 164 (5th Cir. 1977)

In *Blackwell, supra,* at 25,011, Chief Judge Heifetz stated that "[b]ecause of the difficulty of evaluating emotional injuries which result from deprivation of civil rights, courts do not demand precise proof to support a reasonable award of damages for such injuries." *Citing Block v. R. H. Macy & Co., Inc.*, 712 F.2d 1241, 1245 (8th Cir. 1983). He also found circumstances in *Marable* to be applicable to *Blackwell* and stated, at 25,012, that

> ... in *Marable, supra*, where the defendant challenged the plaintiff's claim for compensatory damages on the basis that it was based solely on mental injuries and that there was no evidence of "pecuniary loss, psychiatric disturbance, effect on social activity, or physical symptoms", the court stated:
>
> > It strikes us that these arguments may go more to the amount, rather than the fact, of damage. That the amount of damages is incapable of exact measurement does not bar recovery for the harm suffered. The plaintiff need not prove a specific loss to recover general, compensatory damages, as opposed to actual or specific damages.

704 F.2d at 1220-21.

Here, again, the Government makes an argument for compensation for Complainant's emotional distress, but does not break out the amount it seeks under this category from the total

[6] In its post-hearing brief, the Government presented separate arguments for compensation of the Complainant for his "economic losses," "emotional distress," and "loss of civil rights." However, it never argued as to how much each of these was worth. Instead, it asked for $10,000.00 of compensation as a total.

claimed. It refutes Respondent's argument that Complainant could not have been harmed by only a "five-minute conversation" by pointing out that in that short conversation:

> ...Respondent made rude and discriminatory statements to Complainant; expressed his assumption and belief that Complainant and his male roommates would be messy and unclean, leave dirty dishes in the sink, and encourage roaches like other males had; denied Complainant an opportunity to show that he and his roommates were not messy and unclean males, despite Complainant's request that he have an opportunity to show this; misrepresented the fact that the house was no longer available for rent and that he was taking it off the market; refused to allow Complainant to be interviewed or negotiate for the rental of the unit; denied Complainant an opportunity to inspect the unit; denied Complainant an opportunity to rent and live in the house; and hung up on the Complainant.

Both parties appear to have missed the point. The emotional distress suffered by Complainant cannot be taken to be limited to the five-minute phone conversation. While the words spoken in the conversation were the cause, the real effect of distress is the long-term effects as described above. This situation would make any person angry and cause some stress.

On the stand, Mr. Holley did not appear to be a man of vulnerable constitution who could be easily driven to distress in the sense of needing medical assistance. He was justifiably angered, and he testified that he felt "hurt." These feelings and his continued hope of obtaining the type of housing he desired, only to be frustrated, were a source of anger and distress for a few months. Holley himself said that the phone call caused him disbelief and that he was "..very insulted ... [and] got very angry and there was a little hurt there...," (T 33) but that "...it was kind of easy to get over...." (T 61) Complainant should be compensated for the inflicted emotional distress even though it affected him less than it might have effected other people.

Awards for emotional distress have varied depending upon the circumstances of the case. A review of relevant case law from the federal courts is not very helpful since it reveals a large range of awards.[7] This forum has made awards for emotional distress in three cases. In *Blackwell, supra*, $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. 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

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[7] *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).

cognizable and compensable emotional distress." *Id*. at 25,057. In *HUD v. Guglielmi and Happy Acres Mobile Park*, (HUDALJ 02-89-0450-1, decided Sep. 21, 1990), I awarded $2,500 to the Complainant where it was 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. Based upon this review of the relevant case law and the described consideration of the facts and circumstances of this case, I conclude that the Complainant is entitled to an award of $500.00 from the Respondent for the emotional distress that was inflicted upon him.

3. Loss of Civil Rights

Although the judges of this forum have, in the past, combined their discussions of injury through emotional distress and loss of civil rights and have made combined awards of damages (*See Blackwell, Murphy*, and *Guglielmi, supra*), the government, in this case, argues for compensation for loss of civil rights as a separate topic. It states that a loss of civil rights is a "separate, compensable injury under the Fair Housing Act." *Citing Bradley v. John Branham Agency, Inc.*, 463 F. Supp. 27 (D.S.C. 1978) (plaintiff awarded $2,000 for emotional distress and $5,000 for loss of civil rights). *See also* 42 U.S.C. Section 3612(g)(3); 24 CFR 104.910(b).

The Government points out that the courts have held that damage from the deprivation of a constitutional right can be presumed "even in the absence of evidence that the complainant has suffered any emotional distress, embarrassment, or humiliation." *Citing Hodge v. Seiler*, 558 F.2d 284 (5th Cir. 1977). It is also relevant that it has been held that the amount of compensatory damages should be adequate to redress the deprivation of a complainant's civil rights. *See Corriz v. Narajo*, 667 F.2d 892 (10th Cir. 1981). However, as a general rule, while the amount of damages awarded should compensate for the injury suffered, it should not provide the injured party with a windfall. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

Again, the Government has not broken down what it believes to be an appropriate amount for an award in this case. Moreover, as in the discussion above concerning the award for emotional distress, review of the court cases is not very helpful.[8] Nonetheless, it is manifestly obvious that prevailing Complainants in cases such as this should be awarded significant damages for their loss of civil rights. This is so as a means of showing that the loss of civil rights is a serious matter and will not be disregarded by this forum. Here, the Respondent's discriminatory action took away Complainant's right to chose where and under what conditions he would live. Upon consideration of these issues and the facts in this case, I

[8] In *Blackwell, supra*, at 25,013 it was noted that this problem was stated in R. Schwemm, *Compensatory Damages in Federal Fair Housing Cases*, 16 Harv. C.R.C.L. Law Rev. 83 (1981):

> The federal fair housing laws became effective in 1968. Since then, courts have often awarded damages to victims of housing discrimination, but their decisions have provided little guidance for assessing the amount of such awards. There is a great range of awards, with some courts awarding only nominal damages of $1 and others setting awards of over $20,000.

conclude that the Complainant is entitled to an award of $2,500 dollars to compensate him for Respondent's deprivation of his civil rights.

4. Civil Penalty

The Government has also asked for the imposition of a civil penalty of $5,000.00, which is half of the maximum that can be imposed on a respondent who has not been adjudged to have committed any prior discriminatory housing practices. *See* 42 U.S.C. Section 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.

The nature and circumstances of the violation in this case are serious. While discrimination is often subtle and difficult to show, in this case the Respondent openly expressed his preference not to rent to the Complainant on the basis of his sex. He lied outright about the availability of the house when he claimed he would be taking it off the market to put to his own use. As to the degree of culpability, Respondent is a real estate agent who has been in the business of renting housing for eight years. As such, I find that he knew, or should have known, that he was in violation of long-standing laws that prohibit the actions that he was taking. No evidence of prior violations or Respondent's financial status was entered into evidence by either party. Therefore, I find that Respondent has not been previously adjudged in violation of the Act. I further find that Respondent's financial circumstances do not make him unable to withstand a reasonable fine. Finally, in a case such as this, where there is evidence of intentional wrongdoing, it is important to deter like activity in the future by Respondent and others.

Based upon a consideration of the factors directed by Congress, including consideration of the manner in which the Government handled Mr. Holley's Complaint, and to vindicate the public interest, I conclude that it is appropriate in this case to impose a civil penalty of $4,000.00 upon Respondent Baumgardner. This amount contrasts appropriately with the Maximum permissible penalty of $10,000.00 that was imposed in *Blackwell* for an egregious case of racial discrimination in which the Government went to great lengths to investigate and prepare its case in detail, and is in accord with the $2,000.00 civil penalties that were imposed in *Murphy* and *Guglielmi* where discrimination was found but there were mitigating circumstances.[9]

[9] In *Murphy*, it was found that the Respondents discriminated against families with children in an erroneous attempt to qualify for the exemption from the Act for housing for older persons that is provided at 42 U.S.C. Section 3607(b). In *Guglielmi*, it was also found that the Respondents discriminated against families with children, but for the purpose of putting into effect a vote by the residents of a mobile home park to keep certain areas child free; *i.e.*, the purpose of the park rules was to protect current residents, not to discriminate, even if the latter was a consequence. Moreover, the laws and regulations prohibiting discrimination on the basis of family status took effect only days before the events complained of began to

5. Injunctive Relief

Section 812(g)(3) of the Fair Housing Act also authorizes the administrative law judge to order injunctive or other equitable relief. Here, injunctive relief is necessary to ensure that Respondent will not conduct himself in like manner. To that end, the Government has requested that the Respondent be ordered to cease certain activities and undertake certain other actions. Substantially all of these requests are reasonable and are deemed appropriate under the totality of the circumstances of this case. Accordingly, for the most part, they will be imposed, and the specific provisions of injunctive relief are set forth in the Order issued below.

Order

Having concluded that Respondent, Thomas C. Baumgardner, violated provisions of the Fair Housing Act that are codified at 42 U.S.C. Sections 3604 (a), (c), and (d), as well as the regulations of the U.S. Department of Housing and Urban Development that are codified at 24 CFR 100.60(b)(2), 100.70(b) and (c)(1), 100.75(c)(1) and (2), and 100.80(b)(5), it is hereby

ORDERED that,

1. Respondent is permanently enjoined from discriminating against Complainant, Blanton Holley, or any member of his family, with respect to housing, because of race, color, or sex, and from retaliating against or otherwise harassing Complainant or any member of his family. Prohibited actions include, but are not limited to, all those enumerated in the regulations codified at 24 CFR Part 100 (1989).

2. Respondent shall institute record-keeping of the operation of his rental properties which are adequate to comply with the requirements set forth in this Order, including keeping all records described in paragraph 4 of this Order. Respondent 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, 1991, and continuing for three years, Respondent shall submit reports containing the following information regarding the previous three months, for all properties owned or otherwise controlled by Respondent, to HUD's Chicago Regional Office of Fair Housing and Equal Opportunity, 626 West Jackson Blvd., Chicago, Illinois 60606-5601, provided that the director of that office may modify this paragraph of this Order, as deemed necessary to make its requirements less, but not more, burdensome:

   a. a duplicate of every written application, and written description of every oral application, for all persons who applied for occupancy of all such Respondent's property, including a statement of the person's sex, whether the person was rejected or accepted, the date of such action, and, if rejected, the reason for the rejection;

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take place.

b. a list of vacancies at all such Respondent's properties including the departed tenant's sex, the date of termination notification, the date moved out, the date the unit was next committed to rental, the sex of the new tenant, and the date that the new tenant moves in;

c. current occupancy statistics indicating which of the Respondent's properties are occupied by males or groups including males;

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 one of Respondent's units, including their names, addresses, sexes, 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 tenants or applicants.

4. Respondent shall inform all his agents and employees, including resident managers, of the terms 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, Respondent shall pay damages in the amount of $5,000.00 to Complainant to compensate him for the losses that resulted from Respondent's discriminatory activity.

6. Within forty-five days of the date that this Initial Decision and Order becomes final, Respondent shall pay a civil penalty of $4,000.00 to the Secretary, United States Department of Housing and Urban Development.

7. Within fifteen days of the date that this Order becomes final, Respondent shall submit a report to HUD's Chicago Regional Office of Fair Housing and Equal Opportunity that sets forth the steps he has taken to comply with the other provisions of this Order.

/s/

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Robert A. Andretta
Administrative Law Judge

Dated: November 15, 1990.