

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
Dara Knibbs and David Knibbs,

Charging Party,

v.

Virginia Lee, Jon and Monica Meyers,
Joseph Meyers, M.D.,
Allen Zaccharia, Charlotte Keough,
and Easy Street Associates,

Respondents.

HUDALJ 10-95-0056-8
Decided: August 12, 1996

John C. Babin, Esq.
Douglas L. Melevin, Esq.
For the Respondents

Joyce Moen, Esq.
For the Government

Before: THOMAS C. HEINZ
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This proceeding arises out of a complaint filed by Dara Knibbs ("Complainant") alleging that Virginia Lee, Jon and Monica Meyers, Allen Zaccharia, Charlotte Keough, and Easy Street Associates violated the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (sometimes "the Act"), by refusing to rent or to negotiate to rent an apartment to

Complainant and her minor son, David Knibbs, because of their familial status. The Department of Housing and Urban Development ("HUD" or "the Secretary") investigated the complaint, and after deciding that there was reasonable cause to believe that discriminatory acts had taken place, issued a Charge of Discrimination against the above-named Respondents on January 31, 1996. Respondent Joseph Meyers, M.D., thereafter became a Respondent pursuant to a motion filed by the Charging Party. The Charge alleges that Respondents engaged in housing discrimination on the basis of familial status in violation of §§ 804(a), (b), and (c) of the Act (42 U.S.C. §§ 3604(a), (b), and (c)), and §§ 100.50, 100.60, 100.65, 100.70, and 100.75 of the regulations (24 C.F.R. §§ 100.50, 100.60, 100.65, 100.70, and 100.75).

On April 23, 1996, a hearing was held in Eugene, Oregon, at the close of which the parties were directed to file post-hearing briefs. The last brief was received on June 12, 1996.

Findings of Fact

1. At the time of the hearing, Complainant Dara Knibbs was unemployed and residing in Springfield, Oregon, with her son David, age eight. In early September of 1994 she made three trips from her residence in Portland, Oregon, to Brookings, Oregon, to look for housing for herself and David. She had accepted a job as a physical therapist in Brookings after the failure of her 10-year marriage. She and David moved out of the family home in Portland, because of repeated physical abuse from Mr. Knibbs. According to Complainant, Mr. Knibbs was a diabetic who became violent when his blood sugar fell too low. TR. 13-17.¹

2. At the time of the hearing, Respondent Virginia Lee was in her mid-70's, in ill health, and residing in Arizona. For 13 years before she moved to Arizona she had been the resident manager of Hillcrest Apartments, a 13-unit complex located on Easy Street in Brookings, Oregon. G. 8.

3. Respondents Jon and Monica Meyers, Allen Zaccharia, and Charlotte Keough are engaged in a business partnership under the name "Easy Street Associates." They own and operate Hillcrest Apartments. TR. 10, 110.

¹The following reference abbreviations are used in this decision: "TR." for "transcript" and "G." for "Government's exhibit."

4. Respondent Joseph Meyers, M.D., is the general manager of Easy Street Associates, but he has no ownership interest in the enterprise. He is married to Respondent Charlotte Keough. TR. 107-08.

5. During her second house-hunting trip, Complainant telephoned Respondent Lee at Hillcrest Apartments on Wednesday, September 7, 1994, in response to a newspaper advertisement for a vacant apartment. When Respondent Lee learned that Complainant had a young child, she told Complainant that the vacant apartment was on the second floor and that "we [do] not rent to small children on the second floor because it [is] dangerous." Respondent Lee implemented this policy regarding small children on the second floor without the knowledge or consent of any of the other Respondents. TR. 17-19; G. 3, 6.

6. After Complainant was turned away from Hillcrest Apartments, she drove to Springfield, Oregon, to pick up David, who had been staying with her sister. They then returned to Portland. On Monday, September 12, Complainant drove from Portland to Springfield to leave David with her sister and then on to Brookings to begin her new job the following morning. She stayed in a motel while continuing her search for housing. After 16 hours of looking, she found a duplex apartment on Ransom Avenue on September 15 and moved in the next day, when David was brought from Springfield to join her. TR. 17, 20, 22-26.

7. In October of 1995 Complainant quit her job in Brookings and moved to Springfield because she has fibromyalgia and "borderline" lupus, two debilitating ailments which she found made full-time work as a physical therapist impossible. Her divorce from Mr. Knibbs became final in February of 1996. TR. 13, 29.

Subsidiary Findings and Discussion

The Congress passed the Fair Housing Act to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics." *United States v. Parma*, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *rev'd on other grounds*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 465 U.S. 926 (1982). *See also United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *cf. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Act was designed to prohibit "all forms of discrimination [even the] simple-minded." *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974).

On September 13, 1988, the Act was amended to prohibit, *inter alia*, housing practices that discriminate on the basis of familial status.² 42 U.S.C. §§ 3601-19. "Familial status," as relevant to this case, is defined by the Act as "one or more individuals (who have not attained the age of eighteen years) being domiciled with ... (1) a parent or another person having legal custody of such individual or individuals" *Id.* at § (k); 24 C.F.R. § 100.20. Complainant and her son fall within this definition.

The Act makes it unlawful for anyone to:

refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of ... familial status

42 U.S.C. § 3604(a).

It is also unlawful to:

make ... any ... statement ... with respect to the ... rental of a dwelling that indicates any preference, limitation, or discrimination based on ... familial status ... or an intention to make any such preference, limitation, or discrimination.

Id. at § 3604(c). This provision applies to all written or oral statements made by a person engaged in the rental of a dwelling. 24 C.F.R. § 100.75(b), (c)(1) and (2).

Respondents argue that Respondent Lee did not refuse or intend to refuse to rent to Complainant. Rather, they contend that Respondent Lee merely expressed a *preference* not to rent apartments on the second floor to tenants with small children out of concern for the safety of the children. Brief, p. 3. To support their argument, Respondents cite

²In 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., 2d Sess., at 19 (1988). Congress cited a survey finding that 25 percent of all rental units excluded children and that 50 percent of all rental units had policies restricting families with children in some way. *Id.*, citing Marans, *Measuring Restrictive Rental Practices Affecting Families with Children: A National Survey*, Office of Policy Planning and Research, HUD (1980). The survey also found that nearly 20 percent of families with children were forced to live in undesirable housing due to restrictive housing policies. *Id.* Congress clearly intended the 1988 amendments to remedy these problems for families with children.

Respondent Lee's deposition testimony (she was too ill to attend the hearing) and the fact that children have lived on the second floor in the past. Respondents' argument has no merit.

HUD's investigation found that no children under the age of 15 had resided permanently on the second floor at Hillcrest Apartments in recent years. The fact that two tenants have had small children as weekend visitors on occasion does not demonstrate the absence of a discriminatory policy. G. 6; Tr. 66.

Complainant credibly testified that Respondent Lee told her, "We don't rent to people with children on the second floor. We have railings that kids like to stick their legs through. It's dangerous for them." Tr. 18. Complainant's report at hearing of Respondent Lee's statements mirrored Complainant's report of those statements as set out in the original complaint filed with HUD in October of 1994. G.1. In her written statement of December 2, 1994, Respondent Lee confirmed Complainant's report: She stated under oath that "I told the caller [Complainant] that we did not rent to small children on the second floor because it was dangerous." G. 3, p.2.

During her deposition by telephone on April 5, 1996, Respondent Lee tried to change her story. She testified:

And I said [to Complainant], well, I said we don't like to -- let's see, get it so it sounds right -- that we didn't usually rent to *[sic]* with children on the second floor if they were seven, six, five, four, such and such, because it's on -- it's 14 feet to the ground. There's no way of holding on to go down the stairs or anything like that. And people are not always watching their children in a situation like that. [G. 8, p. 10]

Respondent Lee's deposition testimony is untrustworthy. Throughout her deposition she suffered from numerous memory lapses, both large and small, and the transcript clearly shows that her daughter repeatedly coached her to give less damaging testimony.

Moreover, even if Respondent Lee did not unequivocally refuse to rent to Complainant, Complainant's credible testimony indicates that Respondent Lee's conduct was tantamount to a refusal, and that a formal offer to rent from Complainant would have been a useless gesture. Respondent Lee refused to divulge to Complainant the name and address of the apartments, her name, or the owners' names.³ TR. 19-20. These refusals

³Complainant claimed the refusal to divulge information came in the second of two telephone calls she made to Respondent Lee on September 7. Respondent Lee remembered only one call. Complainant had no motive to testify falsely regarding the number of phone calls made, and it is immaterial whether

indicate an intent to refuse to rent. I therefore credit Respondent Lee's admission made under oath that "we did not rent to small children on the second floor." In short, Respondent Lee's own words show a refusal to rent on the basis of familial status in violation of 42 U.S.C. § 3604(a).

Assuming, arguendo, that Respondent Lee merely discouraged Complainant by stating a *preference* for tenants without small children for the second floor apartment, such a statement itself constitutes a violation of 42 U.S.C. § 3604(c), justifying an award of damages, if proved. That section of the Act makes it unlawful for a housing provider to "make ... [any] statement ... with respect to the ... rental of a dwelling that indicates any *preference* ... based on ... familial status" (Emphasis supplied.)⁴

As resident manager for Hillcrest Apartments, Respondent Lee was the agent for the general manager, Respondent Joseph Meyers, and for the owners of the apartments, the remaining Respondents. Because the duty to prevent discrimination cannot be delegated by a housing provider to his agent, or by an agent to his subagent, Respondents Meyers, Zaccharia, and Keough are responsible for the discriminatory conduct of Respondent Lee even though she implemented the discriminatory policy without their knowledge or consent.⁵

Remedies

Section 812(g)(c) of the Act provides that upon a finding that a respondent has violated the Act, an administrative law judge shall order "such relief as may be

Complainant made one or two calls.

⁴The conclusions that Respondents have violated §§ 804(a) and (c) of the Act obviate a discussion of the Secretary's contention that they have violated § 804(b) as well. A finding that Respondents have also violated § 804(b) would not change the remedy ordered in this case.

⁵*Hamilton v. Svatik*, 779 F.2d 383, 388 (7th Cir. 1985); *Green v. Century 21*, 740 F.2d 460, 465 (6th Cir. 1984); *Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974); *Saunders v. General Servs. Corp.*, 659 F.Supp. 1042, 1059 (E.D.Va. 1987); *Davis v. Mansards*, 597 F.Supp. 334, 344 (N.D. Ind. 1984); *United States v. Youritan Construction Co.*, 370 F.Supp. 643, 649 (N.D.Cal. 1973), *modified on other grounds*, 509 F.2d 623 (9th Cir. 1975), *cert. denied*, 421 U.S. 1002 (1975).

appropriate, which may include actual damages suffered by the aggrieved person." 42 U.S.C. § 3612(g)(3). In the instant case, Respondents have violated the Act through conduct that has caused actual, compensable damages to Complainant.

Complainant's Damages

Out-of-Pocket Expenses

Complainant is entitled to compensation for the tangible expenses caused by Respondents' denial of housing. *See, e.g., HUD ex rel. Herron v. Blackwell*, 908 F.2d 864, 873 (11th Cir. 1990)(hereinafter *Blackwell II*); *Thronson v. Meisels*, 800 F.2d 136, 140 (7th Cir. 1986). After Complainant was turned away from Hillcrest Apartments, she spent a few more hours looking for housing in Brookings before she returned to Portland, where she continued her search by telephone. TR. 19-20. When she returned to Brookings a few days later to begin her new job, she stayed in a motel for four days until she found a place to live. If she had been permitted to rent at Hillcrest Apartments, the background and credit check would have been completed by Monday, and she would not have had to rent a motel room. TR. 110-11. She requests compensation for the cost of the motel (\$144) plus \$50 for meals and \$50 for long-distance telephone calls from the motel to her son in Springfield. The requested amounts appear reasonable and will be awarded. There is no merit to Respondents' complaint that the claim for food is unreasonable. The federal allowance for per diem expenses in Brookings is \$26 per day, considerably more than the \$12.50 per day requested by Complainant.

Complainants who are unlawfully denied housing may receive compensation for time spent seeking alternative housing and for additional expenses associated with living in alternative housing. *Brown v. Ballas*, 331 F. Supp. 1033 (N.D. Tex. 1971); *HUD v. Edelstein, Fair Housing-Fair Lending* (P-H) ¶25,236 at 25,241 (HUDALJ Dec. 9, 1991). For the 16 hours she spent looking for housing while staying in the motel, Complainant will be awarded the requested amount, \$224, calculated at the rate of \$14 per hour, her salary at the time. No claim has been made for the time she spent looking for alternative housing between September 7 and September 12.

Complainant's alternative housing on Ransom Avenue cost \$400 per month, \$25 more per month than the apartment at Hillcrest Apartments. Inasmuch as she stayed in alternative housing for 13 months, Complainant requests \$325 to recover her additional costs for that period. However, the record does not show whether the alternative housing was comparable to the denied housing, or when Complainant became free to move into

cheaper housing--facts essential to support a claim for compensation for more expensive alternative housing.⁶ This portion of the claim therefore must be denied.

Emotional Damages

Actual damages in housing discrimination cases are not limited to out-of-pocket losses, but may also include damages for intangible injuries such as embarrassment, humiliation, and emotional distress caused by the discrimination.⁷ Damages for emotional distress may be based on inferences drawn from the circumstances of the case, as well as on testimonial proof.⁸ Because emotional injuries are by nature qualitative and difficult to quantify, courts have awarded damages for emotional harm without requiring proof of the actual dollar value of the injury.⁹ The amount awarded should make the victim whole.¹⁰

⁶If the properties were comparable in size, location, and amenities, then she could recover the cost of the more expensive alternative. She could also recover the difference in cost if the alternative was superior but comparable housing was unavailable at the time.

⁷See, e.g., *HUD v. Blackwell*, 2 Fair Housing-Fair Lending(P-H) ¶25,001 (hereinafter *Blackwell I*) at 25,011; *HUD v. Murphy*, Fair Housing-Fair Lending (P-H) ¶25,002 at 25,055 (HUDALJ July 13, 1990); See also *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231 (8th Cir. 1976); *Steele v. Title Realty Co.*, 478 F.2d 380, 384 (10th Cir. 1973); *McNeil v. P N & S. Inc.*, 372 F. Supp. 658 (N.D. Ga. 1973).

⁸*Blackwell II*, 908 F.2d 864, 872 (11th Cir. 1990); *Murphy* at 25,055; See also *Marable v. Walker*, 704 F.2d 1219, 1220 (11th Cir. 1983); *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977).

⁹See, e.g., *Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1245 (8th Cir. 1983); *Steele v. Title Realty Co.*, 478 F.2d at 384; *Blackwell I* at 25,011. See also *Blackwell II*, 908 F.2d at 872-73 (recovery for distress is not barred because amount of damages is incapable of exact measure).

¹⁰See *Murphy* at 25,056; *Blackwell I* at 25,013.

The Secretary requests an award of \$10,000 to compensate Complainant for her intangible damages. To support this request, the Secretary cites several facts: As a result of being turned away from Hillcrest Apartments, Complainant spent four extra days searching for housing in Brookings while starting a new job and worrying about her son who was missing school while staying with family in another city.¹¹ David apparently exhibited symptoms of separation anxiety while staying with Complainant's sister. TR. 50. When Complainant finally obtained housing, it needed cleaning and was without water for the first two days. TR. 24. Whereas David's school would have been across the street if they had lived at Hillcrest Apartments, it was a mile away from the alternative housing on Ransom Avenue. If Complainant had been allowed to rent at Hillcrest Apartments, she would have had a dishwasher, an amenity which the Ransom Avenue duplex did not have, and which was especially missed when Complainant's fibromyalgia and borderline lupus made her so tired that she felt she could not wash the dishes by hand. TR. 28-9.

Complainant suffered severe emotional distress during September of 1995, but Respondents can be held responsible for only a fraction of that suffering. Most of her distress during that period must be attributed not to Respondent Lee's refusal to rent to her, but rather to her recent separation from an abusive husband (leading to divorce 17 months later), the difficulties of adjusting to single parenthood, and the normal stresses anyone would experience when moving to a new town, hunting for housing, and beginning a new job. Furthermore, the record does not show that the emotional distress attributable to Respondent Lee's conduct lasted for more than the eight-day period between September 7 and September 15. Nevertheless, Respondents' unlawful discrimination against Complainant because of her familial status can only have exacerbated her emotional distress during a very trying time. She will be awarded \$2,500 for that distress and for whatever inconvenience she experienced as a result of living at the Ransom Avenue property rather than at Hillcrest Apartments. The larger award requested by the Secretary is not merited because the injuries caused by Respondents, although significant, were not severe, and they were confined almost entirely to a very short period.¹²

¹¹David would have missed two weeks of school if Complainant had obtained housing on September 7. Because he did not join her in Brookings until September 16, he missed an additional week of school.

¹²No part of this award is to David Knibbs personally. He did not appear and testify, and the evidence that he suffered from separation anxiety during the four extra days that he and his mother were apart is too vague to support an award, particularly in light of testimony from Complainant's sister indicating that David enjoyed visiting with his aunt and cousins. The record does not show whether he suffered any injury as a result of attending a school that was more than a mile from his home on Ransom Avenue rather than a school that would have been across the street if he had lived at Hillcrest Apartments.

Civil Penalties

To vindicate the public interest, the Act authorizes an administrative law judge to impose civil penalties upon respondents who violate the Act. 42 U.S.C. § 3612(g)(3)(A); 24 C.F.R. § 104.910(b)(3). Determining an appropriate penalty requires consideration of five factors: (1) the nature and circumstances of the violation; (2) whether the respondent has previously been adjudged to have committed unlawful housing discrimination; (3) respondent's financial resources; (4) the degree of respondent's culpability; and (5) the goal of deterrence. *See Murphy* at 25,058; *Blackwell I*, at 25,014-15; H. Rep. No. 711, 100th Cong., 2d Sess. at 37 (1988).

Nature and Circumstances of the Violation

The nature and circumstances of the violation in this case do not compel imposition of the maximum possible penalty. There is no evidence that Respondents' unlawful discrimination was motivated by animus toward Complainant and her son personally or against families with children in general. Families with children have rented on the ground floor at Hillcrest Apartments in the past. Complainant did not suffer any long-term or grievous injury, such as eviction, public humiliation, physical injury, or threats of physical injury at the hands of Respondents.

Respondents appear to have cooperated fully with HUD during the investigation of this matter.

Respondents' Record

There is no evidence that Respondents previously have been found to have committed an unlawful discriminatory housing practice. Consequently, the maximum civil penalty that may be assessed is \$10,000, pursuant to 42 U.S.C. § 3612(g)(3)(A) and 24 C.F.R. § 104.910(b)(3)(i)(A).

Respondents' Financial Circumstances

All of the Respondents except Respondent Lee stipulated that they would be able to pay the maximum civil penalty. Evidence regarding Respondent Lee's financial circumstances is peculiarly within her knowledge, so she had the burden of introducing such evidence into the record. *See Campbell v. United States*, 365 U.S. 85, 96 (1961); *HUD v. Jerrard*, 2 Fair Housing-Fair Lending ¶25,005 at 25,092. Since Respondent Lee did not do so, she also must be deemed capable of paying the maximum penalty without suffering undue hardship.

Culpability

None of the Respondents except Respondent Lee knew of or consented to the discrimination suffered by Complainant. Respondent Lee apparently was motivated by a well-meaning but misguided concern for the safety of children. Respondent Joseph Meyers testified that in his judgment the property presented no safety hazards for children. TR. 121. In any event, rental decisions based on safety judgments are for parents and guardians to make, not landlords.

Deterrence

Respondents and other housing providers need to be deterred from engaging in any form of discriminatory conduct based on familial status. They and other similarly situated landlords and their agents must come to understand that they may be guilty of unlawful discrimination if they exclude children from only some of their rental properties, and that they have a duty to ensure that the occupancy policies implemented by their agents are reasonable and nondiscriminatory.

* * *

The Charging Party seeks to impose a \$10,000 civil penalty against Respondents, the maximum permissible in this case. Maximum penalties should be reserved for the most egregious cases, where willful conduct causes grievous harm--that is, where all factors argue for the maximum penalty. This case does not fall into that category. A civil penalty of \$2,000 will vindicate the public interest.

Injunctive Relief

An administrative law judge may order injunctive or other equitable relief to make a complainant whole and protect the public interest in fair housing. 42 U.S.C. § 3612(g)(3).

Conclusion

Respondents have violated § 804(a) and (c) of the Fair Housing Act, 42 U.S.C. §§ 3604(a) and (c). As a result of Respondents' conduct, Complainant suffered actual damages for which she will receive a compensatory award. Further, to vindicate the public interest, an injunction will be ordered against Respondents as well as a civil penalty.

ORDER

It is hereby **ORDERED** that:

1. Respondents are permanently enjoined from discriminating against Complainant Dara Knibbs, any member of her family, or any tenant or prospective tenant, with respect to housing because of familial status.
2. Within thirty (30) days of the date on which this Order becomes final, Respondents shall pay actual damages of \$2,968 to Complainant Dara Knibbs; and
3. Within thirty (30) days of the date on which this Order becomes final,

Respondents shall pay a civil penalty of \$2,000 to the Secretary of HUD.

This Order is entered pursuant to 42 U.S.C. § 3612(g)(3) of the Fair Housing Act and the regulations codified at 24 C.F.R. § 104.910, and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary within that time.

/s/

THOMAS C. HEINZ
Administrative Law Judge