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 Gayle Herman, and her minor child, Justin Herman, Charging Party, v. Paul Schmid and Karen Schmid, Respondents.

HUDALJ 02-98-0276-8
Decided: July 15, 1999

Arlene C. Vasquez, Esq.
For the Charging Party

James W. Garble, Esq.
For the Respondents

Before: CONSTANCE T. O'BRYANT
Administrative Law Judge

INITIAL DECISION AND ORDER

Statement of the Case

This matter arose as a result of a complaint filed by Gayle Herman and her minor child, Justin Herman, ("Complainants"), alleging discrimination in violation of the Fair Housing Act, as amended, 42 U.S.C. § 3601-3619. On December 17, 1998, following an investigation and a determination that reasonable cause existed to believe that discrimination had occurred, the Department of Housing and Urban Development ("HUD" or "the Charging Party") issued charges against Respondents Paul and Karen

Schmid, alleging that they had engaged in a discriminatory housing practice in violation

of 42 U.S.C. § 3604(c); 24 C.F.R. §§ 100.75 (b)(c)(1) and (2), and 24 C.F.R. § 100.50 (b)(3).

The charges alleged that Respondents violated the Act when Mrs. Schmid made the following statement with respect to the rental of a dwelling that indicated a limitation or preference based on familial status: "This apartment has a pool, so we don't want children or pets." *Charge ¶7.*

Respondents failed to file an answer to the Charge of Discrimination. In response to the Motion for Default Judgment, Respondents claim that they had not answered because they had not received a copy of the Charge. HUD submitted a certified mail receipt showing that the post office attempted delivery of the Charge but that delivery had been refused.[1] The undersigned ruled that the evidence supported finding that Respondents' failure to receive notice of the Charge was due to their refusal to accept delivery of the Charge, thus, their nonreceipt was not good cause for their failure to file an answer. They were declared in default, and adjudged to have violated 42 U.S.C. 3604© by Decision and Order dated February 19, 1999. That Decision and Order was reissued on March 1, 1999.

A hearing limited to the issue of the appropriate relief to be awarded to the Charging Party was held on March 30, 1999, in Buffalo, New York. Respondent Karen Schmid did not appear at the hearing. Her husband, Paul Schmid, appeared *pro se*. According to him, his wife stayed at home to take care of the couple's children.

At the conclusion of the hearing, both parties were given the opportunity to submit post-hearing briefs, and both parties did so. The case is now ready for decision as to appropriate relief.[2]

---

[1]By affidavit, Respondent Paul Schmid admitted that he refused receipt of certified mail from HUD dated December 17, 1998, which contained the Charge of Discrimination and related information.

[2]Subsequent to the hearing, Respondents obtained legal counsel, who on May 4, 1999, filed a motion to set aside the default, arguing (1) that the default was not wilful; (2) that setting aside the default would not prejudice the Charging Party; (3) that Respondents' defense was meritorious; and (4) that the equitable factors supported a resolution on the merits, and not by default. The undersigned denied that motion by order dated May 7, 1999, determining that Respondents' default was wilful, and that Respondents had no meritorious defense to the Charge.

Findings of Fact

1. The Complainant, Gayle Herman, is a single mother of one son, Justin Herman. *Charge ¶2*. At the time of the alleged discrimination, Justin lived with her. Ms. Herman and her son were being forced to move from that address because her then landlord would not accept a Section 8 voucher. Tr. 16-17.[3]

2. The Respondents are the married owners of a duplex at 1128 Englewood Avenue, Tonawanda, New York; 14223. They occupy one of the two units and rent the other. *Charge ¶3,4,5.*

3. On or about October 31, 1997, Complainant telephoned (716) 877-3406 in response to an advertisement in the Tonawanda News for the rental of a two-bedroom apartment, and spoke to Karen Schmid. *Charge ¶6;* Tr. at 18.

4. After describing the apartment, Mrs. Schmid inquired whether the Complainant would be living alone. Before the Complainant responded, Mrs. Schmid stated: "This apartment has a pool, so we don't want children or pets." *Charge ¶7.*

5. The Complainant thereupon informed Mrs. Schmid that she had a son. As Complainant attempted to explain that her son was almost thirteen years old and that he would not fall in the pool, Mrs. Schmid interrupted her, stating "No, because this is my house--because we live here we can make these rules." *Charge¶8, 9.*

6. Complainant thereafter recalled hearing a speaker at the Every Woman Opportunity Center who talked about problems relating to housing and the role of an organization called Housing Opportunities Made Equal, Inc. (H.O.M.E.). She made a telephone call to H.O.M.E. Tr. at 19.

7. Following the telephone call from Ms. Herman, H.O.M.E. conducted two tests in this matter. On or about November 6, 1997, tester number 1 telephoned Respondent Karen Schmid. After Mrs. Schmid described the rental unit, she stated that she and her husband were "looking for a tenant with no pets and no children." When tester number 1 informed Mrs. Schmid of her ten-year-old son, the she stated: "Oh, I'm sorry, but we have to be very careful because of the pool." Tester number 1 then stated that her son

[3]References to the transcript of the hearing conducted on March 30, 1999, are referred to as "Tr. at ___."

swam very well. Mrs. Schmid then stated that she and her husband had two children of their own, but they were very careful because of the pool. Tester number 1 thereupon said to her: "I guess you don't want to show me the apartment then?" Respondent answered, "no, I'm sorry." *Charges ¶10, 14.*

8. On or about November 7, 1997, tester number 2 telephoned Respondent Karen Schmid. After describing the unit and discussing the rent ($475/mo.), Mrs. Schmid informed the tester that they had an in-ground swimming pool in the backyard, and asked the tester whether she had any children or pets. After tester number 2 responded that she did not have children, Mrs. Schmid stated that she "did not want any children or pets due to the liability of the in-ground pool." *Charges ¶15, 16.*

9. On or about November 8, 1997, while showing tester number 2 the subject rental unit, Respondent Karen Schmid again asked tester number 2 whether she had any children and again expressed her concern about children and the pool. *Charge ¶17.*

10. As a result of Respondent Karen Schmid's statements to Complainant, Complainant and her son suffered damages, including emotional distress and economic loss. *Charge ¶18.*

Discussion

The Fair Housing Act was enacted by Congress 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, sophisticated as well as simple-minded." *United States v. Parma*, 494 F. Supp. 1049, 1053, (N.D. Ohio 1980), *aff'd in relevant part*, 661 F. 2d 562 (6th Cir. 1981), *cert. denied*, 465 U.S. 926 (1982).

On September 13, 1988, the Act was amended 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 throughout the country, "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 noted a survey finding that 25 percent of all rental units exclude children and that 50 percent of all rental units have policies that restrict 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 found also that almost 20 percent of families with children were forced to live in less desirable housing due to restrictive housing policies. *Id*. The desire to remedy these problems motivated Congress to provide for the protection of families with children under the Fair Housing Act. Congress clearly

and unequivocally sought to outlaw housing discrimination against families with children.

Violation of 42 U.S.C. § 3604(c)

The Charging Party alleges as a violation of 42 U.S.C. § 3604(c) Karen Schmid's statement that "this apartment has a pool, so we don't want children or pets." (*Charge*, ¶7). Section 3604(c) states that it is illegal:

> to make . . . any . . . statement . . . with respect to the sale or 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.

Prohibited actions covered under 3604(c) include all written and oral notices or statements by a person engaged in the rental of a dwelling that indicates a preference, limitation or discrimination because of familial status. *See* 24 C.F.R. § 100.75(b). Actions prohibited include the use of words or phrases which convey that dwellings are not available to a particular group of persons because of familial status and expressing to prospective renters or any other persons a preference or a limitation on any renter because of familial status. 24 C.F.R. §§ 100.75(c)(1) and (2).

The test used to determine whether a statement is discriminatory is whether it suggests to an "ordinary listener" that a particular protected class is preferred or "dispreferred" for the housing.[4] *HUD v. Gwizdz*, Fair Housing-Fair Lending (P-H) ¶25,086 at 25793 (HUDALJ, Nov. 1, 1994 citing *Soules v. HUD*, 967 F. 2d 817, 824 (2d Cir. 1992); *Guider v. Bauer*, Fair Housing-Fair Lending ¶15,956, at 15,956.2 (HUDALJ, Sept. 30, 1994) citing *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205, 212 (1972). *See also, Ragin v. New York Times Co.*, 923 F. 2d 995, 999-1002 (2nd Cir.), *cert. denied*, 112 U.S. 81 (1991); *HOME v. Cincinnati Enquirer, Inc.*, 943 F. 2d 644, 646-48 (6th Cir. 1991); *HUD v. Gutleben*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,078, 25,725 (HUDALJ Aug. 13, 1994).

As found in the Decision and Order issued herein on February 19, 1999, Mrs. Schmid made the discriminatory statement "This apartment has a pool, so we don't want children or pets." I find that the statement violated § 3604© of the Act.

---

[4]The "ordinary listener" is "neither the most suspicious nor the most insensitive." *Ragin v. New York Times Co.*, 923 F. 2d 995 at 1002 (2nd Cir. 1991).

A. Ms. Herman and her son, Justin, met the definition of a family and fell within the protected classification of "familial status" under the Fair Housing Act

"Familial status" is defined by the Act as "one or more individuals (who have not attained the age of eighteen years) being domiciled with . . . a parent or another person having legal custody of such individual or individuals." 42 U.S.C. § 3602(k)(I). Moreover, "family" is defined as including a parent and one child. See 24 C.F.R. § 100.20.

At all times relevant to this case, Justin was twelve years of age and resided with his mother. Accordingly, at the time of the alleged discrimination, Ms. Herman and her son constituted a "family" and enjoyed "familial status."

B. The statement " This apartment has a pool, so we don't want children or pets" indicates a dispreference for, or limitation on, renters because of familial status in violation of the Act.

Because Respondents occupy one-half of the two unit dwelling they own, they are exempt from all of the provisions of section 3604 prohibiting discrimination in the sale or rental in housing except subsection (c).[5] However, a homeowner whose dwelling is

---

[5]The Act exempts two types of dwellings from most of the prohibitions of § 3604. Section 3603(b)(1) exempts a single-family house sold or rented by its owner under certain limited circumstances not relevant to this decision. Section 3603(b)(2) exempts units in buildings that are occupied or intended to be occupied by no more than four families, if the owner maintains a residence in that building (the so-called "Mrs. Murphy" exemption). The subject dwelling is an owner-occupied, two-family dwelling; therefore, it is exempt from the prohibitions of most of § 3604. However, the provisions of § 3604(c) of the Act are specifically carved out of the exemption. Section 803(b)(2) (42 U.S.C. 3603(b)(2)) reads in pertinent part, as follows:

Nothing in § 804 of this title *(other than subsection (c). . .)* shall apply to . . . (2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of

exempt under section 3603(b), though free to discriminate with impunity in selling or renting that dwelling, does not have a right to publicly state to potential buyers or tenants his intent to so discriminate. *United States v. Hunter*, 459 F. 2d 205, 213-14 (4th Cir.) *cert. denied*, 409 U.S. 934 (1972). *See also HUD v. Dellipaoli*, Fair Housing-Fair Lending (P-H) ¶ 25,127 at 26,072 (HUDALJ Jan. 7, 1997); *Schwemm*, Chpt. 15, sec. 15.2(1) and (2). Section 3604(c) gives persons seeking housing the right to inquire about the availability of housing from a housing provider without having to endure the insult of discriminatory statements. *HUD v. Gruzdaitis*, Fair Housing-Fair Lending (P-H) ¶25,136 at 26,119 (HUDALJ Aug. 14, 1998). Although Respondents were free not to

---

each other, if the owner actually maintains and occupies one of such living quarters as his residence. [emphasis added]

Thus, it can be seen that under § 803(b)(2), (42 U.S.C. 3603(b)(2)), owner-occupiers of two-family dwellings are not protected when they violate § 804(c) (42 U.S.C. § 3604(c)).

rent to a family with a child, when Mrs. Schmid stated the reason for not renting to the family (i.e., they did not want to rent to any children), she violated the Act.

Section 3604(c) has been said to be essentially a "strict liability" statute -- all that is required to establish liability is that the challenged statement was made with respect to the rental of a dwelling and indicates discrimination based on familiar status. See *Schwemm*, Chpt. 15, §15.2(1)(2). *See also HUD v. Dellipaoli*, Fair Housing-Fair Lending (P-H) ¶25,12 at 26,077 (HUDALJ Jan. 7, 1997), and *HUD v. Schuster*, Fair Housing-Fair Lending (P-H) ¶25,091 at 25,834 (HUDALJ Jan 13, 1995.) Further, HUD regulations (24 C.F.R. § 100.75(b)) provide that a practice prohibited by 42 U.S.C. § 3604(c) is "[e]xpressing to agents . . . prospective sellers or renters . . . a preference for or limitation on any . . . renter because of . . .familial status . . . of such persons." *See also Schwemm* §15.3(2). The statement in question ". . . we don't want to rent to children" indicates, on its face, a preference based on familial status. The statement expressed a blanket ban on renting to a family with a child or children. *See HUD v. Jancik*, 2 Fair Housing - Fair Lending(P-H) ¶25,058 at 25,566 (HUDLAJ Oct. 1, 1993).

Respondent Karen Schmid rejected prospective tenants with children because she was concerned about the safety of children around the swimming pool. However, nothing in the Fair Housing Act permits the owner of rental property to determine that his dwelling per se presents unacceptable risks to the health, safety and welfare of children. That decision is for the prospective tenant/parent to make. *See HUD v. Bucha*, 2 Fair Housing-Fair Lending (P-H) ¶25,046 (HUDALJ May 20, 1993) and *HUD v. French*, 2 Fair Housing-Fair Lending (P-H) ¶25,113 at 25,973 (HUDALJ Sept.19, 1995).

C. Respondents Karen and Paul Schmid are both Liable for the Discriminatory Statement Made by Karen Schmid

The duty of property owners not to discriminate is non-delegable. Consequently, property owners may be held liable for the discriminatory actions of their employees or agents. *U. S. v. Gorman Towers Apartment*, 2 Fair Housing-Fair Lending (P-H) ¶*15,942 at 15,942.4 (1994) (citing Walker v. Crigler*, 976 F. 2d 900 (4th Cir. 1992). If it is established that the agent of a defendant has engaged in discriminatory conduct in violation of the Act, the defendant will be held liable. *See Gorman* at 15,942.4 (citing *Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F. 2d 1086 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2961 (1993). It is well-settled agency law that a principal may be held liable for the discriminatory conduct of his agent if such acts took place within the scope of the agent's apparent authority, even if the principal neither authorized nor ratified the acts. *Gorman*, at 15,942.5.

In the case *sub judice*, the owners of the complex are Paul and Karen Schmid. As co-owners they are agents for each other. Karen Schmid screened the prospective tenants and she acted for her husband in communicating with prospective tenants about the vacant unit. Tr. at 38-39. *See HUD v. Bucha*, 2 Fair Housing-Fair Lending (P-H) ¶25,046 at 25,456 (HUDALJ May 20, 1993) (owner who employs manager and rental agent is a principal who is liable for the wrongful acts of his agent). Paul Schmid is vicariously liable for his wife's statement. Accordingly, Respondents are jointly and severally liable for Mrs. Schmid's statement in violation of the Act.

Remedies

The Act provides that where an administrative law judge finds that a respondent has engaged in a discriminatory housing practice, 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 other equitable relief." 42 U.S.C. § 3612(g)(3). A civil penalty may also be imposed. *HUD v. Cabusora*, 2 Fair Housing - Fair Lending (P-H) ¶ 25,026 (HUDALJ, Mar. 23, 1992).

Emotional Distress, Embarrassment and Humiliation

It is well established that the damages that may be awarded under the Act include damages for embarrassment, humiliation and emotional distress caused by acts of discrimination. Such damages can be inferred from the circumstances, as well as proven by testimony. *HUD v. Blackwell*, Fair Housing-Fair Lending (P-H) ¶ 25,001 at 25,011 (HUDALJ Dec. 21, 1989), *aff'd*, 908 F.2d 864 (11th Cir. 1990). Because these intangible type of injuries cannot be measured quantitatively, courts do not demand precise proof to support a reasonable award of damages. *See Marable v. Walker*, 704 F.2d 1219, 1220 (11th Cir. 1983); *Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1245 (8th Cir. 1983). Key factors in such a determination are the complainant's reaction to the discriminatory conduct and the egregiousness of the respondent's behavior. Schwemm, *Housing Discrimination*, § 25.3(2)(c) (1990). [6]

---

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

The Charging Party asserts that the discriminatory statements to Complainant by Mrs. Schmid caused emotional distress for which she and her son should be compensated. It seeks $1500.00 for Ms. Herman's emotional distress and $750.00 for Justin's emotional distress. In addition, it seeks a $2000.00 civil penalty.

The Charging Party argues that Ms. Herman suffered emotional distress as a direct result of Mrs. Schmid's discriminatory statements in the form of anger, upset, and worry. The Complainant testified that she was angered and outraged by the statement refusing to rent to her because she had a child. She was also offended by Respondent's statements, since she thought that it inappropriate to equate children with pets and not allow either. Further, Ms. Herman believed she was "treated badly." Mrs. Schmid was "very abrupt" and "nasty" to her during the telephone conversation. Finally, as a single parent who was struggling financially, Mrs. Schmid's statement of rejection added to the normal anxiety involved in Ms. Herman's search for an apartment. Hearing Mrs. Schmid's statement caused her to worry that she might again be denied an apartment because of her child.

Ms. Herman told her son about the conversation. According to her, Justin was "upset" and "insulted" by the discriminatory remarks. He, too, did not like being compared to pets or being stereotyped. He was not a toddler who would fall into the swimming pool. He said: "I'm not a little kid." Tr. at 20.

Shortly after her conversation with Mrs. Schmid, Ms. Herman called H.O.M.E. and reported the incident. She talked to Mrs. Mujahid-Moore. According to Mrs. Mujahid-Moore, Ms. Herman was "very upset," was "shaking in her voice" and "very determined that she should not be treated this way." Subsequently, when Mrs. Mujahid-Moore telephoned Ms. Herman to inform her of the results of their investigation, she was said to have become "angry all over again" and "outraged" that Mrs. Schmid continued to make discriminatory statements. Tr. at 21, 28, 29.

Respondents argue that the Charging Party has failed to show that Ms. Herman suffered any recoverable damages as a result of the actions of Mrs. Schmid. They assert: (1) that the Charging Party has submitted mere assertions of the alleged emotional distress and that more than mere assertions of emotional distress is required to establish compensable emotional distress; (2) that a reasonable complainant who heard Mrs. Schmid's statements would not have suffered compensable emotional distress; (3) that Complainant and her son attributed their alleged emotional distress to those portions of Mrs. Schmid's statements that are lawful; and (4) that any emotional distress suffered by Complainant and her son resulted from a denial of housing, and since the Schmids could lawfully deny them housing, Complainants have suffered no emotional distress caused by the Respondents.

With regard to their first argument, Respondents argue that the Charging Party produced no proof that the Complainant was treated for her alleged emotional distress, and no proof that her employment, or her performance at work, or her relationship with others was adversely impacted by her emotional distress. Citing *Morgan v. HUD*,

985 F. 2d 1451, 1459 (10th Cir. 1993), they argue that more than mere assertions of emotional distress is required to establish compensable emotional distress.[7]

Respondents' reliance on *Morgan* is misplaced. What the court found missing in *Morgan* was proof of a causal connection between the illegal action of respondent and the complainant's injury. There is no such missing link in the instant case.[8] The court in *Morgan* recognized that damages from emotional distress "may be inferred from circumstances beyond the ordinary in addition to being proven by testimony." It also acknowledged that recovery is not barred by the fact that damages for such distress are not capable of precise measurement. 985 F. 2d at 1459. Further, case law makes it clear that a complainant's testimony of general distress, if deemed credible, is sufficient basis to justify an award for emotional damages. Although proof of treatment for emotional distress and evidence that activities of daily living have been affected are relevant, these factors go to the assessment of the amount of damage, not to the fact of damages itself. *See Marable v. Walker*, 704 F. 2d 1219 (11th Cir. 1983). *See also HUD v. Schuster*, 2 Fair Housing Fair Lending (P-H) ¶25,091 at 25,836 (HUDALJ Jan.13,1995).

As to their second challenge to the damages claimed, Respondents assert that the statement Mrs. Schmid made shows she acted and spoke out of fear for the safety of children who might hurt themselves in the swimming pool on their property. Thus, they argue, no reasonable listener who heard Mrs. Schmid's statement could have concluded that she spoke or acted out of any maliciousness or intent to hurt another's feelings. At the very worst, the reasonable complainant would have felt mildly annoyed by Mrs. Schmid's statement because of the resultant need to continue the search for an apartment.

Respondents have used the reasonable complainant standard in arguing the unreasonableness of the damages sought in this case. However, Respondents who discriminate in housing must take their victims as they find them and compensate them accordingly. *See, e.g., HUD v. Kogut*, 2 Fair Housing -Fair Lending (P-H) ¶25,100 at

---

[7]Complainant's testimony as to her distress was corroborated by the testimony of Mrs. Mujahid-Moore of H.O.M.E. *See* pg. 9, *infra.*

[8]Except as to Respondents' third argument. (*See* pg. 11, *infra.*)

25,905-06 (HUDALJ Apr. 17, 1995), *citing Williamson v. Handy Button Mach. Co.*, 817 F. 2d 1290, 1294 (7th Cir. 1987), and *HUD v. Las Vegas Housing Authority*, 2 Fair Housing- Fair Lending (P-H) ¶25,116 at 26,007 (HUDALJ Mar. 1, 1996). In the case of a particularly sensitive complainant, judges must take into consideration the susceptibility to injury of that complainant, and damages must be awarded based on the injuries actually suffered. *HUD v. Kelly*, 2 Fair Housing- Fair Lending (P-H) ¶25,034 at 25,362

(HUDALJ Aug. 5, 1991); *HUD v. Nelson Mobile Home Park*, Fair Housing-Fair Lending (P-H) ¶25,063 at 25,613 (HUDALJ Dec. 2, 1993).

In Ms. Herman's case, the evidence supports a finding that she was a particularly sensitive complainant. Only eight months before October, 1997, Ms. Herman was forced to move because her landlord would not accept the Section 8 voucher she had obtained. She had moved into another apartment and now had been told by her new landlords that they wanted the apartment for their daughter. Once again she had to undertake an apartment search. Having to move twice in less than a year created a level of anxiety in Ms. Herman which existed at the time of her encounter with Mrs. Schmid.

Further, as a financially struggling single parent of a school-age child, Ms. Herman knew that her options were limited. Ms. Herman's landlord told her that she had until February 1998 to move out of her apartment. As a Section 8 tenant she knew she had to start looking early because it would take time for the Section 8 administrators to inspect and approve an apartment and to complete the necessary paperwork. In addition, Ms. Herman wanted to move at an appropriate break in her son's school year, so she immediately initiated the search for a new home.

Finally, by the time of the call to Mrs. Schmid, Ms. Herman was already in a highly emotional state from her apartment search, having been sensitized to the fact that having a child made it more difficult to find a suitable place to rent. Before she called Mrs. Schmid, Ms. Herman had experienced a situation where the prospective landlord had reacted negatively to the thought of renting to her because of her son. He was concerned that her son was almost a teenager and thought there might be a problem with his friends coming around. Tr. at 20. Against this backdrop, Mrs. Schmid's statement that she would not rent to her because she had a son upset Ms. Herman very much and exacerbated her concern about her ability to find a suitable home. Considering herself a responsible parent, she became more upset and angry when Mrs. Schmid ignored her assessment that the pool was an acceptable risk for her son, and abruptly hung up the telephone on her. She believed she had been treated badly. Tr. at 18 -21. All of these factors must be considered in determining Ms. Herman's susceptibility to injury in this case.

Respondents contend that neither Ms. Herman nor Justin is entitled to damages because the statements which the Charging Party claims to have caused the their emotional distress were lawful statements. They point to Ms. Herman's testimony that she and her son were offended and suffered emotional distress because Mrs. Schmid put children and pets "on the same level," and argue that neither Complainant is entitled to compensation for distress that resulted from that statement because it was a lawful, albeit insulting statement. This contention has merit. In order for damages to be awarded, the injury must be linked to an unlawful act. The "ordinary listener" standard is used to determine whether a statement is violative of the Act. On this record, there is nothing illegal about Mrs. Schmid saying she did not want to rent to someone with pets. Further, the ordinary listener, upon hearing the statement "I don't want to rent to children or pets" would not have perceived that Mrs. Schmid was comparing children with pets. Thus, there is no causal connection between a statement which is violative of the law and Complainants' distress resulting therefrom. Accordingly, no portion of the damages awarded in this case is attributable to the emotional distress suffered by Complainant and her son as a result of their perception that Mrs. Schmid equated children with pets.

Finally, Respondents argue that Ms. Herman was distressed not by Mrs. Schmid's statement but rather by the denial of the opportunity to rent the Schmid's apartment. They argue further that since denial of housing is not a legitimate basis for recovery of damages in this case, compensation should be denied. *See HUD v. Denton*, Fair Housing-Fair Lending (P-H) ¶25,024 at 25,281 (HUDALJ Feb. 7, 1992) and *HUD v. Dellipaoli*, 2 Fair Housing-Fair Lending (P-H) ¶25,127 (HUDALJ Jan. 7, 1997).

Respondents' argument that Ms. Herman's testimony shows that her distress was caused by the denial of housing and not by the statement itself, is not persuasive. Ms. Herman has not claimed damages for loss of housing opportunity. She has claimed damages from distress caused only by the utterance of the statements. Part of that distress was the fear generated in her by the statement that she might face similar discrimination in the future. Such fear has been compensated in past cases. *See, e.g., HUD v. Gruzdaitis*, 2 Fair Housing -Fair Lending (P-H) ¶25,136 at 26,120 (HUDALJ Aug. 14, 1998) where the court in assessing damages considered the complainant's testimony that, as a result of respondent's statement and conduct, she felt incapable of inquiring about any other apartment for nearly a month. *See also HUD v. Jancik*, Fair Housing - Fair Lending ¶ 25,058 at 25,569 where a Black tester was awarded $2000.00 for emotional distress resulting from statement of inquiries made about her race. Part of the tester's distress came from her belief, based on having been discriminated against in the past, that if she revealed her race to the owner, he would not allow her to see the apartment.

The goal of a damage award in a housing discrimination case is to try to make the

victim whole. The awards of damages for emotional distress caused by being subjected to discriminatory statements range from the relatively small amount of $500.00 in *HUD v. Dellipaoli*, Fair Housing-Fair Lending (P-H) ¶25,127 at 26, 072 (HUDALJ Jan. 7, 1997), to $25,000.00 in *HUD v. Gruzdaitis*, Fair Housing-Fair Lending (P-H) ¶25,136 at 26,119 (HUDALJ Aug. 14, 1998).

The Charging Party seeks $1500.00 in compensation for Ms. Herman's emotional damages. That amount is reasonable. Ms. Herman was an especially sensitive victim. She was a single mother who was financially struggling to provide for her family. Not only was she upset and angered, humiliated and embarrassed by Mrs. Schmid's discriminatory stereotyping of her child, but since she had been searching for an apartment for some time, and had previously experienced a landlord who showed reluctance to rent to woman with a teenage boy, hearing Mrs. Schmid's discriminatory statement increased her anxiety about her ability to find satisfactory housing. Additionally, she was embarrassed and humiliated by the rude and hostile way Mrs. Schmid spoke to her. Considering all these circumstances, I find the amount which the Charging Party seeks to compensate Ms. Herman for her emotional distress, embarrassment and humiliation to be reasonable. Accordingly, I award the $1,500.00 sought. As noted above, no portion of the damages awarded to Ms. Herman is attributable to the emotional distress she suffered as a result of her perception that Mrs. Schmid equated children with pets.

The Charging Party has sought $750.00 in compensation to Justin. I conclude that $500.00 is more appropriate. Justin did not hear the statement directly from Karen Schmid. It was told to him by his mother. Further, his feelings of insult and anger from being compared to a pet is not compensable. And, a $500.00 award is consistent with previous similar cases. *See, e.g., HUD v. Schuster*, a Fair Housing -Fair Lending (P-H) ¶ 25,019 at 25,836 (HUDALJ May 13, 1995) where two daughters who had been told by their mother of the discriminatory statement were awarded $500.00 each. Like Justin in the instant case, they felt insulted by the offender's attitude about children and perplexed by the discriminatory statement.

<u>Out-of-Pocket Loss</u>

Complainant seeks compensation in the amount of $26.20 for economic losses. This is said to represent the additional expense Ms. Herman incurred in communicating with HUD, H.O.M.E., and traveling to the hearing. Tr. at 22, 29.

Respondents argue that the out-of-pocket damages are too speculative to justify an award of $26.20.

The amount of out-of-pocket expenses is small, and it is likely that Complainant incurred some expenses relating to the prosecution of this matter. However, I agree with Respondents that on this record the amount of out-of-pocket expenses has not been adequately proven. Any amount of reimbursement would be based on speculation. *See HUD v. Rollhaus*, Fair Housing -Fair Lending (P-H) ¶25,019 at 25,250 (HUDALJ Dec. 9, 1991). Accordingly, reimbursement will be denied.

Civil Penalty

To vindicate the public interest, the Act also authorizes an administrative law judge to impose a civil penalty upon a respondent who has been found to have discriminated in violation of the Act. 42 U.S.C. § 3512(g)(3)(A). A maximum penalty of $11,000.00 may be assessed if a respondent has not been adjudged to have committed any prior discriminatory housing practice. 24 C.F.R. § 180.670 (b) (3) (iii) (A) (2). However, assessment of a civil penalty is not automatic. The Congress indicated that in ascertaining the amount of the civil penalty, this tribunal "should consider the nature and circumstances of the violation, the degree of culpability, any history of prior violations, the financial circumstances of the Respondent and the goal of deterrence, and other matters as justice may require." H.R. Rep. N. 711, 100th Cong. 2d Sess. at 37 (1988). *See also HUD v. Jerrard*, Fair Housing-Fair Lending (P-H) ¶ 25,000 at 25,096 (HUDALJ Sept. 28, 1990).

The Charging Party seeks a civil penalty of $2,000.00 against Respondents. It argues that a civil penalty in that amount is warranted due to the nature and circumstances of the violation. It argues that Karen Schmid's statement showed an unreasonable blanket prohibition against children and that based on the H.O.M.E. test results, she had a practice of making discriminatory statements which showed a careless disregard for the impact of her statements on families with children. The assessment of a civil penalty, the Charging Party argues, would send a strong message that the Government will not tolerate the making of discriminatory statement in rental negotiations and deter others who would be inclined to make similar injurious statements.

Respondents argue that they should not be assessed a civil penalty because the conduct represented their concern for the safety of children, and was not based on any malicious feelings against families with children. I conclude that a civil penalty is warranted, but not in the amount requested.

Nature and Circumstances of the Violation

The nature and circumstances of the violation in this case warrant imposition of a

modest penalty. The Respondents' conduct was serious, although not such as to warrant the maximum penalty, nor the amount sought by the Charging Party. Based on the evidence, including the statement in the Charge itself, Mrs. Schmid's statement was motivated exclusively by concern for the safety of children who might hurt themselves in the swimming pool on the property. Further, the evidence shows that she was either uninformed or misinformed about the right to make the statement in question. No intentional violation of the Fair Housing Act has been proved.

Degree of Culpability

Neither Respondent is a real estate broker and the testimony showed that this husband-wife couple owned only this dwelling. They had no prior knowledge that the statement made violated any law. The evidence does not demonstrate that Mrs. Schmid acted with careless disregard for the Fair Housing Act. On the other hand, owners of rental property are bound to know the law and to adhere to its mandates. *See Morgan v. HUD*, 985 F. 2d 1451 (1993) and *HUD v. Bucha*, 2 Fair Housing - Fair Lending (P-H) ¶25,046 at 25,458.

History of Prior Violations

In this case, there is no evidence that either Respondent has been adjudged to have committed any previous discriminatory housing practices. Thus, the maximum civil penalty that may be assessed against Respondents in this case is $11,000. 42 U.S.C. § 3612(g)(3)(A) and 24 C.F.R. § 180.670.

Respondents' Financial Circumstances

Evidence regarding Respondents' financial circumstances is peculiarly within their knowledge, so they have the burden of producing such evidence for the record. If they fail to produce credible evidence which would tend to mitigate against assessment of a civil penalty, a penalty may be imposed without consideration of financial circumstances. *See Campbell v. United States*, 365 U.S. 85, 96 (1961); *HUD v. Blackwell*, 2 Fair Housing-Fair Lending (P-H) ¶25,001, 25,015 (HUDALJ Dec. 21, 1989), *aff'd*, 908 F.2d 864 (11th Cir. 1990). There is testimony that Respondents own no other property and that their assets are limited. However, the extent of Respondents' assets and liabilities is not known. Respondent Schmid testified that he earns about $30,000 yearly, and that his wife also earns an income from teaching music, although the amount was not stated. I find that Respondents have failed to present evidence to establish that payment of a civil penalty would cause them undue financial hardship.

Goal of Deterrence

An award of some civil penalty is appropriate as a deterrence to Respondents as well as to others. In this case, Respondent Paul Schmid stubbornly insisted that his wife had a right to make the statement in question, even after having been informed that the making of the statement to Ms. Herman violated the law. Further, others similarly situated must be put on notice that violators of the Fair Housing Act will incur serious consequences. Housing providers must be put on notice that the making of discriminatory statements to prospective tenants will not be tolerated.

Based on consideration of the above five elements, I conclude that a civil penalty of $500.00 is warranted. The making of the statement was motivated by concern for the safety of children. On the other hand, both Mr. and Mrs. Schmid were bound to know and follow the law. Finally, the civil penalty is being assessed jointly and severally against both Paul and Karen Schmid. Although Karen Schmid made the statement in question, Paul Schmid at hearing condoned the making of the statement by his wife. He asserted her right to make the statement even after this court had ruled in the default order that the making of the statement violated the law.

Injunctive Relief

The administrative law judge may order injunctive or other equitable relief to make the complainant whole and to protect the public interest in fair housing. 42 U.S.C. § 3623(g)(3). "Injunctive relief should be structured to achieve the twin goals of insuring that the Act is not violated in the future and removing any lingering effects of past discrimination." *Blackwell*, 908 F. 2d at 874 *(quoting Marable v. Walker*, 704 F. 2d at 1219, 1221 (11th Cir. 1983)).

The purposes of injunctive relief in housing discrimination cases include eliminating the effects of past discrimination, preventing future discrimination, and positioning the aggrieved persons as close as possible to the situation they would have been in but for the discrimination. *See Park View Heights Corp. v. City of Black Jack*, 605 F. 2d 1033, 1036 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980). *See also Blackwell*, 908 F. 2d at 874. The relief is to be molded to the specific facts of the case.

The Charging Party seeks injunctive and other equitable relief in light of the violation. It asks that Respondents be permanently enjoined from discriminating against families with children in violation of § 3604(c). The appropriate injunctive relief for this case is provided in the Order below.

CONCLUSION AND ORDER

The preponderance of the evidence demonstrates that Respondents Karen and Paul Schmid discriminated against Complainants Gayle Herman and Justin Herman on the basis of familial status in violation of 42 U.S.C. § 3604(c). The evidence also establishes that as a result of Respondents' unlawful actions, the Complainants have suffered injuries which must be remedied by an award of compensatory damages. In addition, to protect and vindicate the public interest, injunctive relief is necessary and a civil penalty must be imposed against Respondents. Accordingly, the following Order is entered.

ORDER

Having concluded that Respondents discriminated against Complainants in violation of 42 U.S.C. § 3604© of the Fair Housing Act, it is hereby **ORDERED** that:

1. Respondents are permanently enjoined from: making, printing, or publishing any statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on familial status, or on any other basis prohibited by the Fair Housing Act;

2. Within thirty (30) days of the date on which this Order becomes final, Respondents Karen and Paul Schmid shall pay actual damages in the amount of $1500.00 for compensation of Complainant Gayle Herman's emotional distress and humiliation;

3. Within thirty (30) days of the date on which this Order becomes final, Respondents Karen and Paul Schmid shall pay actual damages in the amount of $500.00 for compensation of Complainant Justin Herman's emotional distress and humiliation; and

4. Within thirty (30) days of the date on which this Order becomes final, Respondents Karen and Paul Schmid shall pay a civil penalty of $500.00 to the Secretary, United States Department of Housing and Urban Development.

This **Order** is entered pursuant to 42 U.S.C. § 3612(g)(3) and 24 C.F.R. § 180.670, 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.

CONSTANCE T. O'BRYANT
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION AND ORDER issued by CONSTANCE T. O'BRYANT, Administrative Law Judge, in HUDALJ 02-98-0276-8, were sent to the following parties on this 15th day of July, 1999, in the manner indicated:

_____
Chief Docket Clerk

REGULAR MAIL:

Gayle Herman
6417 Transit Road, Apt. #1
East Amherst, NY 14051

Home Opportunities Made Equal, Inc.
700 Main Street
Buffalo, NY 14202-1909

Paul and Karen Schmid
1128 Englewood Avenue
Tonawanda, NY 14223

James W. Grable, Esq.
1020 Liberty Building
420 Main Street
Buffalo, NY 14202

Arlene C. Vasquez, Esq.
Office of Counsel
U.S. Department of Housing and
Urban Development
26 Federal Plaza, Room 3500
New York, NY 10278-0068

INTER0FFICE MESSENGER:

Eva M. Plaza, Assistant Secretary
for Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 5100
Washington, D.C. 20410

Harry L. Carey, Assistant General Counsel for Fair Housing
for Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 5100
Washington, D.C. 20410

Jonathan Strong, Deputy Assistant General Counsel for Fair Housing
for Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 5100
Washington, D.C. 20410