UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary of Housing and Urban Development, on behalf of Lucia T. Terrizzi, Charging Party, v. Theresa and Francesco Dellipaoli, Respondents.	HUDALJ 02-94-0465-8 Decided: January 7, 1997

Gabriel M. Ambrosio, Esquire
For the Respondents

Nicole K. Chappell, Esquire
For the Secretary

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 Lucia T. Terrizzi ("Complainant"), alleging discrimination in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601-3619. On April 18, 1996, 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 Theresa and Francesco Dellipaoli, alleging that they had engaged in a discriminatory housing practice in violation of 42 U.S.C. § 3604(c) of the Fair Housing Act ("Act") and 24 C.F.R. §§ 100.75 (a),(b), and (c)(1). The charge alleged that Respondents violated the Act when Mrs. Dellipaoli made a statement to

Ms. Terrizzi with respect to the rental of a dwelling that indicated a limitation or preference based on familial status.

The Charging Party withdrew the original Charge which had named Lucia T. Terrizzi as the sole Complainant, and on June 12, 1996, filed a new charge which included Ms. Terrizzi's 17 year old son, Jesse Andrew Wyatt, as an additional aggrieved party. However, the Charging Party's post-trial brief refers only to one complainant, Ms. Lucia T. Terrizzi. Accordingly, this decision addresses only Ms. Terrizzi as an aggrieved party.

A hearing was held on August 20, 1996 in Lyndhurst, New Jersey. At the hearing Respondents made an oral motion for involuntary dismissal under Rule 41(b), Federal Rules of Civil Procedure. That motion was denied. Both parties submitted post-hearing briefs. The case is now ready for decision.

Respondents deny that Theresa Dellipaoli made any discriminatory statement to Complainant and assert that even if she did, Respondents could not be guilty of a violation under § 3604 of the Act because they enjoyed an exemption from the prohibitions of § 3604 pursuant to § 3604(b)(2).

Findings of Fact

1. The Complainant, Lucia Terrizzi, is a single mother of three sons. Tr[1]36, 40, 59, 112-114. At the time of the alleged discrimination, the youngest of the three sons, Jesse Andrew Wyatt, then age 17, lived with her at 248 Forest Avenue, their home over the past year-and-a-half. Tr. 33-34, 36-37. Ms. Terrizzi and her son were forced to move from that address in 1994 because the residence failed inspection. Tr. 37, 69. Ms. Terrizzi looked into a number of rental units. On July 24, 1994, she observed a newspaper advertisement *in the South Bergenite* which read, "Lyndhurst - 6 rooms, near New York bus. Ideal for 2 people. No pets. Call 438-4405." Tr. 38; G-1.

2. Respondents Theresa and Francesco Dellipaoli are the owners of the property in question, a two-family, owner-occupied, six-room dwelling located at 10 Page Avenue, Lyndhurst, New Jersey. Tr. 191-92. The Dellipaolis reside on the lower level of the

[1]The following abbreviations are used throughout this decision: "Tr." for hearing transcript and "G-#" for Government (HUD) Exhibit number.

dwelling, and rent out the upper level. Tr. 192. They have done so for nearly 16 years. Tr. 161, 192-93. They own no other residential properties. Tr.194; Charge ¶6.

3. During the 16 years of renting the upper level of the property, Respondents have rented to a total of four families. Tr. 161, 192-93.

4. On July 27, 1994, Complainant telephoned the number advertised in the *South Bergenite* and spoke to Theresa Dellipaoli. Mrs. Dellipaoli asked Ms. Terrizzi how many persons would reside in the apartment. Tr. 39-40. Ms. Terrizzi responded that she and her teenage son would occupy the apartment, and reminded Mrs. Dellipaoli that the advertisement stated "two people" and that she qualified under that term. Mrs. Dellipaoli then told Ms. Terrizzi that teenagers were not permitted. Tr. 40, 48, 109-110, 120. Ms. Terrizzi retorted that the advertisement did not state "no children permitted" or "for adults only" and, realizing that prohibiting children was a probable violation of the law, threatened to report Mrs. Dellipaoli to the housing authority if she didn't reconsider. Undaunted, Mrs. Dellipaoli told Ms. Terrizzi to "go right ahead." Tr. 40, 89, 120.

5. On August 2, 1994, Ms. Terrizzi filed a complaint of housing discrimination. In it she alleged that on July 24, 1994, she had been discriminated against for rental occupancy by a person known as "Theresa" at the 10 Page Ave., Lyndhurst, New Jersey address. She stated that she believed she had been discriminated against because of the presence of a child under the age of 18. G-1, 2.

6. Mrs. Dellipaoli's denial that she made the statement "no teenager permitted" is not credible.

7. As a result of Respondents' discriminatory statement, Complainant, a single mother for much of her adult life, suffered emotional distress. Tr. 63-65. She felt "traumatized," "shocked," and "offended." She experienced anguish, felt demeaned because she had a child and felt like a second-class citizen. Tr. 40-41, 58-59, 112, 120-125.

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.

Violation of 42 U.S.C. § 3604(c)

The Charging Party alleges as a violation of 42 U.S.C. § 3604(c) Theresa Dellipaoli's statement to Ms. Terrizzi that no teenagers were allowed to rent the upstairs' unit. (*Charge*, ¶15). Section 3604 provides that, as made applicable by § 3603 and except as exempted by §§ 3603(b) and 3607, it shall be unlawful:

> (c) To make, print, or publish, or cause to be made, printed, or published any notice, 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 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 indicate 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"[2] that a particular protected class is preferred or "dispreferred" for the housing. *HUD v. Gwizdz,* Fair Housing-Fair Lending (P-H) ¶25,086 at 25,793 (HUDALJ, Nov. 1, 1994)*citing Soules v. HUD*, 967 F. 2d 817, 824 (2d Cir. 1992);*Guider v. Bauer*, 865 F. Supp. 492, 495 (N.D. Ill. 1994);*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,* 502 U.S. 821 (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).

After considering all the evidence, and the "ordinary listener" test as applied to the facts in this case, I conclude the following:

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[2]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. Respondent Theresa Dellipaoli made a discriminatory statement under § 3604(c)

Proof of the making of discriminatory statements may be by direct evidence. Statements by "a person engaged in the sale or rental of a dwelling" that (1) convey that housing is unavailable because of familial status or (2) express a preference for or limitation on renters because of familial status violate the Act. 42 U.S.C. § 3604(c); 24 C.F.R. § 100.75(a)(b)(c)(1) and (2).

Respondents argue that the Charging Party has failed to meet its burden of proof on the making of the discriminatory statement in question in that Ms. Terrizzi's testimony that Mrs. Dellipaoli made the discriminatory statement is countered by Mrs. Dellipaoli's credible denial. I agree that the finding turns on the credibility of these two witnesses. However, I credit the testimony of Ms. Terrizzi.

In ruling on credibility, I considered the testimony given by each witness, the demeanor of each witness while testifying, each witness' ability to recall the conversation, any interest or bias each might have had, the consistency of the statements made, and the reasonableness of each witness' testimony in light of all the evidence of record.

Ms. Terrizzi's version of the conversation is that she saw a copy of the ad in the newspaper and called the telephone number listed therein. Mrs. Dellipaoli answered. Ms. Terrizzi asked questions of Mrs. Dellipaoli, including the amount of rent being sought. Mrs. Dellipaoli's reply was "it all depends." Ms. Terrizzi was puzzled by that response. She then asked "where is it?," seeking the location of the apartment, whereupon Mrs. Dellipaoli asked Ms. Terrizzi who, besides herself, would be renting the apartment. Tr. 39-40. When Ms. Terrizzi responded that her teenage son would reside with her, Mrs. Dellipaoli stated "No, no, no. No teenagers permitted." Tr. 40. Ms. Terrizzi then said to Mrs. Dellipaoli: "Do you realize what you are doing?"... " Well, I am going to have to report you to the [housing] authorities[3]."Mrs. Dellipaoli dared her to do so, saying "Well, go right ahead." Mr. Terrizzi then hung up. Tr. 40.

In denying that she made the statement testified to by Complainant, Theresa Dellipaoli testified that Ms. Terrizzi began the phone conversation in question by asking how much the rent was. Before Mrs. Dellipaoli responded to that question, she asked

[3]Ms. Terrizzi saw the Equal Housing Opportunity logo right next to the ad, and it included "details about familial status." Tr. 40.

Ms. Terrizzi "how many people are in your family?" Ms. Terrizzi became irate and began screaming at Mrs. Dellipaoli telling her that she discriminated against her, and then hung up on her without giving Mrs. Dellipaoli chance to say anything further. Tr. 195 - 199; 204.

The problem with Mrs. Dellipaoli's version of the conversation is that although Ms. Dellipaoli denied that she made a discriminatory statement of any kind, she corroborated Ms. Terrizzi's testimony that during the conversation Ms. Terrizzi accused her of discrimination. Tr. 204. Mrs. Dellipaoli gave no testimony that would explain why Ms. Terrizzi would have become irate by the question "how many people would be renting?" The ad stated that the unit was "ideal for two people." Ms. Terrizzi was only interested in renting for two people. Respondents have offered no theory to explain why Ms. Terrizzi would have brought up the question of discrimination and have threatened Mrs. Dellipaoli with a complaint of housing discrimination if Mrs. Dellipaoli had said nothing suggesting discrimination. Further, it lends credence to Ms. Terrizzi's account that she followed up by going to the fair housing office and filing a complaint of discrimination -- a complaint based on *familial status.* Accordingly, I credit Ms. Terrizzi's testimony that Mrs. Dellipaoli stated she did not wish to rent to a family with a teenager and reject Mrs. Dellipaoli's testimony to the contrary.

Further, I find that Mrs. Dellipaoli made the statement while engaging in a conversation with regard to the rental of housing property. Mrs. Dellipaoli is the owner and occupant of the property in question and made the statement while talking to Complainant, a prospective tenant. An ordinary listener would interpret the statement as expressing a preference against, and discouraging renting to, families with children in the upstairs' unit. Accordingly, I find that Respondent Theresa Dellipaoli made a statement of preference with respect to the rental of property in violation of § 3604(c).

B. The Charge of Making an Unlawful Statement is Not Barred in this case by the Exemption Found at § 3604(b)

Respondents claim that this charge is barred by the exemption provision of § 3604. Respondents assert that this exemption is found at § 3604(b) and 24 C.F.R. § 100.10(c)(2).

It is axiomatic that those who claim the benefit of an exception to a statutory prohibition have the burden of proving that their claim comes within the exception. *Guider v. Bauer,* 685 F. Supp. 492, 495 (N.D. Ill. 1994). The courts have made clear that they will strictly construe the exemptions to Title VIII's general coverage. *See United States v. Columbus Country Club,* 915 F.2d 877, 883 (3rd Cir. 1990), *cert denied,* 501

U. S. 1205 (1991) describing respondents' exemption claim as an affirmative defense and stating that exceptions to a general statute are to be strictly construed; *HUD v. Murphy*, P-H, Fair Housing-Fair Lending ¶25,002 at p. 25,004 (HUDALJ 1990); *See also City of Edmonds v. Oxford House, Inc*, 115 S.Ct. 1776, 1780 (1995); *Singleton v. Gendason*, 545 F.2d 1224, 1227 (9th Cir. 1976) (reading the § 3603(b)(1) exemption broadly "would be contrary to the spirit of Title VIII"); *United States v. Hughes Memorial Home*, 396 F. Supp. 544, 550 (W.D. Va. 1975).

The Fair Housing Act contains seven exemptions from its general mandate in § 3604. Two of these are found in § 3603(b). 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 dwelling that is the subject of this case is an owner-occupied, two-family dwelling. However, the provisions of § 3604(c) of the Act are specifically carved out of the § 3603 exemptions, thus, the ban on discriminatory advertising, notices and statements in § 3604(c) is not subject to these exemptions. Section 3603(b)(2)) reads in pertinent part, as follows:

> Nothing in § 3604 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 each other, if the owner actually maintains and occupies one of such living quarters as his residence. [emphasis added]

Thus, contrary to Respondents' assertion, the clear language of § 3604(b)(2) provides that subsection (c) of § 3604 is not a part of the § 3603(b) exemption.

Respondents argue, nonetheless, that the conversation between Ms. Terrizzi and Mrs. Dellipaoli was nothing more than negotiation between two parties over possible rental of the unit. They argue that the purpose of the exception from the exemption was to preclude otherwise exempt individuals from exercising their discriminatory preferences through advertising or by using the *media as a conduit* and that statements of preference made in negotiations between the parties (and not using the media) are exempted from the exception under 42 U.S.C. § 3604(b). They argue that it makes no sense that Congress gave owner-occupiers of 2 - 4 family dwellings the right to discriminate in choosing who they want to live in their home, but did not give them the right to convey to the prospective buyers the reason for their choice. To have done so, Respondents state,

would suggest that Congress adopted a "if asked then lie" policy, with the result that an owner-occupier of a 2 - 4 family dwelling can discriminate, but can do so only under the cloak of secrecy. Respondents do not believe that Congress intended this result.

In support of their argument, Respondents have seized upon language from the Secretary's regulations interpreting the Act as it relates to exemptions to § 3604. The regulation at 24 C.F.R. § 100.10(c) provides that:

> Nothing in this part, other than prohibitions against *discriminatory advertising*, applies 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 each other, if the owner actually maintains and occupies one of such living quarters as his or her residence. [emphasis added]

Respondents rely on the above-stated regulation to argue that only discriminatory advertising is excepted from the exemption, not oral statements.

HUD asserts that § 100.10(c)(2) must be read in conjunction with § 100.75(c)(1) and (2). Section 100.75(c)(1) includes the Secretary's interpretation of what is prohibited under § 3604(c). It provides that the prohibitions apply to "all written or oral notices or statements by a person engaged in the sale or rental of a dwelling" and that § 3604(c) prohibits "[e]xpressing to agents ... prospective sellers or renters ... a preference for or limitation on any ... renter because of ... familial status ... of such persons."

Respondents' reliance upon the stated exception to the exemption as found at § 100.10(c)(2) is not persuasive. Their very narrow reading of the regulation runs contrary to the clear wording of the statute and, therefore, must be rejected.

It is established case law that an agency's interpretation of a statute that it administers commands deference so long as it does not violate the plain meaning of the statute and is a permissible or reasonable construction of the law. *Chevron, U.S.A. v. Natural Resources Defense Council, Inc*, 467 U.S. 837, 842-44 (1984).

In construing a statute, legislative intent is first to be gathered from the plain meaning of the words of the statute, and it is presumed that statutory language is used in its ordinary sense, with the meaning commonly attributed to it, unless the contrary clearly appears. Each phrase in the statute must, if possible, be given effect. *United States v. Hunter,* 459 F.2d 205 (4th Cir.) *cert denied,* 409 U. S. 934 (1972).

The statutory provisions at issue, read:

> In § 3604: "As made applicable by § 3603 *and except as exempted by §§ 3603(b) and 3607*, it shall be unlawful ..."
>
> In § 3603(b)(2): "Nothing in § 3604 of this title *(other than subsection (c)* shall apply to ..."
>
> In § 3604(c) it is a discriminatory practice *["t]o make, print, or publish, ... any notice, statement, or advertisement, ..."* [emphasis added]

Thus, by the clear and unambiguous wording of the statute, the prohibitions against making any statement and printing any notice in § 3604(c) are excepted from the exemption provided in § 3604(b), not just discriminatory advertising.

That the prohibitions of § 3604(c) were intended to apply to more than advertisements has long been established. As the court stated in *Mayers v. Ridley*, Congress' use of the additional words "notices" and "statements" in § 3604(c) clearly shows that § 3604(c) was intended to "prohibit other types of communications besides advertisements." 465 F.2d 630, at 649 (D.C.Cir. 1972) (en banc) (Wilkey, J. concurring). And, utterances that suggest to an ordinary listener that a particular protected group is preferred or dispreferred for the housing in question violate the Act *Jancik v. HUD*, 44 F.3d 553, 556 (7th Cir. 1995) (*quoting from Ragin v. New York Times Co.*, 923 F. 2d 995 (2nd Cir. 1991)).

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 that it indicates discrimination based on a prohibited factor. *See* Schwemm, *Housing Discrimination*, §15.2(1)(2) (1990). As previously stated, § 3604(c) is not subject to the exemptions of § 3603(b) as are the other subsections of § 3604. This means that a homeowner whose dwelling is exempt under § 3603(b), though "free to indulge his discriminatory preferences in selling or renting that dwelling, [does not have] a right to publicize his intent to so discriminate." *United States v. Hunter*, 459 F. 2d at 213-14. *See also* Schwemm, *Housing Discrimination* § 15.2 (1) and (2). Thus, it can be seen that under § 3603(b)(2), Respondents as owner-occupiers of two-family dwellings are not protected when they violate § 3604(c).

In further support of their position, Respondents point to language in the case of *Holmgren v. Little Village Community Reporter*, 342 F. Supp. 510 (1971). In that case, the court in enjoining a newspaper from printing discriminatory advertising stated that the decision "does not, however, preclude the same sellers and landlords who are no longer permitted to express national origin preferences in newspaper ads from exercising such a preference in personal negotiations with prospective buyers and tenants, provided, of course, that the sellers and landlords come within the terms of 42 U.S.C. § 3603(b)." 342 F. Supp. at 512.

Respondents reliance upon the above-cited case is misplaced as well. First of all, the language Respondents point to is not the holding in the case, but *dicta*. Secondly, it does not support their contention that the exemption applies to protect discriminatory *statements* by a landlord to a prospective renter during negotiations. The court stated that its decision did not preclude landlords who meet the § 3603(b) criteria (owner occupier of 2-4 family dwelling) "from *exercising* a discriminatory preference in personal negotiations ... " (*emphasis added*). That a landlord who meets the criteria of § 3604(b) may *exercise* a discriminatory preference by renting to whomever he pleases is not in dispute. As the court stated in *Hunter*, where the landlord enjoys an exemption under § 3604(b), he is free to indulge his discriminatory preference by renting to whomever he wishes. 459 F.2d at 213-14. The issue in the instant case regards the landlords' making of a discriminatory *statement* to Complainant in violation of the prohibitions of § 3604(c), not their refusal to rent to her.

Respondents have not met their burden of proving that the § 3604(c) exception to the exemption found at § 3604(b) is limited to discriminatory advertising. I find that § 3604(b) does not exempt Respondents from the prohibition against making discriminatory statements to a prospective tenant with regard to rental of a dwelling unit.[4]

C. Respondent Francesco Dellipaoli is Liable for the Discriminatory Statement Made by Theresa Dellipaoli

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) (HUDALJ) 15,942 at 15,942.4 (1994) (*citing Walker v. Crigler*, 976 F. 2d 900 (4th Cir. 1992). In this case, the owners of the complex are Theresa and Francesco Dellipaoli. Theresa Dellipaoli screened the prospective tenants. There is no question that she acted

[4] Respondents' assertion that compliance with the Act would leave the owner no alternative but to "if asked then lie," is not accurate. The owner could choose to remain silent under the circumstances.

for her husband in communicating with prospective tenants about the vacant unit. Tr. 161-183. Accordingly, Respondents are jointly and severally liable for Mrs. Dellipaoli'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 ¶ 25,026 (HUDALJ, March 23, 1992). The damages which may be awarded include compensation for out-of-pocket expenses, embarrassment, humiliation and emotional distress where caused by the discrimination. *See e.g. HUD v. Blackwell,* 2 Fair Housing - Fair Lending ¶ 25,001 (HUDALJ, Dec. 21, 1989), *aff'd*, 908 F. 2d 864 (11th Cir. 1990).

The Charging Party asserts that the discrimination against Complainant "took the form of a denial of a rental because of familial status" and requests an award of $24,885.26 for emotional distress, loss of an important housing opportunity and for inconvenience caused by Respondents' discriminatory "actions" or "conduct." *Charge* ¶5; *Charging Party's Post-hearing Brief* at pp. 15-18. In support of the amount of award requested, it cites cases which involved denial of rental because of familial status in violation of § 3604(a) and (b) of the Act, not § 3604(c).

Respondents argue that the Charging Party has failed to show that Ms. Terrizzi suffered any recoverable damages as a result of the actions of Mrs. Dellipaoli. They assert that the "trauma" Ms. Terrizzi alleged she suffered was caused not as a result of the two-minute telephone conversation she had with Mrs. Dellipaoli and the statement allegedly made to her but as a result of the mounting pressures she was facing, including being forced to move out of her apartment. These were more likely the cause of her distress than the two-minute telephone conversation she had with Mrs. Dellipaoli. *Respondents' post-hearing Brief* at pp.8-9.

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 December 21, 1989), *aff'd*, 908 F.2d 864 (11th Cir. 1990). Because intangible injuries cannot be measured quantitatively, courts do not demand precise proof to support a reasonable award of damages for such injuries. 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).[5]

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 in these cases range from a relatively small amount, e.g., $150.00 in *HUD v. Murphy*, Fair Housing-Fair Lending (P-H) ¶ 25,002, awarded to a party who "suffered the threshold level of cognizable and compensable emotional distress" (at 25,079), to substantial amounts, e.g., $175,000. *See HUD, et al v. Edith Marie Johnson*, HUDALJ 06-93-1316-8 (July 26, 1994).

In support of its request for an award of $24,885.26, the Charging Party asserts that Ms. Terrizzi suffered significant damages as a result of Mrs. Dellipaoli's act of discrimination, the most significant of which had to do with her inability to find suitable housing and her subsequent need to send her son Jesse away to live with an older brother. However, the amount of the award is intended to compensate complainants for the damage inflicted by *the act of discrimination*. Here, the act of discrimination involves a violation of § 3604(c). It is not the denial of housing. Although Ms. Terrizzi's testimony shows that she reacted to the statement with hurt and humiliation as a woman who had had the sole responsibility for the care and housing of her minor children over the years,[6] her testimony shows that by far the greatest distress to her came not from hearing the statement, but from her perception that she was being denied housing to which she erroneously believed she was entitled under the law. As previously discussed, because of the exemption enjoyed by the Dellipaolis, they could refuse to rent to the Terrizzis for any reason without violating the law. Accordingly, I have discounted most of Ms. Terrizzi's distress resulting from Mrs. Dellipaoli's statement.

For the compensable portion of Ms. Terrizzi's emotional reaction to Mrs. Dellipaolis's statement, I award $500.

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[5] *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).

[6] Ms. Terrizzi testified that she was hurt by the reason given for the discrimination. She stated that as a single parent "I was so offended. I felt like a second class citizen." Tr 40.

Loss of Housing Opportunity

I find no basis to make an award for loss of housing opportunity. Although it is true that Complainant may recover for loss of housing opportunity where housing is made unavailable by unlawful discrimination,*HUD v. Edelstein*, 2 Fair Housing-Fair Lending (P-H) (HUDALJ) ¶25,018 at 25,240 (1991), such is not the case before us. In this case, Respondents had a right to rent to anyone they chose -- even to discriminate in doing so. Complainant did not have a right to rent the upstairs' unit. Accordingly, there has been no denial to Complainant of a right to housing for which she may be compensated.

Out of Pocket Loss

Complainant seeks compensation in the amount of $114.74 for economic losses. This is said to represent the additional expense Ms. Terrizzi incurred in communicating via long distance telephone with Jesse, whom she had sent to Pennsylvania, as well as her long distance telephone communications with HUD. Although the cost of telephone calls made to HUD in prosecution of this matter may be reimbursable, the cost of telephone calls to Jesse would not be. The need for the calls to Jesse was not the consequence of any illegal action taken by Respondents in this case. There is no assignation of cost of telephone calls to and from Jesse versus those placed to HUD. Accordingly, I make no award for out-of-pocket losses.

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); 24 C.F.R. § 104.910(b)(3). A maximum penalty of $10,000 may be assessed if a respondent has not been adjudged to have committed any prior discriminatory housing practice. 42 U.S.C. § 104.910(b)(3)(i)(A). However, assessment of a civil penalty is not automatic. The House Report indicates 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 $5,000. Again, the rationale provided in support thereof is faulty. It relies on a violation for denial of rental opportunity to a family with a child and cites Respondents' attitude toward families with children as

"callous and violative of the Federal law." (*Charging Party's Post-Hearing Brief* at pp. 19-20). This rationale does not support a civil penalty in this case in that it does not address the only violation in the case - - the making of the discriminatory statement. Nevertheless, I conclude that a civil penalty is warranted.

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. The evidence shows that they are a retired and elderly couple who lived in the downstairs apartment. They were concerned about their ability to live with relative peace and quiet and with the minimal amount of disruption in their lives. Respondents appeared worried that having a teenager living on the second floor would interfere with their enjoyment of the unit below. Although they could lawfully refuse to rent to a family with a teenager, the vocalization of this decision led to the discriminatory statement violation in question.

Degree of Culpability

Neither Respondent is a real estate broker, and the testimony showed that they owned only one dwelling. Further, they had rented on only four occasions in the 16 years that they rented out the apartment; therefore, they had little experience with rental transactions. The evidence does not demonstrate that they acted with careless disregard for the Fair Housing Act. *See Morgan v. HUD*, 985 F. 2d 1451 (1993).

History of Prior Violations

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 $10,000. 42 U.S.C. § 3612(g)(3)(A) and 24 C.F.R. § 104.910(b)(3)(i)(A).

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 Mr. Dellipaoli is on disability, that Respondents own no other property and that their assets are limited. However, the extent

of Respondents assets and liabilities is not known and Respondents did not present testimony which establishes that payment of the maximum civil penalty would cause them financial hardship. Accordingly, I find that the record does not support a finding

that Respondents could not pay the maximum civil penalty without suffering undue hardship.

Goal of Deterrence:

An award of some civil penalty is appropriate as a deterrence to others. Those similarly situated as Respondents must be put on notice that violations of the Fair Housing Act will not be tolerated. Owners must be put on notice that the making of discriminatory statements to prospective tenants during rental negotiations, even to tenants who will reside in the owner's home, will not be tolerated.

Based on consideration of the above five elements, I conclude that a civil penalty of $500 is warranted. It is assessed jointly and severally against Respondents Theresa and Francesco Dellipaoli.

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 II, supra*, 908 F. 2d at 874 *(quoting Marable v. Walker*, 704 F. 2d at 1219, 1221 (11th Cir. 1983).

The purpose 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 482, 485 (7th Cir. 1975) *(citation omitted)*. 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). *Charging Party's Post-hearing Brief* at p.9. The Charging Party also requests that Respondents be enjoined from discriminating because of race or color against any person in any aspect of the sale, rental use or enjoyment of a dwelling pursuant to 42 U.S.C. § 3612(g)(3). I find no basis in the facts

of this case to issue such an Order. There is no allegation of race or color discrimination made in the Charge. Further, to the extent that Respondents enjoy an exemption under § 3604(b)(2) from the prohibitions of § 3604 (except as to § 3604(c)), the requested order would destroy that exemption.

However, I conclude that injunctive relief is necessary to ensure that Respondents do not in the future engage in the making of discriminatory statements with regard to rental housing. The appropriate injunctive relief for this case is provided in the Order below.

CONCLUSION AND ORDER

The preponderance of the evidence demonstrates that Respondents Theresa and Francesco Dellipaoli discriminated against Complainant Luzia T. Terrizzi 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 action, the Complainant has 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 Respondent discriminated against Complainant in violation of 42 U.S.C. § 3604(c) 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 Theresa and Francesco Dellipaoli shall pay actual damages in the amount of $500 to Complainant to compensate Complainant for emotional distress and humiliation; and

3. Within thirty (30) days of the date on which this Order becomes final, Respondents Theresa and Francesco Dellipaoli shall pay a civil penalty of $500 to the Secretary, United States Department of Housing and Urban Development.

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.

CONSTANCE T. O'BRYANT
Administrative Law Judge