

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF THE SECRETARY

The Secretary, United States
Department of Housing and
Urban Development, on behalf
of Laura Friend,

Charging Party,

v.

Holiday Manor Estates Club, Inc.;
Esther Hosier, President;
Dale Webb; and
Jack Burwell,

Respondents.

HUDALJ 05-89-0544-1

Decided: March 23, 1992

William Byer, Sr., Esquire
For the Respondents

Richard S. Bennett, Esquire
For the Charging Party

Initial Decision and Initial Decision on Remand Before:
ROBERT A. ANDRETTA, Administrative Law Judge

Final Decision Before:
JACK KEMP, Secretary of Housing and Urban Development

FINAL DECISION

I. PROCEDURAL HISTORY

A. Background Summary

On May 9, 1989, Laura Friend (hereinafter "Complainant" or "Friend") filed a housing discrimination complaint with the Department of Housing and Urban Development. She alleged that she was discriminatorily denied permission to occupy a mobile home owned by her parents, the Littles, in Holiday Manor Estates (hereinafter "Respondents ¹" or "Holiday

¹The term "Respondent" or "Respondents" hereafter refers to Respondents Holiday Manor Estates Club, Inc. and

Manor") because of her familial status, in violation of Title VIII of the Civil Rights Act of 1964, as amended, (hereinafter the "Fair Housing Act"), 42 U.S.C. Sec. 3601 *et. seq.*. Her April, 1989 application was rejected by Holiday Manor because she intended to reside in the mobile home with her son, who was under the age of 18. In September, 1989, Complainant, in desperation over living in a battered women's shelter, moved with her son to her parents' mobile home in Holiday Manor. She did not submit another application or obtain permission from Respondents to do so. She moved from Holiday Manor in April, 1990.

After investigation of Ms. Friend's complaint, the Department (hereinafter "Charging Party") issued on January 31, 1991, a determination of reasonable cause and a charge of discrimination alleging that discriminatory housing practices had occurred when Ms. Friend was denied approval to live in the mobile home park. A hearing was conducted before the Administrative Law Judge, Robert A. Andretta (hereinafter "ALJ") on May 7 and 8, 1991. Over Respondents' opposition, the Charging Party was allowed to amend the charge to conform to the evidence to allege a violation of Section 818 of the Fair Housing Act. The amended charge alleged that Complainant had been subjected to illegal harassment during her residency in Holiday Manor.

B. The Initial Decision

The Initial Decision in this case was issued on November 26, 1991. In summary, the ALJ held that Respondents had violated the Fair Housing Act by denying Complainant's application and maintaining a policy of excluding families with children from Holiday Manor, except in one designated section of the mobile home park. The ALJ ruled that Complainant had not been a victim of illegal retaliation under Section 818 of the Act because she was not authorized by Holiday Manor to live in the park when the alleged harassment occurred. The ALJ awarded damages to Complainant for the discriminatory rejection of her application in the amount of \$5,250 and assessed a civil penalty against Respondents in the total amount of \$2,200. The ALJ also ordered injunctive relief.

C. The Proceedings on Remand

In accordance with the regulation codified at 24 CFR 104.930, during the 30-day period following the issuance of the Initial Decision, the Charging Party, on December 23, 1991, moved to remand the case from the Office of the Secretary to the Office of Administrative Law Judges, which motion was granted on the same day by the Office of the Secretary.

Also on December 23, 1991, Charging Party filed a "Motion For Partial Reconsideration Of Initial Decision And Order." In that motion, the Charging Party requested that the ALJ reconsider those portions of the Initial Decision and Order in which he concluded that the Charging Party had failed to establish a *prima facie* case of retaliation under Section 818 of the Act. In the alternative, the Charging Party requested that the ALJ find that the Respondents' activity constituted a continuation of the discrimination he had found in violation of 42 U.S.C. Sec. 3604. The Charging Party moved that the ALJ award compensatory damages and a civil penalty for the alleged harassment of Friend. There was no specific

request in the Motion for an award of damages to Friend for her alleged constructive eviction. Nor did the Charging Party challenge the amount of the ALJ's award of compensatory or economic damages arising from Respondents' discriminatory rejection of Complainant's application in April, 1989.

On remand, the ALJ issued an Order on December 26, 1991, allowing the Respondents a 21-day period within which to file a response to the Motion For Reconsideration. On January 13, 1992, the Respondents filed their "Response To Motion Of The Secretary".

On January 10, 1992, Complainant Friend moved for leave to intervene. The Respondents filed an opposition to the Motion for Intervention; the Charging Party did not oppose intervention. The ALJ denied the Complainant's Motion To Intervene in an Order dated January 21, 1992.² The ALJ held that Complainant could have intervened earlier. He also held that Complainant had failed to show that the interests of the Charging Party and the Complainant had diverged and that there was no purpose for the intervention.

D. The Decision on Remand

On February 21, 1992, the ALJ issued his Initial Decision on Remand. He rejected the Charging Party's and Complainant's contentions on remand and denied additional relief. With respect to the Section 818 retaliation claim, the ALJ again found that, at the time of the Respondents' allegedly coercive and threatening acts, the Complainant was not engaged in an activity the Act protects. With respect to the alleged continuing violation of 42 U.S.C. Sec. 3604, the ALJ found that the Respondents' letters to the Littles were not coercive or threatening and were not directed toward the Complainant. In addition, the ALJ found that several of the actions against the Complainant could not be attributed to Respondents.

E. The Motions for Review

On March 13, 1992, the Charging Party moved to have the Secretary review and modify the ALJ's Decisions.³ The Charging Party requests that a Final Decision be issued that concludes that Respondents' acts at issue were not coercive or threatening. The Charging Party

²Also in that Order, the ALJ stated that a letter brief dated December 23, 1991, from Complainant's counsel, the NAACP Legal Defense and Education Fund, to the Secretary, requesting a remand of this case for reconsideration, would be treated as an *amicus* brief unless the parties objected. They did not object, and the ALJ states that the letter was so treated.

³In exhibit 2 to its Motion, the Charging Party designated portions of the record for review. However, because of the nature of the issues presented in this case the transcript of the administrative hearing in this case and the exhibits to the record of the hearing, including the two volume deposition of Esther Hosier, have also been reviewed. Contrary to the ALJ's suggestion at the hearing of this case (TR., v.1, p.600, lns. 11-20) this review has not been treated as a "pro forma" matter.

asks that the Final Decision not be based on a finding that the Complainant was not engaged in an activity the Act protects. The Charging Party has reasoned that, since the ALJ's decision could be affirmed on other grounds, it is unnecessary to decide these issues of law in the instant case. However, the Charging Party has asked that those parts of the ALJ's Decisions which held that the Complainant was not engaged in a protected activity be vacated.

The Complainant, in a "Motion for an Immediate Award of Full Compensatory Relief,"⁴ seeks reversal of the ALJ's January 21, 1991 decision denying intervention. She also requests that the Final Decision conclude that Complainant was engaged in a protected activity during her residency in Holiday Manor, and that while there she was the victim of unlawful harassment.⁵ The Complainant also argues that the award of damages in this case was too low and, in addition, that it was erroneously computed. Finally, Complainant requests that the Final Decision include a provision requiring payment of the "uncontested" amount of \$5,250 already awarded by the ALJ.

Respondents have moved to strike Complainant's motion for intervention and vigorously argues that Complainant should not be permitted to intervene at this late stage in the proceedings. Respondents also have objected generally to the Secretary's review of the ALJ's Decision and to the proceedings on review. Respondents additionally request that Charging Party's request to vacate those portions of the Initial Decisions concerning Complainant's unprotected status while residing in Holiday Manor without issuing findings and conclusions be denied.⁶

In this review proceeding, there have been other motions and briefs on various procedural and substantive issue. Orders have been issued related to Respondents' motions for an extension of time. All of these motions and orders will be incorporated in the record.

II. ISSUES PRESENTED

This Secretarial review of the ALJ's Decisions has focused on those issues which have been raised, either directly or by inference, by the parties and the Complainant, following the

⁴Both the Complainant and the Respondent erroneously captioned their motions and briefs to the Office of Administrative Law Judges (though the Complainant's reply brief was accurately directed to the Office of the Secretary). During the thirty day period for Secretarial review of the ALJ's decision, the ALJ is without jurisdiction to make rulings in this case, unless the case is remanded to the ALJ. See ruling on Respondent's motion for extension of time in this action, dated March 19, 1991. However, it is clear from the substance of the moving papers that both the Respondent and Complainant were directing their requests to the Secretarial Designee.

⁵Complainant attached to her motion a copy of the December 23, 1991 letter to the Secretary which the ALJ had accepted as an *amicus brief*. That letter also contends that Complainant should be awarded damages for her constructive eviction from Holiday Manor.

⁶Respondent has objected to receiving documents filed in this case on review from the Charging Party and the putative Intervenor. It is noted that service on Respondent was effected on the date that the document was *mailed* by the parties (or the Secretary), 24 C.F.R. § 104.30 (d)(2). Duplicative facsimile is an accommodation used in this case because of the short thirty day period provided under the statute for the Secretary's review of the ALJ's Decisions.

Initial Decision on Remand. Therefore, the following conclusions of the ALJ in his Initial Decision, his findings of fact related to those findings, and his rationale for those findings and conclusions, are hereby adopted and incorporated in this Final Decision:

1. Failure of the Department to complete the investigation of the complaint in this case within 100 days of its filing does not preclude the Charging Party from maintaining the cause of action.

2. The Final Investigative Report in this matter was completed in accordance with the requirements of 42 U.S.C. Sec. 3610 (b)(5) and (d)(2) and 24 CFR Sec. 103.230.

3. Respondents violated the provisions of the Fair Housing Act, codified at 42 U.S.C. Sections 2604 (a), as well as HUD's regulations at 24 CFR Sec. 100.50 (b)(1) and (3) and 100.60 (b)(1) and (2), when they refused to allow Ms. Friend to reside in a mobile home owned by Mr. Little because of the age of her son.

4. Complainant is entitled to damages for injuries suffered by herself and her son for the period beginning when her application was denied and ending when she moved into the Mr. Little's mobile home. Additionally, she is entitled to be compensated for the emotional distress from the denial of her application and resulting denial of housing of her choice during the same period. However, as noted below, the amount of damages is in dispute.

5. Respondents have violated 42 U.S.C. Sec. 3604 (b) and HUD's regulations at 24 CFR Sec. 100.50 (b)(2) and 100.65 by limiting families with children to certain areas of the mobile home park.

6. Respondents have violated 42 U.S.C. Sec. 3604 (c) and HUD's regulations at 24 CFR Sec. 100.50 (b)(4) and 100.75 (a)-(c) by adopting a rule prohibiting families with children under the age of 18 years from becoming club members.

The following issues have been presented by the parties and the putative intervenor in this review:

1. Should the ALJ's Decision of January 21, 1992 denying intervention to Complainant Laura Friend be reversed?

2. Was the Complainant engaged in a protected activity when she occupied her parents' mobile home without approval from Respondents?

3. Does the preponderance of the evidence establish that Complainant Laura Friend was unlawfully harassed by Respondents during her residency at Holiday Manor?

4. Was the amount of the ALJ's award of economic and compensatory damages for the denial of Complainant's application appropriate?

III. DISCUSSION

A. Complainants' Request to Intervene

Complainant has requested reversal of the ALJ's January 21, 1991 decision denying her intervention. There is no explicit statutory or regulatory authority for me to do so. 42 U.S.C. Sec. 3612 (h)(1) authorizes review of the ALJ's orders issued under subsection (g) of the Act. This subsection concerns the Initial Decisions that the ALJ issues after hearing. 24 CFR Sec. 104.930 (a) also refers to the Secretarial designee's authority to review the "initial decision" of the ALJ. There is no specific mechanism in the regulations for review of the ALJ's interlocutory orders. Compare 24 CFR Sec. 26.26. Further, the language of both the statute and the regulation suggests that, if the Secretarial designee is authorized at all to review an interlocutory order, such as the Order denying intervention in this case, it must be done within thirty days of its issuance.

However, given the unique circumstances of this case, it is unnecessary to decide whether authority to overrule the ALJ's decision on intervention exists, or to decide that the ALJ's decision was erroneous, in order to provide the Complainant with the intervenor status that she is seeking.⁷ As discussed in more detail in section C below, the Charging Party has contended at this stage of the proceeding that there is "substantial evidence in the record" supporting the finding of the ALJ in his Initial Decision on Remand that Respondents' acts "were not coercive or threatening to Complainant." The Charging Party therefore seeks *affirmance* of this finding of the ALJ. This position represents an abandonment of its position forcefully advanced in all previous proceedings.

The Charging Party's new position is, on its face, inimical to the interests of the Complainant. Therefore, at this stage of the proceedings, the Complainant's interests are not adequately represented by the Charging Party. It is clear from the position now taken that the Charging Party would not seek judicial review of an adverse Final Decision. I find that it would cause a manifest injustice if the Complainant could not intervene, thereby, in effect, denying her the right to seek judicial review of this Final Decision. 42 U.S.C. Sec. 3612 (i).

In so deciding, consideration has been given to Respondents' position that allowing intervention at this stage in the proceedings unduly prejudices Respondents. However, in this case Respondents have had an opportunity, which they exercised, to contest Complainant's intervention before the Administrative Judge while the case was on remand. Respondents' and the ALJ's observation that Complainant initially delayed in seeking intervention is well taken. However, Charging Party's surprise abandonment of one of its major contentions on Complainant's behalf constitutes a new and unexpected circumstance for Complainant. Weighing all of the circumstances, the prejudice to the Complainant in denying intervention outweighs any prejudice to the Respondents by granting intervention.

Under the statute⁸ and the implementing regulation⁹, Secretarial review need not be

⁷There is no dispute that Complainant is otherwise qualified to intervene. The Fair Housing Act provides that: "Any aggrieved person may intervene as a party in the proceedings." The regulations at 24 CFR § 104.200 (a) provide that intervention shall be permitted if the request is timely and if, as here, the intervenor is the aggrieved person on whose behalf the charge is issued.

⁸42 U.S.C. § 3612 (h) (1) states:

The Secretary may review *any finding, conclusion, or order issued under subsection (g)*. Such review shall be completed not later than 30 days after the finding, conclusion, or order is so issued; otherwise the finding, conclusion, or order becomes final. (emphasis added)

limited to only those findings and conclusions that are presented by the parties. Authority exists to review the ALJ's finding that Complainant and the Littles were not illegally harassed even if a party to this proceeding has not questioned the finding. As discussed in more detail below, given the conflict between the findings of the ALJ on this issue in the Initial Decision and his findings in Initial Decision on Remand, his findings on the issue would have been reviewed at this time, even absent intervention. Granting intervention is well supported by case authority.¹⁰ *HUD v Downs*, P-H Fair Housing-Fair Lending, para. 25, 017 (Nov. 22, 1991), *appeal pending on other grounds sub nom., Soules v Secretary of HUD*, No. 91-4192 (2d Cir.).

B. Complainant's Status as a Resident of Holiday Manor

Title VII of the Civil Rights Act of 1964 makes it unlawful to deny an individual employment opportunities because of race, color, religion, national origin, or sex. Title VII and Title VIII, the Fair Housing Act, were part of the same effort by the Congress to eliminate invidious discrimination in our society. Decisions under Title VII have been used by the courts to analyze substantive issues of proof under the Fair Housing Act. *Huntington Branch, NAACP v Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988); *Asbury v Brogham*, 866 F.2d 1276 (10th Cir. 1989). Under Title VII, in order to establish a *prima facie* case of retaliation, a plaintiff must meet a three-prong test. She must show that she was engaged in a protected activity known by the defendant; that an action was taken that disadvantaged her; and that a causal connection exists between the first two elements. See, e.g., *Grant v Bethlehem Steel Corp.*, 622 F.2d 43 (2d Cir. 1973).

Using the analytical framework set out in Title VII cases, the Office of Administrative Law Judges has formulated the following elements of *prima facie* case of retaliation in a case of housing discrimination under the Fair Housing Act: (1) that the Complainant was engaged in an activity protected by the Act; (2) that Respondents took some adverse action against

⁹24 C.F.R. §104.930 (a) provides in relevant part as follows:

Issuance of final decision by Secretary. The Secretary of HUD may review any finding of fact, conclusion of law, or order contained in the initial decision of the administrative law judge and issue a final decision in the proceeding. The Secretary may affirm, modify or set aside, in whole or in part, the initial decision or remand the initial decision for further proceedings.

¹⁰ In that case, the Charging Party did not appeal the Initial Decision of the ALJ against the Complainant, and the Initial Decision became the Final Decision. The Final Decision was contrary to the position that the Charging Party had argued to the ALJ. Because no party remained to adequately represent the Complainant's interest, the ALJ granted the Complainant's motion to intervene so that Complainant's rights to judicial review of an adverse determination could be preserved. See also, *Newspaper and Mail Deliverers' Union of New York and Vicinity* 101 NLRB 589, 31 LRRM 1105 (1952); *Honolulu Star-Bulletin, Ltd.*, 123 NLRB 395, 43 LRRM 1449 (1959), *reversed on other grounds, Honolulu Star-Bulletin, Ltd. v NLRB* 274 F.2d 567 (D.C. Cir. 1959) (intervention for purpose of filing exceptions to ALJ's findings permitted). See also, *United States v Imperial Irrigation Distr.*, 559 F.2d 509 (9th Cir. 1977), *affirmed on this ground sub. nom. Bryant v Yellen* 447 U.S. 352 (1980); *Banks v Chicago Trimmers*, 389 U.S. 813 (1967), 390 U.S. 459 (1968); *Hunter v Ohio ex. rel. Miller*, 396 U.S. 879 (1969).

Complainant; and (3) that there is a causal connection between the Complainant's protected activity and the Complainant's injury. *HUD v Murphy*, P-H Fair Housing-Fair Lending, para. 25,002 (Dec. 21, 1989).

The ALJ in the instant case found that the Complainant did not meet the first prong of this three-prong test and, therefore, had failed to establish a *prima facie* case of retaliation. This finding was based upon the ALJ's conclusion that the Complainant was occupying the Littles' mobile home without Respondents' permission and, therefore, was not engaged in a protected activity.

The Charging Party maintains that this finding is erroneous as a matter of law. For that reason, the Charging Party requests that the parts of the ALJ's Initial Decision, and Initial Decision on Remand containing this finding be vacated. However, the Charging Party suggests that findings and conclusions regarding this issue need not be made in this Final Decision. Charging Party is now contending that Complainant has not met the second prong of the test for a *prima facie* case of retaliation. Therefore, Charging Party argues, it is not necessary to reach the question of whether Complainant was engaged in a protected activity as required under the first prong of the test. Complainant, on the other hand, urges reversal of the ALJ's finding and the issuance of a Final Decision finding that she was engaged in a protected activity at the time of the alleged retaliatory harassment. Respondents request affirmance of the ALJ's decision on this issue. They also maintain that the ALJ's decisions should not be vacated without making findings and conclusions which explain that decision.

The ALJ's concern that victims of housing discrimination should not be encouraged to exercise "self-help" is well taken. Victims of housing discrimination should avail themselves of the legal remedies under the Fair Housing Act. However, on the unique facts of this case, the purpose of the Act is supported by concluding that the Complainant was engaged in a protected activity under Section 818 of the Fair Housing Act.

The Supreme Court has recognized the principle of "self-help" against unlawful discrimination. There is a series of cases involving allegations that black individuals were unlawfully trespassing when they took a seat in restaurants against the policy of the restaurant owner. In *Hamm v City of Rock Hill*, 379 U.S. 306, 389 (1964), overturning such a conviction under Title II of the Civil Rights Act of 1964, the Court held:

It has been argued, however, that victims of discrimination must make use of the exclusive statutory mechanisms for the redress of grievances, and not resort to extralegal means. Although we agree that the law generally condemns self-help, the language of 203 (c) supports a conclusion that nonforcible attempts to gain admittance to or remain in establishments covered by the Act, are immunized from prosecution, for the statute speaks of exercising or attempting to exercise a "right or privilege" secured by its earlier provisions. The availability of the Act as a defense against punishment is not limited solely to those who pursue the statutory remedies.

In this case it should be emphasized that the Complainant had the permission of the Littles to occupy the mobile home. The Littles were the lawful owners of the mobile home. Complainant was not, therefore, a trespasser when she occupied the dwelling, i.e., the mobile

home. The Littles have a strong property interest in the use of their property. The Respondent HMECI does not own, sell, or rent any mobile home sites in the park. (Secretary's Exhibit 8) The Respondent HMECI is a corporation formed to manage the park; it has no property interest at all in the Littles' mobile home. Balancing the interests of these two entities, I find that the property interest of the Littles in allowing their daughter to live in their mobile home outweighs the interests of Respondents in enforcing a discriminatory corporation rule, which has been determined to be unlawful.

It is accurate that no one may own or lease property in Holiday Manor without first becoming a member of Respondent HMECI. However, the interest of HMECI is an interest in the "public" or common areas of the mobile home park. As the ALJ observed: "The more an owner opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh v Alabama*, 326 U.S. 501 (1946)." The decision in *Hamm* and similar cases decided under Title II are persuasive under these facts.

Complainant did not break any criminal or civil laws when she occupied the Littles' mobile home in Holiday Manor. Further, as discussed above, she was not a trespasser. Her sole culpability is that she violated the rules of the park by living in the mobile home with her son without permission of the park management. Persons who break discriminatory rules do not automatically lose protection under the anti-discrimination statutes. The regulations under the Fair Housing Act, for example, protect employees who refuse to follow a discriminatory housing policy from being discharged. 24 CFR Sec. 100.70 (d)(1). *Wilkey v Pyramid Construction Co.*, 619 F. Supp. 1453 (D. Conn. 1985). Similar results have been reached under Title VII. *Novotny v Great American Federal Savings and Loan Association* 584 F.2d 1235 (3d Cir. 1978); *EEOC v Crown Zellerbach Corporation*, 720 F.2d 1008 (9th Cir. 1983); *Tidwell v American Oil Co.*, 332 F. Supp. 424 (D. Utah 1971); EEOC Dec. No. 71-2227 (1971).

In many of the cases decided under Title VII involving the protection of persons who have violated an employer's rule or policy in order to engage in opposition to a discriminatory practice, the courts have used a balancing test. *See, e.g., Hochstadt v Worcester Foundation for Experimental Biology, Inc.*, 545 F.2d 222 (1st Cir. 1976). In balancing the interests of the employer, the complainant, and the public, the courts have examined the challenged activity of the employee to determine whether it was inimical to the essential interests of the employer. Applying this test in this case, Respondents have not established any compelling interest that was violated by the residency of Complainant and her son. On the other hand, the Complainant's unusual desperate circumstances in this case are compelling. Effectively, the evidence shows that she faced the choice of enduring physical abuse from her ex-husband, living in a battered women's shelter, being homeless, or moving into her parents' mobile home.

Finally, individuals who have occupied housing in violation of discriminatory rules of the owner have been given protected status in eviction cases. *See, e.g., Park Place Home Brokers v P-K Mobile Home Park*, 773 F. Supp. 46 (N.D. Ohio 1991); *Oxford House-Evergreen v City of Plainfield*, 769 F. Supp. 1329 (D.N.J. 1991) *United States v Borough of Audobon, NJ*, No. 90-3771 (D.N.J. Sept. 9, 1991); *Bush v Kaim*, 297 F. Supp. 151 (N.D. Ohio 1969); *United States v Keck*, 1990 U.S. Dist Lexis 19309 (W.D. Wash. 11-15-90). The ALJ

distinguished these cases on the ground that they involved protecting the individual from punitive action rather than supporting an independent cause of action by the individual. In this case, the Respondents did not attempt to evict the Complainant; instead, it is alleged, they attempted to harass Complainant and her parents to force her out of the park. Adopting the ALJ's point of view under these facts could be read to encourage property owners to avoid the legal processes available to them to dispossess unwanted individuals and instead to embark upon their own form of "self-help."

C. Harassment

In his Initial Decision, the ALJ made several findings of fact which support a conclusion that the letters of complaints received by the Littles from Respondents were a form of harassment in retaliation for Ms. Friend's residency in Holiday Manor or the fact that she had filed a housing discrimination complaint against Respondents. These findings are contained at page 5 of the ALJ's Initial Decision. In summary, the ALJ found that the Littles had received complaints about harboring stray animals when they first moved into the mobile home park in 1981, but that they had received no further complaints until 1989, after Ms. Friend moved into Holiday Manor. He found that the non-conforming porch built by Mr. Little in 1986 about which the Littles had received a 1989 letter of complaint, had not been the subject of any complaints until Ms. Friend moved into the mobile home park. He also found that the porch was similar to others in the mobile home park that had not been the subject of complaints. He found that the Littles received more letters of complaint during Complainant's residency at the mobile home park than during any other time they lived there.

Based upon my review, these findings in the Initial Decision are supported by a preponderance of evidence in the record. (See citations to transcript and exhibits contained in Initial Decision at p. 5) In his Initial Decision on Remand, however, the ALJ found, on the same record, that: "The letters to Complainant's parents were not coercive or threatening to Complainant, but dealt with continuing complaints that management had with Complainant's parents' failure to abide by park rules. A history of these complaints was established prior to Complainant's occupancy." These findings on remand are not supported by the record. Mr. Little acknowledged having received three letters when they first moved into the mobile home park. However, he testified that "there was a period of time there for four years, maybe five years, everything was no problem;..." (TR, v.1, p. 199, lns. 16-24). The testimony of Respondents's witnesses does not effectively rebut this account. Mr. O'Haver testified to problems that "they" had with the Littles early in the Littles' residency. Mr. O'Haver alluded to "trouble with them ever since," but was no more specific about either the time period or actions taken, if any, to resolve the trouble. (TR, v. 1, p. 452, ln. 21- p.455, ln. 22) Mr. Webb testified that he was aware that Mr. Little was "in violation many times" but did not ascribe any time period to the alleged violations. (TR, v.1, p. 548, ln. 19- p. 549, ln. 9). The only letters of record containing complaints concerning the Littles were dated after Ms. Friend began living in Holiday Manor. Thus, the preponderance of the evidence establishes that the Littles were subjected to harassment by Respondents because Ms. Friend occupied a mobile home owned by them in Holiday Manor.

Section 818 of the Fair Housing Act provides that:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person

in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 803, 804, 805, or 806 of this title.

It is clear from this language that the Littles could have filed a housing discrimination complaint of their own challenging the Respondents' harassment of them. However, they did not do so. The only "aggrieved person" on whose behalf this action has been brought is Complainant Friend. Therefore, the Charging Party must establish by a preponderance of the evidence either that the Complainant was herself harassed by the Respondents or their agents or that the harassing actions taken against the Littles also harmed her.

The record supports the finding of the ALJ in his Initial Decision on Remand that insufficient evidence exists to establish that any claimed acts of harassment directly against the Complainant, or even against her son, can be attributed directly to the Respondents. Ms. Friend testified that no one interfered with her occupancy of the trailer, no one said anything directly to her about her residency in the park, and no one required her to move. (TR, p. 108, lns. 16-24) However, the evidence of record indicates that some unidentified residents of Holiday Manor were committing non-violent acts of a harassing nature against Ms. Friend and her son. These included an unattributed comment made to her son; interference with her mail¹¹; and problems with the installation of her phone.¹²

The remaining question regarding this issue is whether it has been established that the harassment of the Littles constituted actionable harm to the Complainant. The record evidence does not establish that the Complainant was compensably injured by the harassment of her parents by Respondents. Complainant testified vividly and explicitly about the humiliation, depression, anxiety and emotional pain she experienced as a result of being rejected by Holiday Manor. In contrast, Complainant's only specific testimony on this issue is her statement that she left Holiday Manor because of the harassment of her parents. (TR, v. 1, p. 77, ln. 25-p. 78, ln. 4). Complainant's statement is not supported by a preponderance of the evidence. Complainant told Respondent that she only intended to live at Holiday Manor temporarily. Her move from Holiday Manor back into the home she had shared with her ex-husband coincided with his moving out of that house. Most importantly, Complainant also was apparently motivated, at least in part, by the harassment that she and her son were experiencing from unidentified residents of Holiday Manor.

The remaining testimony on this issue is, at best, ambiguous. When questioned about

¹¹This is one of the more serious allegations made by Complainant. However, there is no evidence identifying the person who allegedly directed the Complainant's mail back to her previous address.

¹²Ms. Friend testified that she was told by a worker from the telephone company that her order to install a telephone had been canceled by an unidentified "member of the Holiday Manor Club" (TR, p. 96, ln. 10- p. 97, ln. 9). With regard to this incident, Respondent Ms. Hosier testified that she told a man from the telephone company that Ms. Friend did not live there, that the Board had not approved her application. Ms. Hosier testified further: "And I said, so, you can go on around there if you want to and see if there's anybody there." (Hosier depo., p. 14) The record does not establish whether Respondent Hosier knew at the time she made that statement that Complainant had moved into the mobile home.

the effect that *all* of the alleged discrimination had on her, Complainant spoke of the effect on her of her son's reaction to the events. (TR, v.1, p. 85, ln 19-p. 86, ln. 4) She did not sufficiently attribute this emotional distress to her or her son's experience as residents of Holiday Manor. She also testified that she believed that the harassment of her parents contributed to their marital problems, (TR, p. 86, lns. 8-14), but she did not explain how this belief affected *her* psychological state.¹³

This case is distinguishable from the facts in *Davis v Mansard*, 597 F. Supp. 334, 348 (N.D. Ind. 1984) and *HUD v Morgan*, P-H Fair Housing-Fair Lending, para. 25,008 (July 25, 1991) raised by the Charging Party in its brief on remand. In *Davis*, the court awarded damages to Mr. Johnson, a black tester plaintiff, who, with his wife, had been denied an opportunity to apply for an apartment. Mrs. Johnson had been emotionally distraught over her treatment. Mr. Johnson, the court observed, was more cynical and therefore less affected by the discrimination. However, the court noted that "Mr. Johnson suffered through his wife's depression while sustaining his own reopened wounds" and awarded \$2,500 in compensatory damages to Mr. Johnson.

In *Morgan*, citing the *Davis* case, the ALJ awarded the complainant lost wages experienced by him and by his wife, who was not an "aggrieved person" in the charge. However, the ALJ noted that: "Since Mrs. Ricciotti's loss of income was also a loss to Mr. Ricciotti, her lost wages are compensable." *Morgan*, supra, at p. 25,138, n. 30. The ALJ also recognized that the stress suffered by other members of the aggrieved person's family could compound the aggrieved person's emotional distress and awarded \$5,000 in emotional distress damages to the Complainant Ricciotti.

In each of the above cases, the harm experienced by the family members was because of the same unlawful activity that injured the aggrieved person himself. In the instant case, the Complainant has been awarded compensatory damages in the amount of \$4,000, for her emotional distress because Respondents unlawfully denied her application for residence in Holiday Manor. The ALJ acknowledged that her harm was compounded by the suffering of her son. In addition, however, the Complainant attempts to use the psychological damage to her parents because of *different* actions directed solely against them as the basis for a claim of unlawful retaliation against her.

Some decisions under Title VII have held that an individual can sustain a claim of unlawful harassment creating a hostile or offensive environment based on the harassment of persons other than the claimant. *Hicks v Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987). However, those claims cannot succeed unless there is proof that the harassment of others affected the claimant's own psychological well-being, and the evidence of this psychological harm should be compelling. *Collins v Baptist Memorial Geriatric Center*, 937 F.2d 190 (5th Cir. 1991). See also *Fisher v San Pedro Peninsula Hospital*, 214 Cal. App. 3d 590 (1989) (decided under the California Fair Employment and Housing Act). The evidence in this case fails to meet that high standard.

¹³Complainant's step-father speculated that Complainant felt guilty about the emotional strain on him and her mother and its possible effect on their relationship. (TR, v. 1, p. 165, ln. 14-p. 166, ln. 9) However, great weight cannot be placed on this speculation.

Assuming, *arguendo*, that the first and second prongs of the test for a *prima facie* case of retaliation have been met, the third prong has not been met. Under that prong, the evidence must show a causal connection between *Friend's* protected activity and the harm to her as a result of harassment of her parents. The purpose of this prong is to raise an inference that the Respondent intended to harm the Complainant because of her protected activity.

There is evidence to suggest that the Littles were harassed by the Respondents because they allowed Mrs. Little's daughter to occupy a mobile home they owned in Holiday Manor. The testimony and exhibits introduced at the hearing show that Respondents were taking action against the Littles because, in Respondents' opinion, the Littles had broken the rules of the Club by having an unapproved occupant on their property. This evidence raises the inference that the Littles were harassed by Respondents because of their own protected activity, not because of the protected activity of their daughter. This inference is supported by the fact that Respondents took no direct action against *Friend* to remove her from the property. A reasonable interpretation of all of the evidence of record is that Respondents were attempting to pressure the Littles to remove Complainant from their mobile home.

D. Damages for the Rejection of Complainant's Application

Complainant argues that the damages award for her emotional suffering was outrageously low. It is difficult to place a monetary value on the psychological damage that is done to an individual as a result of being discriminatorily denied housing of her choice. For that reason, precise proof of the extent of this damage is not required to support an award of compensatory damages for psychological injuries. *Marable v Walker*, 704 F.2d 1219 (11 Cir. 1983); *Grayson v Rotundi & Sons Realty Co.*, 1 Fair Housing-Fair Lending para. 15,516 (E.D.N.Y. 1984).

However, absent evidence of a clear abuse of discretion, it would be inappropriate to substitute my judgment on the appropriate amount of compensatory pain and suffering damages for that of the ALJ. Importantly, the ALJ has observed the demeanor of the complainant, and is in a position to assess the witness' credibility, any continuing emotional trauma, or evidence of psychological scars. A review of the case authority indicates that the ALJ's award in this case is not so out of line with awards in other cases as to suggest an abuse of discretion. Further, in the absence of clear support on the existing record, substantially augmenting the damage award to the Complainant for the rejection of her application at this stage, without remanding the case to the ALJ for further proceedings, would not be fair to the Respondents. See, e.g., *Nicholas v Bates*, 544 F. Supp. 256 (E.D. Tex. 1982).

Complainant also has challenged some elements of the ALJ's computation of her damages for the period of time between the rejection of her application and the beginning of her residency in Holiday Manor. From a review of the record, I am unable to make an independent assessment of the validity of Complainant's assertions. Under other circumstances, remand of this case to the ALJ to either re-open the record on the issue of those damages or to specifically address and decide the economic damages issues raised by the Complainant might be appropriate. In this case the Complainant persuasively has urged that this case not be remanded unless a Final Decision is issued requiring the Respondent to pay the \$5,250 that the ALJ awarded in his Initial Decision. Her position is based upon her assumption that the \$5,250 award is "undisputed." Respondents do dispute this award,

however. Therefore, the case will not be remanded.

IV. ULTIMATE CONCLUSIONS AND ORDER

For the reasons discussed above, I find that the Complainant was not unlawfully retaliated against in violation of Section 818 of the Fair Housing Act, 42 U.S.C. Sec. 3617. Therefore, Complainant is not entitled to an award of damages for the period of time in which she resided in Holiday Manor or thereafter. I also find that the evidence of record in this case supports the damages which have been awarded to Complainant for the rejection of her application in violation of 42 U.S.C. Sec. 3604.

Permission for intervention by Complainant is *GRANTED*. The Initial Decision in this case is *MODIFIED* as discussed herein. The Initial Decision on Remand is *SET ASIDE*. It is further **ORDERED** that the Charging Party's claim that Respondents committed coercive and threatening acts that constituted violations of section 818 or, alternatively, continuing violations of subsection 804(b) is *DENIED* for the reasons stated herein.

The remedies ordered in the Initial Decision numbered 1 through 4 are hereby **ADOPTED, INCORPORATED, AND ORDERED** herein. In addition, it is **ORDERED** that:

5. Within thirty days of the date of this Final Decision, Respondent HMECI shall pay damages in the amount of \$5,250 to Complainant to compensate her for the losses that resulted from Respondent's discrimination against her.

6. Within forty-five days of the date of this Final Decision, Respondent HMECI shall pay a civil penalty of \$2,000 and Respondent Hosier shall pay a penalty of \$200 to the Secretary, United States Department of Housing and Urban Development.

7. Within forty-five days of this Final Decision, Respondent HMECI shall submit a report to HUD's Chicago Regional Office of Fair Housing and Equal Opportunity that sets forth the steps it has taken to comply with the other provisions of this Order.

SHELLEY A. LONGMUIR
Secretarial Designee