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 Julie Nkeonyeme Obi, Charging Party, v. Duk Hee Ro, and Myung Ro, Respondents.	CORRECTED COPY HUDALJ 03-93-0313-8 Decided: June 2, 1995

Jane S. O'Leary, Esq.

David Godschalk, Esq.
For the Charging Party

Bart Columbo, Esq.
For the Intervenor

Matthew S. Yoo, Esq.
For Respondents

Before: William C. Cregar
Administrative Law Judge

INITIAL DECISION AND ORDER

This matter arose as a result of a complaint of discrimination based upon race and national origin, in violation of the Fair Housing Act, as amended, 42 U.S.C § 3601, *et seq.* ("Fair Housing Act" or "Act") and 24 C.F.R. Parts 103 and 104. Complainant Julie Nkeonyeme Obi filed a complaint with the United States Department of Housing and Urban Development ("HUD" or "the Charging Party") against Respondent Duk Hee Ro on February 25, 1993.[1] On October 20, 1994, HUD's Assistant General

Counsel for the Mid-Atlantic issued a Determination of Reasonable Cause. On December 27, 1994, I granted the Complainant's Motion to Intervene, and on January 5, 1995, I granted the Charging Party's Motion to Amend the Charge to include national origin as an additional basis for the alleged discrimination. A hearing was held in Washington D.C., on January 23-24, 1995. The parties timely filed their post-hearing briefs on April 4, 1995; the last brief was received on April 7, 1995.[2] Accordingly, this case is ripe for decision.

The Fair Housing Act makes it illegal to "refuse to sell or rent, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable a dwelling. . . because of race. . . or national origin" or to "make. . . any. . .statement . . with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on. . . race. . . or national origin or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. §§ 3604(a) and (c); *see also* 24 C.F.R. §§ 100.50(b)(1) and (4); 100.60 (a) and (b)(2); 100.75(a).

The Charging Party and Intervenor allege: (1) that Respondents violated 42 U.S.C. § 3604(a) by refusing to rent an apartment to Complainant because of her race and national origin; and (2) that Duk Hee Ro made statements with respect to the rental of an apartment, expressing a preference, limitation, or discrimination based on race and national origin in violation of 42 U.S.C. § 3604(c). They seek damages on behalf of Complainant for emotional distress. In addition, the Charging Party requests that civil penalties be assessed against Respondents. Respondents deny the allegations.

Statement of Facts

1. Complainant Julie Nkeonyeme Obi, a native of Lagos, Nigeria, is a 38-year-old black woman. Ms. Obi emigrated to the United States in 1987. In 1988, she married Anthony Obi, whom she had known since childhood. The Obis have three sons, ages 16, 4, and 15 months, as of the date of the hearing. Tr. pp. 27-28, 30-31.

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[1]Myung Ro was added as a Respondent by a subsequent complaint dated December 3, 1993. C.P. Ex. B-1.

The following reference abbreviations are used in this decision: "C.P. Ex." for the Charging Party's Exhibit; "Res. Ex." for Respondents' Exhibit; and "Tr.," followed by a page number.

[2]Pursuant to my request, the parties briefed the admissibility of statements purportedly made by Ms. Ro to a third party under circumstances unrelated to this case. Because I have found that other evidence establishes violations under the Act, I do not decide whether these statements are admissible, and I have not considered them for any purpose.

2. In 1980, Ms. Obi received a Bachelor of Arts degree in English and history from the Lagos College of Education, University of Lagos. Tr. pp. 30-31. In the United States, Ms. Obi received a Bachelor of Science degree in mass communications from Norfolk State University, Norfolk, Virginia. Tr. pp. 28, 32, 87.

3. From 1980 until she entered the United States, Ms. Obi was employed as a news reporter, producer, and television anchorwoman for Nigerian television. Tr. pp. 30-31. Since graduating from Norfolk State University, she has been employed as a social worker in St. Mary's, Prince George's, and Frederick Counties in Maryland. In December of 1992, Ms. Obi was employed by the Department of Social Services in Frederick County Maryland. Her job entailed visiting clients' homes, assessing their needs, and at times, attempting to locate accommodations for them. Her primary responsibility was to prevent clients' children from entering foster care. Tr. pp. 27-34, 87-88.

4. In Nigeria, Ms. Obi spoke English at school and also with her siblings at home. Tr. pp. 29, 32, 87. She speaks English fluently with a pronounced accent.

5. Respondents Duk Hee Ro and Myung Ro are a Korean born married couple with two children who were 25 and 20 years old at the time of the hearing. The Ros emigrated to the United States in 1970. Tr. pp. 392-93. Duk Hee Ro received her Bachelor of Science degree in nursing from a Red Cross Nursing College in Korea and was employed for approximately nine years in Korea as a registered nurse, specializing in obstetrics. Tr. p. 392.

6. Dr. Ro, an anesthesiologist, is presently employed at Frederick Memorial Hospital and also belongs to an anesthesiology practice. Tr. pp. 290-92. Since the birth of their first child, Ms. Ro has not practiced nursing. Her husband preferred that she remain at home to raise their children. Tr. pp. 292, 396-98. However, because Ms. Ro wanted to work outside the home, she became involved in real estate as early as 1977. C.P. Ex. E; Tr. pp. 293, 399-401.

7. Respondents are co-owners of the following rental properties: 23 residential apartments, two row houses, three townhouses, one single family home, and seven commercial spaces in Frederick and Baltimore City, Maryland. C.P. Ex. E; Tr. p. 295. Dr. Ro signed the mortgages on the rental properties. Tr. pp. 293, 400-02. Dr. Ro does the monthly bookkeeping for the properties, and signs the tax returns. Tr. p. 302. Ms. Ro manages and rents their properties. C.P. Ex. E., Tr. pp. 293, 400-02. She maintains an office at 316 North Market Street in Frederick. Since 1994, she has used the trade name of James Properties. C.P. Ex. E; Tr. pp. 38, 409.

8. Duk Hee Ro took English courses in Korea for ten years as part of the required curriculum in middle school, high school, and college. Tr. pp. 393-94, 471. She worked as an interpreter translating Korean into English at the American Hospital in Seoul, Korea. Her job as an interpreter required that she first pass an examination, which the majority of applicants fail. Tr. pp. 471-72. After moving to the United States, she passed the New York State registered nursing examination. Tr. pp. 396-97. She also obtained a registered nursing license in Maryland. C.P. Ex. E. She conducts her rental business in English. In addition, her leases and tenant applications are written in English. Tr. pp. 472-73. In 1977-78, she took real estate and real estate management courses at Frederick County Community College. C.P. Ex. E. She speaks English with her children and her tenants. C.P. Ex. E; Tr. p. 473. Her English is broken and spoken with a Korean accent.

9. In early December 1992, Ms. Obi had been assigned to assist a 21-year-old white client, Angela Perrero, in finding accommodations. The Maryland Department of Social Services was to pay Ms. Perrero's first month's rent and security deposit once a suitable rental was found. Tr. pp. 35-37, 40, 50-51, 232-34.

10. On or about December 7, 1992, as part of their housing search, Ms. Obi and Ms. Perrero read advertisements for apartments in the *Frederick Post* newspaper. The least expensive and most conveniently located unit was Respondents' apartment at 300-304 North Market Street. Tr. pp. 39-41.

11. At approximately 11:00 a.m. on December 7, 1992, Ms. Obi and Ms. Perrero arrived at Ms. Ro's office, one block from the advertised apartment. Ms. Obi was wearing appropriate business attire. Tr. pp. 34, 37-38, 40, 409. Ms. Ro asked them what they wanted. Ms. Obi told Ms. Ro that they wanted to inspect the advertised apartment. Ms. Ro pointed at Ms. Perrero, looked at Ms. Obi, and said, "She's okay for the apartment, you are not." Tr. pp. 42, 102, 237-38, 258-59. When Ms. Obi asked Ms. Ro what she meant by the statement, Ms. Ro repeated, "She's okay for it, you are not."[3]
Tr. pp. 43, 103, 240.

[3]Although Ms. Ro disputes the assertion that she made such statements, I have credited the testimony of Complainant and Ms. Perrero concerning this event. For the reasons discussed *infra*, I do not find Ms. Ro to be a credible witness.

12. Ms. Ro then said that she would show the apartment to Ms. Perrero, signaled to Ms. Perrero, turned, walked out of the office, and led them to the apartment. Tr. pp. 47, 113. During their tour of the apartment, Ms. Obi explained to Ms. Ro that she was Ms. Perrero's caseworker and that Social Services would pay the first month's rent and security deposit on behalf of Ms. Perrero. Ms. Ro then became "friendly." She started smiling and volunteering information about the apartment. Tr. pp. 45, 52, 105, 153, 242. They returned to Ms. Ro's office, where she rented the apartment to Ms. Perrero. Res. Ex. 2.; Tr. pp. 52, 55-56, 242.

13. Ms. Obi returned to her office, "humiliated," "embarrassed," and visibly "upset." Tr. pp. 58, 169, 209. She was particularly mortified because the incident occurred in front of a client. Tr. p. 59. Complainant spoke about the incident to her friend and co-worker, James Bailey, for approximately 30 minutes. Tr. pp. 59-60, 208. That entire evening, she discussed the incident with her husband. Tr. pp. 61-62. She wept when she described what had happened. That evening and for several days later, she was unable to perform her usual household chores or care for her children. Tr. pp. 90, 168, 175, 196. In addition, Ms. Obi had trouble eating and sleeping for several days. Tr. pp. 176-77.

14. Ms. Obi became more withdrawn with her white coworkers. Tr. pp. 227-28. In addition, before accompanying clients to prospective housing, she began to ponder whether her presence would hinder the clients in obtaining housing. Tr. pp. 82, 215.

15. Ms. Obi sought assistance from the director of the Human Relations Department in Frederick County, who referred her to HUD. She signed a HUD complaint form on December 21, 1992. C.P. Ex. B; Tr. p. 64.

16. After learning that Ms. Obi had filed a complaint with HUD, Ms. Ro arrived unannounced at Ms. Obi's place of work on three occasions to attempt to convince Ms. Obi that she had misunderstood what occurred on December 7th. Tr. pp. 69-73, 134-35. On the third occasion, Ms. Ro brought along her new property manager, Pat Ingram, a black woman. Tr. pp. 73, 135. Ms. Ingram worked for Ms. Ro for two weeks around February of 1993. Tr. pp. 413, 443, 482, 494-95.

17. From September until December of 1992, the Ros employed Janell Daake, a white woman. Ms. Daake worked full-time mainly providing clerical assistance to Dr. Ro. She also answered phones for Ms. Ro and set up appointments for her. Tr. pp. 347-51.

18. Ms. Obi missed approximately two weeks of work around the end of January or beginning of February 1993 because she was ill with headaches and unable to sleep.

Tr. pp. 81-82, 91, 121-22, 141-42. At the time, she was pregnant with her third child. Tr. pp. 154, 229.

Discussion

Governing Legal Framework

Congress passed the Fair Housing Act as Title VIII of the Civil Rights Act of 1968 to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics." *United States v. Parma*, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *rev'd on other grounds*, 661 F.2d 562 (6th Cir.), *cert. denied*, 465 U.S. 926 (1982); *see also United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

> The Act makes it unlawful, *inter alia*,
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> (a) To refuse to. . . rent after the making of a bona fide offer, or to refuse to negotiate for the. . . rental of, or otherwise make unavailable or deny, a dwelling to any person because of race. . . or national origin.
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> * * *
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> (c) To make. . . any. . . statement. . . with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on. . . race. . . or national origin. . . or an intention to make any such preference, limitation, or discrimination.

42 U.S.C. §§ 3604(a) and (c); *see also* 24 C.F.R. §§ 100.50, 100.60 and 100.75.

The legal framework to be applied in a case under 42 U.S.C. § 3604(a) depends on whether the evidence offered to prove the alleged violation is direct or indirect. Direct evidence establishes a proposition directly rather than inferentially. *See, e.g., HUD v. Tucker*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,033, 25,347-48 (HUDALJ Aug. 24, 1992), *submission of appeal vacated*, No. 92-70697 (9th Cir. July 18, 1994) (unpublished order). If it constitutes a preponderance of the evidence as a whole, it will support a finding of discrimination. *See HUD v. Morgan*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,008, 25,134 (HUDALJ July 25, 1991), *aff'd*, 985 F.2d 1451 (10th Cir. 1993); *HUD v. Jerrard*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,005, 25,087 (HUDALJ Sept. 28, 1990).

Absent direct evidence, the Charging Party may prove discriminatory animus by indirect evidence of intent by establishing a *prima facie* case. Specifically, in the circumstances of this case, a *prima facie* case of discrimination under 42 U.S.C. § 3604(a) would be demonstrated by proof that 1) Julie Obi is a member of a protected class; 2) she made an inquiry about renting the apartment;[4] 3) Duk Hee Ro refused to negotiate the rental of the apartment with her, or otherwise make it available; and 4) Ms. Ro simultaneously expressed a willingness to negotiate with and otherwise make the apartment available to Ms. Perrero, who is not, and is not known to be, a member of the same protected class as Ms. Obi. *See, e.g., HUD v. Blackwell,* 908 F.2d 864, 870 (11th Cir. 1990); *Robinson v. 12 Lofts Realty, Inc.,* 610 F.2d 1032, 1038 (2d Cir. 1979).

Once the Charging Party establishes a *prima facie* case, the burden of production shifts to Respondents to articulate a nondiscriminatory reason for their actions. The Charging Party then may prove that the asserted legitimate reasons are pretextual. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *see also Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981). However, pretext alone does not necessarily prove discrimination. The Charging Party still maintains the burden to demonstrate that an asserted reason, even though pretextual, evidences an intent to discriminate. *See St. Mary's Honor Center v. Hicks,* 113 S.Ct. 2742; 125 L.Ed. 2d 407 (1993).

Statements by "a person engaged in the sale or rental of a dwelling" that (1) convey that housing is unavailable because of race and/or national origin or (2) express a

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[4]It is not necessary that Ms. Obi be a home seeker in her own right. Section 804(a) of the Act prohibits a refusal to "rent after the making of a bona fide offer, *or* to refuse to negotiate. . . or otherwise make unavailable or deny, a dwelling" because of discrimination. 42 U.S.C. § 3604(a) (emphasis added). This section is "so constructed that the `bona fide offer' requirement grammatically applies *only to refusals to rent,* and not to" refusals to negotiate or otherwise make a dwelling unavailable. *United States v. Youritan Constr. Co.,* 370 F.Supp. 643, 650 (N.D. Cal. 1973) (emphasis added), *aff'd as modified,* 509 F.2d 623 (9th Cir. 1975); *see also* 42 U.S.C. § 3604(a). Thus, a violation exists where there has been a refusal to negotiate for or make housing available, even absent a bona fide offer to rent. In addition, Ms. Obi falls under the definition of an "aggrieved person" which includes "any person who. . . claims to have been injured by a discriminatory housing practice." 42 U.S.C. § 3602(i). Ms. Obi claims injury in the form of emotional damages. *See infra* p. 13. Indeed, damages have been awarded to "testers" in numerous decisions despite the fact that testers had no intention of acquiring housing, but rather were "testing" to determine whether a housing provider practices discrimination. *See, e.g., United States v. Balistrieri,* 981 F.2d 916, 933 (7th Cir. 1992) (The court upheld a jury award of $2,000 for each of five testers.), *cert. denied,* 114 S. Ct. 58 (1993); *Davis v. Mansards,* 597 F. Supp. 334, 347-48 (N.D. Ind. 1984) (Husband and wife testers were awarded $2,500 and $5,000, respectively.); *HUD v. Jancik,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,058 (HUDALJ Oct. 1, 1993) (A tester was awarded $2,000 in emotional distress damages.), *aff'd,* 44 F.3d 553 (7th Cir. 1995).

preference for or limitation on housing applicants because of race and/or national origin violate the Act. 24 C.F.R. § 100.75(b); *see also* 42 U.S.C. § 3604(c); 24 C.F.R. §§ 100.75(a), (c)(1) and (c)(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. *Soules v. HUD*, 967 F.2d 817, 824 (2d Cir. 1992); *see also Ragin v. New York Times Co*., 923 F.2d 995, 999-1002 (2d Cir.), *cert. denied*, 112 U.S. 81 (1991).

42 U.S.C. Section 3604(a)

The nature of the Charging Party's and the Intervenor's evidence of race and/or national origin discrimination is indirect, rather than direct. Ms. Obi and Ms. Perrero testified that Ms. Ro told Ms.Obi that she could not rent, but that Ms. Perrero could. Because Ms. Ro did not state the reason for her rejection of Ms. Obi and her preference for Ms. Perrero, one is unable to conclude directly, *i.e.*, without making an inference, that it is based on race and/or national origin. Accordingly, an intent to discriminate must be inferred using the *McDonnell Douglas* three-part shifting burdens analysis. *See supra* pp. 6-7.

Prima Facie Case of Race Discrimination

It is undisputed that the first and second elements of a *prima facie* case of race discrimination have been satisfied. Because Ms. Obi is black, she belongs to a protected class. *See* 42 U.S.C. § 3604(a). In addition, Ms. Obi made an inquiry concerning the apartment. Respondents contend that the third and fourth elements have not been satisfied based on Ms. Ro's denial that she ever told Ms. Obi that she was not "okay" for the apartment. *See* Tr. pp. 410-14, 463. For the reasons discussed below, I do not find Ms. Ro to be credible. Accordingly, I find that Ms. Ro made the alleged statements rejecting Ms. Obi as a prospective applicant while simultaneously expressing an interest in renting to Ms. Perrero. *See supra* finding no. 11.

First, Ms. Ro's testimony was contradictory and implausible. For example, Ms. Ro's hearing testimony that she always performs credit checks on prospective tenants is flatly contradicted by her deposition in which she states that she did not. Tr. pp. 476-77, 479. In addition, Ms. Ro testified that she had a "language problem." Tr. p. 484. However, at her deposition, Ms. Ro stated that she did not have a language problem because she was educated in the United States. Tr. p. 485. Moreover, I find Ms. Ro's claim that she had a language problem to be implausible, based on my own observation of her facility in English. In addition, I note that Ms. Ro has been in the United States for 25 years, speaking English with her children and her tenants. She conducts her rental business in English, and her leases and tenant applications are written in English. She

earned nursing licenses from the states of New York and Maryland. She has taken real estate courses that were taught in English. As an interpreter, she translated Korean into English. Finally, while a student in Korea, she studied English for ten years.

Second, I found her to be an evasive and uncooperative witness. I had to instruct her many times to answer the question asked and not to argue with the attorneys. *See* Tr. pp. 410, 420, 460, 461, 482. Even her own counsel had to instruct her to answer his questions and to be specific in her responses. *See* Tr. pp. 410, 437, 457. In addition, Ms. Ro frequently interjected self-serving statements. For example, when she was asked by Respondents' counsel about the physical properties of her office, Ms. Ro testified that her employees can see "what's going on because [she has] always language problem." Tr. p. 407. She again testified about the alleged language problem in response to a question about whether Ms. Obi or Ms. Perrero liked the apartment. Tr. pp. 415-16; *see also* Tr. pp. 410-11, 413, 450, 453-54, 461, 473.

In contrast to Ms. Ro, I credit Ms. Obi's testimony concerning the events of December 7, 1992. In contrast to Ms. Ro, I found Ms. Obi to be credible. Her testimony was entirely consistent, and her answers were forthright and responsive.

Although Ms. Obi's credible testimony, when weighed against Ms. Ro's testimony, is sufficient to establish the Charging Party's *prima facie* case by a preponderance of evidence, Ms. Obi's testimony was also corroborated by the only other person to recollect the December 7th conversation,[5] Ms. Perrero, a disinterested witness in these proceedings. By the date of the hearing, Ms. Perrero was no longer Ms. Obi's client. They severed their relationship in the Spring of 1992, prior to Ms. Perrero moving out of state.[6] Tr. pp. 122, 125, 273.

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[5]Respondents claim that the Ros' former employee, Janell Daake, was also an eyewitness to the incident. Ms. Daake worked full-time at Ms. Ro's office, from September to December 1992, and was working on December 7, 1992. Tr. pp. 351, 355. She remembered no rejection by Ms. Ro of a prospective tenant. Tr. p. 357. However, she was unable to testify with certainty that such a conversation did not take place, and that if it did, whether she would have heard the entire conversation. Tr. pp. 352, 364-65. Moreover, Ms. Daake had no recollection of ever seeing either Ms. Obi or Ms. Perrero. Tr. pp. 352-53, 359. Accordingly, I do not find that she witnessed the December 7th incident.

[6]Respondents attack Ms. Perrero's credibility on two grounds. First, they claim that she lied to Ms. Ro in a conversation about the December 7, 1992, incident, and second, that she contradicted herself during the hearing. *See* Respondents' Brief (Apr. 4, 1995) at 4-5.

Soon after Ms. Perrero became a tenant, Ms. Ro confronted her and asked her whether Ms. Perrero thought that she had discriminated against Ms. Obi on December 7, 1992. Ms. Perrero stated that she agreed with Ms. Ro's view that it was not a discriminatory incident. Tr. pp. 268-69. Ms. Perrero openly admitted at the hearing that she had lied to her landlady. She stated that she was afraid that a different response would result in her eviction. Tr. pp. 269-70. Respondents question the veracity of

Ms. Perrero's alleged fear of eviction because she had not hesitated to complain about several problems in the apartment, such as lack of heat. Tr. pp. 273-74. I disagree. A tenant's complaint about lack of heat is far less consequential than an accusation of discrimination against the landlord.

Second, Ms. Perrero testified that at the time Ms. Ro asked her opinion about the December 7th incident, she feared eviction based on Ms. Ro's negative reputation as a landlady. Tr. pp. 283-84. Respondents claim that Ms. Perrero contradicted herself by later testifying that when Ms. Ro asked her opinion, she was not yet familiar with Ms. Ro's reputation. Tr. p. 288. After having reviewed this later testimony, I conclude that Ms. Perrero was confused as to the particular occasion to which I was referring in my questions. *See* Tr. 287-88.

Respondents assert that Ms. Ro did not make the statements based on alleged inconsistencies between Ms. Obi's and Ms. Perrero's testimony. Ms. Obi and Ms. Perrero offered slightly different versions concerning the precise wording of Ms. Ro's statements.[7] These differences are not significant because, in any event, both Ms. Obi and Ms. Perrero agree that Ms. Ro's statements clearly were an outright rejection of Ms. Obi and a preference for Ms. Perrero.

Finally, Respondents argue that Ms. Ro did not reject Ms. Obi, because she showed the apartment to both Ms. Obi and Ms. Perrero. Respondents' Brief at 3. This argument is without merit. Respondent showed the apartment to both women having already decided that she would not make her apartment available to the black applicant.

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[7]Ms. Obi's testimony concerning Ms. Ro's statements of December 7th is as follows:

Q. [Y]ou stated that you. . . and Ms. Perrero went into. . . Mrs. Ro's office together?
A. [S]he asked why we were there. . . . I told her we were there to look at the apartment.
Q. And then she. . . said that. . . Angela Perrero is okay but you're not okay?
A. Yes.
Q. Is that the exact language she used?
A. Yes. I remember her saying she's okay for it; you are not.
Q. [Y]ou never challenged her. . . about that statement?
A. I asked her what she meant by it.
Q. And she repeated the same thing?
A. Exactly.

Tr. pp. 102-03. Ms. Perrero testified as follows:

Q. [Y]ou said that [Ms. Ro] told Mrs. Obi that she could not rent the apartment, were those the exact words she used?
A. She didn't say she could not rent the apartment. She said you could not live here.
Q. Are those the exact words or that's just what you thought she meant?
A. That's what I heard.

Tr. p. 241. Because Ms. Ro's statement was directed at Ms. Obi, and consisted of an outright rejection of her, the statement is not something that Ms. Obi is likely to soon forget. Ms. Obi was adamant that she remembered "exactly" what Ms. Ro said. Tr. pp. 102-03. In contrast, when Ms. Perrero was twice asked if she remembered Ms. Ro's "exact words," she was unable to respond affirmatively. Tr. p. 241.

I find that Ms. Ro refused to negotiate with or otherwise make her apartment available to Ms. Obi while simultaneously expressing a willingness to negotiate and make the apartment available to Ms. Perrero. Accordingly, the Charging Party has proved all four elements of a *prima facie* case of race discrimination.

Prima Facie Case of National Origin Discrimination

The first three elements of a *prima facie* case of national origin discrimination have been satisfied. Because Ms. Obi is Nigerian, she belongs to a protected class. *See* 42 U.S.C. § 3604(a). She speaks with a pronounced accent. Accordingly, I find that her oral statements to Ms. Ro expressing interest in the apartment, and inquiring what Ms. Ro meant when she said that Ms. Obi was not "okay" for the apartment made Ms. Ro aware that she was not a native born American. In addition, Ms. Ro admitted in her deposition that, based on Ms. Obi's speech, she knew that she was foreign born. *See* Tr. p. 500. The second element is satisfied because Ms. Obi made an inquiry concerning the apartment. The third element is satisfied by Ms. Ro's refusal to negotiate or otherwise make her apartment available to Ms. Obi. However, the Charging Party has failed to satisfy the fourth element. At the time Ms. Ro rejected Ms. Obi, Ms. Perrero had not spoken or otherwise given any indication to Ms. Ro of her national origin. Ms. Ro had no basis upon which to conclude that Ms. Perrero was not also a foreign national. Thus, her simultaneous rejection of Ms. Obi and preference for Ms. Perrero, has not been demonstrated to result from their differing national origins. Accordingly, the Charging Party has failed to establish a *prima facie* case of national origin discrimination.

Other Issues

Because the Charging Party has established a *prima facie* case of race discrimination, the burden of production shifts to Respondents to articulate a legitimate, nondiscriminatory reason for Ms. Ro's conduct. Because Respondents contend that she did not make these statements, they have not asserted any legitimate, nondiscriminatory reasons for her actions. Thus, Respondents have failed to meet their burden of production under the *McDonnell Douglas* three-prong test. Accordingly, the Charging Party has proved that Ms. Ro violated 42 U.S.C. § 3604(a).

Respondents argue that even if Ms. Ro violated the Act, Dr. Ro is not legally liable for the acts of his wife because of the lack of an agency relationship. I disagree. "[A]n agency arises when one person, the principal, manifests his consent to another, the agent, that the latter should act on the former's behalf, or where one person undertakes to transact some business. . . on account of such other person, irrespective of the existence of a formal contract, or the receipt of compensation. . . ." 2A C.J.S. *Agency* § 37 (1972). Dr. Ro, who signed the mortgages, purchased the property, along with his wife, to enable her to

work outside of the home. Tr. pp. 292-93. In addition, their accountant had advised Ms. Ro to find and purchase property for them because her husband was too busy working to get involved in real estate. Tr. pp. 398-403. By providing the financial support for his wife's real estate ventures, Dr. Ro delegated the management and rental of the properties to her. Tr. pp. 292-93. As a co-owner, he "manifested his consent" to her acting for him as their manager, and she "transacted business" on his behalf. *See* 2A C.J.S. *Agency* § 37. Accordingly, I find that she was acting as his agent. *See Izard v. Arndt,* 483 F. Supp. 261, 263-64 (E.D. Wis. 1980) (An agency relationship existed where a wife had sole responsibility for rental of property that she owned with her husband.). Therefore, Dr. Ro is liable for Ms. Ro's discriminatory actions. *Id.*; *see also, City of Chicago v. Matchmaker Real Estate Sales Center,* 982 F.2d 1086, 1096-99 (7th Cir. 1992), *cert. denied,* 113 S. Ct. 2961 (1993); *Walker v. Crigler,* 976 F.2d 900, 903-05 (4th Cir. 1992); *Marr v. Rife,* 503 F.2d 735, 740-41 (6th Cir. 1974); *United States v Youritan Constr. Co.,* 370 F. Supp. 643, 649 (N.D. Cal. 1973), *aff'd as modified,* 509 F.2d 623 (9th Cir. 1975).

42 U.S.C. Section 3604(c)

To prove a violation of 42 U.S.C. § 3604(c), the Charging Party must establish that Ms. Ro was "a person engaged in the sale or rental of a dwelling," who made a statement expressing either that the apartment was unavailable because of race or that she had a preference concerning prospective renters because of race. 24 C.F.R. § 100.75(b); *see also* 42 U.S.C. § 3604(c); 24 C.F.R. §§ 100.75(a), (c)(1) and (c)(2). Because Ms. Ro was attempting to rent the apartment, she obviously was "a person engaged in the. . . rental of a dwelling." 24 C.F.R. § 100.75(b). As discussed above, Ms. Ro made the following statement to Ms. Obi: "She's (*i.e.,* Ms. Perrero's) okay for the apartment, you are not." *See supra* pp. 8-10. When Ms. Obi asked her what she meant, she repeated the statement. Ms. Ro's statements, on their face, conveyed both that housing was not available to Ms. Obi, and that she had a preference for Ms. Perrero and against Ms. Obi.

Ms. Ro's statements express a discriminatory preference, if an "ordinary listener" may reasonably interpret them as such. *Soules,* 967 F.2d at 824; *Ragin,* 923 F.2d at 999-1002; *HOME v. Cincinnati Enquirer, Inc.,* 943 F.2d 644, 646-48 (6th Cir. 1991). The "ordinary listener" is "neither the most suspicious nor the most insensitive." *Ragin,* 923 F.2d at 1002. It is a standard that must be evaluated under the particular facts of each case. *Soules,* 967 F.2d at 824. In light of the circumstances of this case, I find that the statements indicate to an ordinary listener that Ms. Ro preferred Ms. Perrero and rejected Ms. Obi solely because of race.

Prior to her statements, Ms. Ro had made no other inquiries of either Ms. Obi or Ms. Perrero. The two women had just arrived at Ms. Ro's office seeking information about the rental apartment. Ms. Ro did not know either of the women; she had no information that

would make Ms. Perrero a more desirable tenant. In addition, their appearances did not provide any reason for Ms. Ro to prefer Ms. Perrero over Ms. Obi. Ms. Obi presented a very professional, positive appearance. By Ms. Ro's own admission, Ms. Obi had a "professional look," was wearing a beautiful dress, had her hair fixed beautifully, and was, herself beautiful. Tr. pp. 458-59. The only ostensible difference between Ms. Obi and Ms. Perrero was race. Accordingly, I find that the "ordinary listener" would reasonably interpret Ms. Ro's statements as both conveying that housing is unavailable because of race, and expressing a preference and limitation because of race. Therefore, Respondents[8] violated 42 U.S.C. § 3604(c).

Remedies

Complainant is entitled to "such relief as may be appropriate, which may include actual damages. . . and injunctive and other equitable relief." 42 U.S.C. § 3604(g)(3). In addition, Respondents may be assessed a civil penalty "to vindicate the public interest." *Id.* The Charging Party and Intervenor seek $35,000 in damages for Ms. Obi. The Charging Party seeks civil penalties and appropriate injunctive relief.

Emotional Distress

Ms. Obi is entitled to damages for emotional distress caused by Respondents' actions. "Although courts do not demand precise proof to support a reasonable award of damages [for emotional distress], *Block v. R.H. Macy & Co., Inc.,* 712 F.2d 1241, 1245 (8th Cir. 1983), such damages may be inferred from the circumstances of the discrimination, as well as established by testimony." *Tucker,* 2 Fair Housing-Fair Lending at 25,350; *see also Seaton v. Sky Realty Co., Inc.,* 491 F.2d 634, 636 (7th Cir. 1974); *HUD V. Blackwell,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,001, 25,011-13 (HUDALJ Dec. 21, 1989), *aff'd,* 908 F.2d 864 (11th Cir. 1990).

The record demonstrates that Ms. Obi suffered emotional distress because of Ms. Ro's rejection. She was humiliated, embarrassed, and upset. The incident was particularly painful because it occurred in front of Ms. Perrero, someone with whom

[8]Again, even though Ms. Ro made the statements, her husband is also liable for the violation. *See supra* pp. 11-12.

Ms. Obi maintained a professional relationship. Ms. Obi began doubting her ability to help clients obtain housing because she questioned whether her mere presence was a hinderance. In addition, she became withdrawn with white coworkers after the incident. The discrimination also affected her family life. The evening of December 7th, she wept at home while discussing the incident with her husband. That evening and for several days thereafter she was unable to perform household chores or care for her children. Her physical reactions provided further evidence of her emotional distress. Ms. Obi had difficulty sleeping or eating for several days after the incident.[9] Finally, Ms. Obi also had to endure Ms. Ro's unannounced visits to her work place in which Ms. Ro attempted, on three separate occasions, to convince Ms. Obi that she was mistaken concerning what occurred during the December 7th incident. Ms. Obi characterized these visits as "insulting her intelligence." Tr. p. 70.

Although Ms. Obi suffered embarrassment and humiliation, the discrimination did not drastically impact her lifestyle. Her home life was affected only for a short period of time. She suffered no lasting harm, nor was she denied housing. With the exception of a few days, she did not experience substantial anguish. Her injury is similar to, although more severe than that suffered by most testers. Ms. Obi, like a tester, was not actually seeking, nor was she denied housing. While testers make inquiries of housing providers in hopes of gaining information about, or even *anticipating* potential discriminatory practices, Ms. Obi did not expect the treatment that she received at the hands of Ms. Ro. Thus, unlike testers, Ms. Obi was unable to anticipate the discrimination, and to brace herself against the shock of a rejection because of her race. In addition, I find that Ms. Obi's embarrassment was heightened by the fact that the incident occurred in front of her client, someone with whom she had a professional relationship. Accordingly, I find that Ms. Obi is entitled to $10,000 in damages for emotional distress.[10]

Civil Penalty

[9]The Charging Party and the Intervenor seek damages for other physical manifestations allegedly attributable to Ms. Ro's actions. They request compensation for the two-week period of time that Ms. Obi missed work because of illness. This period was around the end of January or beginning of February 1993. The record does not demonstrate that her illness during this time period was caused by Ms. Ro's discrimination. The illness did not occur until approximately two months after the discriminatory conduct. In addition, Ms. Obi was pregnant at the time. Thus, without further evidence, I am unwilling to speculate that Ms. Ro was responsible for Ms. Obi's two-week illness. Accordingly, I do not award damages for this period.

[10]This award is appropriate in comparison with other cases. *See supra* note 4.

The Charging Party seeks a penalty of $8,000 against Ms. Ro and $4,000 against Dr. Ro. Assessment of a civil penalty is not automatic. *See* House Judiciary Comm., *Fair Housing Amendments Act of 1988,* H.R. Rep. No. 711, 100th Cong., 2d Sess. 37 (1988). In determining whether to assess a penalty and the amount involved, the following factors must be considered: (1) the nature and circumstances of the violation, (2) the degree of culpability, (3) the goal of deterrence, (4) whether there has been a previous unlawful violation, and (5) the financial circumstances of the respondent.

The nature and circumstances of Ms. Ro's actions warrant a significant penalty. Her action was blatant and serious. She unabashedly rejected Ms. Obi as a potential tenant solely because of her race, while simultaneously preferring Ms. Perrero for the same reason. In addition, her lack of candor throughout this proceeding also indicates that she has not yet accepted her responsibilities under the Act.

While Ms. Ro is responsible for her own actions, Dr. Ro also must bear responsibility for his. With the exception of monthly bookkeeping, he delegated all matters concerning their properties to his wife, without paying sufficient attention to his responsibility as a housing provider under the Act.

The goal of deterrence also warrants a penalty against Respondents. Ms. Ro continues to manage Respondents' numerous rental properties. She must learn that she cannot engage in such discriminatory practices in the future. Dr. Ro, and other owners must be made aware that they cannot blindly delegate management duties to someone who blatantly practices discrimination.

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

Because Respondents possess the information concerning their financial circumstances, they have the burden of introducing such evidence into the record. The failure to produce credible evidence militating against assessment of a penalty will result in imposition of a penalty without consideration of Respondents' financial circumstances. *See Campbell v. United States,* 365 U.S. 85, 96 (1961); *Blackwell,* 2 Fair Housing-Fair Lending at 25,015. The record contains no evidence indicating that imposition of a penalty would create undue hardship for Respondents. *See* C.P. Ex. E at 8.

Upon consideration of all factors, I have determined that a civil penalty in the amount of $10,000 is warranted against Ms. Ro and Dr. Ro jointly and severally. *See HUD v. Burns Trust,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,092, 25,843-44 (HUDALJ

Jan. 17, 1995), *appeal filed on other grounds*, No. 95-70255 (9th Cir. Mar. 17, 1995); *see also HUD v. Banai*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,095, 25,860 (HUDALJ Feb. 3, 1995), *appeal filed*, No. 95-4377 (11th Cir. Mar. 20, 1995).

Injunctive Relief

An administrative law judge may order injunctive or other equitable relief to make a complainant whole and protect the public interest in fair housing. 42 U.S.C. § 3612(g)(3). The purposes of injunctive relief include the following: 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. Once a judge has determined that discrimination has occurred, he or she has "the power as well as the duty to `use any available remedy to make good the wrong done.'" *Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1975) (citations omitted). The injunctive provisions of the following Order serve all of these purposes.

Conclusion

The preponderance of the evidence demonstrates that Respondents Duk Hee Ro and Myung Ro discriminated against Complainant Julie Nkeonyeme Obi on the basis of race, but not national origin, in violation of 42 U.S.C. §§ 3604(a) and (c), and 24 C.F.R. §§ 100.50(b)(1) and (4); 100.60 (a) and (b)(2); 100.75(a). Complainant suffered actual damages for which she will receive a compensatory award. Further, to vindicate the public interest, injunctive relief will be ordered, as well as a civil penalty against Respondents.

ORDER

It is hereby ORDERED that:

1. Respondents Duk Hee Ro and Myung Ro, and their agents are permanently enjoined from discrimination with respect to housing because of race. Prohibited actions include, but are not limited to the following:

a. making unavailable or denying a dwelling to any person because of race;

b. making, printing, or publishing, or causing 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 race;

c. representing, because of race, that any dwelling is not available for sale, rental, or inspection, when it is in fact so available; and

d. retaliating against Complainant Julie Nkeonyeme Obi, any witness, or any person for their participation in this case.

2. Provided that the director of the Mid-Atlantic Office of Fair Housing and Equal Opportunity, Pennsylvania State Office, 100 Penn Square East, Philadelphia, PA 19107-3390, may modify this paragraph to make its requirements less, but not more burdensome, Respondents shall keep records regarding the operations of their rental housing properties including the following:

a. a duplicate of every written application, and a written description of every oral inquiry, for all persons who applied for occupancy at each rental housing unit owned or managed by Respondents, including information as to the person's race, the date of the application or inquiry, whether the person was rejected or accepted, and, if rejected, the reason for the rejection;

b. a list of all vacant housing units at properties owned or managed by Respondents, including the date Respondents were notified the unit would be vacant, the date the tenant moved out, the date the unit was next committed to rental, the date the new tenant moved in; the name and race of both the former and new tenant; and

c. a copy of all rules, regulations, leases, notices to vacate, eviction papers, including court documents, and any other documents, or changes thereto, provided to or signed by any tenants or applicants.

3. Consistent with 24 C.F.R. Part 11, Respondents shall display the HUD fair housing poster next to any "for rent" signs posted in their rental housing properties.

4. Within forty-five (45) days of the date on which this Order becomes final, Respondents shall pay actual damages to Complainant in the amount of $10,000 to compensate her for emotional distress.

5. Within forty-five (45) days of the date on which this Order becomes final, Respondents shall pay a civil penalty of $10,000 to the Secretary of HUD.

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

/s/

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WILLIAM C. CREGAR
Administrative Law Judge

Dated: June 2, 1995.