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
James Lavender,

Charging Party,

and

James Lavender,

Intervenor,

v.

Senior Nevada Benefits Group, L.P.,
Ida, Inc., and LeRoy Black,

Respondents.

HUDALJ 09-01-0380-8
Decided: March 5, 2004

DECISION ON SECRETARIAL REVIEW REMAND

Procedural History

An Order on Secretarial Review was issued on November 12, 2003, remanding this matter to me pursuant to 24 C.F.R. § 180.675(g) for the limited purpose of reconsidering "the amount of the emotional distress damage award for the two weeks the Complainant stayed in the homeless shelter in light of case law that the Charging Party has cited in its Petition for Secretarial Review." I issued a Notice and Order on November 13, 2003, directing the parties to file briefs on the limited issue on remand. Both parties submitted briefs by December 8, 2003, and the issue is thus ripe for decision.

On January 6, 2004, the National Fair Housing Alliance (NFHA) filed a Petition to Participate as Amicus Curiae, accompanied by a proposed amicus brief. I issued an Order on January 7, 2004, directing the NFHA to file a brief arguing why I should find good cause to accept their petition at this late stage of the proceedings, and directing the parties to file responses to NFHA's brief. NFHA filed its brief on January 23, 2004. The agency filed its brief on February 9, 2004, and Respondents filed their brief on February 19, 2004. I find that there is good cause to allow NFHA to participate as Amicus Curiae, and I have accepted the amicus brief they filed on January 6, 2004, and considered the arguments contained therein.

Complainant James Lavender filed a letter on January 23, 2004 seeking leave to intervene. I issued an Order on January 27, 2004 directing Mr. Lavender to explain the basis for his request and allowing the parties to file responses. The only pleading I received was the Agency's response in support of the petition to intervene. This was filed on February 9, 2004. The Agency explained that it had urged Mr. Lavender to seek intervention by sending a letter that is standardized for these proceedings. The Agency further urged that Mr. Lavender's intervention was solely to protect his rights to petition the U. S. Court of Appeals for the Ninth Circuit for review of the final agency decision. Although initially concerned with the timing of Mr. Lavender's petition to intervene, I accept the argument of the Agency that to require him to intervene earlier in the proceedings, when his interests and the Agency's coincide, would cause Mr. Lavender to needlessly retain and pay his own counsel. Only when the interests of Mr. Lavender and the Agency diverge, as they now have, is it appropriate for him to undertake the burden of intervening. The case law is clear that, under these conditions, intervention at this stage is wholly appropriate and preserves the complainant's due process rights.[1] Therefore, I have granted Mr. Lavender's petition to intervene.

Analysis

In essence, the Charging Party asserts that, because the default judgment of discrimination also found that Complainant stayed in a homeless shelter and suffered certain emotional and physical distress there, it follows that the Complainant suffered *severe* emotional distress, and that any financial award less than a certain threshold is

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[1] *See HUD v. Holiday Manor Estates Club, Inc.,* 2A Fair Housing-Fair Lending (Aspen) ¶ 25,027, HUDALJ No. 05-89-0544-1 (March 23, 1992) and *HUD v. Downs,* 2A Fair Housing-Fair Lending (Aspen) ¶ 25,017, HUDALJ Nos. 02-89-0322-1, 02-89-0323-1 (November 22, 1991).

therefore merely "token" and contrary to precedent. This is erroneous reasoning.

There has always been wide discretion to set damages for emotional distress in Fair Housing cases. This discretion is limited by two crucial elements: the egregiousness of the Respondent's behavior and the effect of that behavior on the Complainant. *HUD v. Sams,* 2A Fair Housing-Fair Lending (Aspen) ¶ 25,069, HUDALJ No. 03-92-0245-1 (March 11, 1994). As the judge noted in *Sams*, "the record as a whole must demonstrate the need for the amount awarded." *Id*. at page 25,651. "'[M]ore than mere assertions of emotional distress' are required to support an award for that type of intangible damage." *Id.*, citing *Morgan v. Secretary of Housing and Urban Development*, 985 F.2d 1451, 1459 (10th Cir. 1993). In addition, the evidence adduced must be credible and support the level of emotional damages awarded. These elements are entwined and interrelated in administrative adjudications, i.e., the egregiousness of the behavior is only relevant in assessing the degree of emotional distress when considering the effects of the discriminatory behavior on the Complainant.

As to the first element of emotional distress awards, the Respondents' behavior in this matter was clearly not egregious. There is no evidence which by its nature could have been more harmful and thus justified a higher award. And the evidence presented of indirect discrimination does not give rise to even an inference of egregious behavior, motive, pattern, or intent. The more inherently degrading or humiliating a respondent's action is, the more reasonable it is to infer that the victim of that action suffered emotional distress or humiliation. In this case, lacking any evidence of such behavior on the part of Respondents, this element provides no basis for a higher award of emotional distress damages.

That leads us to the second element of emotional distress awards: the effect of the discriminatory behavior on the Complainant. This element squarely places the burden upon the Complainant to provide convincing evidence that he suffered an emotional impact sufficient to warrant the amount of monetary compensation sought. It therefore follows that, in the absence of any supporting documentary evidence or credible third-party testimony of emotional injury, I must find the Complainant's testimony about the emotional impact of the discriminatory act and his subsequent housing situation to be credible in order to award him the amount sought. I did not find him credible, for all the reasons set forth in the Initial Decision. The record as a whole simply did not support the need for a greater award than $100 per week for the two weeks he spent in a homeless shelter.

The Charging Party argues that the award in this case is token or contrary to award

precedent in Fair Housing Act cases. That argument is simply wrong. An award of emotional distress damages is not compelled by a finding of discrimination in and of itself or the recognition that homeless shelters *may* be unpleasant and distressing locations in which to live. As explained above, in the absence of any other evidence, emotional distress damages rest for their proof on the credibility of the Complainant. Therefore, while an award for emotional distress is appropriate in this case, Complainant's testimony alone is not sufficient to support a higher amount, and there is no other evidence of emotional distress.[2] The Complainant's testimony and the facts do not support a conclusion that he suffered severe emotional distress as a result of his two weeks at the homeless shelter. He testified that he had $600 dollars in his possession when he arrived in Las Vegas. This was more than enough money to pay for a motel for at least a few nights. He knew more money would be coming with his next Social Security check. Therefore, he could have chosen to stay somewhere other than a homeless shelter. He also knew he would not be there long because the shelter personnel were finding him housing elsewhere and there were several other rooms for rent in his newspaper with his same criteria and price range. He could have left the shelter earlier if he had found it to be too distressing.

Not only is this determination in line with Fair Housing award precedent, the reasoning of this determination is virtually identical to that found in *HUD v. Wagner*, 2A Fair Housing-Fair Lending (Aspen) ¶ 25,032, 25,337-38, HUDALJ No. 05-90-0775-1 (June 22, 1992) (in which the court awarded the Complainant $350 instead of $2,000 for the subjective value of lost amenities because the Complainant remained in allegedly distressing housing for a long period of time, clearly indicating that it was not too distressing or he would have gone elsewhere (as cited in the Initial Decision, page 16)). Although in *Wagner* the issue was loss of amenities, the inference to be drawn from the Complainant's choice not to change his circumstances is the same in the instant case as in

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[2] Lest the Respondents assert that *any* emotional distress award is improper, I reiterate that the $200 award at issue in this remand decision involves the issue of emotional distress due to residence in the homeless shelter, not emotional distress due to the experience of being discriminated against. Although I do not find it credible that the Complainant *felt* discriminated against (or therefore afraid to find other housing), it remains as fact that there is a default judgment of discrimination and that the Complainant left the Respondents' property with no place to live because Respondents turned him down. He is therefore entitled to damages related to finding somewhere else to stay. He chose to stay at the homeless shelter, for whatever reason. He was thus awarded compensation for his out-of-pocket costs in staying at the homeless shelter. Normally, that would end the issue. However, because of the nature of a homeless shelter (rather than Complainant's testimony), it is credible that he suffered *some* emotional distress while staying in such a facility. Since he was staying in the homeless shelter because he had no place to live due to Respondents' actions, a damages award for emotional distress occurring because of the environment of the homeless shelter is appropriate. Under the facts of this case, the Respondents do not have the option of second-guessing where the Complainant chose to find a place to stay when refused housing at their property.

Wagner.

In support of its contention that the $200 award in this case was improper, the Charging Party cited the following cases: *Johnson v. Hale*, 13 F.3d 1351, 1353 (9th Cir. 1994); *HUD v. Ucci*, 2A Fair Housing-Fair Lending (Aspen) ¶25, 097, HUDALJ No. 02-94-0016-8 (March 17, 1995); *HUD v. Ro*, 2A Fair Housing-Fair Lending (Aspen) ¶25,106, HUDALJ No. 03-93-0313-8 (June 2, 1995); *HUD v. Joseph*, 2A Fair Housing-Fair Lending (Aspen) ¶25,072, HUDALJ No. 04-93-0306-1 (June 2, 1994); *HUD v. Gwizdz*, 2A Fair Housing-Fair Lending (Aspen) ¶25,086, HUDALJ No. 05-92-0061-1 (November 1, 1994); *HUD v. Bangs*, 2A Fair Housing-Fair Lending (Aspen) ¶25,040, HUDALJ No. 05-90-0293-1 (January 5, 1993); *HUD v. Jancik*, 2A Fair Housing-Fair Lending (Aspen) ¶25,058, HUDALJ No. 05-91-0969-1 (October 1, 1993); and *HUD v. Gaultney*, 2A Fair Housing-Fair Lending (Aspen) ¶25,013, HUDALJ No. 04-88-0587-1 (September 27, 1991).[3] The Charging Party specifically focused on *Ro* and *Ucci* as the most directly applicable and similar cases to the instant case.

In *Ro*, a black social worker, Mrs. Obi, accompanied a young single mother to get the mother affordable housing. It was part of Mrs. Obi's job to help families get housing the state would help pay for so as to help keep the family together. At the apartment, Mrs. Ro, the landlord, looked at the two women, pointed at the client, and said, "She's okay for the apartment, you are not." When Mrs. Obi asked what she meant, Mrs. Ro repeated the statement. She then said she would show the apartment to the client.

Although Mrs. Obi was not denied housing and she did not suffer lasting harm or a drastic lifestyle impact, she was awarded $10,000 in emotional distress damages. However, there are significant differences between *Ro* and the instant case. First, as the court in *Ro* stated, ". . . statements express a discriminatory preference if an "an ordinary listener" may reasonably interpret them as such. . . . The "ordinary listener" is "neither the most suspicious nor the most insensitive.'" 2A FH-FL ¶25,106, at 25,929 (quoting *Ragin v. New York Times Co.*, 923 F.2d 995, 1002 (2d Cir.), *cert. denied,* 112 U.S. 81 (1991), and citing *Soules v. HUD*, 967 F.2d 817, 824 (2d Cir. 1992), and *HOME v. Cincinnati Enquirer, Inc*., 943 F.2d 644, 646-48 (6th Cir. 1991)). The court then found that the statements made by Mrs. Ro indicated to an ordinary listener that Mrs. Ro preferred the client and rejected Mrs. Obi solely because of race. 2A FH-FL ¶25,106, at

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[3] I had read and considered these cases prior to issuing the Initial Decision, and quoted and cited to several of them within the Initial Decision. However, because the remand on this issue has requested I review the award in light of these cases, I will discuss the pertinent cases in greater detail.

25,929. There is a default finding of discrimination in the instant case due to Respondents' failure to participate appropriately in the first half of the hearing process, and I did not find that an ordinary listener would reasonably interpret the Respondents' statements and actions in the instant case as expressing a discriminatory preference.

Second, the court in *Ro* found Mrs. Ro, the Respondent, not credible, while finding Mrs. Obi credible. In addition, Mrs. Obi's testimony was supported by both the client who had been present at the time and a co-worker. 2A FH-FL ¶25,106, at 25,926-27. In the instant case, I specifically found the Complainant *not* credible, and his emotional distress testimony was not supported or corroborated by anyone else. An ordinary listener would not have found the Respondents' statements or actions to indicate a discriminatory preference. This, combined with Complainant's lack of credibility, led me to conclude that Complainant suffered no emotional distress from the simple fact that Respondents refused to rent to him. There are other, factual, differences between *Ro* and the instant case that warrant a higher award in *Ro*, but those facts come into play only because the court in *Ro* found the Complainant's testimony credible.

In *Ucci*, like the instant case, the court entered a default judgment of discrimination. However, in *Ucci*, the court again found the Respondent not credible, while crediting the Complainant's testimony as to emotional distress. 2A FH-FL ¶25,097, at 25,871-72. There were also factual differences, as in *Ro* above.

Finally, the 9th Circuit case, *Johnson v. Hale* is even less like the instant case because it involves a case of overt discrimination. The complainants in *Johnson* had an appointment to view the property, but when they arrived, the landlady refused to show it to them, stating that her husband would not allow her to rent to "Negro men." 13 F.3d 1351, at 1352. The court "emphasized" that complainants both provided "detailed and substantial" testimony to support their claims and the landlords offered no evidence to rebut that testimony, unlike the instant case. *Id*. The court found the complainants' testimony credible, unlike the instant case. And finally, the court awarded what it called only a "token" emotional distress damage award *because* the landlady had been polite, it was a rental and not purchase situation, the complainants had not been embarrassed before a third party, and no pattern of discrimination had been established. *Id*. at 1353. The *Johnson* trial court had used these facts as evidence that the emotional distress had been low, *despite* the credible testimony of the complainants that they had suffered severe emotional distress.

The crucial differences between *Johnson* and the instant case on remand are: 1) the differences in the Complainant's credibility; and 2) the fact that the issue here does not involve emotional distress damages due to the experience of being discriminated against. Both the testimony and the inferences from the circumstances of the

discrimination in the instant case justify a lower amount of emotional distress damages than was awarded in *Johnson*.[4]

In any case, *Johnson* is inapposite to the narrow remand issue in the instant case. I have not been requested to review the amount of damages to be awarded Complainant based on his emotional reaction to being denied housing unlawfully.

The remainder of the cases cited by the Charging Party are along similar lines. The differences are obvious and readily discernible. My examination of those differences need not be spelled out in detail here because the cases are clearly distinguishable.

Therefore, I have reconsidered "the amount of the emotional distress damage award for the two weeks the Complainant stayed in the homeless shelter in light of case law that the Charging Party has cited in its Petition for Secretarial Review." I find that the amount of emotional distress damages I awarded in the Initial Decision is consistent with the reasoning or the results of those cases. My Initial Decision stands.

So **ORDERED:** March 5, 2004

/s/

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ARTHUR A. LIBERTY
Chief Administrative Law Judge

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[4]Although the Charging Party relies upon the *Johnson* court's $3,500 award as setting a threshold minimum amount in a fair housing case, see *HUD v. Bangs*, 2A Fair Housing-Fair Lending ¶25,040, 25,417-18, HUDALJ No. 05-90-0293-1 (January 5, 1993) for a representative discussion of emotional distress awards from this forum. This sampling of awards further clarifies that the Charging Party's assertions are erroneous; there is a wide range of appropriate awards for emotional distress damages depending upon the facts of the case and the credibility of the evidence provided. The range briefly sampled in *Bangs* includes an award as low as $150 and an award as high as $40,000, both of which were appropriate and within the judge's discretion. In the *Johnson* case, the court found the evidence sufficient to warrant an award of at least $3,500. In the instant case, the evidence is not credible and is insufficient to support a higher award.

While the *Johnson* case was not a Fair Housing Act case, it did involve an instance of housing discrimination. The court found the complainants' testimony as to the emotional distress they suffered due to the respondents' actions credible. The complainants testified to severe emotional distress. Yet the court awarded them only $125 each in emotional distress because of the factors cited above. The appellate court overturned the amount of the award on the grounds that the trial court considered impermissible factors in assessing the emotional distress damages, and remanded it for consideration of appropriate damages. The trial court failed to increase the damage award, and the circuit court of appeals only then gave specific directions in a second remand to award the complainants at least $3,500. *Id*. at 1352-53. The court apparently felt it necessary to set that minimum in that case to achieve compliance from the trial court, and there is no indication in the language of the opinion that indicates the court intended this amount as a minimum in all Fair Housing cases. This case clearly is fact-specific. I do not find that it was the intent of the U. S. Circuit Court of Appeals for the Ninth Circuit to establish a minimum award for emotional distress damages in housing discrimination cases, as urged by the NFHA amicus brief.