No. 20-_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

_____

JOHN GRAHAM,

Petitioner

v.

THE SECRETARY, UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ON BEHALF OF SHON'TONETTE LEARY AND KERRY STEVENSON,

Respondent

_____

THE SECRETARY'S CROSS-APPLICATION FOR ENFORCEMENT OF THE FINAL AGENCY ORDER

_____

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THE SECRETARY'S CROSS-APPLICATION FOR ENFORCEMENT OF THE FINAL AGENCY ORDER

Respondent, the Secretary of the United States Department of Housing and Urban Development (HUD), pursuant to Section 812(j) of the Fair Housing Act, 42 U.S.C. 3612(j), and Rule 15(b)(1) of the Federal Rules of Appellate Procedure, files in response to the Petition for Review this Cross-Application for Enforcement of the Final Agency Order entered on February 5, 2020.[1] The final agency order, which is attached to this cross-application, requires petitioner John Graham to pay $60,000 to Shon'tonette Leary, $10,000 to her son Kerry Stevenson, and $19,787

[1] The Petition for Review, filed on March 6, 2020, is docketed in this Court as No. 20-1511.

in civil penalties for engaging in what the Secretary determined to be "highly egregious" discriminatory conduct in the process of renting an apartment. See Order on Secretarial Review (Feb. 5, 2020) (Secretarial Order), Att. A, at 7, 10. As of the date of this cross-application, Graham has not paid the awarded damages or civil penalty.

This Court has jurisdiction over this cross-application under 42 U.S.C. 3612(j)(1), which provides that the Secretary may petition for enforcement of an order of an administrative law judge in "any United States court of appeals for the circuit in which the discriminatory housing practice is alleged to have occurred or in which any respondent resides or transacts business." The discriminatory housing practice in this case took place in this circuit, in Paramus, New Jersey. Secretarial Order 2. Graham owned the subject property in Paramus during the time in question. Secretarial Order 2.

Federal Rule of Appellate Procedure 15(b)(1) also provides that "[i]f a petition is filed to review an agency order that the court may enforce, a party opposing the petition may file a cross-application for enforcement."

PROCEEDINGS

On October 17, 2018, HUD filed a Charge of Discrimination on behalf of Shon'tonette Leary against John Graham, alleging violations of the Fair Housing Act. Secretarial Order 2. Leary's son, Kerry Stevenson, was later added as a

second complainant. Secretarial Order 2. Specifically, the Charge alleged that Graham discriminated against Leary and Stevenson by: (1) refusing to negotiate for the rental of a dwelling on the basis of race or color, in violation of 42 U.S.C. 3604(a); (2) making discriminatory statements to Leary with respect to the rental of the dwelling, in violation of 42 U.S.C. 3604(c); (3) falsely representing to Leary because of her race or color that the dwelling was unavailable, in violation of 42 U.S.C. 3604(d); and (4) coercing, intimidating, threatening, or interfering with Leary in the exercise or enjoyment of her rights under the Act, in violation of 42 U.S.C. 3617. Secretarial Order 2.

On January 6, 2020, an administrative law judge (ALJ) issued an Initial Decision and Order finding that Graham violated 42 U.S.C. 3604(c) by making discriminatory statements to Leary with respect to the rental of a dwelling, and that he violated 42 U.S.C. 3617 by engaging in conduct intended to deter Leary from enjoying her rights under the Act. Secretarial Order 2. At the same time, the ALJ held that HUD failed to prove by a preponderance of the evidence that Graham had the requisite discriminatory intent to commit violations of 42 U.S.C. 3604(a) or (d). Secretarial Order 2. As to these claims, the ALJ also held that the "Mrs. Murphy" exemption of 42 U.S.C. 3603(b)(2)—which applies when the owner of a unit for rent "actually maintains and occupies" one of the other living quarters within a dwelling that houses no more than four families—excused Graham from

liability. Secretarial Order 2. The ALJ ordered Graham to pay $15,000 to Leary and $6000 to Stevenson in emotional distress damages, as well as a $5000 civil penalty. Secretarial Order 3.

HUD sought review of the Initial Decision under 24 C.F.R. 180.675.[2] Secretarial Order 3. On February 5, 2020, the Secretary issued an Order on Secretarial Review. Secretarial Order 1-12. In light of the application of the "Mrs. Murphy" exception, the Secretary struck the portions of the Initial Decision discussing HUD's failure to prove by a preponderance of the evidence violations of 42 U.S.C. 3604(a) and (d). Secretarial Order 3-4. Nevertheless, the Secretary also concluded that the ALJ erred in finding that text messages that Graham sent to Leary—which included language such as "nigger free zone," "white power," and "K k k"—were not direct evidence of discriminatory intent under Sections 3604(a) and (d). Secretarial Order 4.

The Secretarial Order also increased the damages awards to $60,000 for Leary and to $10,000 for Stevenson, finding that the ALJ erred by: (1) improperly discounting the damages amounts due to the lack of expert medical evidence; (2)

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[2] Graham submitted a statement in opposition, construed in part as a "Cross-Petition," which requested as relief the elimination of any damages to Stevenson. Secretarial Order 9. The Secretarial Order dismissed the "Cross-Petition" as untimely because Graham submitted it more than 15 days after the issuance of the Initial Decision. Secretarial Order 9; see also 24 C.F.R. 180.675(d) (providing 15 days after the issuance of an initial decision for a party to seek secretarial review).

failing to account for the egregiousness of Graham's conduct; and (3) deviating from precedent on emotional distress damages. Secretarial Order 5-9. Finally, the Secretarial Order increased the civil penalty to the maximum amount of $19,787 in light of the egregious nature and circumstances of Graham's violation and the goal of deterrence—two of the factors that an ALJ must consider under 24 C.F.R. 180.671(c). Secretarial Order 9-11. The Secretary also noted that Graham presented no evidence or argument regarding his ability to pay a civil penalty. Secretarial Order 9.

On March 6, 2020, Graham petitioned this Court for review of the Secretarial Order.

FACTS UPON WHICH VENUE IS BASED

John Graham is the owner and landlord of the subject property, a residence located at 18 South Farview Avenue in Paramus, New Jersey. Initial Decision and Order (Jan. 6, 2020) (Initial Decision), Att. B, at 4. The residence has two rental units as well as a basement unit that is not legally rentable. Initial Decision 4. Graham posted an online advertisement offering one of the units for rent in February 2017. Initial Decision 4. At that time, Graham was living temporarily in the basement unit during divorce proceedings with his then-wife, who still lived in their shared residence. Initial Decision 4-5.

Shon'tonette Leary, who is African-American, and her son, Kerry Stevenson, lived in an apartment in Hackensack, New Jersey, that had insufficient heat and sometimes lost power due to the use of space heaters. Initial Decision 5. Leary saw Graham's advertisement and called him on Thursday, February 2, 2017. Initial Decision 5. Leary and Graham had a brief conversation, during which Graham inquired about Leary's employment and who lived with her. Initial Decision 5. Graham asked Leary to come see the apartment immediately, but she said that she could not come until Saturday. Initial Decision 5. Then, the line went dead. Initial Decision 5. Leary unsuccessfully tried to call Graham back. Initial Decision 5. Leary then texted Graham. Initial Decision 5. They had the following exchange via text message:

[Leary:]	Hello my name is Shon'tonette, do you have any pictures for the two-bedroom apartment?
[Leary:]	Can you text me the address also Saturday morning at 10 is that good?
[Graham:]	No thank you
[Graham:]	Do not make the cut
[Leary:]	What are you talking about
[Graham:]	Apartment is rented
[Graham:]	Nigger free zone
[Graham:]	White power white power
[Leary:]	Learn how to wash your ass you racist asshole go kill yourself bastard
[Graham:]	I'll have my slave clean it for me
[Graham:]	With her slave tone
[Leary:]	Go finish fucking your mother you retarded sick ass
[Graham:]	K k k

Initial Decision 5 (alteration omitted). Within a few days, Graham agreed to rent the apartment to another woman (who Graham claimed is a member of a racial minority group), and who later moved in with her mother and son. Initial Decision 6, 14.

Graham's messages made Leary angry, upset, and confused, and his reference to the "KKK" also made her fearful. Initial Decision 21. The exchange was on her mind constantly and left her depressed, embarrassed, and scared. Initial Decision 21. She refrained from continuing to search for a new apartment because she did not want to encounter such discrimination again, and she did not move from her Hackensack apartment until more than a year later. Initial Decision 7, 21. Several months later, in October 2017, Leary had a mental health episode that resulted in her involuntary commitment to a medical facility for three days. Initial Decision 21. During that period of commitment, Leary revealed to medical providers that the incident with Graham contributed to her breakdown. Initial Decision 21. After her discharge, Leary saw a psychiatrist, who prescribed her medications to assist her with sleeplessness and anxiety, and also attended therapy sessions with a licensed clinical social worker. Initial Decision 21. Stevenson also testified that his relationship with his mother changed after the incident with Graham, and that it adversely impacted his emotional health as well. Initial Decision 21.

RELIEF REQUESTED

The Court should enforce the February 5, 2020, final agency order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached THE SECRETARY'S CROSS-APPLICATION FOR ENFORCEMENT OF THE FINAL AGENCY ORDER:

(1) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2019, in 14-point Times New Roman font; and

(2) complies with the requirements of Local Rule 31.1(c) that the text of the electronic cross-application is identical to the text in any paper copies of this cross-application that are submitted to the Court, and that the electronic version of this cross-application, prepared for submission via ECF, has been scanned with the most recent version of Windows Defender (Version 1.2.3412.0) and is virus-free according to that program.

s/ Katherine E. Lamm
KATHERINE E. LAMM
Attorney

Date: May 21, 2020

CERTIFICATE OF SERVICE

I certify that on May 21, 2020, I filed by email the foregoing THE SECRETARY'S CROSS-APPLICATION FOR ENFORCEMENT OF THE FINAL AGENCY ORDER with the Clerk of the Court for the United States Court of Appeals for the Third Circuit, in accordance with this Court's amended General Order dated April 13, 2020.

Pursuant to Federal Rules of Appellate Procedure 3(d) and 15(c), below is a list of individuals upon whom the circuit clerk may serve the Cross-Application:

John Graham
148 Washington Avenue
River Edge, NJ 07661

Robert J. Stack, Esq.
11 Kiel Avenue, Suite C-3
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s/ Katherine E. Lamm
KATHERINE E. LAMM
Attorney

ATTACHMENT A

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:	)	FEB 5 2020
Shon'tonette Leary and Kerry Stevenson,	)	
Complainants,	)	HUDOHA No. 19-JM-0014-FH-002
v.	)	
John Graham,	)	
Respondent.	)	

ORDER ON SECRETARIAL REVIEW

On January 21, 2020, the Charging Party submitted a Petition for Review ("Petition"), appealing the January 6, 2020, Initial Decision and Order ("Initial Decision") issued by Chief Administrative Law Judge ("ALJ") J. Jeremiah Mahoney. On January 28, 2020, the Respondent submitted a reply to the Petition ("Opposition") asking the Secretary to affirm the ALJ's Initial Decision. Respondent's submission also served as a Cross-Petition to Charging Party's Petition for Partial Secretarial Review. In the Initial Decision, the ALJ found that Respondent violated subsection 804(c) of the Fair Housing Act ("the Act"), by making discriminatory statements to Complainant with respect to the rental of a dwelling. The ALJ also found that Respondent violated section 818 of the Act by coercing, intimidating, threatening, or interfering with Complainant in the exercise or enjoyment of her rights. The ALJ found that Respondent did not violate subsections 804(a) and 804(d) when he refused to negotiate for the rental of his dwelling to Complainant and falsely represented to Complainant that the dwelling was unavailable. Lastly, the ALJ found that the "Mrs. Murphy" exemption applied, thus making Respondent not liable for violating subsections 804(a) and 804(d). The Initial Decision ordered the Respondent to pay $21,000 in damages to Complainants, $15,000 to Complainant and $6,000 to Complainant Stevenson, and pay a $5,000 civil penalty.

Upon review of the entire record in this proceeding, including the briefs filed with the Secretary, the Charging Party's Petition is GRANTED IN PART for the reasons set forth below. Pursuant to 24 C.F.R. § 180.675(a), the ALJ's January 6, 2020, Initial Decision and Order is

MODIFIED IN PART. Sections II-A, B and C are stricken from the Initial Decision and Respondent is ordered to pay $60,000 in emotional distress damages to Complainant Leary and $10,000 in emotional distress damages to Complainant Stevenson; and pay $19,787 in civil penalties. Respondent's Cross-Petition is DENIED because it was not timely filed.

BACKGROUND

On October 17, 2018, the U.S. Department of Housing and Urban Development ("HUD" or "Charging Party") filed a Charge of Discrimination ("Charge") on behalf of Shon'tonette Leary ("Complainant") against John Graham ("Respondent") pursuant to the Fair Housing Act, 42 U.S.C. §§ 3601 et seq. ("the Act"). Complainant's son, Kerry Stevenson ("Mr. Stevenson"), was later added as a second complainant in this matter on the Charging Party's unopposed motion.

The Charging Party alleged that Respondent, as owner and landlord of a residential property in Paramus, New Jersey, violated the Act by (1) refusing to negotiate for the rental of a dwelling to Complainant because of her race or color, in violation of subsection 804(a); (2) making discriminatory statements to Complainant with respect to the rental of the dwelling, in violation of subsection 804(c); (3) falsely representing to the Complainant, because of her race or color, that the dwelling was unavailable, in violation of subsection 804(d); and (4) coercing, intimidating, threatening, or interfering with Complainant in the exercise or enjoyment of her rights under the Act, in violation of section 818. The Charging Party sought $129,865.40 in damages, out of pocket losses and penalties, as well as injunctive and equitable relief against Respondent. Specifically, the Charging Party requested emotional distress damages in the amount of $60,000 for Complainant Leary and $45,000 for Complainant Stevenson; $5,078.40 in out of pocket losses; and $19,787 in civil penalties.

On November 16, 2018, Respondent filed its Answer to the Charge. The hearing was held on July 30, 2019. Post-hearing briefs were submitted on September 12, 2019, and reply briefs were submitted on September 25, 2019.

On January 6, 2020, the ALJ issued an Initial Decision. The ALJ found that Respondent violated subsection 804(c) of the Act, which prohibits housing providers from making, printing, or publishing, or causing to be made, printed, or published, any statement with respect to the sale or rental of a dwelling that indicates any preference, limitation or discrimination. *Initial Decision* at 7-9. The ALJ also held that Respondent engaged in discriminatory conduct on account of Complainant's exercise of rights under the Act with the intent of deterring her from further pursuing those rights in violation of section 818. *Id.* at 18-19. The ALJ further held that Respondent did not violate subsections 804(a) and 804(d) because the Charging Party failed to prove, by a preponderance of evidence, that Respondent acted with requisite discriminatory intent in refusing to negotiate with Complainant and telling her that the apartment was already rented. *Id.* at 12-15. The ALJ found that Respondent was subject to the "Mrs. Murphy" exemption, making Respondent exempt from liability under 804(a) and 804(d). *Id.* at 15-18. The ALJ ordered the Respondent to pay $21,000 in damages to Complainants, $15,000 to Complainant and $6,000 to Complainant Stevenson, and pay a $5,000 civil penalty. *Id.* at 24-25.

In its Petition, the Charging Party argued that the ALJ erred in considering subsections 804(a) and 804(d) in the Initial Decision since he had also found that Respondent qualified for the "Mrs. Murphy" exemption and could not be held liable for violating subsections 804(a) and 804(d) of the Act. Therefore, the Charging Party requested that sections II-A., B, and C of the Initial Decision be removed from the Final Order. The Charging Party also requested that the Secretary order Respondent to pay damages totaling $105,000 and assess the maximum civil penalty of $19,787.

In its Opposition, the Respondent requested that the Secretary: 1) uphold sections II-A, B and C of the Initial Decision and Order as part of the Final Decision and Order; 2) confirm the ALJ's determination as to the $21,000 in damages or reduce those damages to $16,000 by eliminating the damages to Complainant Stevenson; and 3) confirm the ALJ's determination as to the assessed civil penalty of $5,000 as an appropriate remedy.

DISCUSSION

I. The ALJ's Analysis of Subsections 804(a) and 804(d) of the Act Was Unnecessary in Light of Court's Finding that Respondent Met the "Mrs. Murphy" Exemption.

The Charging Party appealed the ALJ's analysis and consideration of subsections 804(a) and 804(d) of the Act in the Initial Decision. The Court found that Respondent qualified for the "Mrs. Murphy" exemption and therefore could not be held liable for violating subsections 804(a) and 804(d) of the Act. *Initial Decision* at 15-18. The Charging Party argued that "there was no basis for the Court to even consider, much less opine on, any alleged violations of subsections 804(a) and (d)" if the Court found that Respondent was eligible for the Mrs. Murphy exemption. *Petition* at 4. The Charging Party has asked the Secretary, or his designee, to issue a final agency decision that excludes the Initial Decision's Discussion sections II.A., II.B. and II.C., which discuss the alleged violations of subsections 804(a) and (d). *Id.* In its Opposition, Respondent asserted that the Court did not err in its discussion and conclusions in sections II-A, B and C; and the ALJ, as his duty to justice permits, addressed and rejected each of the allegations proffered by the Charging Party. *See Opposition.*

The "Mrs. Murphy" exemption is an affirmative defense, which states nothing in section 804 [42 U.S.C. § 3604] (other than subsection (c)) shall apply to - rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies such living quarters as his residence. 42 U.S.C. § 3603(b)(2). Thus, where applicable, the exemption excuses a covered owner-occupant from the anti-discrimination requirements of subsections 804(a) and (d). *Initial Decision* at 15.

When asserting the "Mrs. Murphy" exemption, Respondent had the burden to establish that all the factors of the exemption are met. *See United States v. Columbus Country Club*, 915 F.2d 877, 882 (3d Cir. 1990). In the Initial Decision, the Court determined that the Respondent is entitled to the benefit of the "Mrs. Murphy" exemption and thus cannot be held liable for violating subsections 804(a) or 804(d). *Initial Decision* at 15. Notwithstanding the Court's finding regarding the "Mrs. Murphy" exemption, the ALJ offered a detailed analysis of

subsections 804(a) and (d) to determine whether the Charging Party established, by a preponderance of the evidence, the requisite discriminatory intent in refusing to negotiate with Complainant and telling her the apartment was already rented.

I find that any discussion, analysis, or ruling on Respondent's conduct under subsections 804(a) and (d) is unnecessary after determining that the "Mrs. Murphy" exemption applies and prohibits the possibility of liability under these subsections. [1] Therefore, I am striking sections II-A, B, and C from the Initial Decision.

Although the application of the "Mrs. Murphy" exemption is undisputed here, I find that the Court erred in its finding that Respondent lacked discriminatory intent when he denied Complainant Leary's request for housing. To allege discriminatory intent under the Act, a plaintiff may either offer direct evidence of discrimination or invoke the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting framework. *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1451 (4th Cir. 1990). Direct evidence encompasses conduct or statements that both (1) reflect directly the alleged discriminatory attitude, and (2) bear directly on the contested [housing] decision." *Petition* at 6, *citing Letke v. Wells Fargo Home Mortg., Inc.*, No. RDB-12-3799, 2015 U.S. Dist. LEXIS 38980, at *20 (D. Md. Mar. 27, 2015) (quoting *Laing v. Fed. Express Corp.*, 703 F.3d 713, 717 (4th Cir. 2013).

Respondent's uncontested statements – "apartment is rented" followed by "nigger free zone", "white power, white power"; "...I'll have my slave clean it for me"; and "K k k" – in response to Complainant's Leary's mere inquiry into the apartment Respondent advertised for rent on Craigslist constitutes direct evidence of discriminatory intent. *See Dixon v. The Hallmark Companies, Inc.* 627 F.3d 849, 855 (11th Cir. 2010) (courts have held that "fire early-he is too old" constitutes direct evidence of discrimination). Blatant remarks such as these, in relation to a housing inquiry, whose intent could mean nothing other than to discriminate on the basis of an impermissible factor, are direct evidence of housing discrimination. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir. 2004). Because direct evidence exists of Respondent's discriminatory intent, the McDonnell Douglas burden-shifting framework is not applicable. *Trans World Airlines v. Thurston*, 469 U.S. 111, 121, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985) ("The McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination.") Accordingly, the ALJ's conclusion regarding lack of discriminatory intent was clearly erroneous because the finding is contrary to HUD and federal court precedents. *See HUD v. Corey*, 2012 HUD ALJ LEXIS 17, *citing Dixon v. The Hallmark Companies, Inc.* 627 F.3d 849, 854 (11th Cir. 2010) (citing *B/E Aerospace, Inc.*, 376 F.3d at 1086).

II. The ALJ's Holding that Complainants are Entitled to $21,000 in Emotional Distress Damages was Erroneous.

Where a respondent has been found to have engaged in a discriminatory housing practice, the ALJ may issue an order for relief which may include actual damages suffered by the aggrieved person. 42 U.S.C. § 3612. "It is well established that the damages [an aggrieved

[1] The Court found Respondent liable for making discriminatory statements in violation of 804(c) of the Act, which is not subject to the "Mrs. Murphy" exemption.

person] may be awarded under the Act include damages for embarrassment, humiliation and emotional distress caused by the acts of the discrimination." *See HUD v. Godlewski*, 2007 HUD ALJ LEXIS 69, at *11 (HUDALJ July 6, 2007) *citing HUD v. Blackwell*, 1989 WL 386958, *16 (HUDALJ Dec. 21, 1989), *aff'd* 908 F.2d 864 (11th Cir. 1990). Courts have held that, because emotional distress is difficult to quantify, precise proof of the dollar amount of emotional distress is not required to support a reasonable award for such injuries. *See HUD v. Wooten*, 2007 HUDALJ LEXIS 68, * 8-9 (HUDALJ Aug. 1, 2007). Judges are afforded broad discretion in determining emotional distress damages, limited by the egregiousness of respondent's behavior and the effect of the respondent's conduct on the complainant. *See Wooten* at *9; *HUD v. Ocean Sands*, 1993 HUDALJ Lexis 89, *4 (HUDALJ Nov. 15, 1993).

A. The Court erroneously discounted damages due to lack of medical evidence.

The Charging Party argued that the ALJ erred by discounting Complainants' emotional distress because of lack of medical evidence. *See Petition* at 10-11. Courts have recognized that damages from emotional distress may be proven by testimony. *See Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 546 (4th Cir. 2003) ("We have held that a plaintiff's testimony, standing alone, can support an award of compensatory damages for emotional distress."). Medical evidence concerning physical symptoms is not required for an award of emotional distress damages. *See Morgan v. HUD*, 985 F.2d 1451, 1459 (10th Cir. 1993).

Complainant testified that Respondent's discriminatory conduct caused her to have a mental breakdown in October 2017. While hospitalized, she says she told medical providers both that Respondent's racists statements had caused her mental breakdown and that it had been triggered by her son's failure to pay rent. *Transcript* at 102-103. After being discharged, she saw a psychiatrist, who prescribed medications to help her sleep and soothe her anxiety. *Transcript* at 118-123. She also attended numerous therapy sessions with a licensed clinical social worker. *Id.* Notwithstanding Complainant's testimony, the ALJ concluded that the Charging Party did not develop a compelling link between Respondent's single instance of discriminatory conduct and Complainant's mental breakdown and subsequent psychiatric treatment. *Initial Decision* at 21. The Court found that other subsequent events, such as Complainant's eviction proceeding, appeared equally likely to have had a negative influence on her mental health and may have contributed to her psychiatric problems. *Id.*

As noted above, Courts have held that damages for emotional distress can be proved through testimony and medical evidence is not necessary to award such damages. Further, Respondents who discriminate in housing must take their victims as they find them and compensate them accordingly. *See HUD v. Godlewski*, 2007 HUD ALJ LEXIS 67, at *12 (HUDALJ December 21, 2007); *see also HUD v. Housing Auth. Of City of Las Vegas*, 1995 HUD ALJ LEXIS 31, at *82 (HUD ALJ Nov. 6, 1995). The fact that the Complainant had other life events during the same time period should not account for the decrease in the amount of damages the Court awards. Complainant's testimony regarding her emotional distress, which resulted in a mental breakdown, as a result of Respondent's discriminatory conduct is credible and should not be used to discount her damage award.

I find that the Court erroneously reduced Complainant's damages for lack of expert testimony regarding Complainant's medical history and the extent to which Respondent's discriminatory conduct accounted for her mental breakdown.

B. Respondent's discriminatory conduct was egregious.

The Charging Party argued that the Court failed to account for the egregiousness of Respondent's conduct; ignoring evidence of a causal link between Respondent's conduct and Complainants' injuries; and undervaluing Complainants' emotional distress in relation to comparable cases. *Petition* at 13-16. Respondent countered that the award amount of emotional distress damages to Complainant Leary is within the broad discretionary authority of the ALJ. *Opposition* at 9-16. Further, Respondent argued that the award for damages to Complainant's son is not supported by the evidentiary record because Mr. Stevenson was not seeking housing. *Id.* at 13-14.

Complainant, who is Black/African American, contacted Respondent based on Respondent's Craigslist advertisement for an apartment. At some point during the course of her inquiry, the following text message exchange occurred between Respondent and Complainant:

Complainant: Hello my name is Shon-tonette, do you have any pictures for the two-bedroom apartment?
Complainant: Can you text me the address also Saturday morning at 10 is that good?
Respondent: No thank you
Respondent: Do not make the cut
Complainant: What are you talking about
Respondent: Nigger free zone
Respondent: White power white power
Complainant: Learn to wash your ass you racist asshole go kill yourself bastard
Respondent: I'll have my salve clean it for me
Respondent: With her slave tone [sic]
Complainant: Go finish fucking your mother you retarded sick ass
Respondent: K k k

Initial Decision at 5.

The Court credited Complainant's testimony that when Respondent began sending the racist text message, she was angry, upset, and confused, but by the time he sent the final message, she was afraid because she believed he was threatening her by alluding to the KKK. *Initial Decision* at 21. She testified that the text message exchange was on her mind every single day afterward and left her feeling depressed, embarrassed, and scared. *Id.* She also indicated she could not bring herself to look for another apartment because she was depressed and did not want to experience the same sort of discrimination again. *Id.* Thus, the Court concluded that Respondent's discriminatory statements had a "lingering negative effect on Complainant's emotional state." *Id.*

While the Court found that the discriminatory statements had an impact on Complainant,

the Court failed to address the egregiousness of Respondent's conduct. In fact, the Court minimized Respondent's conduct as a "single instance" of discriminatory conduct. Respondent's use of the words "nigger", "slave", "white power" and "kkk" are highly egregious. The term "nigger" is a derogatory and offensive racial slur towards African Americans. Terms such as "white power" and 'kkk" connote white supremacy. Complainant testified that she was afraid, embarrassed, humiliated and scared. *Transcript* at 79. Even if only said once, this is egregious conduct.

Complainant Stevenson lives with his mother, Complainant Leary. *Initial Decision* at 5. Complainant Leary informed Respondent that she was interested in the unit for herself and her son, Complainant Stevenson. *Transcript* at 34, 18-20. Complainant Stevenson learned of Respondent's conduct towards Complainant Leary in October 2017 when she suffered the mental breakdown. *Transcript* at 189, 12 - 190, 11. At that time, Complainant Leary showed him the text messages she received from Respondent. Complainant Stevenson testified that he was "scared ...felt threatened" because at the time he was working in Paramus, near Respondent's rental property. *Transcript* at 195. In addition, Complainant Stevenson testified that "it was scary ... because his mom always took care of everything." *Id.* Now, he had to take on more responsibility and console her when she had breakdowns. *Transcript* at 194, 15. As a result of Complainant Leary's mental state, Complainant Stevenson testified that he was terrified and scared because his mom always took care of everything and was always the strongest person he had met. *Transcript* at 194, 22 – 195, 5.

C. Emotional distress damages awarded are not in accordance with precedent.

In similar cases, courts have consistently awarded significantly higher compensation for emotional distress. In *HUD v. Kocerka*, the Court awarded $50,000 and $40,000 to Complainant Theresia, who is white, and her black husband, Complainant George White, Jr., respectively, for embarrassment, humiliation, and emotional distress they suffered as a result of respondent's unlawful discrimination in the denial of housing. *HUD v. Kocerka*, 1999 HUD ALJ LEXIS 3 (HUDALJ May 4, 1999). In *HUD v. Kocerka*, Complainant Theresia arranged to see a unit advertised for rent. *Id.* at *4. When she arrived with her black husband, at the scheduled meeting time, they were told that the apartment had been rented. *Id.* at *4-5. Complainant Theresia called the same number which she had previously called to ask whether the unit was still available and she was told that it was still available. *Id.* The person asked whether she was black or white. *Id.* at *5. He then informed he that he did not want blacks in the building. *Id.*

In *Banai v. HUD*, a black couple was looking for housing after their house suffered damage caused by Hurricane Andrew. *Banai v. HUD*, 102 F.3d 1203 (11th Cir. 1997). Complainants found a suitable property for rent that would accommodate Complainant Brinson's mobility impairment and was in close proximity to her physical therapist. *Id.* at *4. However, upon learning that the couple was black, the owners refused to rent the property to complainants because of their race. *Id.* at *4. The couple had to continue their search for housing while Complainant Brinson remained hospitalized, but none suited them because they could not accommodate Brinson's special needs resulting from her injuries. *Id.* at *5. The Court awarded the complainants $35,00 each in compensatory damages for their injuries. *Id.* at *7. *See also Broome v. Biondi*, 17 F. Supp. 2d 211 (S.D.N.Y 1997) (jury award affirming $114,000 to each

complainant for emotional distress when denied housing based on racial discrimination). The courts in both *Kocerka* and *Banai* awarded significantly higher compensation for racial discrimination than this case and neither of those cases involved the derogatory slurs present in this case.

The Court failed to consider the egregiousness of Respondent's conduct and the effect of such conduct when arriving at the low damage award of $15,000 for Complainant Leary. "The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action." *Petition* at 13, *citing United States v. Balistrieri*, 981 F.2d 916, 932 (7th Cir. 1992). As discussed earlier, the use of the word "nigger" and reference to "white power" and the "kkk" is the most degrading racial slur and fear-mongering based on a longstanding history of hate towards black people. Based on the case history and the egregiousness of Respondent's conduct in this case, I find an award of $60,000 for Complainant Leary is reasonable.

The Court ordered Respondent to pay damages to Complainant Stevenson in the amount of $6,000. The Charging Party asked for $45,000 in damages for Complainant Stevenson. Complainant Stevenson lived with Complainant Leary in February 2017 and there was no indication in the record that he was going to cease living with his mother, should she find another residence. However, based on the record, it appears that Complainant Stevenson had no knowledge that Complainant Leary had inquired about renting the subject unit from Respondent; that she was denied the unit; and he lacked knowledge of Respondent's refusal to rent to Complainant Leary based on her race or color until she told him in October 2017.

Complainants may still be awarded damages for the distress they experienced as a result of witnessing the distress that the respondents' conduct caused their family members to suffer. *See HUD v. Kocerka*, 1999 HUD ALJ LEXIS 3. In *HUD v. Kocerka*, Complainants, a bi-racial couple, had three children, ages 1, 14 and 19 when they were denied housing based on race of the husband who is African American. *Id.* at *19. The two older children were informed of the discrimination at the time it occurred and, as a result, were exposed to racism in spite of their parents' best efforts to shield them from it. *Id.* at *19-20. Upon learning of the discriminatory incident, the eldest daughter shared her mother's grief, hurt and distress caused by the incident. *Id at *20.* The son became angry over the incident and spoke of seeking revenge and became a bitter young man, frequently seeing racial unfairness in his daily affairs where it did not always exist. *Id.* The court found that additional damages were appropriate because of the emotional distress family members suffered from seeing the close relatives' emotional distress. *Id.* at *21-22. The ALJ found it reasonable to award the parents in the case $90,000 in total. *Id.* at *25.

In this case, Complainant Stevenson suffered a similar emotional distress through witnessing the emotional distress of his mother. As shown above, Complainant Stevenson felt real fear when seeing his mother in emotional distress. *Transcript* at 194-195. Complainant Stevenson also testified that as a result of his mother's mental breakdown, he had to take on more responsibilities. *Id.* at 195, 2-4. In addition, he expressed concern about working near the location of the subject rental property. *Transcript* 195, 9-19. Based on this, Complainant Stevenson is entitled to compensatory damages.

However, I do not believe that $45,000 is appropriate damage amount for Complainant Stevenson. Complainant Stevenson did not experience the discrimination first-hand by Respondent and only learned about it over 6 months later. On the other hand, the Court's award of only $6,000 is too low and does not account for the egregiousness of the conduct and the impact the entire situation had on Complainant Stevenson. Therefore, I find that damages in the amount of $10,000 for Complainant Stevenson is reasonable.

D. Respondent's Cross-Petition is denied.

In his submission, Respondent Cross-Petitioned Charging Party's Petition for Partial Secretarial Review requesting that the Secretary deny damages to Complainant Stevenson. Pursuant to 24 C.F.R. § 180.675, petitions for review must be received by the Secretary within 15 days after issuance of the Initial Decision. Respondent filed its Cross-Petition for Partial Secretarial Review on January 28, 2020, more than 15 days after the issuance of the Initial Decision. Therefore, I find Respondent's Cross-Petition for Partial Secretarial Review untimely and I will not review the substance of Respondent's arguments.

III. The ALJ's Assessment of Only a $5,000 Civil Penalty Was Erroneous.

After finding that a respondent engaged in a discriminatory housing practice, an ALJ may vindicate the public interest and assess a civil penalty against the respondent. 42 U.S.C. § 3612(g)(3). In determining the appropriate penalty, the ALJ is to consider six factors: (1) whether the respondent has previously been adjudged to have committed unlawful housing discrimination; (2) respondent's financial resources; (3) the nature and circumstances of the violation; (4) the degree of that respondent's culpability; (5) the goal of deterrence; and (6) other matters as justice may require. 24 C.F.R. § 180.671(c). In this case, the ALJ assessed a $5,000 civil penalty. The Charging Party appealed the ALJ's assessment of a $5,000 civil penalty, arguing that the ALJ erroneously concluded that Respondent's actions are not "the sort of willful, malicious conduct that demands a maximum penalty." *Petition* at 7. The Charging Party asked for the maximum civil penalty of $19,787. The Respondent argued the interaction between Complainant Leary and Respondent was a short series of back and forth text messages and nothing more; and that if the language used was so egregious, then why is it accepted, perhaps even encouraged, common parlance within the [rap] music industry. *Opposition* at 14-15.

The Court found no evidence Respondent had previously committed unlawful housing discrimination. *Initial Decision* at 22. Respondent presented no evidence pertaining to his financial resources, nor did he argue that imposition of the Charging Party's proposed civil penalty would result in financial hardship. *Id.* In the absence of any evidence to the contrary, I am unable to conclude that Respondent's financial condition adversely affects his ability to pay the maximum civil penalty. With respect to Respondent's degree of culpability, the Court concluded that Respondent engaged in intentionally racist behavior in making the discriminatory statements. *Id.* at 23. The Charging Party did not raise any argument with respect to this factor. Therefore, I will not opine or disturb the Court's finding as to culpability.

Based on the remaining factors, after carefully reviewing the record and legal precedent, I

find that Respondent's violations of the Act are particularly egregious and warrant the maximum civil penalty of $19,787 in order to vindicate the public interest and act as a deterrent.

A. Nature and Circumstances of the Violations.

The Charging Party argued that the ALJ wrongly minimized the violations when he labelled them as nothing more than a "single, apparently isolated incident of discriminatory conduct consisting of words alone." *Petition* at 17. Although the Court found that the Respondent's discriminatory statements were "outrageous, blatantly racist, and made without regard for the impact they would have on Complainant," the ALJ held this case did not warrant awarding the maximum penalty. *Initial Decision* at 22-24.

The record shows that Respondent made highly offensive and racist remarks to Complainant in response to her mere inquiry into the apartment he advertised for rent. The record reflects that Complainant sent a text message to Respondent introducing herself, requesting pictures of the unit and asking when she could see the apartment. *Id.* at 5. In response, Respondent indicated that the "apartment is rented"; "nigger free zone"; "white power white power"; "I'll have my slave clean it for me ... with her slave tone [sic]"; and "K k k." The Court's characterization of these text messages as "words alone" minimizes the inflammatory and demeaning nature of the words. The word "nigger" is highly offensive and demeaning, evoking history of racial violence, brutality, and subordination. *Petition* at 17.

In similar cases where the word "nigger" was uttered, the Court imposed the maximum penalty. In *HUD v. Blackwell*, where a homeowner refused to sell to an African American couple and used the word "nigger" when describing African Americans, the ALJ imposed the maximum civil penalty. *HUD v. Blackwell*, 1989 HUD ALJ LEXIS 15 at *56 aff'd sub nom *Sec'y ex rel Herron v. Blackwell*, 908 F.2d 864. *See also HUD v. Fund*, 2008 HUD ALJ LEXIS 46 (HUDALJ Jan. 31, 2008), at 56 (maximum civil penalty awarded where the respondents had refused to rent to an African American woman because of her race).

I find that the nature and circumstances of the violation are highly egregious and warrant maximum penalty.

B. Deterrence

The Court found that given that the Court had already adjudged Respondent liable for $21,000 in damages, and given that he is not a large commercial member of the real estate industry, the Court believed that sufficient deterrence can be achieved through imposition of a penalty below the maximum amount. *Initial Decision* at 24. The Charging Party argued that the ALJ has confused damages and penalties, as the same type of relief. *Petition* at 19.

The goal of deterrence could not be more important ... where people's race, with nothing further, was used as a reason to bar them from the housing they desired. *HUD v. Kocerka*, 1999 HD ALJ LEXIS 3, *29. Twenty years after the passage of the Act, there was undisputable evidence that racial discrimination in housing was still rampant in this country ... Thus, there is a continuing need for deterrence, and a substantial civil penalty serves that very important goal."

Id. Deterrence is used to put those similarly situated to [Respondent] on notice that violations of the Fair Housing Act will not be tolerated. *HUD v. Parker*, 2011 HD ALJ LEXIS 15, *31 (HUDALJ October 27, 2011). In *HUD v. Parker*, the ALJ ordered the maximum penalty of $16,000 against a real estate agent who told the complainant that, based on complainant's race, it was not a "good idea" to move into a particular neighborhood. 2011 HUD ALJ LEXIS 15, at *31-32. *See also HUD v. Blackwell*, 908 F.2d 864 (11th Cir. 1990) (Court of Appeals affirmed maximum penalty of $10,000 at the time, where property owner refused to sell to potential African American buyer).

The words used by Respondent towards Complainant Leary are rooted in a deep history of racial intolerance, hatred and fear. Similarly situated individuals, should be on notice that this type of conduct is egregious and unacceptable. Respondent and any other persons who might otherwise act similarly will be discouraged from doing so if the maximum civil penalty is imposed here. Therefore, I find that the maximum penalty of $19,787 is warranted in this case.

CONCLUSION

Upon review of the entire record in this proceeding, including the briefs filed with this office, and based on an analysis of the applicable law, the Charging Party's Petition for Review is GRANTED IN PART and the ALJ's Initial Decision and Order is MODIFIED IN PART. Sections II.A., II.B. and II.C. are stricken from the Initial Decision and Respondent is ordered to pay $60,000 in emotional distress damages to Complainant Leary and $10,000 in emotional distress damages to Complainant Stevenson; and pay $19,787 in civil penalties. Respondent's Cross-Petition is DENIED because it was not timely filed.

IT IS SO ORDERED.

Dated this 5 day of February, 2020

Andrew Hughes
Secretarial Designee

CERTIFICATE OF SERVICE

I hereby certify on February 5, 2020, the ***Secretarial Order***, issued by Andrew Hughes, Secretarial Designee, in 19-JM-0014-FH-002, was served on the following parties in the manner indicated:

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ATTACHMENT B

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

The Secretary, United States Department of Housing and Urban Development, Charging Party, on behalf of: SHON'TONETTE LEARY and KERRY STEVENSON, Complainants, v. JOHN GRAHAM, Respondent.	19-JM-0014-FH-002 January 6, 2020

Appearances:

For Complainants: Nicole K. Chappell and Sean P. Kelly, Attorneys, United States Department of Housing and Urban Development, New York, New York

For Respondent: Gary S. Newman, Attorney, Fair Lawn, New Jersey

Before: J. JEREMIAH MAHONEY
Chief Administrative Law Judge

FOREWARNING BY THE ADMINISTRATIVE LAW JUDGE

CAUTION: Be aware that, of necessity, this decision quotes offensive sexual and racist language. The judge is responsible for conducting a public hearing to receive evidence and find facts pertaining to the charged violations of the Fair Housing Act. Those facts are an essential part of the public record supporting this initial decision, and any review by appellate authorities.

INITIAL DECISION AND ORDER

On October 17, 2018, the Secretary of the United States Department of Housing and Urban Development ("HUD" or "the Government"), as Charging Party, filed a *Charge of Discrimination* ("the *Charge*") on behalf of Shon'tonette Leary ("Complainant") against John Graham ("Respondent") pursuant to the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* ("the Act"). Complainant's son, Kerry Stevenson ("Mr. Stevenson"), was later added as a second complainant in this matter on the Charging Party's unopposed motion.

The *Charge* alleges that Respondent, as owner and landlord of a residential property in Paramus, New Jersey, violated the Act by (1) refusing to negotiate for the rental of a dwelling to Complainant because of her race or color, in violation of 42 U.S.C. § 3604(a); (2) making discriminatory statements to Complainant with respect to the rental of the dwelling, in violation of 42 U.S.C. § 3604(c); (3) falsely representing to Complainant, because of her race or color, that the dwelling was unavailable, in violation of 42 U.S.C. § 3604(d); and (4) coercing, intimidating, threatening, or interfering with Complainant in the exercise or enjoyment of her rights under the Act, in violation of 42 U.S.C. § 3617. Based on these allegations, the Charging Party seeks $129,865.40 in damages and penalties, as well as injunctive and equitable relief against Respondent.

On November 16, 2018, Respondent filed an *Answer* to the *Charge* denying the allegations of discrimination and raising ten affirmative defenses, one of which was grounded in the Act's so-called "Mrs. Murphy" exemption codified at 42 U.S.C. § 3603(b)(2). The Charging Party subsequently moved to strike all ten of Respondent's affirmative defenses. Respondent filed a cross-motion to dismiss based on his asserted "Mrs. Murphy" defense. By order dated May 7, 2019, the Court denied Respondent's motion to dismiss and denied the Charging Party's request to strike the "Mrs. Murphy" defense. Thus, the "Mrs. Murphy" defense remained in issue. However, the Court struck Respondent's remaining nine affirmative defenses.

This matter proceeded to hearing in Paramus, New Jersey on July 30, 2019.[1] The parties presented the testimony of Complainant; Mr. Stevenson; Respondent; and Ms. Sadie Salazar, the tenant to whom Respondent rented the dwelling at issue in this case. The Court admitted Government Exhibits 2, 3, 9, and 10 and Respondent's Exhibits 1, 3, 3a, and 6 into evidence. In lieu of closing arguments, the parties submitted post-hearing briefs on September 12, 2019 and response briefs on September 25, 2019. The record is now closed and this matter is ripe for decision.

APPLICABLE LAW

The Fair Housing Act. Title VIII of the Civil Rights Act of 1968 is commonly known as the Fair Housing Act. See Pub. L. No. 90-284, §§ 801-819, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. §§ 3601-3631). Signed into law on April 11, 1968, the Act, in its initial conception, prohibited discrimination in the sale, rental, and financing of housing based on race, color, religion, or national origin. Id. In 1974 and 1988, the Act was amended to further prohibit discrimination based on sex, familial status, or disability. See Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988); Housing and Community Development Act of 1974, Pub L. No. 93-383, § 808, 88 Stat. 633, 728-29 (1974).

The Act's stated policy is to "provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601; see Revock v. Cowpet Bay W. Condo. Ass'n,

[1] The Court initially scheduled the hearing to take place in February 2019. However, the hearing was later rescheduled to account for the delay caused by a lapse in appropriations and resultant partial federal government shutdown that lasted from December 2018 to January 2019. Due to the shutdown, this Court was closed from December 22, 2018 to January 28, 2019, and all matters pending before it, including the instant proceeding, were stayed and subsequently rescheduled.

853 F.3d 96, 104 (3d Cir. 2017) (describing purpose of Act); Mitchell v. Cellone, 389 F.3d 86, 87-88 (3d Cir. 2004) (same). To enforce this policy, the Act imposes prohibitions on certain discriminatory housing practices, as set forth in sections 804, 805, 806, and 818 of the statute. See 42 U.S.C. §§ 3604, 3605, 3606, 3617.

Prohibitions and Exemptions. Pertinent to this case, section 804 of the Act states, in part, that it shall be unlawful for a person to take the following discriminatory actions:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. ...
>
> (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.
>
> (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

42 U.S.C. § 3604(a), (c), (d); see also 24 C.F.R. §§ 100.60, 100.75, 100.80.

Section 818 of the Act further 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 3603, 3604, 3605, or 3606" of the Act. 42 U.S.C. § 3617; see also 24 C.F.R. § 100.400.

Section 803 carves out several exemptions to the Act's requirements. The "Mrs. Murphy" exemption is set forth in section 803(b)(2), which reads as follows: "Nothing in section 3604 of this title (other than subsection (c)) shall apply to ... rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence." 42 U.S.C. § 3603(b)(2). In other words, if a property contains four or fewer rental units and the owner lives in one of them, the property is exempt from all the requirements of section 804 except section 804(c)'s prohibition on discriminatory notices, statements, and advertisements. This is referred to as the "Mrs. Murphy" exemption because it is premised on Congress' judgment that the Act should not reach "the metaphorical 'Mrs. Murphy's boardinghouse.'" United States v. Space Hunters, Inc., 429 F.3d 416, 425 (2d Cir. 2005) (citing 114 Cong. Rec. 2495, 3345 (1968)).

Administrative Hearings. An aggrieved person who believes that the Act has been violated may file a complaint with HUD alleging a discriminatory housing practice. See 42 U.S.C. § 3610(a)(1)(A). If HUD determines, after investigation, that there is probable cause to believe the alleged discrimination occurred, HUD may initiate a legal action by filing a charge of discrimination on the complainant's behalf. Id. § 3610(g). Any party may elect to have the action decided in a federal district court pursuant to 42 U.S.C. § 3612(o). Id. § 3612(a). If the parties do not so elect, the action moves forward as an administrative proceeding before this Court, which holds a hearing and renders findings of fact and conclusions of law in accordance with the Act and HUD's implementing regulations in 24 C.F.R. parts 100 and 180. See id. § 3612(b)-(g).

Proving a Claim. Claims under the Fair Housing Act can be pursued under a theory of disparate treatment, disparate impact, or (in cases involving disability) failure to make a reasonable accommodation. See Cmty. Servs. v. Wind Gap Mun. Auth., 421 F.3d 170, 176 (3d Cir. 2005); Doe v. Butler, 892 F.2d 315, 323 (3d Cir. 1989). The instant case involves four claims of disparate treatment. In order to evaluate such claims under the Act, "courts have typically adopted the analytical framework of their analogues in employment law, including their coordinate burden-shifting analyses once plaintiff has made a prima facie showing of discrimination under a specific claim." Cmty. Servs. v. Wind Gap, 421 F.3d at 176; see, e.g., United States v. Branella, 972 F. Supp. 294, 298-99 (D.N.J. 1997) (applying the McDonnell Douglas-Burdine burden-shifting framework, as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981)).

The Charging Party at all times retains the ultimate burden of proving the essential elements of its claims. See 5 U.S.C. § 556(d) (stating that, except as otherwise provided by statute, the proponent of an order has the burden of proof in administrative proceedings); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (stating that plaintiff alleging discrimination "at all times bears the 'ultimate burden of persuasion'"). The standard of proof is that generally applicable in civil actions, proof by a "preponderance of the evidence." Marr v. Rife, 503 F.2d 735, 739 (6th Cir. 1974); HUD *ex rel.* Brown v. Saari, No. 16-AF-0152-FH-021, 2017 HUD APPEALS LEXIS 3, at *8 (HUDALJ Oct. 6, 2017). Proof by a preponderance of the evidence "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence." Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997). Accordingly, to prevail under this standard of proof, the Charging Party must establish that its allegations are more probably true than not.

FACTUAL BACKGROUND

Respondent is the owner and landlord of a residence located at 18 South Farview Avenue in Paramus, New Jersey. The property is divided into two rental units, one on the second floor and one on the first floor that includes access to space in the basement. As of February 2, 2017, Respondent had listed the first-floor unit for rent on Craigslist.

Respondent alleges that he was living on the premises at the time in a separately accessible portion of the basement that is not a legally rentable unit. Respondent owns another home in Maywood, New Jersey, but had moved from the Maywood residence to the Paramus

property while involved in divorce proceedings with his then-wife. A final divorce decree was issued on February 23, 2017, and Respondent later moved back to his Maywood residence.

Complainant is Black/African-American. As of February 2017, she was living in an apartment in Hackensack, New Jersey with her college-age son, Mr. Stevenson. At the time, because she had been without central heat for several weeks, she was heating the apartment using electric space heaters, which sometimes tripped the circuit breakers. During her lunch break at work on February 2, 2017, which was a Thursday, she saw Respondent's Craigslist advertisement. She testified that the ad's reference to a new kitchen and bath[2] appealed to her desire to improve her housing situation, so she decided to contact the number listed in the ad, which was Respondent's, to express interest.

Complainant and Respondent have offered conflicting accounts of what happened next. According to Complainant, she first called Respondent to inquire whether the apartment was still available. Respondent asked what she did for a living and how many people would be residing in the apartment with her. After Complainant answered these questions, Respondent asked her to come see the unit immediately. Complainant said she was not available at the moment, but could come on Saturday. Then the line abruptly went dead. Believing the call had been dropped, Complainant dialed Respondent's number again. When he did not answer, she texted him to renew her inquiry about viewing the apartment. According to Complainant, the following text message exchange ensued:

[Complainant:]	Hello my name is Shon'tonette, do you have any pictures for the two-bedroom apartment?
[Complainant:]	Can you text me the address also Saturday morning at 10 is that good?
[Respondent:]	No thank you
[Respondent:]	Do not make the cut
[Complainant:]	What are you talking about
[Respondent:]	Apartment is rented
[Respondent:]	Nigger free zone
[Respondent:]	White power white power
[Complainant:]	Learn how to wash your ass you racist asshole go kill your self bastard
[Respondent:]	I'll have my slave clean it for me
[Respondent:]	With her slave tone [sic]
[Complainant:]	Go finish fucking your mother you retarded sick ass
[Respondent:]	K k k

The Charging Party has submitted documentation of the text messages in the form of both screenshots from, and photos of, Complainant's phone. The first message was sent at 2:18 PM

[2] The undated copy of the advertisement submitted as evidence in this case does not actually reference a new kitchen. This minor discrepancy does not affect the Court's credibility determinations.

on February 2, 2017. The rest of the messages were sent later that same day, but it is unclear at what times.[3]

The parties also obtained copies of Complainant's and Respondent's Verizon phone records for the months of January and February 2017. Verizon did not preserve a record of the text message exchange between Complainant and Respondent, but did provide call logs for both of their cell phones during the pertinent timeframe. Their call history consisted of a single two-minute call from Complainant's phone to Respondent's beginning at 2:25 PM on February 2, 2017.

Respondent admits speaking to Complainant by phone and sending her the texts attributed to him. However, he questions Complainant's account of the timing and order of their communications and characterizes his text messages as simply a poor reaction to confrontation. Respondent suffers from post-traumatic stress disorder (PTSD) and lung disease stemming from his service as a first responder after the September 11, 2011 terrorist attacks. Respondent told HUD investigators that he had sent the derogatory text messages in response to Complainant calling him a "racist asshole" because his PTSD causes him to become easily agitated. At hearing, he acknowledged that the screenshots indicate he began sending racially charged text messages *before* Complainant sent the message calling him a "racist asshole." However, he maintained that "other conversations" may have occurred between the messages and that his PTSD had affected his perception of and reaction to Complainant's words.

Respondent also asserted that he had already orally agreed to rent the apartment to Sadie Salazar, a Section 8 tenant, before Complainant contacted him. During the HUD investigation, Respondent told investigators that it was Complainant's choice not to see the apartment on the one day he was showing the unit and that another candidate had put down a deposit that same day. At hearing, he presented testimony from Ms. Salazar that she had called Respondent the morning of February 2, 2017 and had viewed the apartment later that day. At that time, according to Ms. Salazar, Respondent had offered to rent the unit to her contingent on his meeting her mother and her special-needs school-aged son who would be living with her, and Ms. Salazar had given Respondent a $700.00 deposit and arranged to bring her mother to the property the next day.

Respondent obtained screenshots from Ms. Salazar's phone showing text messages they exchanged in February 2017. The documented exchange begins on February 3, 2017, at 4:54 PM, when Ms. Salazar texted Respondent: "Hi just saw apartment my email address is [redacted]. I would like to stop by later today with my mom so she can look at it ... Tomorrow will be better, what time is good tomorrow?" Ms. Salazar subsequently arranged to visit the property with her mother the next morning (Saturday, February 4, 2017). On February 5, 2017, Respondent texted Ms. Salazar, "You got it," to which she replied, "Thank you so much! I have

[3] The 2:18 PM timestamp is displayed above the first message. The rest do not bear a timestamp. A cell phone user can typically see when a text message was sent by touching or swiping the text bubble on the screen. As suggested by Respondent's counsel, a cell phone user typically has the capability to delete text messages, as well. However, in this case, the Court has no way of knowing exactly when the text messages were sent or whether any messages were deleted. As of the hearing date, neither Complainant nor Respondent had kept the cell phones they had been using on February 2, 2017. As a result, they could no longer access their February 2, 2017 text messages electronically or provide the Court with any information about the messages beyond their own recollection and the saved images taken from Complainant's phone screen and photos of that screen taken by her son.

700 to give you for deposit and will give you the remaining 2000 for march 1." On February 13, 2017, Respondent confirmed that he had received a $700.00 deposit from Ms. Salazar.

On February 15, 2017, Respondent, Ms. Salazar, and Ms. Salazar's mother signed a lease. Ms. Salazar, her son, and her mother moved into the apartment on March 1, 2017.

Meanwhile, Complainant and her son remained in their apartment in Hackensack until April 2018. Complainant testified that she could not bring herself to look for another apartment because she did not want what had happened with Respondent to happen again. Complainant and Mr. Stevens testified that, as a result of Respondent's conduct, Complainant suffered a mental breakdown and was referred to a therapist, whom she continues to see.

DISCUSSION

The Charging Party alleges that, by reason of the conduct described above, Respondent has violated four provisions of the Act: sections 804(a), 804(c), 804(d), and 818. See 42 U.S.C. §§ 3604(a), 3604(c), 3604(d), 3617. Respondent argues that the charges should be dismissed because his text messages, while "unsavory," do not tell the whole story and demonstrate merely that he reacted poorly to confrontation, not that he acted with discriminatory intent. He also maintains that he is entitled to the benefit of the "Mrs. Murphy" exemption.

The Court will first address whether Respondent made a discriminatory statement in violation of section 804(c) of the Act. The Court will next consider whether Respondent violated sections 804(a) and (d) of the Act, and, if so, whether he can be held liable for such conduct given that sections 804(a) and (d) are subject to the "Mrs. Murphy" exemption. Finally, the Court will discuss whether Respondent's conduct amounted to unlawful coercion, intimidation, threats, or interference under section 818.

I. Section 804(c) – Discriminatory Statements

Section 804(c) prohibits housing providers from making, printing, or publishing, or causing to be made, printed, or published, any statement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on protected status or an intention to make any such preference, limitation, or discrimination. 42 U.S.C. § 3604(c). Violations under section 804(c) include all written or oral statements by a person engaged in the rental of a dwelling that indicate a preference, limitation, or discrimination because of race or color. See 24 C.F.R. § 100.75(b); see, e.g., United States v. Branella, 972 F. Supp. 294, 302 (D.N.J. 1997) (finding prima facie case established where defendant allegedly made discriminatory statements to a prospective tenant during a phone conversation).

To prevail on a claim that Respondent has made a discriminatory statement under section 804(c), the Charging Party must present evidence that (1) Respondent made a statement, (2) with respect to the rental of a dwelling, (3) that indicated a preference, limitation, or discrimination on the basis of Complainant's status as a member of a protected class. See Corey v. Sec'y, 719 F.3d 322, 326 (4th Cir. 2013); White v. HUD, 475 F.3d 898, 904 (7th Cir. 2007); HUD *ex rel.* Potter v. Morgan, No. 11-F-090-FH-49, 2012 HUD ALJ LEXIS 30, at *5 (HUDALJ Sept. 28, 2012), modified on other grounds, 2012 HUD ALJ LEXIS 33 (HUD Sec'y Oct. 26, 2012). Courts

employ the "ordinary listener" test to determine whether a statement impermissibly indicates a preference, limitation, or discrimination based on protected status. E.g., Rodriguez v. Village Green Realty, Inc., 788 F.3d 31, 52-53 (2d Cir. 2015); Miami Valley Fair Hous. Ctr. v. Connor Grp., 725 F.3d 571, 577 (6th Cir. 2013); Corey, 719 F.3d at 326; White, 475 F.3d at 905-06. This is an objective test whereby the Court decides whether the statement, in context, would have suggested to an ordinary listener that a person from the protected group was favored or disfavored for housing. See Ragin v. New York Times Co., 923 F.2d 995, 999 (2d Cir. 1991), cert. denied, 502 U.S. 821 (1991).

In this case, Respondent does not dispute that, after telling Complainant the apartment he had advertised on Craigslist was not available, he sent her text messages stating, "Nigger free zone" and "White power white power." After Complainant responded that he should "[l]earn how to wash your ass you racist asshole," (as well as telling him to "go kill your self bastard"), Respondent replied that he would have his "slave" clean it for him "[w]ith her slave tone [sic]." Finally, after Complainant retorted, "Go finish fucking your mother you retarded sick ass," Respondent texted, "K k k," which Complainant took as a reference to the Ku Klux Klan.

Upon observing Complainant and Respondent as each testified on the witness stand, the Court found both to be relatively soft-spoken and polite, and would not have expected such rough language from either of them, particularly not in person, face-to-face. Clearly, both parties made vulgar and derogatory statements which they later regretted. The difference is that, for the reasons discussed below, Respondent's words violate the Fair Housing Act while Complainant's do not.

First, Respondent's text messages constitute "statements" within the meaning of section 804(c). Given the context of the conversation, which Complainant initiated for the purpose of inquiring about the rental unit Respondent had advertised on Craigslist, these statements were made "with respect to the ... rental of a dwelling." 42 U.S.C. § 3604(c). Finally, the statements are discriminatory because, in context, they would suggest to any ordinary listener that black and/or African-American people are disfavored as tenants for the subject rental unit.

Specifically, Respondent's reference to a "[n]igger free zone" indicates bias against renting to black people. His use of the racial epithet "nigger" and references to slavery are derogatory to African-Americans and evoke our nation's painful history of racial discrimination, which is precisely the history the Act was intended to address. See Mitchell v. Cellone, 389 F.3d 86, 87-88 (3d Cir. 2004) ("The Fair Housing Act was designed to provide nationwide fair housing to minorities who had previously been victims of invidious racial discrimination, and is a valid exercise of congressional power under the Thirteenth Amendment to eliminate badges and incidents of slavery.") (citing Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439-40 (1968)). And Respondent's messages stating "White power white power" and "K k k"—which Complainant reasonably construed, in context, as a reference to the notorious white supremacist group the Ku Klux Klan—similarly conjure the specter of historical discrimination against African-Americans and suggest to an ordinary listener a preference for white tenants. Accordingly, Respondent's statements made to Complainant via text message were discriminatory and unlawful under section 804(c) of the Act.

At hearing, Respondent apologized to Complainant for his discriminatory statements. In an attempt to explain his mindset at the time he sent the derogatory text messages, Respondent testified that he was having a bad day, and that fact, coupled with his PTSD and his perception that Complainant was making demands of him by asking him to produce photos of the apartment and show it to her on a different day, caused his conversation with Complainant to escalate into "a jack-ass moment." Respondent maintained that he does not actually discriminate against tenants based on race, asserting that as of February 2017, he was renting one of his other units to an African-American man and he himself was "the only Anglo-Saxon person living on the property."

These factors do not excuse Respondent from liability for making discriminatory statements under section 804(c). Discriminatory intent is not a required element of an 804(c) violation. The standard is simply whether a statement would suggest to an ordinary listener that a particular protected group is preferred or dispreferred for housing. See Rodriguez, 788 F.3d at 53 ("[T]he 'touchstone' of the inquiry is the message conveyed."); cf. Ragin, 923 F.2d at 1000 ("[T]he statute prohibits all ads that indicate a racial preference to an ordinary reader whatever the advertiser's intent."). This is an objective standard that focuses on the listener's perspective. Respondent cites no legal authority, and the Court is aware of none, that would allow PTSD, a bad day, or other subjective factors bearing on the speaker's mindset to justify making unlawful discriminatory statements.

Likewise, although Respondent claims the benefit of the "Mrs. Murphy" exemption, this exemption, even if applicable, does not excuse a violation of 804(c). See 42 U.S.C. § 3603(b)(2) (stating that subsection 804(c) is not subject to exemption); see, e.g., United States v. Hunter, 459 F.2d 205, 213-14 (4th Cir. 1972), cert. denied, 409 U.S. 934 (1972) ("The Act specifically states that subsection (c) of § 3604 shall apply to sellers or lessors of dwellings even though they are otherwise exempted by § 3603(b)."); Gonzalez v. Rakkas, No. 93 CV 3229 (JS), 1995 U.S. Dist. LEXIS 22343, at *13 (E.D.N.Y. July 25, 1995) (finding that exemption does not apply to discriminatory statements under 804(c)); HUD *ex rel.* Terrizzi v. Dellipaoli, No. 02-94-0465-8, 1997 HUD ALJ LEXIS 22, at *12-20 (HUDALJ Jan. 7, 1997) (same).

Accordingly, the Court finds Respondent liable for making discriminatory statements in violation of section 804(c) of the Act.

II. Sections 804(a) and (d) – Refusal to Negotiate; False Representations as to Availability

The Charging Party alleges that Respondent violated sections 804(a) and (d) of the Act by refusing to negotiate with Complainant for the rental of the subject apartment and by lying to her about the availability of the apartment due to her race or color. Both alleged violations require a showing of discriminatory intent, and both are subject to the "Mrs. Murphy" exemption. The Court finds that, although Respondent refused to negotiate with Complainant and made a misrepresentation regarding the availability of the subject apartment, he cannot be held liable under 804(a) or (d), for the following reasons.

A. Respondent refused to negotiate a rental with Complainant.

Section 804(a) makes it unlawful for a housing provider to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling because of race or color. 42 U.S.C. § 3604(a). Thus, to establish a violation of 804(a), the Charging Party must show that (1) Respondent denied or made housing unavailable to Complainant, and (2) his actions were based on Complainant's race or color (i.e., he was motivated by a discriminatory intent).[4] Koorn v. Lacey Twp., 78 F. App'x 199, 206 (3d Cir. 2003); see, e.g., Branella, 972 F. Supp. at 302 (finding prima facie claim established under 804(a) where defendant allegedly told prospective tenant that homeowners' association would prohibit rental due to her familial status).

Respondent denied, and made housing unavailable to, Complainant within the meaning of 804(a) when he abruptly and unilaterally terminated their February 2, 2017 phone conversation, thereby refusing to negotiate with her, while she was trying to express interest in the apartment he had listed for rent on Craigslist. Respondent does not deny that he hung up on Complainant. Further, when Complainant attempted to inquire about the apartment via text message, Respondent told her it was unavailable and definitively ended the conversation by sending racially charged messages. This conduct amounts to refusal to negotiate a rental, which is a prohibited action under 804(a) if motivated by discriminatory intent. Thus, the remaining question is whether Respondent acted with discriminatory intent.

B. Respondent falsely represented to Complainant that the subject apartment was unavailable when it was, in fact, available for rental.

Section 804(d) makes it unlawful for a housing provider to represent to any person, because of race or color, that a dwelling is not available for inspection, sale, or rental, when such dwelling is in fact so available. 42 U.S.C. § 3604(d). Thus, the statute prohibits "discriminatory, false representations" regarding the availability of a dwelling. Branella, 972 F. Supp. at 302 (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-74 (1982)). To establish a claim under 804(d), the Charging Party must prove that (1) Respondent made a representation that a dwelling was unavailable; (2) the dwelling was, in fact, available; and (3) Respondent's misrepresentation was motivated by a discriminatory intent. See Branella, 972 F. Supp. at 302; Antonelli v. Gloucester Cnty. Hous. Auth., Civ. No. 17-5313 (RBK/AMD), 2018 U.S. Dist. LEXIS 6592, at *10 (D.N.J. Jan. 16, 2018) (dismissing claim under 804(d) for failure to plead discriminatory intent).

[4] Respondent suggests that the Charging Party also must prove that Complainants were qualified to rent the apartment, applied to rent the apartment, and were rejected. That is the test for whether a housing provider "refuse[d] to sell or rent after the making of a bona fide offer." 42 U.S.C. § 3604(a); see HUD v. Blackwell, 908 F.2d 864 (11th Cir. 1990). However, this case involves allegations that Respondent "refuse[d] to negotiate for the sale or rental of ... a dwelling," which is a separate type of action that violates 804(a) without requiring proof of a bona fide offer and rejection. 42 U.S.C. § 3604(a); see, e.g., Eastampton Ctr. v. Twp. of Eastampton, 155 F. Supp. 2d 102, 116-17 (D.N.J. 2001) (noting that 804(a) "prohibits not only the refusal to sell or rent a dwelling, but also forbids all practices that 'otherwise make unavailable or deny' housing"); Branella, 972 F. Supp. at 302 (discussing broad nature of prohibitions in 804(a) and noting that statute may be satisfied by "evidence showing any one of the violative actions set forth" (emphasis in original)). In other words, the Charging Party need not prove that Complainants submitted a qualified application to rent the apartment, as Respondent is alleged to have stopped them from doing so by refusing to negotiate with them in the first place.

In this case, Respondent represented to Complainant that the dwelling he had listed on Craigslist was unavailable when he sent her a text message stating "Apartment is rented" in response to her inquiries. This representation was false. Although Respondent asserts that he had already agreed to rent the unit to Ms. Salazar at the time Complainant contacted him, the evidence contradicts this claim in several respects.

First, the parties agree that, while on the phone with Complainant, Respondent invited her to come view the apartment immediately. This contradicts his assertion that the apartment was unavailable at the time, as he would have had no reason to show it to Complainant if he had already promised it to someone else.

Second, although Respondent and Ms. Salazar insist that they reached an oral agreement to rent as soon as she contacted him and viewed the apartment, the evidence does not establish that she contacted him before Complainant.

Ms. Salazar testified that she is a single mother who was "going through financial situations" and scrambling to find a place to live for herself and her son before the end of February. Her own mother, who has a Section 8 housing voucher and does not drive or speak English, was in the process of adding Ms. Salazar and her son to the voucher so all three of them could rent an apartment together; the unit Respondent had listed on Craigslist appealed to them because it had two bedrooms and was located in the Paramus school district, where Ms. Salazar's son, who has special needs, would be able to get the services Ms. Salazar believed he needed. Respondent testified that Ms. Salazar's "story really hit [his] heart" and he knew he wanted to rent to her as soon as he met her.

The Court credits this assertion, but it is clear from Respondent's testimony that he does not independently recall the date on which he first showed the apartment to Ms. Salazar. He stated several times that he believed Ms. Salazar was visiting the apartment at the very moment he accepted Complainant's call, as he remembered being in the parking lot while on the phone with her. But he later conceded "[t]here might have been somebody else [other than Ms. Salazar] there at that time."

Ms. Salazar testified that she "definitely" viewed the apartment on February 2, 2017, and took her mother to see it the next day, at which time she gave Respondent a $700.00 partial deposit to prevent him from showing it to anyone else. But the text messages between Respondent and Ms. Salazar do not begin until 4:54 PM on February 3, 2017, at which time Ms. Salazar said she had "just seen [the] apartment" and asked if her mother could view it the following day. Confronted with the text messages, Ms. Salazar admitted that her mother did not see the apartment until Saturday, February 4, 2017, and that she did not give Respondent the $700.00 deposit to hold the apartment until "that Saturday, or a couple of days after."[5] Thus, her testimony as to the timing of her interactions with Respondent was inconsistent, and her assertion that she saw the apartment on February 2, 2017 conflicts with the text message indicating she had "just seen" it on February 3.

[5] In fact, the text messages between Respondent and Ms. Salazar indicate that he received the $700.00 deposit on or about February 13, 2017, which is significantly later than Ms. Salazar initially stated.

Moreover, even if Ms. Salazar did view the apartment on February 2, 2017, both she and Respondent testified that their oral agreement for her to rent the unit was contingent on Respondent meeting her mother and son. Ms. Salazar's mother did not visit the apartment and meet Respondent until February 4, 2017. In the interim, Respondent admits that he continued showing the apartment to other prospective tenants. He did not confirm that he would rent the apartment to Ms. Salazar until he sent her a message stating "You got it" on February 5, 2017, and he did not confirm receipt of her $700.00 holding deposit until February 13, 2017. Thus, at the time Complainant contacted him on February 2, 2017, he had not yet reached a firm decision to rent to Ms. Salazar and was still showing the apartment to other people.

The foregoing evidence establishes that the apartment was still available for rent as of February 2, 2017, the date Complainant contacted Respondent. Respondent misrepresented the availability of the dwelling when he told Complainant it was "rented." Accordingly, he engaged in conduct that is prohibited under section 804(d) of the Act if motivated by discriminatory intent. The remaining question is whether he engaged in this conduct because of Complainant's race or color, i.e., whether he acted with the requisite discriminatory intent.

C. The Charging Party has failed to establish discriminatory intent.

Determining the existence of discriminatory intent requires a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977). Thus, both direct and circumstantial evidence may be considered, and "an invidious design may be inferred from the totality of these relevant facts." United States v. Lepore, 816 F. Supp. 1011, 1017 (M.D. Pa. 1991) (citing Washington v. Davis, 426 U.S. 229, 242 (1976)).

The Charging Party argues that Respondent's text messages to Complainant constitute direct evidence of his discriminatory intent. The text messages are direct evidence of his intent to make discriminatory statements to Complainant because of her race or color, but they do not directly prove that his conduct in refusing to negotiate with her and misrepresenting the availability of the apartment was also motivated by race or color. General evidence of racism is not enough to establish a specific claim under the Act; the Charging Party must prove the particular conduct at issue in the claim was motivated by racism. Cf. Dillon v. Coles, 746 F.2d 998, 1004 (3d Cir. 1984) ("Just as in the tort field, where 'negligence in the air' is not enough to fasten liability on a defendant ... discrimination in general does not entitle an individual to specific relief."). This is why direct evidence of discriminatory intent is so rare. See Arlington Heights, 429 U.S. at 265. Direct evidence is evidence that, if believed, proves a fact without inference or presumption. Torre v. Casio, Inc., 42 F.3d 825, 829 (3d Cir. 1994). Respondent's text messages do not meet this criterion for purposes of proving intent under 804(a) and (d), as they still require an inference that, because Respondent made racist statements, racism must be the reason he told Complainant the apartment was unavailable and refused to negotiate with her.

In the absence of direct evidence of discriminatory intent, the Court applies the inferential burden-shifting framework set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), to assess the evidence. See Chauhan v. M. Alfieri Co., 897 F.2d 123, 126-27 (3d

Cir. 1990); e.g., Newell v. Heritage Senior Living, LLC, 673 F. App'x 227, 231 (3d Cir. 2016); Branella, 972 F. Supp. at 298-99; HUD *ex rel.* Wooton v. Timmons, No. 05-98-1000-8, 2000 HUD ALJ LEXIS 21, at *11-13 (HUDALJ Nov. 16, 2000). Under the McDonnell Douglas-Burdine framework, a prima facie claim of discrimination raises a rebuttable presumption of discriminatory intent, shifting the burden of production to Respondent to articulate a legitimate nondiscriminatory reason for his actions. Newell, 673 F. App'x at 231; Branella, 972 F. Supp. at 298 n.7; Timmons, 2000 HUD ALJ LEXIS 21, at *12-13.

Here, Respondent asserts that the reason he did not rent the apartment to Complainant was not because of her race or color, but because he had previously agreed to rent it to Ms. Salazar. The Court has already rejected this claim. When Respondent took the witness stand, it appeared that he did not actually remember whether he had spoken to Complainant or Ms. Salazar first, and had adopted the stance that the apartment was already rented merely because this was a convenient litigating position. Moreover, his racially charged text messages make clear that he was not thinking solely about the availability of the apartment during his conversation with Complainant and that something else was afoot that led to their heated exchange. The Court concludes that Respondent's proffered nondiscriminatory reason for rejecting Complainant as a rental applicant is pretextual.

The ultimate question remains whether Respondent rejected Complainant because of her race or color. Although Respondent's proffered reason was pretextual, the Charging Party still retains the burden of proving by a preponderance of the evidence that the real reason for his conduct was discriminatory animus. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (making clear that, even under McDonnell Douglas-Burdine framework, plaintiff retains ultimate burden of proof); accord Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43 (2000); see, e.g., Timmons, 2000 HUD ALJ LEXIS 21, at *13 ("[P]retext alone does not necessarily prove discrimination. The Charging Party and [Complainant] still maintain the burden to demonstrate that an asserted reason, even though pretextual, evidence an intent to discriminate."); see also Jackson v. U.S. Steel Corp., 624 F.2d 436, 442-43 (3d Cir. 1980) (finding that district court improperly placed burden of persuasion, as opposed to burden of production, on defendant in requiring it to prove by a preponderance of the evidence that it acted for legitimate nondiscriminatory reasons).

Respondent testified that he hung up on Complainant and sent the racially charged text messages because, due to his PTSD, he had become angry with her when she said she could not view the apartment immediately, as he had requested, and when he perceived she was instead making demands of him. He described his February 2, 2017 conversation with Complainant as "a jack-ass moment" spurred in part by the fact that he was having a bad day:

> I was in the height of the divorce. My lawyers back and forth with me, questions being answered back and forth, money being asked for ... I was trying to get back into my house. This place that I was living in, it's not comfortable, it's not nice. It's not what [sic] someone with severe asthma and breathing problems wants to spend the winter. I was trying to get out of there, trying to get back to my home that I had owned ten years prior to being married.

> And [Complainant] – this might not be [Complainant's] intent to do it this way, but the way I felt was where she's, "Where's my pictures? Where's the address? Where's this?" And I just had a rough day with a woman demanding things, mainly my ex wife ... and just kind of escalated me into a jack-ass moment.

Respondent also indicated that he was overwhelmed by the phone calls and inquiries he was receiving on the apartment, explaining that "some people are clowns" who ask unreasonable questions and ignore instructions. When Complainant asked for pictures and to view the apartment on Saturday instead of at once, he perceived these requests as demands and became annoyed and angry. He hung up to terminate the conversation, and her prospective tenancy.

Respondent also suggested that he and Complainant may have exchanged additional harsh words that were not captured in the documented text message exchange between them. Specifically, he stated, "I look at these texts and I think that there was other conversations between." However, he admitted, "if there was or if there wasn't, that's kind of on me. I believe that there was conversations that were between this and it [his "anger issue"] just bubbles up in me." On cross-examination, when pressed to explain why he had told HUD investigators that Complainant had called him names first, he insisted he had believed at the time there were additional communications. "I would have stood there in front of you and made an ass of myself a few months ago and said there was five or six text messages between the text messages we see today on Verizon, or phone calls, and that just wound me up," he stated, but noted that he now believed "they might have been perceived messages or perceived phone calls."

Respondent's testimony raises the prospect that, because of his anger issues arising from his PTSD, certain aspects of his conversation with Complainant, which may not be documented in the screenshots of their text messages, caused him to become unreasonably angry, resulting in his refusing to consider her as a prospective tenant and sending intentionally offensive messages. At hearing, Respondent acknowledged and apologized for his racist messages, but insisted he did not reject Complainant as a prospective tenant for discriminatory reasons. He emphasized that he had ultimately rented the apartment to another woman of minority status and a child with special needs, and asserted that at the time of his interactions with Complainant, he was renting another apartment to an African-American man, and he himself (Respondent) was the only Anglo-Saxon living on the subject property.

The Charging Party argues that Respondent's reliance on his PTSD as an excuse for his behavior is shameful and not credible. To the extent Respondent has offered PTSD as an excuse for the reprehensible text messages he sent Complainant, the Court has already rejected that argument and found him liable under section 804(c). However, the Court considers his PTSD argument relevant in that it lends credibility to the idea that a relatively minor provocation, such as a belief that Complainant was making demands of him, could have caused him to lose his temper, hang up on her, and make abusive statements he now regrets.

Respondent's claim that he became agitated and hung up on Complainant because she would not come see the apartment immediately is consistent with his initial response to the HUD investigation and with Complainant's testimony that, when she called Respondent, he first asked

about her qualifications as a tenant and did not hang up until she declined his invitation to view the apartment that day. By Complainant's account, she sent him the initial text messages inquiring about the unit after he hung up on her because she believed the call had simply been dropped, at which point Respondent began spewing racist invective without warning. But the timeline she put forth does not align with the documentary evidence the Charging Party produced, which shows that the call was placed after the first text message was sent, and the Charging Party has offered no explanation for the discrepancy. Meanwhile, both parties agree that they had no further contact after Respondent sent the racist text messages, meaning that the phone call must have occurred in the middle of the text message exchange. This leaves open the possibility that, as Respondent claimed, he and Complainant may have exchanged additional angry words during the phone call that "wound [him] up."

In sum, neither of the parties' testimony was completely consistent with Verizon's documentation of their cell phone conversation. Complainant contends that, because all she did was inquire about the apartment, and Respondent responded by hanging up on her and sending racist text messages, his actions were likely motivated by a racially discriminatory intent. Respondent counters that he does not engage in racial discrimination as a landlord, but became angry at Complainant in this case due to his perception that she was making demands, which was affected by his PTSD and possibly by additional words that passed between them but were not documented in their text message exchange. Both accounts are plausible, but the Charging Party and Complainant bear the ultimate burden of persuasion. For the reasons discussed above, the preponderance of the evidence does not establish that Respondent acted with the requisite discriminatory intent in refusing to negotiate with Complainant and telling her the apartment was already rented.

D. Respondent is entitled to the benefit of the "Mrs. Murphy" exemption.

Even if the Charging Party had established that Respondent's refusal to negotiate and misrepresentation regarding the availability of the apartment were motivated by a discriminatory intent, Respondent still could not be held liable for violating sections 804(a) or (d) because he is entitled to the benefit of the "Mrs. Murphy" exemption.

Under the "Mrs. Murphy" exemption, "[n]othing in section [804] (other than subsection (c)) shall apply to ... rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence." 42 U.S.C. § 3603(b)(2). Thus, where applicable, the exemption excuses a covered owner-occupant from the anti-discrimination requirements of sections 804(a) and (d). A person claiming the benefit of the exemption bears the burden of proving that it applies. See United States v. Columbus Country Club, 915 F.2d 877, 882 (3d Cir. 1990) ("Under general principles of statutory construction, 'one who claims the benefit of an exception from the prohibition of a statute has the burden of proving that his claim comes within the exception.'"); Guider v. Bauer, 865 F. Supp. 492, 495 (N.D. Ill. 1994); Dellipaoli, 1997 HUD ALJ LEXIS 22, at *12.

In this case, the parties do not dispute that Respondent is the owner of the property in question. The parties also do not dispute that the property, which is located at 18 South Farview

Avenue, contains living quarters "occupied or intended to be occupied by no more than four families living independently of each other." Specifically, the property is divided into two rental units: one on the second floor, and one on the first floor with access to space in the basement. In addition, Respondent and Ms. Salazar indicated there is a separately accessible portion of the basement that, though not a legally rentable unit, is a livable space with a bathroom and kitchen area. Based on this evidence, the subject property contains a dwelling with living quarters intended to be occupied by two or, at most, three independent families. Because the dwelling houses fewer than four families and Respondent is the owner, the "Mrs. Murphy" exemption applies if he "actually maintain[ed] and occupie[d] one of such living quarters as his residence" within the meaning of the statute during the pertinent timeframe, which the Charging Party disputes.

Respondent claims that he lived in the basement of the property "for months before, during and after the rental" to Ms. Salazar while he was waiting for his divorce to be finalized and for his former wife to move out of the other home he owned in Maywood, New Jersey. Specifically, he testified that he moved to the basement of the South Farview Avenue property in or about January 2016 and was still living there a year later when the resident of the first-floor unit gave notice and moved out, at which point he began searching for a new tenant, leading to his interactions with Complainant and Ms. Salazar. Respondent signed a lease with Ms. Salazar on February 15, 2017, and his divorce was finalized on February 23, 2017, but he testified that he did not move out of the basement of the South Farview Avenue property for several months afterward because his ex-wife remained in the Maywood home until May 5, 2017. In support of this testimony, Respondent offered corroborating testimony from Ms. Salazar; a copy of a commercial driver's license valid through February 28, 2017, that listed his address as 18 South Farview Avenue; and copies of two lease agreements showing that he reduced Ms. Salazar's rent in or around March or April 2017, purportedly because he was still living on the property and helping pay for utilities.[6]

The Charging Party does not dispute that Respondent was living in the basement of the Farview Avenue property as of February 2, 2017, but urges the Court to find that he was not actually maintaining the property as his residence within the meaning of the "Mrs. Murphy" exemption. The Charging Party asserts that Respondent was occupying the space only on a

[6] The Charging Party produced a copy of an unsigned letter from Ms. Salazar dated October 24, 2018, which stated that Respondent had moved into her "spare room" as a friend for a period of several months in late 2017. The letter was addressed to this Court, but never sent. Contrary to the representations in the letter, Ms. Salazar testified that Respondent did not actually move into one of the bedrooms in her apartment in late 2017 and that, to her knowledge, the separately accessible basement unit remained empty as well, although Respondent may have stayed there from time to time without her knowledge. Respondent also denied that he had moved back into the basement unit in late 2017.

In an attempt to explain the origins of the October 24, 2018 letter, Ms. Salazar initially testified that she wrote it to prevent her rent from increasing for reasons relating to utility payments. However, she later indicated she simply wanted to inform this Court, through the letter, that Respondent had helped her and her mother and son through a difficult situation and is not a bad person.

Ms. Salazar's testimony does not satisfactorily explain why the letter was written. The Charging Party suggested at hearing that the letter was prepared as part of a quid pro quo, but did not pursue or further elucidate this theory in its post-hearing briefs. The Court remains uncertain why or under what circumstances the letter was prepared, but believes that the reason it was never sent is because its allegation that Respondent moved back to the South Farview Avenue property in late 2017 is false and its allegation that he may have occupied a Section 8 tenant's "spare room" could expose him to liability for violating the Section 8 program requirements. See 24 C.F.R. § 982.352(a)(6).

temporary basis and that his primary, permanent residence was his home in Maywood. The Charging Party notes that he listed the Maywood residence as his address on the lease agreement he signed with Ms. Salazar on February 15, 2017, and argues that he had no intention of actually maintaining the basement of the Farview Avenue property as his residence, citing, among other things, his testimony that he "was trying to get out of there."

After considering all the relevant evidence, the Court credits Respondent's testimony that he resided in the basement of the South Farview Avenue property until on or about May 5, 2017, while waiting to move back into his Maywood residence. Although there is no definitive proof as to what date Respondent left the South Farview Avenue property, it is reasonable to believe that, having moved there while his divorce was pending, he would have remained until his ex-wife vacated the former marital home. It is also reasonable to believe this may not have occurred immediately after the divorce was finalized. The only evidence suggesting otherwise is the fact that Respondent listed the Maywood residence as his address on the lease with Ms. Salazar, but this circumstantial evidence does not establish actual residency and is outweighed by the other credible evidence.[7] The preponderance of the evidence supports Respondent's allegation that he continued to reside in the basement of the South Farview Avenue property for several months after leasing the first-floor unit to Ms. Salazar and her family.

Because Respondent was living on the subject property at the time the discriminatory conduct occurred and continued to reside there for several months after leasing a unit to Ms. Salazar, the evidence supports a finding that he actually maintained and occupied living quarters on the property as his residence within the meaning of the "Mrs. Murphy" exemption. The Court is mindful of the need to interpret exemptions to the Fair Housing Act narrowly to avoid undermining the Act's broad remedial purposes. See Columbus Country Club, 915 F.2d at 883; Guider v. Bauer, 865 F. Supp. at 495; Dellipaoli, 1997 HUD ALJ LEXIS 22, at *12. However, the Charging Party's proposed interpretation of the "Mrs. Murphy" exemption as requiring an intent to permanently reside on the subject property is overly narrow. As noted by the Charging Party, Congress created the "Mrs. Murphy" exemption to protect a covered landlord's rights to privacy and freedom of association. See 114 Cong. Rec. 2495 (1968). The statute does not require the landlord to maintain and occupy a dwelling indefinitely or for any specified time period.

In this case, even though Respondent intended and wanted to move back to his home in Maywood, he did actually reside in the basement of the South Farview Avenue property for an extended time due to his divorce. His occupancy overlapped by a period of several months with Ms. Salazar's tenancy, which began on March 1, 2017. If his occupancy had overlapped by such a minimal amount of time that no privacy rights could possibly be implicated, or if the Court

[7] At hearing, Respondent was not asked and did not address why he used the Maywood address on the lease. But it was clear, as argued by the Charging Party, that he considered the Maywood property to be his permanent residence and did not intend to live in the basement of the South Farview Avenue property forever. Further, if the basement, which was not a legally rentable unit, had the same mailing address as the first-floor unit, Respondent may have avoided using that address on the lease because Ms. Salazar was a Section 8 tenant, and owner-occupied units are ineligible for participation in the Section 8 program. See 24 C.F.R. § 982.352(a)(6). In fact, in the proceedings leading up to the hearing in this matter, counsel for the Charging Party suggested that certain evidence produced by Respondent raised the prospect of a Section 8 violation. Thus, as the Charging Party is aware, there may be reasons other than actual residency that led Respondent to use the Maywood address instead of the South Farview Avenue address on the lease.

believed he had deliberately moved to the property for the purpose of triggering the "Mrs. Murphy" exemption and circumventing the Act's requirements, these factors might support a narrower construction of the exemption. But the evidence instead shows that Respondent moved to the property because of the divorce and "actually maintain[ed] and occupie[d]" the basement as his living quarters both at the time of his interactions with Complainant and for several months after accepting a new tenant. Accordingly, as the owner-occupant of the property, Respondent satisfies the requirements of the "Mrs. Murphy" exemption. Because the exemption applies, he cannot be held liable for violating sections 804(a) or (d).

III. Section 818 – Coercion, Intimidation, Threats, and Interference

Section 818 of the Act renders it 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 ... any right granted or protected by section 3603, 3604, 3605, or 3606" of the Act. 42 U.S.C. § 3617. The "Mrs. Murphy" exemption does not apply to this provision. 42 U.S.C. § 3603(b)(2); see, e.g., HUD *ex rel.* Stover v. Gruzdaitis, No. 02-96-0377-8, 1998 HUD ALJ LEXIS 39, at *9 (HUDALJ Aug. 14, 1998).

The Third Circuit has held that a section 818 claim requires proof that (1) the plaintiff exercised or enjoyed any right protected under sections 803 to 806 of the Act; (2) the defendant's conduct amounted to coercion, intimidation, threats, or interference; and (3) a causal connection existed between the exercise or enjoyment of the right and the defendant's conduct. Revock v. Cowpet Bay W. Condo. Ass'n, 853 F.3d 96, 112-13 (3d Cir. 2017).

In this case, Complainant exercised rights protected under section 804 of the Act when she conducted a housing search and contacted Respondent in an attempt to negotiate for the rental of the apartment he had listed on Craigslist. Section 804 protects Complainant's rights to engage in such activities without being subject to discrimination on the basis of race or color. Respondent, however, subjected Complainant to such discrimination when he responded to her inquiries with harassing text messages referencing a "[n]igger free zone," white power, slaves, and the KKK.

An incident of harassment can violate section 818 if it is "sufficiently severe or pervasive" as to create a hostile environment that interferes with the exercise of rights. See Revock, 853 F.3d at 113 (stating that interference under 818 may consist of harassment); 24 C.F.R. § 100.600 (providing that a single incident, if severe or pervasive, can constitute hostile environment harassment that violates the Act). In this case, Complainant credibly testified that Respondent's discriminatory statements, particularly his reference to the KKK, frightened and intimidated her. She perceived these statements as threats and testified that they inhibited her from continuing her housing search because she was "depressed, stressed," and "just didn't want what happened to [her] to happen again." Complainant's son, Mr. Stevenson, corroborated her testimony as to the impact of Respondent's statements. Thus, the discriminatory statements amounted to harassment severe enough that it created an environment hostile to Complainant's exercise of protected rights under the Act and interfered with her enjoyment of such rights. This supports a finding that Respondent's conduct amounted to interference.

As for the causal connection between Respondent's conduct and Complainant's exercise of rights, Respondent testified that he sent the discriminatory text messages because he wanted Complainant to leave him alone. Complainant had contacted him to inquire about the apartment he was renting. Thus, Respondent engaged in discriminatory conduct on account of Complainant's exercise of rights under the Act, with the intent of deterring her from further pursuing those rights. This constituted interference, in violation of section 818.[8]

REMEDY

The Charging Party contends that Complainant and her son, Mr. Stevenson, are entitled to damages totaling $110,078.40 for emotional injury, inconvenience, and out-of-pocket losses incurred due to Respondent's discriminatory acts. In addition, the Charging Party seeks injunctive relief and a civil penalty of $19,787.00.

I. Complainants' Damages

Proof of a violation of the Act entitles the aggrieved party to actual damages. 42 U.S.C. § 3612(g)(3); see Curtis v. Loether, 415 U.S. 189, 195-97 (1974); N.J. Coalition of Rooming & Boarding House Owners v. Mayor of Asbury Park, 152 F.3d 217, 223-24 (3d Cir. 1998). Such damages may include compensation for quantifiable monetary losses as well as for intangible injuries such as anger, embarrassment, humiliation, and emotional distress. HUD *ex rel.* Doe v. Woodard, No. 15-AF-0109-FH-013, 2016 HUD ALJ LEXIS 4, at *3-4 (HUDALJ May 9, 2016); HUD *ex rel.* Herron v. Blackwell, No. 04-89-0520-1, 1989 HUD ALJ LEXIS 15, at *44 (HUDALJ Dec. 21, 1989), aff'd, 908 F.2d 864 (11th Cir. 1990). The goal is to "put the aggrieved person in the same position as he would have been absent the injury, so far as money can." HUD *ex rel.* Potter v. Morgan, No. 11-F-090-FH-49, 2012 HUD ALJ LEXIS 30, at *32-33 (HUDALJ Sept. 28, 2012); HUD *ex rel.* White v. Wooten, No. 05-98-0045-8, 2007 HUD ALJ LEXIS 68, at *4 (HUDALJ Aug. 1, 2007); see also Banai v. Sec'y, 102 F.3d 1203, 1207 n.4 (11th Cir. 1997) (noting that "actual damages" serve as compensation for victim's actual injuries, not punishment for defendant's wrongdoing).

Actual damages must be proven by the aggrieved party. United States v. Pelzer Realty Co., 537 F.2d 841, 844 (5th Cir. 1976) (affirming lower court's refusal to award damages under Act where no proof was offered as to actual damages suffered); see also Assoc'd Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 532 n.26 (1983) (noting general

[8] In prior cases, courts have suggested that interference requires more egregious conduct than that present in this case, and/or a finding of discriminatory animus. See, e.g., Bloch v. Frischholz, 587 F.3d 771, 783 (7th Cir. 2009) (stating that interference requires a "pattern of harassment, invidiously motivated"); Mich. Prot. & Advocacy Serv., Inc. v. Babin, 799 F. Supp. 695, 724 (E.D. Mich. 1992) (finding that interference requires "the use or threat of force, coercion, or duress"); HUD *ex rel.* White v. Wooten, No. 05-99-0045-8, 2004 HUD ALJ LEXIS 33, at *32-36 (HUDALJ Dec. 3, 2004) (explaining that section 818 requires egregious harassing conduct). But these requirements are not found in the plain language of section 818, which should be interpreted broadly to serve the Act's remedial intent. See, e.g., Linkletter v. W. & S. Fin. Grp., 851 F.3d 632, 637 (6th Cir. 2017) (stating that "the language 'interfere with' should be broadly interpreted to reach all practices which have the effect of interfering with housing rights"). Further, when HUD promulgated its regulation defining "hostile environment harassment" in 2016, the agency made clear its view that a defendant can be held liable under a negligence standard for any harassment, even a single incident, that is severe enough to interfere with the exercise or enjoyment of protected rights, even in the absence of discriminatory animus. See 81 Fed. Reg. 63054, 63068-69 (Sept. 14, 2016) (final rule implementing 24 C.F.R. §§ 100.7 and 100.600) (explaining that a housing provider can be held liable even for the harassing acts of a third party if the provider knew or should have known of the harassment and took no steps to remedy it).

rule that damages cannot be recovered for "uncertain, conjectural, or speculative losses"). Aside from supporting the amount of damages requested, the aggrieved party must establish that Respondent's prohibited conduct "proximately caused" any injury for which recovery is sought, which requires a showing of "some direct relation between the injury asserted and the injurious conduct alleged." Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1305-06 (2017) (holding that a claim for damages under the Act is akin to a tort action and is therefore subject to common-law principles of directness). However, even absent proof of actual damages, nominal damages are available whenever the Act has been violated in recognition of a fundamental injury to individual rights. Alexander v. Riga, 208 F.3d 419, 429 (3d Cir. 2000).

A. Emotional Distress

Courts have long recognized "the indignity inherent in being on the receiving end of housing discrimination." Wooten, 2007 HUD ALJ LEXIS 68, at *8. Accordingly, damages are available under the Act for emotional distress which arises as a consequence of a respondent's discriminatory acts and which "exceeds the normal transient and trivial aggravation attendant to securing suitable housing." Morgan v. HUD, 985 F.2d 1451, 1459 (10th Cir. 1993).

Key factors in determining the appropriate amount of emotional distress damages include (1) the egregiousness of the respondent's behavior, and (2) the aggrieved party's reaction to the discriminatory conduct. HUD *ex rel.* Hous. Advocates, Inc. v. Parker, No. 10-E-170-FH-19, 2011 HUD ALJ LEXIS 15, at *19 (HUDALJ Oct. 27, 2011); see also HUD *ex rel.* Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Godlewski, No. 07-034-FH, 2007 HUD ALJ LEXIS 67, at *12-13 (HUDALJ Dec. 21, 2007) (stating that respondents "must take their victims as they find them"). Subject to those two factors, the Court is afforded broad discretion in determining damages. HUD *ex rel.* Paul v. Sams, No. 03-92-0245-1, 1994 HUD ALJ LEXIS 74, at *25 (HUDALJ Mar. 11, 1994), aff'd per curiam, No. 94-1695, 1996 U.S. App. LEXIS 449 (4th Cir. Jan. 16, 1996); see Wooten, 2007 HUD ALJ LEXIS 68, at *9 (describing awards ranging from $150 for complainant who suffered threshold level of cognizable harm to $175,000 at the upper end of the spectrum). Because emotional injuries are by nature difficult to quantify, courts may award compensation for such injuries without requiring proof of the exact dollar value. See Woodard, 2016 HUD ALJ LEXIS 4, at *4; Blackwell, 1989 HUD ALJ LEXIS 15, at *44-45 (citing Block v. R.H. Macy & Co., Inc., 712 F.2d 1241, 1245 (8th Cir. 1983) and Marable v. Walker, 704 F.2d 1219, 1220-21 (11th Cir. 1983)).

In this case, the Charging Party requests emotional distress damages in the amount of $60,000.00 for Complainant and $45,000.00 for her son, Mr. Stevenson, for a total requested award of $105,000.00. The Charging Party argues that such damages are appropriate because Respondent's "hateful and destructive" statements to Complainant caused significant emotional damage and upheaval for both Complainant and Mr. Stevenson. Respondent counters that any damages incurred by the Complainants in this case were caused by multiple intervening factors, including Complainant's eviction from her apartment in Hackensack and loss of her Section 8 benefits due to failure to report income, rather than by Respondent's actions.

The Court credits Complainant's testimony that Respondent's discriminatory statements caused emotional harm. Respondent's statements were openly racist and were conveyed using

shocking and offensive words and phrases. Complainant testified that when Respondent first began sending the racist text messages, she was angry, upset, and confused, but by the time he sent the final message, she was afraid because she believed he was threatening her by alluding to the KKK. She testified that the text message exchange "was on [her] mind every single day" afterward and left her feeling depressed, embarrassed, and scared. She also indicated she could not bring herself to look for another apartment because she was depressed and did not want to experience the same sort of discrimination again. Thus, Respondent's discriminatory statements had a lingering negative effect on Complainant's emotional state.

Complainant further alleges that Respondent's discriminatory conduct caused her to have a mental breakdown. In October 2017, Complainant was involuntarily committed to Bergen Regional Medical Center for three days after sending her son a text message stating that she wanted to be with her deceased father. While hospitalized, she says she told medical providers both that Respondent's racist statements had caused her mental breakdown and that it had been triggered by her son's failure to pay rent. After being discharged, she saw a psychiatrist, who prescribed medications to help her sleep and soothe her anxiety. She also attended numerous therapy sessions with a licensed clinical social worker.

The Charging Party has not developed a compelling link between Respondent's single instance of discriminatory conduct and Complainant's mental breakdown and subsequent psychiatric treatment. The breakdown occurred months after the discrimination during a time when Complainant was experiencing other adverse life events such as an eviction proceeding that would appear equally likely to have negatively influenced her mental health. Further, the Charging Party did not present any documentation of, or expert testimony on, Complainant's medical history. Respondent's conduct may have contributed to Complainant's psychiatric problems, but without medical evidence, it is unclear to what extent.

Likewise, although Mr. Stevenson testified that his relationship with his mother changed after her confrontation with Respondent and described both the fallout from her mental breakdown and how finding out about the discriminatory statements affected his own emotional state, it is not clear to what extent he was impacted by the other issues surrounding his and his mother's housing situation and leading to her breakdown.

Accordingly, the Court finds that reduced emotional distress damages are appropriate in the amount of $15,000.00 for Complainant and $6,000.00 for Mr. Stevenson.

B. Out-of-Pocket Losses

The Charging Party seeks compensation for out-of-pocket expenses totaling $5,078.40. This amount allegedly represents $3,798.40 spent by Complainant to cover her three-day stay at Bergen Medical Center; $600.00 she paid toward a migraine-related MRI bill; and $680.00 she paid toward sixteen therapy sessions.

The Charging Party has not presented any documentary evidence or testimony to corroborate the specific amounts requested. In support of the claimed expenses, the Charging Party simply cites the parties' stipulation that Complainant attended sixteen therapy sessions and

the testimony establishing she was admitted to Bergen Regional Medical Center for three days due to a mental breakdown. Absent any evidence of the amounts of the expenses, and considering that the Court has already awarded compensation for Complainant's related emotional distress, the Court declines to award damages for out-of-pocket loss.

II. Civil Penalty

Respondent may also be assessed a civil penalty to "vindicate the public interest." 42 U.S.C. § 3612(g)(3). The Court is authorized to assess a civil penalty against Respondent in an amount not to exceed:

> $19,787, if the respondent has not been adjudged in any administrative hearing or civil action permitted under the Fair Housing Act or any state or local fair housing law, or in any licensing or regulatory proceeding conducted by a federal, state, or local governmental agency, to have committed any prior discriminatory housing practice.

24 C.F.R. § 180.671(a)(1) (2017). In this case, the Charging Party requests the maximum penalty allowed.

In determining the appropriate amount of the penalty, the Court considers the following factors: (i) whether Respondent has previously been adjudged to have committed unlawful housing discrimination; (ii) Respondent's financial resources; (iii) the nature and circumstances of the violation; (iv) the degree of Respondent's culpability; (v) the goal of deterrence; and (vi) other matters as justice may require. 24 C.F.R. § 180.671(c)(1).

i. Previous Unlawful Housing Discrimination

There is no evidence Respondent has previously committed unlawful housing discrimination.

ii. Respondent's Financial Resources

Respondent bears the burden of producing evidence of his financial resources, as such information is peculiarly within his knowledge. Woodard, 2016 HUD ALJ LEXIS 4, at *16; Godlewski, 2007 HUD ALJ LEXIS 67, at *26. A civil penalty may be imposed without consideration of his financial situation if he fails to produce mitigating evidence in this regard. Woodard, 2016 HUD ALJ LEXIS 4, at *16 (citing Campbell v. United States, 365 U.S. 85, 96 (1961)).

Respondent has presented no evidence pertaining to his financial resources, nor does he argue that imposition of the Charging Party's proposed civil penalty would result in financial hardship. Thus, the Court presumes that Respondent can pay the proposed penalty, and Respondent's financial circumstances will not constrain the Court's determination of the

appropriate amount. See id. at *16-17; HUD *ex rel.* Herman v. Schmid, No. 02-98-0276-8, 1999 HUD ALJ LEXIS 5, at *31-32 (HUDALJ July 15, 1999).

iii. Nature and Circumstances of the Violations

The Charging Party argues that the egregiousness and callousness of Respondent's actions warrant assessment of the maximum civil penalty, citing the distress he has caused Complainant and Mr. Stevenson and asserting that his apology at hearing rang hollow. The Court agrees that Respondent's discriminatory statements were outrageous, blatantly racist, and made without regard for the impact they would have on Complainant.

However, a $19,787.00 penalty is excessive. Maximum penalties should be reserved for only the most egregious cases. See Wooten, 2007 HUD ALJ LEXIS 68, at *16 (characterizing the "most egregious cases" as those "where willful conduct causes grievous harm, that is, where all factors argue for the maximum penalty"); see, e.g., HUD *ex rel.* Keys v. Hope, No. 04-99-3640-8, 2002 HUD ALJ LEXIS 38, at *25-27 (HUDALJ May 8, 2002) (respondent threatened complainant with vicious dogs); HUD *ex rel.* Maze v. Krueger, No. 05-93-0196-1, 1996 HUD ALJ LEXIS 62, at *46-47 (HUDALJ June 7, 1996) (respondent "used his position as a housing provider to prey upon [complainant] for his own sexual gratification" and retaliated against her for complaining about it), aff'd sub nom. Krueger v. Cuomo, 115 F.3d 487 (7th Cir. 1997); HUD *ex rel.* Pantoja v. Simpson, No. 04-92-0708-8, 1994 HUD ALJ LEXIS 61, at *50-51 (HUDALJ Sept. 9, 1994) (respondents engaged in "deliberate and premeditated campaign of discrimination that went on for over two years"); HUD *ex rel.* Clay v. Lashley, No. 04-90-0766-1, 1992 HUD ALJ LEXIS 70, at *14-16 (HUDALJ Dec. 7, 1992) (respondents placed bomb under complainants' home). The instant case does not fall within that category, as the violations for which Respondent has been deemed liable arise from a single, apparently isolated incident of discriminatory conduct consisting of words alone.

iv. Respondent's Degree of Culpability

At hearing, Respondent acknowledged making discriminatory statements to Complainant and apologized for his "jack-ass moment." His text messages were so blatantly racist that he could only have intended to offend Complainant on the basis of her race or color. The Court concludes that he engaged in intentionally racist behavior in making the discriminatory statements.

Aside from being intentionally offensive, Respondent's conduct interfered with Complainant's exercise of protected rights and may have contributed to her subsequent mental breakdown, although it is unclear to what extent. There is no evidence that Respondent specifically intended these severe outcomes or that they were reasonably foreseeable. However, he is culpable for acting with reckless disregard for the consequences of his words.

v. Deterrence

The Charging Party asserts that, in light of Respondent's blatant disregard for the law, a substantial penalty is merited to deter Respondent and those similarly situated, especially

landlords who participate in the Section 8 program, from violating the Act. The Court agrees that deterrence is desirable under the circumstances. However, given that the Court has already adjudged Respondent liable for $21,000.00 in damages, and given that he is not a large commercial member of the real estate industry, the Court believes that sufficient deterrence can be achieved through imposition of a penalty below the maximum amount.

vi. Conclusion

The parties have not identified any other factors for consideration in the penalty determination. For the reasons discussed above, the Court concludes that a $5,000.00 penalty is appropriate to vindicate the public interest in this case.

III. Injunctive Relief

The Charging Party asks the Court to issue an order permanently enjoining Respondent from future acts of discrimination based on race or color; compelling Respondent to undergo fair housing training; and allowing HUD to monitor Respondent's compliance by requiring him to furnish information about rental applications, leases, vacancies, and housing advertisements. The Charging Party also requests an injunction be issued preventing Respondent and his heirs and agents from transferring the subject property or any other real property in his possession until he has satisfied the judgment against him.

The Act authorizes the Court to award "injunctive or other equitable relief" as may be appropriate. 42 U.S.C. § 3612(g)(3). The purposes of injunctive relief include eliminating the effects of past discrimination and preventing future discrimination. HUD *ex rel.* Bravo v. Gruen, No. 05-99-1375-8, 2003 HUD ALJ LEXIS 40, at *22-23 (HUDALJ Feb. 27, 2003) (citing Park View Heights Corp. v. City of Black Jack, 605 F.2d 1033, 1036 (8th Cir. 1979), cert. denied, 445 U.S. 905 (1979), and Moore v. Townsend, 525 F.2d 482, 485 (7th Cir. 1975)).

The Charging Party's request for an order compelling Respondent to undergo fair housing training is reasonable and will be granted. Because Respondent has no history of fair housing violations or discriminatory housing practices and will be required to undergo fair housing training to prevent future violations, and because the Act already forbids him from engaging in discriminatory conduct, the Court will decline to issue an injunction constraining his future acts or permitting monitoring. Finally, as for preventing the transfer of real property until the judgment is satisfied, such an injunction would be onerous and would prevent Respondent from selling property to obtain cash to pay the judgment. Accordingly, the Court will decline to enjoin Respondent from transferring real property.

ORDER

Based on the foregoing, it is hereby **DECLARED** that:

1. Respondent has violated 42 U.S.C. § 3604(c) and § 3617.

2. Within thirty (30) days of the date on which this Order becomes final, Respondent shall pay to Complainants the total sum of $21,000.00 in damages.

3. Within thirty (30) days of the date on which this Order becomes final, Respondent shall pay to the Secretary of HUD the total sum of $5,000.00 in civil money penalties.

4. Within one (1) year of the date on which this Order becomes final, Respondent shall undergo training on the Fair Housing Act conducted by a qualified third party. Before obtaining such training, Respondent shall contact the Charging Party, through counsel, and obtain confirmation that the Charging Party considers the third party qualified to provide such training. Within thirty (30) days after completing the training, Respondent shall provide the Charging Party with proof of completion. Respondent shall bear the cost of the training, but shall not be required to incur unreasonable expense to obtain it.

So **ORDERED**,

J. Jeremiah Mahoney
Chief Administrative Law Judge

Notice of appeal rights. The appeal procedure is set forth in detail in 24 C.F.R. § 180.675. This *Initial Decision* may be appealed by any party to the Secretary of HUD by petition for review. Any petition for review must be received by the Secretary within 15 days after the date of this *Order*. Any statement in opposition to a petition for review must be received by the Secretary within 22 days after issuance of this *Order*.

Service of appeal documents. Any petition for review or statement in opposition must be served upon the Secretary by mail, facsimile, or electronic means at the following:

U.S. Department of Housing and Urban Development
Attention: Secretarial Review Clerk
451 7th Street S.W., Room 2130
Washington, DC 20410
Facsimile: (202) 708-0019
Scanned electronic document: secretarialreview@hud.gov

Copies of appeal documents. Copies of any Petition for Review or statement in opposition shall also be served on the opposing party(s), and on the HUD Office of Administrative Law Judges.

Finality of decision. The agency decision becomes final as indicated in 24 C.F.R. § 180.680.

Judicial review of final decision. Any party adversely affected by a final decision may file a petition in the appropriate United States Court of Appeals for review of the decision under 42 U.S.C. 3612(i). The petition must be filed within 30 days after the date of issuance of the final decision

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **INITIAL DECISION AND ORDER** issued by J. Jeremiah Mahoney, Chief Administrative Law Judge, in HUDOHA 19-JM-0014-FH-002, were sent to the following parties on this 6th day of January 2020, in the manner indicated:

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