

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

FILED

NOV 20 2003

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KENNETH BROSH,

Defendant.

No. 02-CV-0368-DRH

MEMORANDUM AND ORDER

Herndon, District Judge:

I. Introduction

On April 26, 2002, Plaintiff United States of America (U.S.A.) filed a complaint on behalf of Dale and Jennifer Van Dyke, and their three minor children alleging that Defendant Dr. Kenneth Brosh violated the **Fair Housing Act** (FHA) (Doc. 1). The complaint alleged that Brosh violated the **FHA** (1) by refusing to rent to the Van Dykes because of their familial status, **42 U.S.C. § 3604(a)**, and (2) by making statements with respect to the rental of a dwelling that indicated a preference, limitation, or discrimination based on familial status or an intention to make such preference, limitation, or discrimination, in violation of **42 U.S.C. § 3604(c)**. The complaint requested relief in the form of (1) enjoining Defendant from further violating **42 U.S.C. § 3604(c)**; (2) compensation for damages the Van Dykes suffered; (3) punitive damages pursuant to **42 U.S.C. §§ 3612(o)(3)** and **3613**

(c)(1); and (4) any additional relief justice may require. Pursuant to U.S.A.'s motion, the Court struck the request for punitive damages (Doc. 27).

On September 22, 2003, the Court held a bench trial. At trial, U.S.A. was represented by Rigel C. Oliveri and Alan Levy. Defendant Brosh represented himself.

The Court has heard the testimony, observed the witnesses' demeanor, and carefully scrutinized the evidence submitted by the parties. For the following reasons, the Court rules in favor of Plaintiff U.S.A. and against Defendant Brosh. The Court now **FINDS** and **CONCLUDES** as follows.

II. Findings of Fact

1. On July 5, 2000, Air Force Captain Dale Van Dyke relocated with his wife, Jennifer Van Dyke, and their three children from Virginia to Scott Air Force Base (Scott AFB) in Illinois.

2. When Captain Dale and Jennifer Van Dyke moved to Scott AFB their children were ages two, four, and six.

3. On their arrival in Illinois, the Van Dykes took up residence in Scott AFB's temporary housing that consisted of a small one bedroom hotel room with a kitchenette.

4. Through the Housing Assistance Office at Scott AFB, the Van Dykes obtained a list of fifteen to twenty houses available for rent that the Van Dykes

narrowed down to three based on their needs for a yard, a safe neighborhood, a good school district, and a sufficient size.

5. The three houses the Van Dykes found tentatively suitable were the Defendant's house at 12 Fox Creek Road in Belleville, Illinois (12 Fox Creek), a duplex at 1616 Progress Street in Belleville, Illinois (1616 Progress duplex), and a house in Germantown, Illinois.

6. After viewing the houses from the outside and researching the school districts, the Van Dykes determined that Defendant's house was the most suitable given that Germantown was approximately forty miles from Scott AFB where Captain Van Dyke worked and given that the 1616 Progress duplex had a smaller yard, backed up to a busy street, and was in a less favorable neighborhood and school district.

7. The Van Dykes concluded they should rent 12 Fox Creek, and in the early afternoon of Saturday, July 8, 2000, Jennifer Van Dyke telephoned Defendant and left a message inquiring about 12 Fox Creek and requesting a return call.

8. Defendant returned Jennifer Van Dyke's phone call around 4 p.m. the same day at which time she asked about setting up an appointment to view the house, and Defendant responded with a description of 12 Fox Creek and two questions.

9. Defendant asked whether Jennifer Van Dyke had any children and, if so, how old they were.

10. Jennifer Van Dyke told Defendant she had three children ages two, four, and six.

11. Defendant said he did not like to rent to families with children under the age of three because such children were destructive and had a tendency to be creative on the walls with their crayons.

12. Jennifer Van Dyke asked Defendant if he knew what he said was illegal.

13. Defendant responded with a sarcastic remark along the lines of "What, drawing on the walls with crayons [is illegal]?"

14. Shocked and feeling further discussion would be futile, Jennifer Van Dyke thanked Defendant for his time and hung up the phone.

15. Ms. Alean Jackson, a HUD investigator, testified that when she contacted Defendant on March 23, 2001 he admitted making the above statements.

16. Over the next several days, the Van Dykes reconsidered those houses they had determined to be unsuitable.

17. On July 14, 2000, the Van Dykes signed a twelve (12) month rental agreement for the 1616 Progress duplex and moved into the house on July 16, 2000.

18. Captain and Jennifer Van Dyke both testified that after their conversation with Defendant on July 8, 2000, they remained in the one bedroom dwelling at Scott AFB for seven to eight days at a rate of twenty-nine dollars per day; the speculation as to the number of days spent in temporary housing allows the

Court to find only that the Van Dykes spent seven (7) days in temporary housing after Defendant's comments on July 8, 2003.

19. During the eleven months spent at the 1616 Progress duplex, the Van Dykes endured significant hardships as a result of moving to an unsuitable house.

20. The 1616 Progress duplex had a small backyard unsuitable for children since it backed up to a busy street with a forty-five mile per hour (45 m.p.h.) speed limit that students from the nearby college frequently drove at excessive speeds; also, the Van Dyke children were even more afraid to play in the backyard following a teenage driver's collision with the duplex neighbor's fence that caused debris to be thrown into the children's sandbox.

21. Also, the thin walls of the 1616 Progress duplex failed to insulate the sounds from the duplex neighbors' unit, and a drainage ditch that ran along side their duplex would flood during heavy rains.

22. Captain and Jennifer Van Dyke testified credibly and convincingly that the undesirable living situation at the 1616 Progress duplex placed extraordinary stress on the Van Dykes' intra-familial relationships, led to doubts as to whether Captain Van Dyke should continue his military career, and led to frequent arguments that increased the level of stress and frustration.

23. Captain and Jennifer Van Dyke testified that they were so displeased with their housing situation at 1616 Progress that they applied for a transfer to regular military housing at Scott AFB that became available eleven months

after moving to 1616 Progress.

24. Captain and Jennifer Van Dyke testified that they so needed to leave the situation at 1616 Progress that they incurred unexpected expenses to move to military housing at Scott AFB; those expenses included the loss of a thousand dollar (\$1000) deposit for early termination of their contract and approximately seven to eight hundred dollars (\$700-800) in moving expenses and telephone connections.

25. Captain and Jennifer Van Dyke testified that their interaction with Defendant caused them to feel unwelcome in the community, caused them to spend additional days in the one bedroom temporary residence at Scott AFB at twenty-nine dollars (\$29) per day, led to a never before experienced anxiety in moving to new regions, caused unanticipated expenses in moving to housing at Scott AFB prior to the end of their lease at 1616 Progress, and resulted in significant distress on the Van Dyke's intra-familial relationships.

26. Jennifer Van Dyke also testified that she incurred expenses resulting from the need to home school their eldest child who had difficulties during his first grade year at his new school because of dissatisfaction with his assigned teacher and bullying from middle school students.

27. Jennifer Van Dyke believed the school district wherein the 1616 Progress duplex was located to be inferior to the one that encompassed 12 Fox Creek; however, the Court does not find the Plaintiff's proof convincing in this regard.

28. Captain Van Dyke testified that he lost six days of salary because

of the need to find housing after Jennifer Van Dyke's conversation with the Defendant.

II. Conclusions of Law

29. The Court has jurisdiction over this action under **28 U.S.C. §§ 1331** and **1345** and **42 U.S.C. § 3612(o)**.

30. This civil action was properly filed in federal court pursuant to **42 U.S.C. § 3612(o)** following Defendant's election to have the charge resolved by a civil action pursuant to **42 U.S.C. § 3612(a)**.

31. The **FHA** discrimination provisions in **42 U.S.C. § 3604** apply only to those dwellings set out in **42 U.S.C. § 3603**. **42 U.S.C. § 3603(a)** requires compliance with the **FHA** for all dwellings not exempted under **subsection (b)** of the same section. **42 U.S.C. § 3603(b)** exempts single-family houses rented by an owner who "does not own more than three single-family houses at any one time."

32. Defendant Brosh has admitted that his dwelling at 12 Fox Creek is covered by **42 U.S.C. § 3603**.

33. A group meets the "familial status" requirement of the statute if a parent lives with one or more of his or her children who are under the age of 18 years. **42 U.S.C. § 3602(k)(1)**.

34. The Van Dykes meet the "familial status" requirement since they have they Captain and Jennifer Van Dyke live with their three minor children.

35. **42 U.S.C. § 3604(a)** makes it unlawful for individuals “[t]o 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.”

36. To show a violation of **42 U.S.C. § 3604(a)**, the plaintiff must show the defendant either (1) refused to sell or rent after the making of a bona fide offer, (2) refused to negotiate, or (3) “otherwise make unavailable or deny”.

37. Courts have found a defendant to “refuse” an individual under **42 U.S.C. § 3604(a)** when the defendant threatened to require litigation in bad faith as an obstruction to the individual’s obtaining the dwelling. *United States v. Pelzer Realty Co.*, 484 F.2d 438 (5th Cir. 1973)(finding a “refusal” when defendant conveyed to potential buyers that “they were not particularly welcome as customers, and, while they could get the houses if they really wanted them, they would have trouble doing so.” *Id.* at 442).

38. A defendant “otherwise make[s] unavailable or den[ies]” under **42 U.S.C. § 3604(a)** if he or she conveys to an individual discouraging information that understandably discourages a plaintiff from seeking to rent or buy the dwelling. *See U.S. v. Badgett*, 976 F.2d 1176, 1180 (8th Cir. 1992).

39. In addition to showing that defendant refused or otherwise made the dwelling unavailable, the plaintiff must show the defendant’s action was “because of” an unlawful purpose. **42 U.S.C. § 3604(a)**. To show an unlawful purpose under

42 U.S.C. § 3604(a), a plaintiff may show that the “defendant had a discriminatory intent either directly, through direct or circumstantial evidence, or indirectly, through the inferential burden shifting method known as the McDonnell Douglas test.” *Kormoczy v. H.U.D.*, **53 F.3d 821, 823-24 (7th Cir. 1995)**.

40. There being no dispute as to the content of Defendant’s comments to Jennifer Van Dyke, the Court determines that Defendant violated **42 U.S.C. § 3604(a)** when he made 12 Fox Creek “otherwise . . . unavailable” to the Van Dykes by causing a reasonable and effective discouragement of their trying to rent 12 Fox Creek in a way that directly evidenced an intent to discriminate on the basis of familial status.

41. **42 U.S.C. § 3604(c)** makes it unlawful for individuals “[t]o 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.”

42. A statement violates **42 U.S.C. § 3604(c)** if it conveys to an “ordinary listener” that having children, or having certain numbers, ages or types of children, is preferred or not preferred for the housing in question, or will otherwise limit the options of the prospective tenant. *Jancik v. H.U.D.*, **44 F.3d 553, 556 (7th Cir. 1995)**. The “ordinary listener” is “neither the most suspicious nor the most

insensitive.” *Ragin v. New York Times Co.*, 923 F.2d 995, 1004-05 (2nd Cir. 1991), *cert. denied*, 502 U.S. 821 (1991).

43. There being no dispute as to the content of Defendant’s comments to Jennifer Van Dyke, the Court determines that Defendant violated **42 U.S.C. § 3604(c)** when he made statements that an ordinary listener would find to show a preference based on familial status.

44. Furthermore, Defendant readily admitted that his comments violated **42 U.S.C. § 3604(c)**.

45. When the government commences a suit on behalf of a private party, **42 U.S.C. §§ 3612(o)(3)** and **3613(c)** provide that a court may grant relief for discriminatory practices in such forms that include actual damages, punitive damages, permanent injunctions, and orders enjoining the defendant from engaging in discriminatory practice.

46. Under **42 U.S.C. § 3613(c)**, a plaintiff may recover compensatory damages under **§ 3604(a)** or **§ 3604(c)**. *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1096 (stating “compensatory damages are an appropriate remedy under . . . Section 3604”); *Ragin v. New York Times Co.*, 923 F.2d 995, 1004-05 (2nd Cir. 1991), *cert. denied*, 502 U.S. 821 (1991)(granting compensatory and punitive damages to plaintiffs who brought a **§ 3604(c)** claim).

47. A plaintiff may recover compensatory damages for emotional

distress when the plaintiff has reasonably and sufficiently explained the circumstances of the injury and not merely resorted to conclusory statements. *Seaton v. Sky Realty Co.*, 491 F.2d 634, 637-38 (7th Cir. 1974); *U.S. v. Balistrieri*, 981 F.2d 916, 931-32 (7th Cir. 1992).

48. The Court determines that the Van Dykes have shown that Defendant's statutory violation caused the Van Dykes to suffer fifteen thousand dollars (\$15,000) in emotional distress due to the shock, frustration, and intra-familial arguments resulting from being discriminated against upon just moving to a new region and the further exacerbation of those injuries caused by enduring eleven months in the inadequate 1616 Progress duplex. *Banai v. H.U.D.*, 102 F.3d 1203 (11th Cir. 1997) (affirming decision to hold 42 U.S.C. § 3604(a) and (c) violator liable for emotional distress resulting from victim's being forced to live in an inadequate dwelling).

49. The Court determines that the Van Dykes have shown that Defendant's statutory violation caused them to remain in Scott AFB's temporary housing for five additional days at a rate of twenty-nine dollars per day and awards Plaintiff one hundred and forty-five dollars (\$145) in expenses.¹

50. The Court determines that Defendant should be enjoined from

¹ As shown by the two day delay between signing the lease for the 1616 Progress duplex and the Van Dykes move from temporary housing, the Court determines the Van Dykes would have incurred two days of temporary housing expenses even if they had moved into Defendant's home at 12 Fox Creek. Consequently, the Van Dykes incurred a total of five additional days of temporary housing expenses.

further violating **42 U.S.C. § 3604**.

51. The Court determines that Defendant's statutory violation did not proximately cause the Van Dyke's to incur expenses to home school their eldest son since the eldest son's difficulties are attributable more to middle school bullies, his random assignment to a disliked teacher's class, and his relocation rather than the Defendant's statutory violation.

52. The Court determines that Plaintiff should not be compensated based on Captain Van Dykes' wages lost as a result of taking time away from work to find a new house because Plaintiff failed to give the pro se Defendant reasonable notice that these damages would be sought at trial since they were not in the final pretrial order (Doc. 24).

53. The Court determines that Plaintiff has shown that Defendant's statutory violation caused the Van Dykes to incur seven hundred dollars (\$700) in moving expenses to escape the unsuitable situation at the 1616 Progress duplex; however, the Court determines that Plaintiff should awarded only three hundred dollars (\$300) because Plaintiff failed to give the pro se Defendant reasonable notice that damages greater than this amount would be sought at trial since they were not in the final pretrial order (Doc. 24).

54. The Court determines that Plaintiff should not be compensated for the one thousand dollar (\$1000) lost deposit resulting from the early termination of the 1616 Progress duplex lease because Plaintiff failed to give the pro se Defendant reasonable notice that these damages would be sought at trial since they were not in

the final pretrial order (Doc. 24).

55. In conclusion, the Court finds Plaintiff has proven that Defendant violated **42 U.S.C. § 3604(a)** and **(c)** and caused the Van Dykes to suffer one hundred forty-five dollars (\$145) in additional temporary housing expenses, fifteen thousand dollars (\$15,000) in emotional distress, and three hundred dollars (\$300) in moving expenses; however, Plaintiff is not entitled to any moving expenses greater than three hundred dollars (\$300), Captain Van Dykes' lost wages, or the one thousand dollar (\$1000) lost deposit because Plaintiff failed to provide sufficient notice of these damages to the pro se Defendant.

V. Conclusion

Accordingly, the Court **FINDS** in favor of Plaintiff U.S.A. and against Defendant Dr. Kenneth Brosh. The Court **DIRECTS** the Clerk to enter judgment in favor of Plaintiff in this cause of action. The Court **ORDERS** Defendant Kenneth Brosh to pay Plaintiff USA fifteen thousand four hundred forty-five dollars (\$15,445). The Court **ENJOINS** Defendant Kenneth Brosh from committing further violations of **42 U.S.C. § 3604(a)** and **(c)**. In order to insure compliance with the Court's order, Defendant shall retain the following records for a period of five years and make same available to the United States Department of Justice, the Department of Housing and Urban Development or the designee of either for inspection upon

request:

- (a) any advertisements of rental property;
- (b) records of current tenants, including names of adults and ages of children (which can be determined after the property has been rented); and
- (c) last known addresses of past tenants.

IT IS SO ORDERED.

Signed this 20th day of Nov, 2003.


DAVID R. HERNDON
United States District Judge