UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Wilbur Wilkinson, on behalf of Ernest and Mollie Wilkinson,	)	
Complainant	)	
	)	SOL Docket No. 07-0196
v.	)	
Edward Schafer, Secretary United States Department of Agriculture	)	
Respondent	)	

DETERMINATION: PART TWO

On June 3, 2008, as the assigned ALJ in this proceeding, I issued a proposed "Determination: Part One" in which I decided that the complaint filed on behalf of Ernest and Mollie Wilkinson, a Native American husband and wife, who are both deceased, stated a timely, eligible complaint of discrimination against USDA in violation of the Equal Credit Opportunity Act. Initially, complainant had sought a hearing, but after several telephone conferences he elected, as is his right under section 15f.16 of the governing rules of practice (7 C.F.R. § 15f.16), to have me issue a decision without a hearing. In the course of the teleconferences that I conducted with the attorneys for the parties, it was decided that this proceeding would be bifurcated so that, in the event I found in complainant's favor, a hearing on damages would be held to allow respondent to controvert Complainant's expert witness through his interrogation and the presentation of testimony by an expert witness of Respondent's choosing. This bifurcated approach was recommended by the parties. In my rulings on March 20, 2008, that made it applicable, I

noted that it was "consistent with an earlier request by the Agency (FAS) representatives that this proceeding be bifurcated to consider damages subsequent to a determination of liability by FAS under the ECOA". It was therefore decided upon, even through 7 C.F.R. §15f.16 contemplates that when an ALJ makes a proposed finding of discrimination under this section, the ALJ will also recommend the award of "… such relief as would be afforded under the applicable statute or regulation under which the eligible complaint was filed…." The section also contemplates that all of the proposed determination shall be based not on an evidentiary hearing, but instead be "… based on the original complaint, the Section 741 Complaint Request, the OCR report, and any other evidence or written documents filed by the parties." The date for the damages hearing was originally scheduled for June 3-4, 2008. In teleconferences conducted on April 1 and April 29, 2008, the feasibility of that hearing date was reviewed and rulings were included at Respondent's request, requiring Complainant to make his expert witness available on specific dates for his deposition to be taken in advance of the scheduled hearing. On May 12, 2008, the damages hearing was postponed to June 25-26, 2008, in deference to Respondent's request for that date, to allow more time for the filing of the Respondent's expert's report who together with one of Respondent's attorneys was scheduled to be out of the office during the week of June 16, 2008.

However, after my June 3rd issuance of the proposed "Determination: Part One", Respondent, on June 9th, filed a request with the Assistant Secretary for Civil Rights for a stay of the June 25-26, 2008 damages hearing, and for her review of the June 3 "Determination: Part One". On June 12, 2008, the Assistant Secretary issued her Ruling granting both requests over Complainant's objections that the request was premature,

untimely, and counter to the Rules of Practice that specifically provide: "Interlocutory review of rulings by the ALJ will not be permitted." (7 C.F.R. § 15f.21(d)(8)).

On June 16, 2008, Complainant filed a motion that requested, in part, that I confirm the scheduled hearing in that under the rules of practice the Assistant Secretary does not have jurisdiction to stay a hearing scheduled by an ALJ, or to review my June 3, proposed determination until after I have completed my function of recommending an award when finding that USDA discriminated against Complainant's parents.

I agree with Complainant that my functions pursuant to the Rules of Practice are not completed until I recommend an award of appropriate relief. I intended to do so after the scheduled hearing in which Respondent would be permitted to examine Complainant's expert and present testimony by its own expert on the subject. However, as previously noted, a proceeding conducted pursuant to 7 C.F.R. §15f.16, does not contemplate that the relief proposed to be awarded will be based upon the presentation of testimony at a hearing, and Respondent's request that the scheduled hearing not be held is construed to be an election that I complete my functions without one. Both Respondent and the Assistant Secretary apparently believe my proposed determination is ripe for review. For it to be completely ripe for review, and to avoid the necessity for a future remand in the event my proposed determination on discrimination is accepted or upheld, I am herewith proposing an award of relief to Complainant in the amount of $5,284,647.00 that I find to be appropriate upon consideration of the affidavits filed by Complainant and the certified report by his expert as measured against the *Will Sylvester Warren* case, USDA Docket No. 1194; HUDALJ No. 00-19-NA, December 19, 2002, and other applicable authorities.

Professor Saxowsky is an Associate Professor and Assistant Dean, Department of Agribusiness and Applied Economics, North Dakota State University. His Curriculum Vitae is attached and clearly establishes that he is an expert on agribusiness and applied economics as those subjects apply to farming in the region of North Dakota where the Wilkinson farmlands and homestead were located. He testified on the losses sustained by the Wilkinsons in *Virgil Wilkinson, et al v. United States of America,* Case No. 1:03-cv-02; 2007 WL 3544062 (November 9, 2007, USDC, ND). The United States District Court accepted Professor Saxowsky as an expert testifying to the value of the loss of use of the Wilkinsons' property due to its unlawful confiscation by BIA at the behest of FSA. The reports he prepared to aid the Court were largely accepted subject to some modifications. (Slip opinion at 17-20).

In addition to his assessment of economic damages for the case against BIA, Professor Sakowsky also offered testimony on the non-economic damages that should be awarded based on *Warren, supra*. The Court did not accept this appraisal because *Warren* was a discrimination case and therefore unrelated to the damage issues before the Court that concerned tort law rather than discrimination.

However, *Warren* has direct application to the present proceeding. The attached report with cover letter by Professor Sakowsky filed in this proceeding applies the methodology used in *Warren* that the Assistant Secretary for Civil Rights accepted. It provides authoritative precedent to be presently applied and followed.

Warren (Slip Opinion at 22-23) held that a creditor who violates the ECOA is subject to civil liability for actual damages suffered by the individual to compensate for losses sustained as a direct result of the injury suffered that may fit within two categories:

> There are two categories of actual or compensatory damages: tangible and intangible. Tangible includes economic loss. Intangible damages include compensation for emotional distress, and pain and suffering, *Bohac v. Dept. of Agriculture*, 239 F.3d 1334, (Fed. Cir. 2001); injury to personal and professional reputation, *Fabry v. Comm'r of IRS*, 223 F.3d 1261 at 1265, (11th Cir. 2000); injury to credit reputation, mental anguish, humiliation or embarrassment, (*Fischl v. General Motors Acceptance Corp*., C.A.5 (La.) 1983, 708 F. 2d 143); impairment of reputation and standing in the community, personal humiliation, mental anguish and suffering' *U.S. v. Burke*, 504 U.S. 229, 112 S. Ct. 1867 at 1874 (1992); and intentional infliction of emotional distress, *Ricci v. Key Bancshares, Inc.*, 662 F. Supp. 1132 (D.C.Me. 1987 and *HUD v. Wilson*, 2 FH-FL (Aspen) ¶ 25,146, (HUDALJ 200).

Professor Sakowsky has estimated the tangible losses of the Wilkinsons resulting from the discriminatory treatment they endured when they were dispossessed from their farm and farm equipment, and lost income from their farming operations, to be $1,534,647.00. This sum is consistent with the evidence before me.

In respect to the intangible losses of the Wilkinsons, I find that using the same 4.687 factor that Professor Sakowsky derived from Warren that would add $7, 192,890.00, for a total of $8,727,537.00, would be excessive. The Wilkinsons lost their farmland and their homestead. Mrs. Wilkinson was required shortly after surgery to be taken to and carried into the County office of FSA to sign the BIA "Assignment of Income from Trust Property" forms which were later used to dispossess the Wilkinsons against their will from their farmland and homestead in circumvention of their protections under applicable North Dakota mortgage foreclosure laws. When they died they were no longer connected to their farm and the life of farming that they loved. Though their anguish and emotional suffering was truly considerable, I do not find that it reached the level of suffering found and described by the ALJ in *Warren*. In my opinion, the

appropriate sum to be awarded for the Wilkinsons' intangible losses is $3,750,000.00, or approximately two and a half times the amount awarded for tangible losses.

The total amount of relief that should be awarded against USDA for the effects of the discrimination suffered by the Wilkinsons therefore is $5,284,647.00.

Dated: June 18, 2008

__Victor W. Palmer_____
VICTOR W. PALMER
Administrative Law Judge

Attachments