IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, v. JOHN R. KOCH, Defendant.	)	8:03CV406 MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR A NEW TRIAL

Under Rule 59(a) and (e) of the Federal Rules of Civil Procedure, the United States asks that I grant a new trial on the issue of damages "because the jury failed to follow the Court's instructions, resulting in a verdict that is against the weight of the evidence and so unreasonably low that it fails to adequately compensate the victims of the defendant's discriminatory actions." (Br., filing 126, p. 1).

After a two-week jury trial, the jury returned a verdict finding that the defendant harassed ten of the nineteen women on whose behalf the United States brought an action for violation of the federal Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (FHA) by sexually harassing women who had rented or tried to rent houses owned by the defendant. Those ten women were awarded actual and punitive damages ranging from low of $2,517 to a high of $31,556. No request has been made for a new trial on behalf of the nine other women who testified at the trial but as to whom the jury found the defendant had not discriminated.

After considering the briefs from both counsel and my recollection and notes from the trial, I shall deny the motion.

The granting of a new trial is within the discretion of the district court. *Larson v. Farmers Cooperative Elevator of Buffalo Center*, 211 F.3d 1089, 1095 (8th Cir. 2000). A new trial should be granted "if the verdict is against the weight of the evidence and if allowing it to stand would result in a miscarriage of justice." *Manus v. American Airlines, Inc.*, 314 F.3d 968, 973 (8th Cir. 2003). If the damages are excessive or the trial not fair to the moving party, the motion may be granted. *Children's Broadcasting Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1017

(8th Cir. 2001), and can be granted if the verdict is too small. *Chicago Rock Island and Pacific R.R. Co. v. Speth*, 404 F.2d 291, 295 (8th Cir. 1968).

"A verdict may not be considered to be excessive unless there has been a 'plain injustice' or a 'monstrous' 'shocking' result. *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 447-8 (8th Cir. 1961)." *School District No. 11 a/k/a South Sioux City Schools, Dakota, Nebraska v. Sverdrup & Parcel and Associates, Inc.*, 797 F.2d 651 (8th Cir. 1986) (repeated in *Stafford v. Neurological Medicine, Inc.* 811 F.2d 470, 475 (8th Cir. 1987)). I think the same or a similar set of words must apply where the verdict is claimed to be too small.

FACTUAL STATEMENT

The factual background, as stated in the plaintiff's brief in support of a motion for a new trial, is a fair statement:

> During a two-week jury trial that began on November 15, 2004, the United States introduced evidence that the defendant discriminated against 19 women – 15 of the women had rented from the defendant and four women had attempted to rent from him. These women testified that, among other things, the defendant made unwanted physical and verbal sexual advances towards them; engaged in unwanted sexual touching; conditioned the terms and conditions of the women's tenancy on the granting of sexual favors; entered their homes without permission, notice, or legitimate purpose; and threatened to take and then took adverse action against them when they refused or objected to his sexual advances.
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> The women testified to a wide variety of emotional harm arising from the defendant's illegal acts. Almost all of them testified that they were embarrassed, humiliated and emotionally distressed by the sexual harassment. Some of the women testified that they had lost their self esteem and were unable to trust male landlords after their experiences with the defendant. A few of the women testified to even more serious consequences of the defendant's unlawful behavior, including Brenda Parker Taylor, who said that she had contemplated suicide as a result of the defendant's actions and Lisa Carroll, who testified that she could no longer enjoy sex, resulting in the break-up of her marriage.
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> On December 9, 2004, the jury returned a verdict, finding that the defendant harassed 10 of the 19 women who testified at trial: Lisa Carroll, Ebony Dishmon, Penny Goforth, Rachael McCluskey, Tamechia Nedds, Felisha Scoggins, Deborah Sterling, Brenda Parker Taylor, Anita Thomas and Kali Underwood.[1] The verdict, which was entered December 13, 2004, awarded those

> women actual and punitive damages ranging from a low of $2,517 for Lisa Carroll to a high of $31,556 for Tamechia Nedds. . . .

ANALYSIS

A. Jury's Failure To Follow Instructions

The United States then concludes that " . . . [T]he jury's verdict is inconsistent with the weight of the evidence and too low to adequately compensate the victims for the harm they suffered as a result of the defendant's unlawful actions." (*Id.* p.2) I disagree with the conclusion.

The United States depends upon two arguments for its position. The first is that the jury's failure to follow the instructions resulted in a miscarriage of justice. I am not persuaded. It is true that the awards, or some of them, were not as large as they could have been if the jury accepted all of the testimony of each of the aggrieved parties regarding her damages. But that is not the test. This case does not match or come close to the factual situation of the cases cited by the United States, where motions for new trial were granted either by the trial court or by the appellate court because of what United States calls "inadequate damages for pain and suffering." (United States' Reply to Defendant's Brief in Opposition to Plaintiff's Motion for a New Trial, p. 2).

In *Brown v. Richard H. Wacholz, Inc.,* 467 F.2d 18 (10th Cir. 1972), cited by the United States, the evidence was that from a slip and fall the following were the physical injuries:

> [H]is right femur was broken at a point about six to eight inches above the knee joint . . .
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> . . . [T]he open reduction operation was performed and a six-inch stainless steel plate with screws was installed . . . [and the plaintiff] remained in the hospital for about 11 days, but was confined to a wheelchair for a period in excess of three months thereafter . . .
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> . . . [H]e [had] permanent disability in the function of the right leg . . . a 20 percent impairment of the leg . . .

Id. at 18. The court summarized:

> In the present case the verdict reflects the exact amount of medical and

> hospital outlay. Thus, on its face it establishes that the jury failed and refused to award compensation for pain and suffering and permanent disability. Where, as here, the plaintiff suffered a severe injury in which the damages were substantial, the conclusion must be that the jury disregarded its fact-finding function. It is clear from the authorities that the jury has no such dispensing power. Where this is apparent the failure of the trial judge to grant a new trial constitutes a manifest abuse of discretion.

(*Id.* 20).

The present case is distinctly different. Here, there is no failure to grant *any* damages for pain and suffering or permanent disability. They did award damages for what the instructions permitted them to do--grant damages for "emotional distress and/or mental anguish and inconvenience." (Final Jury Instructions, "ACTUAL DAMAGES").

In *Channel 20, Inc. v. World Wide Towers Services., Inc.,* 607 F. Supp. 551 (S.D. Texas 1985), the court granted a new trial on the issue of damages where the jury returned *no* damages for pain and suffering, even though it awarded $5 million in punitive damages. The facts involved the collapse of a 1900-foot broadcast tower, resulting in the deaths of five workers. The court observed that:

> A hallmark of this trial was the presentation into evidence of a videotape made of the calamity as it actually occurred. . . . Plaintiffs introduced a second copy of the videotape with amplified audio containing distinct screaming which was not viewed by the jury. . . . The screams certainly seemed to be those of the hapless workers plunging to their deaths. Based only on the video actually seen by the jury, the Plaintiffs made a showing (by the great preponderance of the evidence) that the men were conscious for at least part of their fall, and no one can seriously question that such a fall would engender terror and mental suffering of the greatest magnitude known to the human experience. Stainless [a defendant] did not produce any evidence whatsoever to negative this evidence, which strongly indicates the men's conscious anguish. . . .

Id. 557. Again, this case is markedly different from the present case, where damages for emotional distress *were* awarded. The issue has to do with the amount of damages, of which the jurors are the favored decision makers.

The third case relied upon by the United States is *Schiek v. Duluth Heating and Sheet Metal Supply Co.*, 53 F.R.D. 401 (D. Minn. 1971). Therein the court said at page 402:

> In answer to a special interrogatory, the jury found plaintiff Clem R. Schiek's damages to be $4,713.54. This was the exact amount contained on an exhibit introduced by plaintiffs showing a total and the details of his special damages, being plaintiffs' Ex. 45. Clem R. Schiek received rather serious and at least to some extent disabling injuries, including a two-foot scar on the left shoulder, a loss of some motion thereof, two bone fractures and, according to one of the medical witnesses, a permanent partial disability of 35 % in his left shoulder . . .
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> . . .
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> It can be argued that of plaintiff Clem R. Schiek's claim for special damages, some $1,020.36 represented 'Paid on behalf of Betty' and that since she was not entitled to a recovery, the jury in effect by awarding $4,713.54 actually included $1,020.36 for plaintiff Clem R. Schiek's personal injuries. The jury received no specific instructions on this aspect. Even were the court to adopt this argument, this amount of $1,020.36 for Clem R. Schiek's injuries, had it been so designated or intended by the jury, would be sufficiently inadequate as to shock the conscience of the court and would justify the granting of a new trial. . . .

An awarding of an amount exactly matching the special damages, therefore indicating nothing for pain and suffering, as the court in ***Schiek*** seems to recognize was the effect, remains, as with the other cases relied upon by the plaintiff, different from the awarding of an amount for emotional distress, as here, that does not shock the judicial conscience.

Next, the United States relies upon ***Ries v. Sanders***, 34 F.R.D. 468 (N.D. Miss. 1964). The court described the situation as follows:

> Turning now to plaintiff's motion to set aside the verdict and award a new trial as to damages only, it is necessary to review to a substantial degree the evidence of injury and expense. . . . and the jury was instructed that if they found from a preponderance of the evidence that defendant was guilty of negligence which proximately caused or proximately contributed to the collision, the verdict should be for the plaintiff, ***in which event it would be the duty of the jury to award plaintiff full damages*** . . .
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> . . .
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> As a result of this collision, the proof shows that plaintiff suffered a fracture of seven ribs, a fractured vertebra, a fractured clavicle, a fractured acromion process, a Colles's fracture of the left wrist and four fractures of the pelvis. The proof shows further that plaintiff was confined to a hospital for a

> period of 61 days during which time she suffered extreme pain; that she has suffered pain continuously since her release from the hospital on January 12, 1962; that she will continue to suffer pain for the rest of her life; that during her stay in the hospital and continuously since then until now it has been necessary for her to take regularly pain relieving drugs and medicines and that she will continue to be required to purchase drugs and medicines to ease her pain. Further, the proof shows that plaintiff has suffered a permanent loss of motion in her left wrist, right shoulder, left leg and right leg. The medical proof is uncontradicted that she will have a permanent disability of forty percent of her body as a whole. It was stipulated that plaintiff's medical and hospital expense to the date of the trial had amounted to $2,696.97.
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> For a long time after her release from the hospital, plaintiff could not do anything of any consequence. She could move from the bed to a chair with help, but could not even dress herself. By the end of about four months, plaintiff first became able to do an extremely limited amount of housework.

Id. at 474.

The court held:

> Here this court is bound to say that the award to plaintiff of $2,303.03 as compensation for all elements of her damages other than her stipulated medical and hospital expense is manifestly insufficient and wholly inadequate to compensate; that it is grossly inadequate to such an extent that it is apparent that the jury did not respond to reason upon the uncontradicted evidence of damage produced and to let this award stand approved by it would shock the conscience of this court. . . .

Id. at 476. The *Ries* case is more like the present case than any of the others cited by the United States. In it, some amount was allowed for the personal injuries, including pain and suffering. The difference is that those physical injuries were demonstrable, evidently uncontradicted, and clearly severe, whereas the emotional distress in the present case differed substantially among the nine aggrieved individuals for whom damages were awarded and was entirely subjective, resting wholly on the credibility of the aggrieved person. None of the aggrieved persons in the present case had any evidence of permanent disability, of physical damage, of continuous pain, of hospitalization, of fractured bones, of the necessity of pain relieving drugs and medicines. The *Ries* case, however, does stand for the proposition that a new trial may be justified where ***some*** award has been made by the jury for the physical injuries and perhaps some for pain and

suffering but in an amount so inadequate as to "shock the conscience of" the court.

The last case cited by the United States is *Sanders v. Green*, 208 F.Supp. 873 (E.D.S.C. 1962). There, an award of $5,000 for the death of a 44-year-old man survived by brothers and sisters was held to be grossly inadequate, and a new trial on damages was ordered. The opinion of the court stressed the following:

> As to the motion of the plaintiff to set aside the jury's verdict and grant a new trial on the issue of actual damages only, the testimony revealed that the decedent was forty-four years of age and was the next to the youngest of eight brothers and sisters who varied in ages from forty-two to fifty-nine; that this family was a closely knit unit because of the death of the mother and father when the children were very young; that the defendant had lived with various brothers and sisters for practically all of his life; that the brothers and sisters frequently visited each other; and that some of his family regarded decedent as a child and daily fed him and took care of him as though he were one of their children. The decedent had a life expectancy of twenty-six years. . . .
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> It is well settled in South Carolina that the elements of damage in this case would be such mental shock and suffering and wounded feelings, grief, sorrow, loss of companionship and deprivation of the use and comfort of their brother's society as the decedent's brothers and sisters may have sustained as a result of his death. . . . and that in arriving at the amount of any verdict, a jury should take into consideration the increased cost of living and the diminished purchasing power of money, since damages that might be fair compensation in value for a given wrong when money is dear and its purchasing power is great will not suffice when money is cheap and its purchasing power is small. . . .
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> . . .

(*Id.* 877).

> . . . [O]nly where the verdict is so grossly excessive or so grossly inadequate as to shock the judicial conscience will the court reverse the jury's determination and grant a new trial on the issue of damages, since the court must respect the verdict of the jury and not interfere or substitute its own verdict for that of the jury except in extreme and exceptional cases. (Citations omitted).
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> I have reviewed the testimony and in the exercise of my discretion I have concluded that the verdict in this death action is grossly inadequate and I have decided that such an inadequate verdict could have only been reached by the jury's misapplication or misunderstanding of the legal principles charged to them . . .

(*Id*. 878).

Applying the same standard as used in *Sanders v. Green, supra,* I conclude that the verdict in the present is not grossly inadequate or one that could have been reached only by a misapplication or misunderstanding of the legal principles charged to the jury.

B. Jury's Award On The Basis Of Whether A Report Was Made To An Agency

The United States' second argument is the claim that the damages awarded by the jury demonstrate that the jury ignored the instruction that if they found that a particular woman was a victim of the defendant's sexual harassment, the jury was to "justly compensate her for any damages you find she sustained as a direct result of the defendant's discriminatory actions," (Br. in Spp't of United States' Motion for New Trial on Damages, p. 5) but, rather, the jury awarded damages

> based on whether or not a victim had contemporaneously reported the harassment, even though the jury instruction labeled 'No Need To File Administrative Complaint' instructed the jury that:
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> > there is no requirement for a woman who believes that she has been subjected to housing discrimination by a landlord to complain to an administrative agency, such as the Department of Housing and Urban Development, the Omaha Housing Authority, or any other agency.

The argument that the jury looked to whether the aggrieved victim reported the defendant's harassment to some agency rather than the nature and amount of emotional distress or mental anguish suffered by a victim of the defendant's misconduct is not persuasive.

It is true that the highest amounts awarded by the jury were to the two women who had either recorded the harassing conversation or had made a complaint to the Omaha Housing Authority of the harassment--Tamechia Nedds and Penny Goforth. Tamechia Nedds had, as the government says, "an undisputed audiotape confirming her account of sexual harassment," (Br. in Spp't of United States' Motion for a New Trial on Damages) Penny Goforth filed a contemporaneous complaint with the Omaha Housing Authority. The United States characterizes Tamechia Nedds' emotional damage as not being "enormous," which is a permissible argument, but Nedds did testify that she was shocked when she filled out her

application to rent a house from the defendant and he asked if he could "have a taste," by which she inferred that he meant oral sex, that he asked to touch her butt and again asked for a taste on another occasion. She testified that because he refused to let her move in until August 1, whereas he had known that her deadline for moving out of the house she then occupied was July 15, she felt "like less of a person" being without a permanent home for two weeks; that she moved in with her mother, lost her job, and was unemployed because of his delay occasioned by her refusal to give him sex, which he wanted to have every week and, if she would have sex with him, he would knock off $75 rent. Although the "emotional distress" may have been as characterized by the United States, she was also entitled under the instructions to damages for inconvenience. She did testify to inconvenience in having lost her job because of his unfulfilled desire to have sex with her. It is true that she testified that she went to the Omaha Housing Authority, who arranged for her to wear a tape recorder and have his requests for sex recorded, which she did. It is not inappropriate for a jury to consider that the certainty and severity of damages arising from emotional distress, mental anguish or inconvenience are verified by a recording of sexual conversations. Here, the defendant, John Koch, testified that in his first visit with Nedds she was the one to comment on ***his*** having a "nice ass" and proceeded to lift her skirt. He also testified that he did not say on this first occasion that he would like a "taste." He testified that she said she blamed him for losing her job. She testified that he asked to play "peek a boo" with her; he denied it. Most of his insistence that she seemed to be the aggressor and that she invited trading sex for rent was belied by the audio tapes. It would not be difficult for the jury properly to conclude that what she was saying about the effects on her of his harassment, including being shocked, being inconvenienced, being distressed were more pointedly true because of his recorded actions than might otherwise have been the case. Credibility was a key component--credibility of the one doing the harassing and the one receiving it. Recording or reporting an incident appropriately may impact the credibility both as to the mental states of the actor and the victim and the emotional state of the victim. It is the jury, not the judge, who is the best equipped to decide the size of a damage award, "especially . . . when damages are not easily calculable in economic terms." ***Stafford v. Neurological Med., Inc.,*** 811 F.2d 470, 475 (8th Cir. 1987), quoted in ***Eich v. Bd. of Regents,*** 350 F.3d 752, 763 (8th Cir. 2003). But attributing all of

the awards to the ten women to being primarily influenced by whether reports had been made to some authority is not logically necessary or likely to be true.

The other woman used by the United States to further its claim that reporting to an authority was a prime influence in the jury's thinking was Penny Goforth. She was awarded $1,868 in compensatory damages and $6,351 in punitive damages. Penny Goforth's experience was quite remarkable. The defendant had agreed to show her a house and upon seeing it, she liked it and said she would like to rent it and he said okay. They met the next day to complete paperwork. He wanted $500 down payment and she asked if she could make $150 at that time and more later. He excused himself to go to the restroom, came out, walked toward her, with his zipper down, his penis erect and sticking out entirely, and an unrolled condom hanging from his front pocket. He was smiling and walking slow as he brought the paperwork toward her. She was afraid to move, she said. He looked down toward his penis, smiled, and said that he could make arrangements about the deposit. They completed the paperwork and he remained exposed for about five minutes. She did not take the house in view of what he had done. She says she was in shock, embarrassed, scared of what she thought he was going to try to do--that is, rape her. She says she got home, called the case worker at Omaha Housing Authority, told her what had happened. At home she was upset, mad. The event makes her sick and nervous even today. She left about ten or eleven minutes after he left the bathroom. I see no connection between the events testified to about the defendant's harassment and Goforth's reporting to the Omaha Housing Authority. Neither do I see anything extraordinary about the amount of the compensatory or punitive damages awarded Goforth in comparison with the awards of the other persons to whom awards were made.

The awards to at least one of the other women tend to undermine the claim of the United States that the jury awarded damages "based on whether or not a victim had contemporaneously reported the harassment." Anita Thomas *did* report to "Fair Housing"--that is Omaha Housing Authority--and told the persons there that the defendant was harassing her. Yet, the award Anita Thomas for compensatory damages was $1,086 and for punitive damages was $1,738, for a total of $2,824. Any connection between either of the amounts awarded--the third ***lowest*** awarded in compensatory, punitive, and total damages--and the fact that she reported to the Omaha Housing

Authority is more hypothetical than real.

Ebony Dishmon is another to whom awards were made. There is no evidence that she took the initiative in reporting the defendant's harassment, but there is evidence that she talked to the Department of Justice attorneys when they contacted her, despite the defendant's asking her not to or not to say anything negative about him. Ebony Dishmon stands in about a middle position with respect to amount of her awards and there is no logical connection between the amount of the awards and her talking with Justice Department attorneys.

C. Conclusion

The arguments of the plaintiff do not lead to the conclusion that a new trial is warranted. The verdict is not against the weight of the evidence. Allowing it to stand will not be a miscarriage of justice. There is no monstrous or shocking result.

IT IS ORDERED that the Plaintiff's Motion For A New Trial, filing 125, is denied.

Dated March 29, 2005.

BY THE COURT

s/ Warren K. Urbom
United States Senior District Judge