

REMEDIES AND DAMAGES IN FAIR HOUSING CASES AND THE PHYSICAL AND EMOTIONAL IMPACT

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A. ACTUAL DAMAGES FOR INDIVIDUAL PLAINTIFFS

1. ENTITLEMENT: Proof of violation of Fair Housing Act entitles plaintiff to actual damages. *Curtis v. Loether*, 415 U.S. 189, 197 (1974) (“[I]f plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount”); *United States v. City of Hayward*, 36 F.3d 832, 839-40 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 65 (1995) (*Curtis* and the legislative history of the 1988 Fair Housing Amendments Act “indicate that if a party proves actual damages, a district court’s award of compensatory damages is mandatory, not discretionary.”); *See also Smith v. Wade*, 461 U.S. 30, 52 (1983) (An award of compensatory damages in a civil rights case is “mandatory” because compensatory damages are the primary damages that deter others from violating civil rights laws) (Section 1983).

2. EMOTIONAL DISTRESS: Plaintiffs may recover damages for emotional distress, embarrassment and humiliation. *Hamilton v. Svatik*, 779 F.2d 383 (7th Cir. 1985); *Marable v. Walker*, 704 F.2d 1219 (11th Cir. 1983). Most of the damages awarded in fair housing cases are for emotional distress. *See, e.g., Broom v. Biondi*, 17 F. Supp. 2d 211 (S.D. N.Y. 1997) (Award of \$228,000 to inter-racial couple for emotional distress). Emotional distress damages may be inferred from the circumstances or established by testimony. *Johnson v. Hale*, 940 F.2d 1192 (9th Cir. 1991).

3. ECONOMIC DAMAGES: Plaintiffs may recover economic damages resulting from discrimination such as:

- the expenses incurred in finding another place to live, *HUD ex rel Herron v. Blackwell*, 908 F.2d 864, 873 (11th Cir. 1990) (Packing and relocating costs awarded); *Hamilton v. Svatik*, 779 F.2d 383 (7th Cir. 1985) (Moving and temporary housing costs);
- the difference in the cost of housing denied and the housing obtained, *Morgan v. HUD*, 985 F.2d 1451, 1458 (10th Cir. 1993) (Damages awarded for alternative housing secured by complainant); *Krueger v. HUD*, 115 F.3d 487, 492 (7th Cir. 1992) (Award for alternative housing); *Thronson v. Meisels*, 800 F.2d 136, 140 (7th Cir. 1986) (Award for rent on former apartment plaintiffs would not have incurred);

- the costs of commuting to and from work in excess of those that would have been incurred to and from the denied housing.

4. LOSS OF HOUSING OPPORTUNITIES: Plaintiffs may recover damages for lost housing opportunities where the denied housing had a location, amenities or other characteristics that make it particularly valuable to a complainant. Heifetz and Heinz, *Compensatory Damages in Fair Housing Adjudications*, 26 John Marshall L. Rev. 26 (1992); see *Pollitt v. Bramel*, 669 F.Supp. 172, 176-77 (S.D. Ohio 1987)(Awarding emotional distress damages for couple who was forced to live in less desirable housing); *Banai v. HUD*, 102 F.3d 1203, 1208 (11th Cir. 1997)(Affirming HUD ALJ award for lost housing opportunities)

- Damages for lost housing opportunities have been awarded where the physical attributes of alternative housing were inferior to the housing sought. See *Woods-Drake v. Lundy*, 667 F.2d 1198, 1203 (5th Cir. 1982)(Damages include amount for inferior housing forced to rent); *HUD v. Welch*, Fair Housing - Fair Lending ¶ 25,125 at 26, 070 (HUD ALJ 1996)(Damages awarded where complainants had to live in small, unheated trailer); *HUD v. Burns Trust*, Fair Housing - Fair Lending ¶ 25,073 at 25,683 (HUD ALJ 1994)(Damages awarded where complainants had to live in an apartment with an unfinished bathroom, leaks and inoperable windows)

- Damages for lost housing opportunities have also been awarded where the housing had a unique value to the complainants. *HUD v. Ineichen*, Fair Housing - Fair Lending ¶ 25,009 at 25,893 (HUD ALJ 1995)(Damages awarded where alternative housing was further from where they had lived for many years and where they established solid, nurturing relationships with friends, neighbors, schools and other institutions); *Burns Trust*, Fair Housing - Fair Lending ¶ 25,683-4 (Loss of comfortable, wheelchair accessible home near caregivers and public transportation)

- Damages awarded where alternative housing was located in a neighborhood where there was more crime and inferior schools. *HUD v. French*, Fair Housing - Fair Lending ¶ 25,113 at 25,978 (HUD ALJ 1995)(Housing denied was located in an area with lower crime rate and within the best school district)

5. LOSS OF CIVIL RIGHTS: Recovery for more than nominal damages in a fair housing case for violation of civil rights is doubtful. In *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), the Supreme Court held that no more than nominal damages may be awarded for the abstract value of a lost constitutional right in a section 1983 case. The Supreme Court held that the appropriate means of vindicating rights is through an award of nominal damages and “not damages based on some undefinable value of infringed rights.” *Id.* at 308, n. 11.

6. PRESUMED DAMAGES

i. Defined

In *Stachura*, the Supreme Court held that an award of presumed damages may be appropriate as a substitute for compensatory damages. The Supreme Court in *Stachura* explained the difference between presumed damages and damages for loss of civil rights: “Presumed damages are a substitute for ordinary compensatory damages, not a supplement for an award that fully compensates the alleged injury. When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate. In those circumstances, presumed damages may be roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure.” *Id.* at 310.

ii. Application in fair housing cases

Applying the standards set forth in *Stachura*, the Sixth Circuit in *Baumgartner v. Secretary of HUD*, 960 F.2d 572 (6th Cir. 1992), set aside a \$2500 award for loss of civil rights in a fair housing case where the complainant received compensatory damages for both inconvenience and emotional distress. Because the court believed that plaintiff’s intangible injuries had been fully compensated by these awards, it concluded that there was no need to add additional awards for presumed damages, although it held out the possibility that such an award might be appropriate. *Id.* quoting *Stachura*, 477 U.S. at 308, 311. (“[W]e do not preclude an award of presumed damages in civil rights claims in all events * * * it may be in particular situations, that ‘some form of presumed damages may possibly be appropriate.’”).

Judge Jones concurred in the opinion, explaining that presumed damages may be appropriate under the Fair Housing Act where the plaintiff cannot prove compensatory damages. *Id.* at 586. (If plaintiff “had been unable to

come forth with direct evidence of compensable injury, he would not have been limited to merely nominal damages, but rather would be entitled to seek presumed damages.”)

7. STATUTORY DAMAGES UNDER STATE LAW

a. State law statutes may provide for trebling of actual damages. *See e.g.* Cal. Civ. Code section 52(a)(Providing for trebling of actual damages under the Unruh Act); Cal. Civ. Code section 54.3 (Providing for trebling of actual damages in disability discrimination cases); Cal. Civ. Code section 3345 (Providing for trebling of punitive damages or civil penalty in cases involving persons with disabilities or elderly persons).

b. Minimum statutory damages and penalties may apply in fair housing cases. *See e.g.* Cal. Civ. Code section 51 et seq (Minimum statutory penalty of \$4000 for violations of Unruh Act and Bane Act); Cal. Civ. Code section 54.3 (Minimum statutory penalty of \$1000 for disability discrimination); Cal. Civ. Code section 52(b)(2) (Minimum statutory damage of \$25,000 for violations of Ralph Act and Section 51.9 (Sexual harassment violations))

B. DAMAGES FOR FAIR HOUSING ORGANIZATIONS

1. RELATIONSHIP TO STANDING

If diversion of resources and frustration of mission are sufficient to confer standing on a fair housing organization, it may receive damages for those injuries. *See United States v. Balistreri*, 981 F.2d 916, 933 (7th Cir. 1992)

2. DIVERSION OF RESOURCES

a. Definition

Diversion of resources damages are the harm caused by the diversion of resources away from other programs to address the defendant’s discriminatory housing practices. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 & n. 19, 102 S.Ct. 1124-25 & n. 19 (1982)

b. Opportunity Costs

Diversion of resources damages are equivalent to the opportunity costs or the activities that a fair housing organization has to forego to address the

defendant's actions. *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990); *HUD v. Properties Unlimited*, Fair Housing - Fair Lending ¶ 25,009 at p. 25,148 (HUD ALJ 1991); *HUD v. Jancik*, Fair Housing - Fair Lending ¶ 25,058 at p. 25,567 (HUD ALJ 1993)

c. Value of opportunity costs determined by value of time devoted to case

A reasonable guideline for determining the value of the opportunity costs is the value of the time the fair housing organization has devoted to the case. *Saunders v. General Serv. Corp.*, 659 F.Supp. 1042, 1060 (E.D. Va. 1987).

d. Includes time diverted by fair housing organization to counseling, investigation, and legal efforts directed against discrimination

e. Includes expenditures that counteract the effect of a defendant's discrimination such as increased education, counseling and outreach. *Spann v. Colonial Village*, 899 F.2d 24, 27 (D.C. Cir.), *cert. denied*, 498 U.S. 980 (1990)(A fair housing organization may also recover damages if "the purportedly illegal activity increases the resources the group must devote to programs independent of the suit challenging the action").

3. LOST FINANCIAL OPPORTUNITY

HUD v. Jancik, Fair Housing - Fair Lending ¶ 25,058 at p. 25,568 (HUD ALJ 1993)(Awarding \$9,000 for loss of a contract with a lender to perform testing and training of lender's employees)

4. FRUSTRATION OF MISSION DAMAGES

a. Definition: Injury to "non-economic interest in encouraging open housing." *Havens*, 455 U.S. at 368 n. 20; but see *HUD v. Properties Unlimited*, Fair Housing - Fair Lending ¶ 25,009 at p. 25,149-50 (HUD ALJ 1991)(Refusing to award damages for frustration of purpose but awarding damages for future testing, training and monitoring); *HUD v. Jancik*, Fair Housing - Fair Lending ¶ 25,058 at p. 25,567 (HUD ALJ 1993)(same)

b. The costs of the programs necessary to counteract the effects of the discrimination serves as a measure of the injury to the mission of the fair housing organization. See John Relman, *Housing Discrimination Practice Manual*, Appendix 6A n. 3 (1999). To recover, a fair housing organization must establish that expenditures in education, counseling or outreach are necessary to counteract the effects of the discrimination. See *Spann*, 899 F.2d at 28-29; *Fair Housing of*

Marin v. Combs, 285 F.3d 899, 905 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 536 (2002).

c. Fair housing organization is not required to counter effects of discrimination before recovery of damages. *Id.*; *See Saunders*, 659 F.Supp. 1060-61 (Awarding frustration of mission damages without requiring organization to have already expended funds).

d. The fact that the damages are not capable of exact measurement and have not yet been incurred should not prevent award of frustration of mission damages. *Housing Discrimination Practice Manual*, Section 6.1(1)(b)(ii); *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1234 (D.C. Cir. 1997)(“Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of justice to deny all relief to the injured party, and thereby relieve the wrongdoer from making amend for his acts. In such case, while damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result may only be approximate”).

5. EFFECT OF RECEIVING GRANT MONEY:

a. Collateral Source Rule Applies: Common law collateral source rule which provides that an award of damages should not be offset by compensation that a plaintiff receives from another sources applies in a fair housing case. *Baltimore Neighborhoods, Inc. v. LOB, Inc*, 92 F. Supp. 2d 456, 465 n. 9 (D. Md. 2000)

b. Where fair housing organization receives grant funds that could have been used for another purpose, the collateral source rule applies and receipt of grant money does not offset award of damages. *Id.* (Applying the collateral source rules and refusing to offset FHIP funds that were used for homebuilder education program but could have been used for another purpose).

C. PUNITIVE DAMAGES

1. RATIONALE: By definition, punitive damages are not intended to compensate the injured party. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 255-6, 101 S.Ct. 2748, 2759-60 (1981). Rather, “The focus is on the character of the tortfeasor's conduct -- whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory damages.” *Smith v. Wade*, 461 U.S. 30, 54 (1983).

2. STANDARD

To receive punitive damages under federal law, a plaintiff must show that a defendant operated a rental premises with “reckless disregard or indifference” for the plaintiff’s federally protected rights. *See Smith v. Wade*, 461 U.S. 30, 56 (1983)(Reckless disregard of federally protected rights justifies award of punitive damages in section 1983 action). Reckless disregard for federal protected rights means that a person acted in the face of a perceived risk that her actions may violate federal law. *Kolstad v. American Dental Association*, 119 S.Ct. 2118, 2125 (1999). The reckless indifference or disregard standard has routinely been applied in fair housing cases where a plaintiff seeks punitive damages. *See Lincoln v. Case*, 340 F.3d 283, 291 (5th Cir. 2003); *Preferred Props. v. Indian River Estates*, 276 F.3d 790, 800 (6th Cir. 2002); *Alexander v. Riga*, 208 F.3d 419, 430-32 (3rd Cir. 2000); *Badami v. Flood*, 214 F.3d 994, 997-98 (8th Cir. 2000)(same).

a. Type of Conduct that Satisfies the Reckless Indifference Standard

- i. Racially discriminatory statements. *See Fair Housing of Marin v. Combs*, 285 F.3d 899, 907 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 536 (2002)(Owner told testers that landlord wanted an “all white” building and used racially derogatory language when telling tenants that did not want to rent to African Americans; *Tolliver v. Amici*, 800 F.2d 149, 151 (7th Cir. 1986)(Racial statements support punitive damages).
- ii. Differential treatment. *See Fair Housing of Marin*, 285 F.3d at 907 (Treating African American testers less favorably than white testers); *Chicago v. Matchmaker Real Estate Sales Center*, 982 F.2d 1086, 1099-1100 (7th Cir. 1992)(“[A]ctive discrimination” against African American testers justified punitive damages award).
- iii. Covering Up Discriminatory Housing Practices. *See Fair Housing of Marin*, 285 F.3d at 907 (Owner told tenant that he could use pretext of bad credit to refuse to rent to African-Americans); *Davis v. Mansards*, 597 F.Supp. 334, 347 (N.D. Ind. 1984)(Attempts to cover up discriminatory conduct justify a punitive damages award).
- iv. Lies About Availability. *Badami v. Flood*, 214 F.3d 994, 997-98 (8th Cir. 1994)(Evidence that defendant told plaintiff that housing was unavailable when it actually was available combined with testimony that in real estate business for years and knew of fair housing laws supports submission to jury of issue of punitive damages)

v. Refusal to Deal with Protected Class. *Alexander v. Riga*, 208 F.3d at 431-2 (Refusal to deal with African Americans and misrepresentations about availability were sufficient evidence of reckless indifference to submission to jury of issue of punitive damages).

vi. Knowledge of Illegality. *Fair Housing of Marin*, 285 F.3d at 907 (Owner knew it was illegal to discriminate on the basis of race)

3. METHODOLOGY

a. Revenue Generated from Discrimination. *Fair Housing of Marin*, 285 F.3d at 907 (Affirming punitive damages award determined by revenue generated from replacement of African American tenants with white tenants)

4. VICARIOUS LIABILITY OF OWNER

a. In General

Federal courts follow traditional agency principles as developed by federal common law, rather than state law, in determining whether to hold a principal liable for punitive damages based on the conduct of its agents. *Kolstad*, 119 S.Ct. at 2128.

b. The Restatement Approach to Vicarious Liability

The Restatement (Second) of Torts, Section 909 may govern when a principal may be liable for punitive damages based on the conduct of his agent. *Id.*

The Restatement (Second) of Torts Section 909 states:

Punitive damages may properly be awarded against a master or other principal because of the act of an agent if, but only if,

(a) the principal or a managerial agent authorized the doing of an act, or

(b) the agent was unfit and the principal or managerial agent was reckless in employing or retaining him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.

i. Special Requirement for Managerial Agents?: May need to show that owner did not adopt good faith efforts to comply with the Fair Housing Act

In *Kolstad*, the Supreme Court modified traditional agency principles and held that an employer may not be vicariously liable for punitive damages based on the discriminatory conduct of its managerial agents where the conduct is directly contrary to the good faith efforts to comply with Title VII. *Kolstad*, 119 S.Ct. at 2129. The court reasoned that strictly applying traditional common law principles would undermine Title VII's goal of preventing violations by reducing the incentive of employers to adopt policies to prevent discrimination in the workplace. *Id.* at 2129. At least one circuit court of appeals, the Third Circuit, has applied *Kolstad* in a fair housing cases. *Alexander v. Riga*, 208 F.3d 419, 433-34 (3d Cir. 2000)(Requiring district court to submit to jury the question of whether husband owner of apartment complex had implemented good faith efforts to comply with Fair Housing Act).

c. Traditional Knowledge, Ratification or Authorization Approach: Punitive damages may not be imposed unless the defendant knew of or ratified the discriminatory actions of the employee. *Fort v. White*, 530 F.2d 1113, 1117 (2d Cir. 1975); *City of Chicago v. Matchmaker Real Estate Sales Inc.*, 982 F.2d 1086, 1100-01 (7th Cir. 1992); *Asbury v. Brougham*, 866 F.2d 1276, 1282 (10th Cir. 1989).

i. Conduct satisfying the knowledge or ratification standard:

– observing discrimination but not taking any action to stop it, *Portee v. Hastava*, 853 F.Supp 597, 611 (E.D. N.Y. 1994)

– failure to take effective steps to ensure compliance by employees with fair housing laws, *Miller v. Apartments & Homes of N.J., Inc.*, 646 F.2d 101, 111 (3d Cir. 1981)

– failure to apologize or repudiate employee's conduct after he became aware of it, *Asbury*, 866 F.2d at 1282-83.

– presence at the rental property and involvement in the rental process, *Grayson v. Rotundi Realty*, Fair Housing - Fair Lending ¶ 15,516 (E.D. N.Y. 1994)

5. COMPENSATORY DAMAGES AS A PREREQUISITE FOR PUNITIVE DAMAGES

Circuit courts are split as to whether compensatory damages are a necessary prerequisite for punitive damages. Compare *Alexander*, 208 F.3d at 430 (3d Cir. 2000)(Holding that compensatory damages are not a necessary prerequisite) with *Louisiana Acorn Fair Housing v. LeBlanc*, 211 F.3d 298, 303 (5th Cir. 2000)(Vacating \$10,000 punitive damage award where jury awarded no compensatory damages); *See also, Fountila v. Carter*, 571 F.2d 487, 492 (9th Cir. 1978) *citing Rogers v. Loether*, 467 F.2d 1110, 1112-13 (7th Cir. 1972), *aff'd sub. nom, Curtis v. Loether*, 415 U.S. 189 (1974) (Noting that the Seventh Circuit has held that an award of actual damages is not a prerequisite to a punitive damage award)

6. CONSTITUTIONAL

- a. Factors: (1) degree of defendant's reprehensibility or culpability; (2) disparity of harm or potential harm suffered by victim and punitive damage award; and (3) sanctions authorized or imposed in other cases for comparable misconduct. *Lincoln*, 340 F.3d at 292 *citing BMW of North America v. Gore*, 517 U.S. 559, 574-75 (1996)(Reducing \$100,000 to \$55,000 to comport with the civil penalty authorized under the FHA in actions brought by DOJ); *United States v. Big D Enterprises*, 184 F.3d 924, 934 (8th Cir. 1999)(Affirming awards of \$100,000 in punitive damages for three plaintiffs against two defendants).
 - i. Reprehensible: Intention discrimination, trickery or deceit in providing false information about availability to plaintiffs and testers, or pattern or misconduct satisfies reprehensible guidepost. *Lincoln*, 340 F.3d at 293; *Big D Enterprises*, 184 F.3d at 934.
 - ii. Ratio: In housing discrimination cases ratio between punitive damages and compensatory damages is justifiable given the inherently low or hard to determine actual damages and the goal of deterring wrongdoing. *Lincoln*, 340 F.3d at 293.
 - iii. Civil Penalty: Statutory maximum civil penalty may be reasonable and proportionate to the wrong committed *Id.*; *Big D Enterprises*, 184 F.3d at 933.

D. CIVIL PENALTIES IN ADMINISTRATIVE PROCEEDINGS

1. FACTORS: (a) Nature of circumstances of violation; (b) the degree of culpability; (c) any history of prior violations; (d) the financial circumstances of the respondent; (e) the goal of deterrence; and (f) any factors as justice may require. *HUD v. Schmid*, Fair Housing - Fair Lending ¶ 25,139 (HUD ALJ 1999) *citing* H.R. N. 711, 100th Congr. 2d. Sess. at 37 (1988); 24 C.F.R. § 180.671(c)
2. MAXIMUM AMOUNTS: \$11,000 if respondent has not been adjudged to have committed any prior discriminatory housing practices; \$32,500 if respondent has been adjudged in administrative hearing, civil action or licensing or regulatory action to have committed one other such practice within five years of the charge; and \$60,000 if the respondent has been adjudged in administrative hearing, civil action or licensing or regulatory action to have committed two or more such practices within seven years of the charge. 24 C.F.R. § 180.671(a).
 - a. Time Limits Do Not Apply If Same Natural Person Adjudged to Have Discriminatory Housing Practice in Administrative hearing or Civil Action. 24 C.F.R. § 180.671(d).
3. MAY BE ASSESSED FOR EACH SEPARATE AND DISTINCT DISCRIMINATORY HOUSING PRACTICE: 24 C.F.R. §§ 180.671(a), 180.671(b) (“A separate and distinct discriminatory housing practice is a single, continuous uninterrupted transaction or occurrence that violates * * * the Fair Housing Act) and 180.671(e)(1); cf. *HUD v. Pheasant Ridge Associates*, Fair Housing - Fair Lending ¶ 25,123 at 26,052 (HUD ALJ 1996)(awarding civil penalty of \$10,000 for each of complainants); and *HUD v. Johnson*, Fair Housing - Fair Lending ¶ 25,076 (HUD ALJ 1994)(Acts of racial harassment amounted to a single discriminatory housing practice).
4. MAY BE ASSESS AGAINST EACH OF RESPONDENTS. 24 C.F.R. § 180.671(e)(2).
5. UNDUE DELAYS OR PROCEDURAL ERRORS MAY RESULT IN REDUCTION OR DENIAL OF CIVIL PENALTIES. *HUD v. Ocean Parks Condominium Ass’n.*, Fair Housing - Fair Lending ¶ 25,054 at 25,528 (HUD ALJ 1993)(refusing to award civil penalty because of delays in issuing charge); *HUD v. Kelly*, Fair Housing - Fair Lending ¶ 25,034 at 25,363 (HUD ALJ 1992)(same).
6. CIVIL PENALTIES IN HOUSING-RELATED HATE ACTS: Relevant factors are (1) nature and circumstances of violation; (2) degree of culpability; (3) goal of deterrence; and (4) other matters as justice may require. 24 C.F.R. § 180.671(c)(2).

E. PROVING DAMAGES FOR INDIVIDUAL PLAINTIFFS

1. FACTORS IN DETERMINING DAMAGES FOR INDIVIDUAL PLAINTIFFS

- the amount of out-of-pocket losses caused by the defendants' denial of housing.
- emotional distress suffered
- whether medical treatment was sought
- whether physical symptoms accompanied the emotional distress
- whether the emotional distress was felt over a prolonged period of time
- the effect on plaintiff other than emotional distress
- the egregiousness of the discrimination
- whether the discrimination was face to face
- whether the discrimination was accompanied by racial epithets
- whether the discriminatory acts were accompanied by acts of violence or threats of violence
- whether plaintiffs feared for their safety
- the wealth of the defendants and the number of rental properties owned
- personal involvement in the discrimination by the owners
- whether the discrimination had a prolonged effect upon plaintiff, and
- whether the defendants' acts are covered by insurance

2. SETTLEMENTS AND JUDGMENTS IN SIMILAR CASES, *See Housing Discrimination Practice Manual § 6.1(2)(a)*.

F. QUANTIFYING DAMAGES FOR FAIR HOUSING ORGANIZATIONS

1. GENERAL CONCEPTS

a. Hourly Rates

Hourly Rates =

Market Hourly Rates for Staff or
Actual Hourly Pay plus Overhead or
Hourly Rates Based on Costs of Operating Fair Housing Organization

- i. Market Rates: rates that employees would earn in the private sector based on rates received for training, consultant work or expert testimony. *See Fair Housing of Marin*, 2000 U.S. Dist. LEXIS 4737 at * 10 (“It is completely reasonable to charge an hourly rate that does not match the pro

rata salary of an individual; to hold otherwise would place into question the fees and costs of litany of professionals including attorneys whose hourly rates and salary pro rated to the hour bear only passing resemblance to one another”)

ii. Actual hourly pay rate plus overhead. *Saunders*, 659 F.Supp. at 1060 (awarding \$2,500 for value of staff time plus overhead); *HUD v. Properties Unlimited*, Fair Housing - Fair Lending ¶ 25,009 at p. 25,148 (HUD ALJ 1991); *HUD v. Jancik*, Fair Housing - Fair Lending ¶ 25,058 at p. 25,567 (HUD ALJ 1993)

iii. Other cases. *Ragin v. Harry Maclowe Realty*, 801 F.Supp. 1213, 1234 (S.D. N.Y. 1992), *aff'd in part, rev'd in part*, 6 F.3d 898 (2d Cir. 1993)(Awarding \$20,000 for diversion of resources based on 150-200 hours expended by fair housing organization)

b. Activities to Counteract Discrimination: must be sufficient causal nexus between activities conducted to counteract the effects of the discrimination and the defendant's conduct

2. ESTABLISHING DIVERSION OF RESOURCES DAMAGES

Diversion of Resources Damages =

Value of time spent by staff in intake +
Value of time spent by staff investigating case +
Value of time spent by staff litigating case +
Out-of-pocket expenses+
Testing expenses +
Time spent on activities counteracting defendant's discrimination

a. Activities Defendant's Actions Diverted From

- Maintain a strategic plan or written description of planned activities.

b. Diversion of Resources for Staff Time

Diversion of Resources for Staff Time:

Number of Hours =
Hours spent in intake +
Hours spent investigating case +
Hours spent assisting litigation

Total Diversion of Resources Damages for Staff Time = (Total Employee 1) +
(Total Employee 2) + (Total Employee 3) . . .

Employee 1 x Number of Hours x Hourly Rate = Total Employee 1
Employee 2 x Number of Hours x Hourly Rate = Total Employee 2
Employee 3 x Number of Hours x Hourly Rate = Total Employee 3

i. Time spent investigating case. *Balistreri*, 981 F.2d at 933 (approving jury award of \$5000 to fair housing organization for conducting tests and following up on results of test); *Inland Mediation Board v. Saunders*, 659 F.Supp. at 1052, 1060 (“HOME’s staff was forced to spend significant time investigating defendant’s advertising practices and attempting to counteract the alleged discriminatory advertising. * * * While it may be true that some of this time was spent on activities necessary to the instant lawsuit, such a contention does not negate the establishment of standing”); *HUD v. Properties Unlimited*, Fair Housing - Fair Lending ¶ 25,009 at p. 25,148 (HUD ALJ 1991)(Awarding damages for costs of time spent investigating and processing complaint); *HUD v. Jancik*, Fair Housing - Fair Lending ¶ 25,058 at p. 25,567 (HUD ALJ 1993)(Awarding damages for costs of preparing and conducting test); *see also*, *Walker v. Fair Housing Foundation of Long Beach*, 2001 U.S. App. Lexis 25169, *13 (9th Cir. 2001)(9th Circuit mentioned lost staff time in responding to city’s retaliation as one of the basis for fair housing organization’s standing)

ii. Time spent litigating case if standing established by other means. *See Ragin*, 801 F.Supp. at 1234 (Allowing recovery of time spent attending conciliation meeting); *Fair Housing of Marin*, 2000 U.S. Dist. LEXIS 4737 at * 9-10 (“[C]oncept of opportunity costs applies equally where resources are diverted to assist litigation”); *HUD v. Properties Unlimited*, Fair Housing - Fair Lending ¶ 25,009 at p. 25,148 (HUD ALJ 1991)(Awarding damages for time spent attending administrative hearing)

But cannot rely on litigation expenses alone to establish standing. *Walker v. Fair Housing Foundation of Long Beach*, 2001 U.S. App. Lexis 25169, *13 (9th Cir. 2001)(“Because we agree that a plaintiff cannot establish standing simply by filing its own lawsuit, we will not consider the time and money the FHF has expended in prosecuting this suit in deciding if the FHF has standing to pursue the retaliation claim.”).

iii. Testing expenses. *Baltimore Neighborhoods, Inc. v. LOB, Inc*, 92 F. Supp. 2d 456, 464 (D. Md. 2000)(Awarding \$381 to fair housing organization for cost of testing); *Fair Housing of Marin*, 2000 U.S. Dist. LEXIS 4737 at * 9-10 (Allowing recovery of \$898 in tester expenses)

Testing Expenses =
Stipends +
Mileage +
Application Fees +
Tester Training and Recruitment Costs

c. Activities to Counteract Discrimination

Damages for activities to counteract discrimination =

Value of staff time and expenses spent on educational activities +
Value of staff time and expenses for targeted outreach +
Value of staff time and expenses for counseling victims of defendant’s discrimination +
Value of staff time and expenses expended on other activities to counteract discrimination

i. Must not be part of normal, day to day activities

ii. Directed at relevant geographical area, group of persons affected, or real estate industry

iii. Educational activities. *Baltimore Neighborhood, Inc. v. LOB, Inc.*, 92 F.Supp.2d 456, 465 (D. Me. 2000)(Awarding damages for 1/44 of costs of homebuilder program to educate area builders about housing

discrimination where 44 developments were found to have violated the law)

iv. Other activities to counteract discrimination. *Fair Housing of Marin*, 2000 U.S. Dist. LEXIS 4737 at * 9-10 (Awarding time spent on housing discrimination task force)

v. Other Cases

Ragin, 801 F.Supp. at 1231, 1234 (Allowing recovery of time spent counteracting and identifying defendant's advertising practices)

vi. Subject to discretion of trier of fact

d. Hours

- Maintain contemporaneous time records recorded in 1/10 or 1/4 of an hour

2. ESTABLISHING FRUSTRATION OF MISSION DAMAGES

Frustration of Mission Damages =

Future testing expenses +

Future training expenses +

Future staff time monitoring records +

Future staff time reviewing advertisements +

Future educational and outreach activities to counteract discrimination+

Future counseling to counteract discrimination

a. Testing Expenses. *Matchmaker*, 982 F.2d at 1099 (Awarding \$6000 in future testing expenses); *HUD v. Properties Unlimited*, Fair Housing - Fair Lending ¶ 25,009 at p. 25,148 (HUD ALJ 1991)(Awarding \$ 2,448 for four paired tests in three years); *HUD v. Jancik*, Fair Housing - Fair Lending ¶ 25,058 at p. 25,568 (HUD ALJ 1993)(Awarding \$11,590 for costs of 12 tests over three years at a cost of \$920 per test)

Testing Expenses =

(Number of tests per year) x (dollar amount charged per test) x (number of years)

b. Training Expenses. *Matchmaker*, 982 F.2d at 1099 (awarding \$2500 in training expenses); *HUD v. Properties Unlimited*, Fair Housing - Fair Lending ¶ 25,009 at p. 25,148 (HUD ALJ 1991)(Awarding \$372 for costs of three annual fair housing trainings); *HUD v. Jancik*, Fair Housing - Fair Lending ¶ 25,058 at p. 25,567 (HUD ALJ 1993)(Awarding \$550 for one training)

Training Expenses=

(Number of trainings per year) x (number of years) x (amount charged per training)

c. Staff Time and Expenses Monitoring Records and Reviewing Advertising. *Matchmaker*, 982 F.2d at 1099 (Awarding \$5000 in monitoring expenses); *HUD v. Properties Unlimited*, Fair Housing - Fair Lending ¶ 25,009 at p. 25,148 (HUD ALJ 1991)(Awarding \$ 744 for monitoring records once a year for three years)

Staff Time and Expenses Monitoring Records and Reviewing Advertising=

(Number of hours estimated to monitor records and review advertising) x (hourly rate of employee who will be conducting monitoring) x (number of years)

d. Educational/Outreach Program. *Fair Housing of Marin*, 2000 U.S. Dist. LEXIS 4737 at * 11-12 (Awarding frustration of mission damages for outreach and education program)

- subject to discretion of trier of fact

e. Alternative or Additional Measure: Use costs expended by defendant in support of discriminatory housing practices as a benchmark for amount needed to redress frustration of mission and harm to community. See Relman, *Housing Discrimination Practice Manual*, § 6.1(1)(b)(ii).

G. REFERENCES

1. Susan Bensinger, *Maximizing Damages for Fair Housing Organizations Under the Fair Housing Act*, 5 J. of Affordable Housing 227 (1996)
2. Brancart & Brancart, *Fair Housing Council Damages Worksheet*
3. Kathleen C. Engel, *Moving Up the Residential Hierarchy: A New Remedy for An Old Injury From Housing Discrimination*, 77 Wash. U. L. Q. 1153 (1999)

4. Alan W. Heifetz and Thomas C. Heinz, *Compensatory Damages in Fair Housing Adjudications*, 26 John Marshall L. Rev. 26 (1992).
5. Timothy J. Moran, *Punitive Damages in Fair Housing Litigation: Ending Unwise Restrictions on a Necessary Remedy*, 36 Harv. C.R. - C.L. Law Rev. 279 (2001)
6. National Fair Housing Alliance, *Organizational Standing Guide: Guidance for Fair Housing Organizations on Establishing Organizational Standing*
7. JOHN RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL (West 2003)
8. ROBERT SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION, (West 2003)
9. Jeffrey L. Taren, *Obtaining Meaningful Damages in Fair Housing Cases* in 11 CIVIL RIGHTS LITIGATION AND ATTORNEYS FEES HANDBOOK 19-1 (1996)