

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States  
Department of Housing and Urban  
Development, on behalf of  
Joseph A. LaBarbera, Elizabeth  
LaBarbera, and Gerald S. Ross,

Charging Party,

v.

Paradise Gardens, Section II,  
Homeowners Association; P.G. Two  
Homeowners, Inc.; Ray Weintraub;  
Andrew H. Menditto; Joseph  
Tinella; and Albert Greenberg,

Respondents.

CORRECTED COPY

HUDALJ 04-90-0321-1  
HUDALJ 04-90-0726-1  
Decided: October 15, 1992

Theresa L. Kitay, Esquire  
For the Charging Party

Ephraim Collins, Esquire  
For the Respondents

Before: Samuel A. Chaitovitz  
Administrative Law Judge

**INITIAL DECISION**

**Statement of the Case**

This matter arose as a result of a complaint filed by Joseph A. and Elizabeth LaBarbera on April 10, 1990, and of a complaint filed by Gerald Ross on August 2, 1990, alleging discrimination based on familial status, in violation of the Fair Housing Act as amended, 42 U.S.C. secs. 3601, *et seq.* ("Fair Housing Act" and "Act").<sup>1</sup> On January 8, 1992, following an investigation of the complaints and a determination that reasonable cause existed to believe that discrimination had occurred, the United States Department of Housing and Urban Development ("HUD") issued a consolidated

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<sup>1</sup> The LaBarbera and the Ross complaints were amended on April 6, 1991 and July 21, 1991 respectively to add Oriole Homes Corp., f/k/a Oriole Land and Development, Inc. ("Oriole") as a Respondent.

Determination of Reasonable Cause and Charge of Discrimination ("Charge") against Respondents Paradise Gardens, Section II, Homeowners Association<sup>2</sup>; P.G. Two Homeowners, Inc.; Andrew H. Menditto; Joseph Tinella; Albert Greenberg; Oriole; and Ray Weintraub.<sup>3</sup> The Charge alleges that section 3604 (b) and (c) of the Fair Housing Act was violated, as well as section 100.50(b)(2) and (4) of HUD's Regulations, 24 C.F.R. sec. 100.50(b)(2) and (4). Respondents answered the Charge denying any unlawful discrimination and raising several affirmative defenses.

On June 3 and 4, 1992, a hearing on the consolidated Charge was held in Ft. Lauderdale, Florida. At the conclusion of the hearing, the parties were instructed to file post-hearing briefs on or before July 20, 1992. Pursuant to a joint request of the parties, the time for filing briefs was extended to August 20, 1992. Briefs were timely filed.

Based upon the entire record, including my observation of the witnesses and their demeanor, and my evaluation of the evidence, I make the following:

### **Findings of Fact**

#### **A. The Paradise Gardens Community**

1. Paradise Gardens is a planned development of single family homes in Margate, Florida, built over twenty years ago by Oriole. (G. 2).<sup>4</sup>

2. Respondent Paradise Gardens, Section II, Homeowners Association ("Association") originally existed to regulate membership in the community with regard to the use of the recreational facilities built by Oriole. (G. 12). Within six years of the opening of Paradise Gardens, P.G. Two Homeowners, Inc. ("Corporation") was formed. (Tr. 285-286; G. 13; G. 22). At all material times the Association was responsible for membership and social activities and the Corporation collected fees and maintained the facilities of Paradise Gardens. (Tr. 275; 277; 285-286; 333; G. 12; G. 13; G. 22).

3. At all material times the recreation facilities of Paradise Gardens, including the swimming pool and club house, have been owned by Oriole. (G. 22). When Oriole first built Paradise Gardens, Oriole established a set of protective covenants to govern the community. In the protective covenants Oriole stated its intent to "assign its obligation to operate and maintain" the recreational facilities to another entity. (G. 2).

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<sup>2</sup> The community of Paradise Gardens Section II will be referred to herein as "Paradise Gardens."

<sup>3</sup> Oriole and Ray Weintraub were dismissed as Respondents by agreement of the parties on February 14, 1992 and May 28, 1992, respectively.

<sup>4</sup> The transcript of the hearing is cited as "Tr." followed by a page number. HUD's exhibits will be cited as "G." followed by the exhibit number and those of Respondents are cited as "R."

4. The protective covenants provide, among other things:

"4. AGE LIMITATION ON PERMANENT RESIDENTS.

In recognition of the fact that the lots hereinabove described have been platted, and the structures to be located thereon designed primarily for the comfort, convenience and accomodation of adult persons, the use of all lots in the foregoing-described lands are hereby limited to permanent residents sixteen (16) years of age or older. No permanent resident shall be permitted in the foregoing-described lands who is under the age of sixteen (16) years." (G. 2).

5. With respect to the clubhouse and swimming pool the covenants provide:

"6. The Board of Directors reserves the right to alter these rules as they deem necessary."

....

"VII SWIMMING POOL

....

2. Guest children under 16 but over 5 years of age will be permitted to use the pool between the hours of 11:00 and 2:00 only.

3. Children under 10 years of age must be accompanied by an adult in the pool....

4. Children under 5 years of age are not allowed in the pool at any time.

5. It is the responsibility of the adult members to regulate the use of the pool by their guest children." (G. 2).

6. In 1975 Oriole and the Corporation executed an Assignment and Assumption Agreement which assigned Oriole's obligation to operate and maintain the recreation facilities to the Corporation, which had been created specifically to receive the assignment. (G. 13; G. 22).

7. The Assignment and Assumption Agreement provides, among other things, that all of Oriole's rights and obligations with regard to the recreation facilities are assigned to the Corporation, including the obligation to operate and maintain the recreation buildings and structures of the community. (G. 22). The agreement also provided that after its effective date Oriole "shall be relieved and discharged from any

further obligations to maintain, operate or repair the recreation facilities of Paradise Gardens." (G. 22).

8. Since the effective date of the Assignment and Assumption Agreement, Oriole has received monthly lease payments collected by the Corporation, and the Corporation is completely responsible for the maintenance of the pool, clubhouse, and grounds. (Tr. 332-333).

9. The bylaws of the Association provide, in part, that the purpose of the Association shall be to assist members in the enjoyment of the facilities of the clubhouse at Paradise Gardens. The bylaws go on to provide, under "Membership," "Membership shall be limited to homeowners in Paradise Gardens, Section II, Margate, Florida. Persons occupying homes in the development under a lease of at least one year shall be considered the homeowners during the period of the lease, except that they shall not have the right to vote on any questions or at any elections." (G. 12). These bylaws also provide that membership in "Paradise Gardens, Section II Clubhouse" is limited to "family units" who are residents of Paradise Gardens and "family units" are defined as the head of the household and members of his family who reside in his household, "who must be at least sixteen (16) years of age." (G. 12).

10. Respondent Menditto has lived in Paradise Gardens over twenty years and, at all relevant times, he served as president of the Corporation. (Tr. 256-257).

11. Respondents Greenberg and Tinella are residents of Paradise Gardens and, although neither holds an office in either the Corporation or the Association, Greenberg and Tinella routinely act on behalf of the Corporation and the Association. In this regard, Greenberg often fills in for absent officers, as needed, and Tinella is in charge of the maintenance of the pool and pool area. (Tr. 298; 300; 315; 363).

12. Members of the Paradise Gardens community were aware that passage of the Fair Housing Act of 1988 might have some effect on the continued enforcement of the "adults only" covenant. Respondent Greenberg did some research and determined that, since 95% of the residents of Paradise Gardens were over fifty-five years of age, the community could claim exemption from the Fair Housing Act's prohibition of discrimination based on familial status. (Tr. 354-357).

13. Based on his determination, Respondent Greenberg prepared a statement that was printed in the November 1989 issue of "Par Two", the community's newsletter that is published jointly by the Association and Corporation. "Par Two" is delivered to all homes at Paradise Gardens. The editors of the November 1989 issue of "Par Two" were Respondents Greenberg and Menditto. (Tr.45; 258; 354-357; G. 1).

14. The article written by Respondent Greenberg and published in the November 1989 issue of "Par Two" stated:

"PAR II - HOMEOWNERS ASSOCIATION

Based on the listing of Homeowners, prepared by your Board of Directors, over 90% are 55 years of age or older. This means we are in compliance with the Federal Anti-discrimination Law requirement as an ADULT Community. We can legally request Courts and HUD, that anyone living here under the age of 16 be required to move out.

Therefore, it is requested that any Homeowner seeing anyone with young children looking at a house with the purpose of buying or renting same, please advise them of our compliance with HUD Regulations and that we will take all legal steps to enforce them." (G.1; Tr. 354).

#### B. Joseph and Elizabeth LaBarbera

15. Complainants Joseph A. and Elizabeth LaBarbera (collectively referred to as "LaBarberas") are a married couple under the age of 55. In the Fall of 1989, as a result of a search for their first home, they found a house in Paradise Gardens that suited their particular needs. They liked Paradise Gardens because it was a quiet community of well cared for single family homes, had a pool, a lawn service and was affordable. They liked the particular house because it was on a quiet cul-de-sac directly behind the pool, and it was around the corner from Complainant Joseph LaBarbera's parents, who live in Paradise Gardens. (Tr. 37-38; 165).

16. In October 1989, the LaBarberas put a contract on the house in Paradise Gardens. (Tr. 37). Shortly after entering into the contract, but before closing on the house, the LaBarberas discovered that Complainant Elizabeth LaBarbera was pregnant with the couple's first child. (Tr. 39). Their daughter was born in June of 1990. (Tr. 37).

17. Complainant Joseph LaBarbera's parent's (hereinafter referred to as the "senior LaBarberas") mentioned to the LaBarberas the possibility of some opposition to their moving into Paradise Gardens because they were a young couple, but there would probably be no problem because there was no member of the household under sixteen. (Tr. 40).

18. After the LaBarberas signed the contract for the house and after they discovered they were going to have a child, the senior LaBarberas showed the LaBarberas the protective covenants, the bylaws of the Association, the bylaws of the Corporation, and the November 1989 issue of "Par Two." (Tr. 166-167).

19. Complainant Joseph LaBarbera became concerned, especially in light of the statement in "Par Two" that the community intended to enforce the prohibition of residents under the age of 16. In November of 1989, Complainant Joseph LaBarbera spoke by telephone with Respondent Menditto, the Corporation president. (Tr. 168-169).

20. During the November 1989 telephone conversation between Respondent Menditto and Joseph LaBarbera, Respondent Menditto had no problem with the fact that both LaBarberas were under 55. However after Respondent Menditto was informed that Complainant Elizabeth LaBarbera was pregnant, Menditto indicated this was against their regulations and rules and he asked Complainant Joseph LaBarbera why he wanted to live in Paradise Gardens because it was a place for old people. Respondent Menditto said that children were not in that area and that it is not a place in which children want to live or be around. Respondent Menditto repeated that it was mostly a place for older people. Complainant Joseph LaBarbera stated that the reason they wanted to live in Paradise Gardens was because his parents lived there. Respondent Menditto stated that they had their rules and regulations and that they were going to enforce them. Complainant Joseph LaBarbera stated that Menditto should do what he had to do. Respondent Menditto responded that they would do what they had to and the LaBarberas should do what they had to. (Tr. 168-171).<sup>5</sup>

21. As a result of the November 1989 telephone conversation with Respondent Menditto, Complainant Joseph LaBarbera came away with the clear impression that Menditto tried to discourage the LaBarberas from moving into Paradise Gardens. (Tr. 172-173).

22. Complainant Elizabeth LaBarbera was informed by her real estate agent that the Fair Housing Act negated the protective covenants. (Tr. 311).

23. In December of 1989, the LaBarberas closed on their house in Paradise Gardens, and have lived there since that date. (Tr. 37).

24. Respondents took no action to remove the LaBarberas from their home. (Tr. 55).

25. Sometime after the LaBarberas moved into their home and before their child was born, Respondent Menditto told the Corporation's board "not to bother" the LaBarberas. (Tr. 289).

26. After the LaBarberas filed their complaint in this case, the Corporation erected a sign at the entrance of Paradise Gardens that stated "Adult Community". (Tr. 62; 360-361; G. 4).

27. The City Attorney of Margate advised the Corporation that the "Adult Community" sign was on city property and that unless it was moved HUD might bring a suit against the city. (Tr. 360-361). The sign in question was then moved to a tree facing the home of the senior LaBarberas. (Tr. 65).

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<sup>5</sup> Respondent Menditto denies he participated in this telephone conversation. (Tr. 279). In this respect I credit Joseph LaBarberas' testimony and do not credit Respondent Menditto's denial. Joseph LaBarbera was a forthcoming witness whose testimony was consistent with the other facts and circumstances. Menditto was a less cooperative witness, whose testimony was inconsistent with a previously given deposition, and who argued with counsel. (Tr. 262-271; 292). In light of the foregoing and the demeanor of the witnesses, I credit Complainant Joseph LaBarberas' version of the November 1989 telephone conversation.

28. The Paradise Gardens telephone directory, published in 1990, set forth "General Rules", "Club House Rules", and "Pool Rules". (Tr. 74-75; 392-3; G. 9). The "General Rules" provided, in part, "1. All homes are limited to permanent residents who are 16 years of age or Older." The "Club House Rules" provide, in part, "4. Inside facilities will be available to all members and their guests 16 years of age and older during open hours: from 7:30 A.M. to 10:00 P.M. daily." The "Pool Rules" provide, in part, "4. No children under 5 permitted in pool area; children, ages 5 to 16 allowed in pool from 11 A.M. to 2 P.M. with an adult escort." (G. 9).

29. The LaBarberas feel ongoing hostility directed at them by the community. They do not feel welcome and have given up any inclination toward community involvement to avoid confrontation. (Tr. 55-56; 174). Complainant Joseph LaBarbera stated that the "Adult Community" sign posted across the street from his parents' home is like a "slap in the face" every time he drives by it. (Tr. 174-175).

### C. The Swimming Pool

30. The swimming pool at Paradise Gardens is subject to a number of rules that are prominently displayed in the pool area, as well as printed in the covenants and in the community telephone directory. (G. 2; G. 6; G. 7; G. 8; G. 9). The rules posted at the pool provide, among other things, "4. No child under 5 years permitted in pool or pool area." and, "7. Children ages 5 to 16 allowed in the pool from 11 a.m. to 2 p.m." (G. 6).

32. Although these rules were posted when the pool was first built, twenty years ago, they are still in effect. (Tr. 260).

### D. Gerald Ross

33. Complainant Gerald Ross is married and has two children under 18. (Tr. 207). He rented a house in Paradise Gardens under a one year lease beginning on May 29, 1990. (Tr. 208).

34. When the Ross family moved into Paradise Gardens, Jennifer Ross was two and one-half years old and Eric Ross was six and one-half years old. (Tr. 210).

35. Complainant Gerald Ross liked Paradise Gardens because the house was the right size, with a Florida room that could serve as a playroom for the children; because the house was affordable; because the community had a pool and club house; because the community was only two blocks from the elementary school his son would attend; and because the community was convenient to Complainant Ross' employment. (Tr. 209).

36. Both Ross children loved to go to a swimming pool. Jennifer Ross, who was too young to swim, had been going in a swimming pool since she was three months old. Eric could swim and had taken red cross instruction. (Tr. 218; 210).

37. The rental agent did not indicate to the Ross family that there would be

any limitation on their use of the pool and gave them four passes to the pool facility.  
(Tr. 211-212).

38. Approximately three or four weeks after they moved into their Paradise Gardens house the Ross family went to the pool. (Tr. 214). Complainant Gerald Ross noticed some posted restrictions concerning the use of the pool, but the family proceeded to the pool area and started to put their swimming articles down by a lounge chair. (Tr.214). The Ross family heard some people from inside the club house, which was contiguous to the pool area, yelling that the Rosses were not allowed to use the pool, that their daughter was not allowed in the pool area, and that they should get out. (Tr. 214). The Rosses ignored the comments and began to swim. After a few minutes, Respondent Tinella arrived and identified himself as the person responsible for the maintenance of the pool area. Respondent Tinella ordered the Rosses to remove their daughter from the pool immediately. Respondent Tinella stated that no children under the age of five were permitted in the pool. The Rosses did not immediately comply and Respondent Tinella stated he would do it. Mrs. Ross stated that Respondent Tinella had better not touch the child. Respondent Tinella stated that if the Rosses did not remove themselves and their daughter from the pool area he would call the Margate Police and have the Rosses removed. The discussion had gotten more heated.  
(Tr. 215-216).

39. The Rosses continued to refuse to leave and Respondent Tinella called the Corporation president, Respondent Menditto, about this infraction of the rules. Respondent Menditto was unable to come to the pool at that time, and he asked Respondent Greenberg to go in Menditto's place. (Tr. 302; 318; 365).

40. Respondent Greenberg arrived at the pool and identified himself as representing Respondent Menditto. Respondent Greenberg told the Rosses that the Rosses had to leave the pool area because they were in violation of the pool rules and the Margate laws and regulations about having a five year old in the pool. He said that according to the rules a child under five was not permitted in the pool.  
(Tr. 216-218; 319). The Rosses indicated their lease gave them the right to use the pool. Respondent Greenberg responded that the lease could not be legal because there had been a recent court case that stated that a lease can not convey use of the common elements.<sup>6</sup> (Tr. 320).

41. The Rosses then gathered up their paraphernalia and left the pool area. (Tr. 321). The Ross children were ordered to leave the pool area because they were violating the pool rules, not because they were renters. (Tr. 366-367).

42. Jennifer Ross was completely barred from using the pool by pool rule

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<sup>6</sup>Respondent Greenberg's reference to, and discussion of, the case might have lead Respondent Ross to his conclusion that Respondent Greenberg had identified himself as legal adviser to the Association. (Tr. 216). Respondent Greenberg denied he so represented himself. (Tr. 321).

#4 because she was under 5 years of age. ( G. 6). Eric Ross' use of the pool, because he was over 5 years of age but less than 16, was limited to the hours of 11 a.m. and 2 p.m. by pool rule #7. (G. 6). This constituted a virtual ban on his use of the pool because he was in school during those hours, during the school year, was at day camp during those hours during the summer, and on weekends usually, one of his parents was working and the other had to watch Jennifer, who was not allowed in the pool area. (Tr. 245-246).

43. During mid-July 1990, shortly after the incident at the pool, Complainant Ross received a letter from Respondent Menditto, as president of the Corporation, enclosing a newspaper clipping and a letter from the Corporation's attorney. Menditto's letter also explained that it would be necessary for Complainant Ross "to get specific permission from our Board of Directors to use any of our facilities during your stay in Paradise Gardens Two." (G. 14). The enclosed letter from the Corporation's attorney stated that the protective covenants limit the use of the recreational facilities to lot owners and permanent residents of Paradise Gardens Two and that tenants have no right to use the facilities of the recreation area except insofar as the Corporation "gratuitously" allows them. (G. 15).

44. The July 1990 Menditto letter was the first time Complainant Ross heard that he had to obtain permission to use the recreation facilities. (Tr. 223). The Paradise Gardens community was first notified of the requirement that renters needed permission to use the facilities after the Ross incident. (Tr. 271; 307; 371). This policy requiring renters to seek permission to use the facilities, including the pool, came about as a result of the Ross incident. (Tr. 271). A renter or lessee need only sign a document agreeing to abide by the posted rules to receive permission to use the facilities. (Tr. 271-272; G. 21).

45. Prior to June 1990, lessees at Paradise Gardens had used the recreation facilities without permission of the Corporation or Association. (Tr. 371).

46. Complainant Ross would not have rented the house in Paradise Gardens if he had thought his family would have been denied access to the recreational facilities. He knew of the amendments to the Fair Housing Act and specifically confirmed with the real estate agent that he and his family would be permitted to use the recreational facilities. (Tr. 219; 212).

47. Complainant Ross had read the Association bylaws and, because he had a one year lease, he thought he was considered a homeowner and was entitled to use the facilities. (Tr. 212).

48. The Rosses moved out of the Paradise Gardens' community in May of 1992. (Tr. 207).

49. The LaBarberas' child can not use the pool because she is less than 5 years old and Mrs. LaBarbera can not use the pool during the day because she is alone with her child during the day, and can not leave the child unattended. This is especially difficult because they can see the pool from their porch. (Tr 72; 82).

#### E. The Leaflet Distribution

50. About one week before the hearing in this case, Respondents, on advice of counsel, distributed to each house in the community, pamphlets on children and water safety. (Tr. 338-339). One pamphlet, entitled, "Children and Pools: a Safety Checklist" is published by the U.S. Consumer Product Safety Commission. (G. 23). The other is black with red lettering, which states, "Drowning #1 Killer of our Children in Florida." Inside is a picture of a child floating face down in a pool, and it says that water is the silent killer. This latter pamphlet was published by the Parents of Near Drownings (POND). (G. 23).

51. The LaBarberas received these pamphlets in their mailbox. (Tr. 88). Both LaBarberas were very upset by the POND pamphlet. (Tr. 88-91; 181-182). In the two and one-half years they had lived in Paradise Gardens the LaBarberas had never received any kind of safety pamphlet or advisory from the community until they received the PONDs and the Consumer Product Safety Commission pamphlets the week before the hearing. (Tr. 204-205).

#### **Discussion and Conclusions of Law**

The Fair Housing Act was enacted to ensure the removal of artificial, arbitrary, and unnecessary barriers which operate invidiously to discriminate on the basis of impermissible characteristics. *United States v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir.), *cert. denied*, 422 U.S. 1042 (1974). The Act was designed to prohibit "all forms of discrimination, sophisticated as well as simple-minded." *Williams v. Mathews Co.*, 499 F.2d 819, 826 (8th Cir. 1974).

The Fair Housing Act was amended to prohibit, *inter alia*, housing practices that discriminate on the basis of familial status. 42 U.S.C. Secs 3601-19. In amending the Act Congress recognized that "families with children are refused housing despite their ability to pay for it." H.R. Rep. No. 711, 100th Cong., 2d Sess., at 19 (1988). Congress cited a survey finding that 25 percent of all rental units exclude children and 50 percent of all rental units have policies restricting families with children in some way. *Id.*, citing Marans, *Measuring Restrictive Rental Practices Affecting Families with Children: A National Survey*, Office of Policy Planning and Research, HUD (1980). The survey also revealed that almost 20 percent of families with children were forced to live in undesirable housing due to restrictive housing policies. *Id.* Congress recognized these problems and intended the 1988 amendments to the Fair Housing Act to remedy these problems for families with children.

The Fair Housing Act, 42 U.S.C. at 3604, in pertinent part, makes it

unlawful for anyone:

"(b) To discriminate against any person in the terms conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of...familial status...

"(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...familial status...or an intention to make any such preference, limitation, or discrimination.

The Fair Housing Act defines familial status, in pertinent part, as "...one or more individuals (who have not attained the age of 18 years) being domiciled with--(1) a parent or another person having legal custody of such individual or individuals..." *Id* at 3602(k); 24 CFR § 100.20.

The Fair Housing Act makes 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...." the Fair Housing Act.  
42 U.S.C. 3617.

With respect to "Administrative Enforcement: preliminary matters", the Fair Housing Act provides, in part:

"(iv) the Secretary shall make an investigation of the alleged discriminatory housing practice and complete such investigation within 100 days after the filing of the complaint...,unless it is impracticable to do so."

42 U.S.C. 3610 (a)(1)(B)(iv). If the Secretary is unable to meet this schedule he is to notify the complainant and respondent in writing of the reasons for not doing so.

42 U.S.C. 3610(a)(1)(C).

Respondents argue that the subject action should be dismissed for HUD's failure to comply with this 100 day time limitation set forth in the Statute. The record herein establishes that HUD did not complete the investigation of the complaints filed by the LaBarberas and Complainant Ross within 100 days from the date each was filed and did not notify either Complainants nor Respondents of the reason HUD failed to timely complete the investigations.

Neither the failure to complete the investigation within 100 days nor the failure to notify the parties of the reasons for such a delay deprives HUD of its power to prosecute the case under the Fair Housing Act. *HUD v. Murphy*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,002 (HUDALJ July 13,1990); *HUD v.*

*Baumgardner*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,006 (HUDALJ Nov. 15, 1990).

Respondents, however, were entitled to prove that they had been unduly prejudiced by these procedural defects. *Baumgardner v. U.S.*, 960 F.2d 572 (6th Cir. 1992); *U.S. v. Scott*, 788 F. Supp. 1555 (D. Kan. 1992). Respondents did not present any evidence that the delay in the investigation and failure of notification prejudiced them in any way. Accordingly, while HUD should have complied with the statutory time schedule, its failure to do so does not justify dismissing this case.<sup>7</sup>

The Charge of Discrimination alleges that Respondents' actions violated section 3604(b) and (c) of the Fair Housing Act, 42 U.S.C. 3604(b) and (c)<sup>8</sup>, with respect to the LaBarberas, because of their familial status. At all relevant times the LaBarberas met the Fair Housing Act's definition of familial status, even while Complainant Elizabeth LaBarbera was pregnant. 24 C.F.R. 100.20. HUD does not contend that Respondent Tinella violated the Act with respect to the LaBarberas.

In its brief HUD moved to amend the Charge of Discrimination to add a cause of action under section 3617 of the Fair Housing Act, 42 U.S.C. 3617, concerning the LaBarberas' receipt of the POND pamphlet. Respondents have filed no opposition to this request to amend the Charge. The issue of the pamphlet was fully litigated without objection from Respondents. HUD's regulations provide that when issues not raised by the pleadings are reasonably within the scope of the original charge and have been tried with the express or implied consent of the parties, "the issues shall be treated as if they had been raised in the pleadings and amendments may be made as necessary to make the pleadings conform to evidence." 24 C.F.R. 104.440. Accordingly, the Charge is hereby amended to contain the allegation that Respondents violated section 3617 of the Fair Housing Act by distributing the POND pamphlet to the LaBarberas.

In analyzing a case under the Fair Housing Act, direct evidence proving the alleged violation, if it constitutes a preponderance of the evidence, will support a finding of discrimination. *See Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir. 1990), *cert denied*, 111 S.Ct. 515 (1990); *HUD v. Leiner*, Fair Housing-Fair Lending (P-H) ¶ 25,021 (HUDALJ Jan. 3, 1992); *HUD v. Jerrard*, 2 Fair Housing-

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<sup>7</sup> Similarly, Respondents allege in their amended answer that they had not been served with the amended administrative complaint forms filed by LaBarberas and Complainant Ross. These amended complaint forms did not change any of the complainants' allegations, they merely added Oriole as a respondent. After issuance of the Charge, Oriole was dismissed from the action by stipulation of the parties. Thus, as with the delay in the investigation, Respondents did not present any proof that they had been prejudiced by the alleged failure of HUD to serve the amended complaint forms on the Respondents. Accordingly the alleged failure to serve the amended complaint forms does not justify dismissing this action. The Respondents did not raise this issue in their brief.

<sup>8</sup> The Charge also alleges Respondents violated section 100.50(b)(2) and (4) of HUD's regulations, 24 C.F.R. §§ 100.50(b)(2) and (4), which are restatements of the subject sections of the Fair Housing Act.

Fair Lending (P-H) ¶ 25,005 (HUDALJ Sept. 28, 1990). In the absence of sufficient direct evidence of discrimination, however, discrimination under the Fair Housing Act is proved using the same three part test used in employment discrimination cases under Title VII of the Civil Rights Act, as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *HUD v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990) (hereinafter *Blackwell II*).

HUD alleges that two of the rules governing the swimming pool violate section 3604(b) and (c) of the Fair Housing Act. There is no dispute as to what rules govern the pool, whether they apply to everyone, and whether they are enforced. Two of the rules, rule 4 which provides that no child under 5 years old is permitted in the pool or pool area and rule 7 which provides that children between 5 and 16 years old are allowed in the pool from 11 a.m. to 2 p.m., are prominently posted at the pool and are, on their face, direct restrictions on the use of the pool facilities by children under 18.

Because these rules, on their face, discriminate against families with children and interfere with their enjoyment and use of the facilities of Paradise Gardens, they violate the Fair Housing Act, unless Respondents establish that Paradise Gardens is exempt from the Act's prohibition of discrimination based on familial status or that the restrictions are based on reasonable health and safety considerations. *HUD v. Edelstein*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,018 (HUDALJ Dec. 9, 1991)(*Edelstein*).

Respondents do not claim that Paradise Gardens is covered by the exemption for "housing for older persons" provided in section 3607 of the Fair Housing Act, 42 U.S.C. 3607. In this regard, prior to the hearing, I issued an ORDER denying Respondents' Motion to amend their answer and answers to interrogatories to allege Paradise Gardens is housing for older persons. This motion was denied, in part because Respondents claimed that Paradise Gardens could be housing for older persons even if it did not meet the requirements set forth in HUD's regulations, 24 C.F.R. 100.304. I concluded that these regulatory requirements did apply. Accordingly, the record fails to establish that Paradise Gardens is housing for older persons within the meaning of section 3607 of the Act and HUD's regulations, and I conclude that it is not exempt from the Act's limitations on discrimination based on familial status.

It has been recognized that in amending the Fair Housing Act Congress did not intend "to limit the ability of landlords or other property managers to develop and implement reasonable rules and regulations relating to the use of facilities associated with dwellings for the health and safety of persons." 54 Fed. Reg. 3236 (Jan. 23, 1989). Respondents, thus, can impose the restrictions on children, which are discriminatory on their face, only if the rules are motivated by legitimate concerns for the health and safety of residents. *HUD v. Murphy*.

No evidence was presented to establish that pool rule #7, limiting the use of the pool by children between 5 and 16 to the period between 11 a.m. and 2 p.m., was established or maintained for health and safety reasons. Rather Respondents argue that

noisy and rowdy children would disturb the other residents of Paradise Gardens, the vast majority of whom are elderly. Thus, they argue, setting times when young people may use the pool is reasonable.<sup>9</sup> (Resp. Br. 11).

Although an association of residents may be empowered to establish rules to fairly accommodate the varying interests of residents to make the community enjoyable, it cannot set rules that would, in effect, deny or unduly limit the use of facilities based on familial status. These latter rules would violate the Fair Housing Act because they would deny facilities based on familial status. 42 U.S.C. 3604(b).

Rule #7 does more than provide hours when children 5 to 16 can use the pool, so as not to disturb the elderly residents of Paradise Gardens. It basically prevents these children from using the pool at all during the week, during the school year. Further, during the summer this is the hottest part of the day in Florida, and it is a bad time of the day for people to be out in the sun. (Tr. 144). Respondents argue that the middle of the day is when people want to go to the pool, and that the cooler parts of the day are less desirable for swimming. (Resp. Br. 12). Respondents submitted no evidence to support these contentions, and, at least during the summer, when it is unhealthy to be out in the sun during the middle of the day, I reject Respondents' argument that the middle of the day is the desirable time to use the pool. On the contrary, it is a highly undesirable and unhealthy time to use the pool. Further, it prevents families, where the parents work, from enjoying the pool together during the work week. Accordingly, limiting the use of the pool by children 5 to 16 to the period from 11 a.m. to 2 p.m. is not a reasonable balancing of the interests of the elderly residents in tranquility and of the families with children to use the pool; rather, it is, for all intents and purposes, denying the use of the swimming pool to families with children between the ages of 5 and 16.

Respondents contend that pool rule #4, prohibiting the presence of children under 5 in the pool or pool area, was maintained for two reasons. The first reason was because of the danger of drownings and accidents, and the resulting liability, and the second reason was the possible presence of fecal material in the pool.<sup>10</sup> The record does not establish the reasons this rule was originally instituted.

Respondents called Dan Aksel, the president and chairman of the board of directors of POND, as an expert on the demographics of drowning. (Tr. 402). Aksel testified that drowning is the leading cause of death of children in Florida, and of those deaths, children under 5 are the most common victims of drowning. (Tr. 403-407). In the span of ten years 900 children lost their lives by drowning in South Florida. Most drownings of children under 5 occur in back yard pools, as distinguished from community pools, such as the one at Paradise Gardens. (Tr. 418). Backyard pools are dangers because they are present in the children's environment even when the pools are not in active use, and they therefore pose a

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<sup>9</sup> Reference to Respondents' brief will be noted as "Resp. Br." followed by a page number; and references to HUD's brief will be noted as "HUD Br." followed by a page number.

<sup>10</sup> Although this latter issue was litigated it was not raised or developed in Respondents' brief.

threat to children whenever parents are performing other tasks. (Tr. 421). Aksel made no recommendation as to how old a child should be before he is permitted to swim and stated that, when properly supervised, swimming can be fun for a child under 5. (Tr. 415-417). Neither Aksel nor POND have any objection to a child under the age of 5 going in the water. (Tr. 417). Aksel stated that the best safety precautions for a child under 5 is active adult "eye contact" supervision. (Tr. 415-416).

HUD called Patricia Riley, an environmental specialist for the Florida Department of Health and Rehabilitative Services, Broward County Public Health Unit, as an expert on pool operation and inspection and water safety. She has had nine years experience inspecting pools to insure they are safe and sanitary. She also is certified by the University of Florida as a lifeguard and water safety instructor and she is a member of a number of professional organizations having to do with healthful and safe pool operations. (Tr. 126-133). She testified that there is no health reason to exclude children of any age from a pool, and that a pool can be maintained in a healthful and clean condition, regardless of the ages of those who enter the pool. Riley testified that she is aware of incidents of human waste in pools of all adult health clubs and that there is no correlation between the age of swimmers and the sanitariness of a pool.

(Tr. 133-141). She testified further that children should not, as a group, be excluded from a pool. Rather, under proper supervision, children should learn to swim because it is a life safety skill. Riley testified that she is aware of no health or safety reason for excluding children under 5 from a public pool. (Tr. 141-143).

In light of all the foregoing I conclude swimming pool rule #4 which barred all children under 5 from the pool and pool area is, on its face, discriminatory because it denies use of the swimming pool facilities to children and this limitation is not for the health and safety of the residents. Thus, as noted above, the rule is not necessary for a clean and healthy pool. Riley's testimony is clear and convincing that excluding children under 5 from the pool does not make the pool any more sanitary or healthful.

Additionally, denying the use of the pool to children under 5, allegedly for the safety of the child, is not a valid limitation on the use of facilities by families with children. Thus, although Paradise Gardens may have a valid interest in promulgating a rule to protect residents from drowning, rule #4 is too broad and not really designed to protect the children. Thus, as discussed above, use of a pool and learning to swim is a life safety skill that children should not be denied and the best protection against drowning for a child is eye contact supervision. Neither expert recommended banning young children from using a pool; rather each stressed responsible use of the pool, including close supervision of children. As a general rule, safety judgements are for informed parents to make, not landlords. *Edelstein* at 25,239.

Further, I find it telling that for the two and one-half years the LaBarberas' lived in Paradise Gardens they received no distributions or publications from Respondents about the danger of drownings, until immediately before this hearing. This distribution of the POND leaflet, that it was obtained by Respondents from their counsel (Tr. 338), and its timing, evidence that the safety

considerations advanced by Respondents to justify pool rule #4 are mere pretexts advanced to conceal the real reason for the rule.<sup>11</sup>

In light of the foregoing, the fact that pool rule #7 had no real safety consideration and was solely a limitation on use of the pool facilities based on familial status and, as discussed hereinafter, the hostility on the part of Respondents to families with children residing in Paradise Gardens, I conclude that pool rule #4 was maintained to keep children under 5 out of the pool area because their presence would bother older residents of the community, and not for the safety of the children. It is a limitation on the use of facilities of Paradise Gardens based on familial status, with no lawful justification. Rule #4 is distinguishable from the swimming pool rule found lawful in *Murphy*. In that case the rule merely stated that children under 14 had to be accompanied by an adult. That rule was found to serve the legitimate purpose of maintaining safety. *Murphy* at 25,053.<sup>12</sup>

In light of all of the foregoing I conclude that Respondents' maintenance and enforcement of swimming pool rules #4 and #7 violates section 3604(b) and (c) of the Fair Housing Act. 42 U.S.C. 3604(b) and (c).

HUD urges that a violation of the Act be found with respect to the limitation on the use of the clubhouse by anyone under the age of 16. (G. 9; HUD Br. 25). Respondent Menditto testified that the rule meant no such person can use the clubhouse unless accompanied by an adult. (Tr. 388-389; 391). No specific allegation concerning a limitation on the use of the clubhouse was included in Charge of Discrimination and no motion was made to that effect at the hearing or in HUD's brief. However, Paragraph II 19 of the Charge does refer, generally to "copying, publishing...and/or relying on restrictive covenants" which indicate a limitation based on familial status would violate section 3604(c) of the Act. Accordingly, I find such violation of the Act and I consider the maintenance of such a limitation as evidence of Respondents' discriminatory intent.

Similarly, the maintenance of the covenants' prohibition on any resident under the age of 16 living in the community (G. 2) and the maintenance and publication in the telephone book (G. 9) of the covenants' "Age limitation on permanent residents," which on their face state a limitation with respect to being

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<sup>11</sup> Respondents submitted testimony that the POND leaflet was distributed because it was summer, grandchildren were coming down, there was to be a picnic involving residents and guests, including children, and the Respondents feared for the safety of the children, because of all the canals in the area. (Tr. 338-340). However, I note that the POND leaflet deals primarily with pools, young children were not permitted in the pool at Paradise Gardens and the picnic was not at the pool. I find this testimony unpersuasive in light of the other circumstances present, including the timing of the leaflet distribution and that it was obtained through Respondents' counsel.

<sup>12</sup> Respondents would have been able to achieve their expressed aims had they limited the use of the pool to children who are toilet trained and required adults to accompany children under 5 to the pool and to be in the water with the child whenever the child goes in the water. As discussed above, however, I have concluded that the safety and sanitation reasons advanced by Respondents were pretexts to conceal their actual aim of discouraging and preventing families with children from using the pool.

able to purchase or rent a dwelling in Paradise Gardens based on familial status, violate section 3604(c) of the Act.  
42 U.S.C. 3604(c).

The statement in "Par Two" to the effect that because Paradise Gardens is an Adult Community under the Act, it could request any resident under 16 "to move out" and the request in "Par Two" that homeowners seeing anyone with children seeking to purchase or rent a home in Paradise Gardens tell the prospective residents that legal steps will be taken to enforce the Adult Community status of the community (G. 1), violate section 3604(c) of the Fair Housing Act. Further this false claim that Paradise Gardens is exempt from the Fair Housing Act's prohibition against discriminating on the basis of familial status is, itself, a violation of section 3604(c) of the Act. *Murphy*.

Respondents argue that the pool rules are required by the covenants and that the Association and the Corporation, as a lessee from Oriole, have no power to change the covenants. Respondents contend that Oriole, as the owner and lessor of the pool and recreation facilities at Paradise Gardens, is the only entity that has the power to change the covenants. Respondents argue that they are in a "catch 22" situation in that if they are ordered to breach the covenants they are liable to Oriole. This argument is rejected. To the extent these covenants are unlawful and in violation of the Fair Housing Act, they are unenforceable. *Cf. Shelley v. Kraemer*, 334 U.S.1 (1948); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Mayers et al. v. Ridley*, 465 F 2d. 630 ( D.C. Cir. 1972) (*Ridley*).

Respondents, in fact, did not enforce all the protective covenants. They permitted children under 16 to live in the community<sup>13</sup>, and they did not feel bound to post, or enforce all the pool rules included in the covenants. In this regard the protective covenants provide that, among others, the following rules are to be posted at the pool:

"5. All women, and men with long hair, MUST WEAR A BATHING CAP enclosing ALL of the hair.

6. No more than 26 persons may be in the pool at the same time.

7. For your SAFETY, stay out of the pool during storms, especially when thunder and lightning is present." (G. 2).

The rules posted at the pool do not contain rule #5 or rule #7 and the limitation set forth in rule #6 has been changed to indicate " Bathing Load--18." (G. 6).

Oriole delegated to the Corporation the rights and obligations of Oriole concerning the recreation facilities, and the assignment discharges Oriole from any obligation or duties to maintain, operate, or repair such facilities. (G. 22).

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<sup>13</sup> Albeit grudgingly.

Thus, the Corporation and Association in practice, could, and did, ignore and change those covenants as they wished. It ill behooves them, in these circumstances, to claim they are bound by such covenants.<sup>14</sup>

The LaBarberas met the definition of familial status set forth in section 3602(k) of the Fair Housing Act. Because they had a young child they were subject to the terms of the covenants, pool rules and publications that expressed unlawful and discriminatory limitations on their right to buy a home and live in Paradise Gardens and use the swimming pool. Further, during the telephone conversation in November of 1989, Respondent Menditto did express to Complainant Joseph LaBarbera that the community would rather the LaBarberas, with a child to be born, not move into the community. Respondent Menditto tried to discourage the LaBarberas from moving into Paradise Gardens. He stated that it would be against the rules and regulations for the LaBarberas to move in and he would enforce these rules and regulations. These comments by Respondent Menditto, president of the Corporation, were statements, relying on restrictive covenants and other rules, which indicated a limitation based on familial status in violation of section 3604(c) of the Act.

In 1990, after the LaBarberas filed the complaint in this case, the Corporation put up the "Adult Community" sign at the entrance to Paradise Gardens. At the request of Margate City authorities this sign was then moved from the entrance, which was on city land, to a tree directly across the street from the senior LaBarberas. Respondents argue that because over 85% of the families in Paradise Gardens have at least one person over 55, it is in actuality a community of older persons. It is then argued that the Act does not prohibit a sign which informs people of this fact. I reject this argument. Language subject to section 3604(c) analysis is to be interpreted naturally, as it would be interpreted by an ordinary reader. *Edelstein* at 25,239, n.6. The meaning the sign "Adult Community" conveys to an ordinary reader is that this is a community of and for adults. The sign means that adults are preferred and desired and children are not.<sup>15</sup> Such a sign constitutes a statement, with respect to the sale and rental of homes

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<sup>14</sup> The record fails to establish that Respondents made any attempt to obtain permission from Oriole to cease maintaining and enforcing the unlawful covenants and rules.

<sup>15</sup> Respondents' interpretation of the sign is unrealistic. The sign does not say "Adult Community with some children" nor was it changed when Complainant Elizabeth LaBarbera had a child. Additionally it must be noted that in "Par Two" the Association and Corporation used the phrase "Adult Community" to refer to the Act's exemption for housing for the elderly and to support the claim that children under 16 are excluded from the community. (G. 1).

in Paradise Gardens, that there is a preference based on familial status in violation of section 3604(c) of the Fair Housing Act.<sup>16</sup>

Respondents argue that Complainant Ross and his family were not entitled to use the pool because they were renters, not homeowners. They base this contention on two grounds: first, the covenants provide that the pool and clubhouse are for the use of owners and permanent residents (G. 2 at page 11 of the Covenants and page 6 of the Amendments to the Covenants); and second, a lease of a home does not automatically carry with it the right to use common elements of the community reserved for the use of owners.

Complainant Ross lived in Paradise Gardens for two years on one year leases. The term "permanent resident," especially when contrasted with "homeowner," is not such a term of art, as argued by Respondents, that it has a very precise and restrictive meaning. Rather, in these circumstances, I conclude it is meant to be distinguished with transient. In the subject case the Rosses, during the two years they lived in Paradise Gardens, had no other home and this was their only residence and the place from which their children attended school.

The Association and Corporation had always let renters use the pool facilities. (Tr. 271; 367). In fact the Association's by-laws provide that membership is available to homeowners in Paradise Gardens and that persons occupying homes in the development under a lease of at least one year shall be considered a homeowner during the term of the lease. (G. 12). Even now, renters are permitted to use the pool, except, since the incident with the Rosses, the renters must receive permission by agreeing to abide by the pool rules. (Tr. 271-272; 371-372).

In light of the foregoing, I conclude nothing in the covenants or rules were intended to deny renters, under a lease of at least a year, the right to use the swimming pool.

Respondents argue further that a lease of a home or a condominium apartment does not automatically carry with it the right to use the common elements of the community reserved for use of the owners. (Resp. Br. 3). However the case relied upon is inapposite. *Hannum v. Bealla Vista Property Owners Association* 611 S.W. 2d 756 (Ark 1981), holds that when the Declaration of Covenants provided that the easement of enjoyment in the common elements was for fee owners of a lot, a unit owner can not lease this easement right to his lessee. This case does not hold, as urged by Respondents, that a condominium cannot permit renters to have a right to use common recreational elements. I reject Respondents' argument that, as a matter of law a lessee has no right to use a common recreational facility in a condominium. Rather the law, as set forth in *Hannum v. Bella Vista Property Owners Association*, is that condominium covenants can put lawful restrictions on the rights of renters to enjoy common recreational elements. The facts of that case are distinguishable from the case herein. As

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<sup>16</sup>The only situation in which such a sign indicating a preference for adults and not children is permitted is when the community is exempted under section 3607 of the Fair Housing Act as "housing for older persons." Paradise Gardens is not such a community and therefore the sign violates the Act.

discussed above, the right to use the recreational facilities in Paradise Gardens, as expressed in the covenants, was for homeowners and permanent residents, which includes renters, under a lease of a year or more. Thus nothing, as a matter of law, prevented the Ross family from using the pool.

The Association, apparently recognizing that the unit owners wished to continue to let renters use the recreational facilities, changed its practice of permitting renters to use the pool with no prior approval, and required renters to apply for permission to use the pool. This permission was automatically granted if the renter agreed to abide by all the rules of the pool, including the limitations on children's use of the pool. Thus this change makes clear the discriminatory intent of the limitation on renters use of the pool, and such a limitation violates section 3604(b) of the Fair Housing Act.

HUD alleges that Respondents violated section 3617 of the Fair Housing Act by distributing the POND pamphlet. Section 3617 of the Act makes it unlawful to coerce, intimidate, threaten or interfere with any person in the exercise of rights granted or protected by the Act. HUD argues that because the POND leaflet startled and shocked the LaBarberas, its distribution violated the Act. As discussed above, because the leaflet originated with Respondents' counsel, was distributed immediately before the hearing, and no such leaflet had been previously distributed, I concluded that it was evidence of pretext. I reject, however, the argument that distribution of the leaflet violated section 3617 of the Act. The POND leaflet was for general distribution, and although admittedly hard hitting, its aim was to stress safety and awareness of the dangers of drowning. The leaflet was not aimed at the LaBarberas, was distributed to all in the community, and its message of safety was a good one, reasonably expressed. Although it is regrettable the LaBarberas were upset by the leaflet, I conclude the distribution of the leaflet was not intended to intimidate them or interfere with their rights protected by the Act and such distribution would not be reasonably foreseen to have such an effect.

In light of all of the foregoing, I conclude, with respect to Complainants Joseph and Elizabeth LaBarbera, that all Respondents except Respondent Tinella, violated section 3604(b) of the Fair Housing Act by discriminating against the LaBarberas in the provision of services or facilities because of their familial status, and violated section 3604(c) of the Act by publishing a notice or statement with respect to the sale or rental of a dwelling that indicates a preference, limitation, or discrimination based on familial status. I conclude, with respect to Gerald Ross all Respondents, in the same manner as set forth above, violated section 3604(b) and (c) of the Fair Housing Act.

### **Remedies**

The Fair Housing Act provides that where an administrative law judge finds that a respondent has engaged in discriminatory practices, the judge shall issue an order "for such relief as may be appropriate, which may include actual damages suffered by the

aggrieved person and injunctive and equitable relief" and the order "may, to vindicate the public interest, assess a civil penalty against the respondent." 42 U.S.C. 2612(g)(3).

### Damages

Complainant is entitled to recover damages for intangible injuries such as embarrassment, humiliation, and emotional distress. *See, e.g., HUD v. Blackwell*, 2 Fair Housing-Fair Lending (P-H), ¶ 25,001 at 25011 (HUDALJ Dec. 21, 1989) (hereinafter *Blackwell I*), *aff'd* 908 F.2d 864 (11th Cir. 1990); *HUD v. Murphy*, 2 Fair Housing-Lending (P-H) ¶ 25,002 at 25055 (HUDALJ July 13, 1990); *See also Smith v. Anchor Bldg. Corp.*, 536 F.2d 231 (8th Cir. 1976); *Steele v. Title Realty Co.*, 478 F.2d 380, 384 (10th Cir. 1973); *McNeil v. P-N & S. Inc.*, 372 F. Supp. 658 (N.D. Ga. 1973); *HUD v. Jerrard*, at 25,091. Damages for emotional distress may be based on inferences drawn from the circumstances of the case, as well as on testimonial proof. *Blackwell II*, at 1872; *Murphy* at 25,055; *See also Marable v. Walker*, 704 F. 2d 1219, 1220 (11th Cir. 1983); *Gore v. Turner*, 159 F.2d 159, 164 (5th Cir. 1977). Because emotional injuries are by nature qualitative and difficult to quantify, courts have awarded damages for emotional harm without requiring proof of the actual dollar value of the injury. *See, e.g., Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1245 (8th Cir. 1983); *Steele v. Title Realty Co.* at 384; *Blackwell I* at 25,011; *Blackwell II* at 872-73. The amount awarded should make the victim whole. *See HUD v. Murphy* at 25,056; *Blackwell I* at 25,013.

HUD asks that Complainants Joseph A. and Elizabeth LaBarbera be awarded damages in the amount of \$4,000 for their emotional distress, humiliation and inconvenience; and that Complainant Ross be awarded damages in the amount of \$4,000 for his emotional distress, humiliation and inconvenience.

The LaBarberas became aware of the November 1989 "Par Two" issue at the time they were involved in the closing on their house and at the time they discovered Complainant Elizabeth LaBarbera was pregnant. Both LaBarberas were very upset by the implication they might be forced to move after their child was born. It was a hurtful experience. (Tr. 54).

As a result of the "Par Two" issue, the publications of the covenants restricting the ages of residents, the posting and maintenance of the "Adult Community" sign, the telephone conversation between Respondent Menditto and Complainant Joseph LaBarbera, and the posted restrictive pool rules, the LaBarberas feel humiliated and excluded from the community. They avoid community activities and feel isolated. (Tr. 55; 108; 174). They feel frustrated because they can not even take their daughter to the pool (Tr. 71-72), which is also a great inconvenience. Underlying all of this is a constant fear that at any time Respondents could try to force the LaBarberas out of the community. (Tr. 201).

Accordingly, Complainants Joseph A. and Elizabeth LaBarbera are jointly awarded \$4,000 for emotional distress, humiliation and inconvenience from all Respondents except Respondent Tinella.

Complainant Ross' damages flow primarily from the encounter between his family and Respondents Tinella and Greenberg. The confrontation occurred because Respondent Tinella and Respondent Greenberg<sup>17</sup> adamantly enforced the discriminatory swimming pool rules and insisted, in public view, that the Rosses leave the pool area. This was a public humiliation and embarrassment. The result was that, during the two years they lived in Paradise Gardens, the Rosses could not use the pool.

Further, Complainant Ross suffered humiliation and discomfort when he had to explain to his son, six and one-half years old when the Rosses moved into Paradise Gardens, that he could not go to the pool and had to sit in the yard and play in his sister's little inflatable pool. (Tr. 230). Complainant Ross is distressed because, to this day, his daughter is afraid to go to a swimming pool in fear she will get yelled at. (Tr. 219). Complainant Ross is very concerned because he fears her refusal to swim will result in her growing up afraid of the water, a safety problem in South Florida. (Tr. 230). The daughter's refusal to go near a pool, as a result of the confrontation at Paradise Gardens, has repeatedly inconvenienced the Ross family, including Complainant Ross, because plans must be changed to accommodate the daughter's fears. (Tr. 231).

Accordingly, Complainant Ross is awarded \$3500 for emotional distress, humiliation and inconvenience from all Respondents.

### Civil Penalty

To vindicate the public interest, the Fair Housing Act authorizes an administrative law judge to impose civil penalties upon respondents who violate the Act. 42 U.S.C. 3612(g)(3)(A); 24 CFR 104.910(b)(3). HUD asks that a civil penalty of "at least" \$5,000 be imposed in this case against the Corporation and the Association, and that nominal penalties be imposed on Respondents Menditto and Greenberg because they were policy makers and spokespersons for the Corporation and Association.

In addressing the factors to be considered when assessing a request for imposition of a civil penalty, the House Report on the Fair Housing Amendments Act of 1988 states:

"The Committee intends these civil penalties are maximum, not minimum penalties, and are not automatic in every case. When determining the amount of a penalty against respondent, the ALJ should consider the nature and circumstances of the violation, the degree of culpability, and any history of prior violations, the financial circumstances of that respondent and the goal of deterrence, and other matters as justice may require" H.R. Rep. No. 711, 100th Cong., 2d Sess. 37, *reprinted in* 1988 U.S. Code Cong. & Admin. News 2173, 2198.

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<sup>17</sup> Respondent Greenberg was acting on behalf of Respondent Menditto, the Corporation president.

There is no evidence that any of the Respondents have previously been found to have committed an unlawful discriminatory housing practice. Consequently, the maximum civil penalty that may be assessed against any Respondent is \$10,000. 42 USC 812 (g)(3)(A) and 24 CFR 104.910(b)(3)(i)(A).

Evidence regarding respondents' financial circumstances is peculiarly within their knowledge, so they have the burden of producing such evidence. If they fail to do so a penalty may be imposed without consideration of their financial circumstances. *See HUD v. Jerrard* at 25,092; *Blackwell I* at 25,015. No evidence was submitted as to the financial circumstances of any of the Respondents.

The Corporation and the Association published, maintained and enforced the discriminatory pool rules and discriminatory covenants, reaffirming them in "Par Two," the telephone directory, and in the "Adult Community" sign. Respondents Menditto, Tinella, and Greenberg, to varying degrees, actively enforced and reiterated the discriminatory rules and covenants. A person who acts as a conduit for discriminatory conduct of another is liable for the unlawful conduct. *See Village of Bellwood v. Dwivedi*, at 1530-1531.

Taking the foregoing into consideration a civil penalty of \$3,000, jointly, against the Corporation and the Association; \$100 against Respondent Menditto; and \$100 against Respondent Greenberg are deemed appropriate and shall be imposed. No civil penalty is imposed against Respondent Tinella because, although he participated in the incident with the Rosses, he was not a policy maker or regular spokesperson for either the Association or for the Corporation.

#### Injunctive and Equitable Relief

An administrative law judge may order injunctive or other equitable relief to make a complainant whole and to protect the public interest in fair housing. 42 U.S.C. 3612(g)(3); *Blackwell II* at 875. The purposes of injunctive relief include eliminating the effects of past discrimination, preventing future discrimination, and positioning aggrieved persons, as close as possible, to the situation they would have been in, but for the discrimination. *See Park View Heights Corp. v. City of Black Jack*. The injunctive remedies provided herein will serve these purposes. Further, it is appropriate in this case to order Respondents to publish in "Par Two" an appropriate statement that families with children are permitted to live in Paradise Gardens and that children can use the pool and other facilities.

**Order**

1. Respondent Paradise Gardens, Section II, Homeowners Association; Respondent P.G. Two Homeowners, Inc.; Respondent Andrew H. Menditto; Respondent Joseph Tinella; and Respondent Albert Greenberg are permanently enjoined from discriminating against Complainants Joseph A. and Elizabeth LaBarbera, Complainant Gerald S. Ross, any member of their families, and any resident or prospective resident, with respect to housing in Paradise Gardens because of familial status, and from retaliating against or otherwise harassing Complainants or any member of their families. Prohibited actions include, but are not limited to all those enumerated in the regulations at 24 C.F.R. Part 100 (1991).

2. Respondents and their agents and employees shall cease employing any policies, rules, covenants, or practices that discriminate against families with children, including barring children under 5 from using the swimming pool, limiting the use of the swimming pool by children between 5 and 16 to between the hours of 11 a.m. and 2 p.m., prohibiting families with children from residing in Paradise Gardens, or any policy that prohibits or discourages people with children 18 years or younger from living in any home in Paradise Gardens.

3. Respondent Association and Respondent Corporation shall remove the "Adult Community" sign which is posted in Paradise Gardens and the rules posted at the swimming pool that forbid children under 5 from using the pool and limits the use of the pool by children between 5 and 16 to between the hours of 11 a. m. and 2 p.m.

4. Respondent Corporation and Respondent Association shall cease giving effect to and enforcing any covenants or rules which prohibit families with children under 16 from purchasing or renting dwellings or otherwise residing in Paradise Gardens; which prevent or unlawfully limit the use of the swimming pool or clubhouse by any child under 16; or in any other way prohibit or discourage people with children under 18 from purchasing or renting dwellings, or otherwise residing in Paradise Gardens.

5. Respondent Corporation and Respondent Association shall amend the protective covenants, described above, by removing the age limitation on permanent residents and the unlawful restrictions on the use of the swimming pool and club house, or, if this is impracticable, shall record a statement that the community will not enforce these provisions of the covenants.

6. Respondent Corporation and Respondent Association will publish a written statement in "Par Two" announcing that families with children under 16 are permitted to live in Paradise Gardens and announcing the new swimming pool and clubhouse rules. This statement must be approved by the U.S. Department of Housing and Urban Development, Atlanta Regional Office of Fair Housing and Equal Opportunity.

7. Respondents shall not publish in the community telephone directory, or in any other notice, those covenants and rules that prohibit families with children under 16 from living in Paradise Gardens, that prohibit children under 5 from using the swimming pool, that limit the use of the pool by children between 5

and 16 to between 11 a.m. and 2 p.m.; or that otherwise discriminate in the terms and privileges of sale or rental of a dwelling in Paradise Gardens, or in the provision of services or facilities in connection therewith, because of familial status.

8. Within ten days of the date upon which this Order becomes final, Respondents shall pay actual damages to Complainant Gerald S. Ross in the amount of \$3,500 for emotional distress, humiliation and inconvenience.

9. Within ten days of the date upon which this Order becomes final, Respondents Corporation, Association, Menditto and Greenberg shall pay actual damages to Complainants Joseph A. and Elizabeth LaBarbera in the amount of \$4,000 for emotional distress, humiliation and inconvenience.

10. Within ten days of the date upon which this Order becomes final, Respondents Corporation and Association shall pay a civil penalty of \$3,000 to the Secretary of HUD.

11. Within ten days of the date upon which this Order becomes final, Respondent Andrew H. Menditto shall pay a civil penalty of \$100 to the Secretary of HUD.

12. Within ten days of the date upon which this Order becomes final, Respondent Albert Greenberg shall pay a civil penalty of \$100 to the Secretary of HUD.

13. Consistent with 24 C.F.R. Part 110, Respondents shall display the HUD fair housing poster in a prominent common area in the Club House and in the Pool Area.

14. Within 15 days of the date upon which this Order becomes final, Respondents shall submit a report to HUD's Atlanta Regional Office of Fair Housing and Equal Opportunity, that sets forth the steps to comply with this Order.

This Order is entered pursuant to 42 U.S.C. 3612(g)(3) of the Fair Housing Act and the regulations at 24 C.F.R. 104.910, and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary within that time.

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SAMUEL A. CHAITOVITZ  
Administrative Law Judge