

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
Kevin Kelsay

Charging Party,

v.

Alicia Wagner, Mohammed Y. Kahn,
and Dennis Moskol

Respondents,

HUDALJ 05-90-0775-1
Decided: June 22, 1992

Alicia Wagner, *pro se*
Dennis Moskol, *pro se*

Geoffrey T. Roupas, Esquire
Michael Kalven, Esquire
For the Secretary and Complainant

Before: THOMAS C. HEINZ
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This proceeding arises out of a complaint filed by Kevin Kelsay ("Complainant") alleging that Alicia Wagner, Mohammed Y. Kahn, and Dennis Moskol ("Respondents") violated the Fair Housing Act, 42 U.S.C. 3601 *et seq.* (sometimes "the Act"), by refusing to negotiate the rental of a dwelling, representing that a dwelling was not available for rental when such dwelling was in fact so available, and making statements concerning the rental of a dwelling that indicated a preference, limitation, or discrimination based on the familial status of Complainant. The Department of Housing and Urban Development ("HUD" or "the Government") investigated the complaint, and after deciding that there was reasonable cause to believe that discriminatory acts had taken place, issued a Charge of Discrimination against the Respondents on December 3, 1991. The Charge alleged violations of sections 804 (a), (c), and (d) of the Act (42 U.S.C.

Secs. 3604(a), (c), and (d)) as well as sections 100.60, 100.75, and 100.80 of the regulations promulgated thereunder (24 C.F.R. Secs. 100.60, 100.75, and 100.80).

None of the Respondents filed an Answer to the Charge. Nevertheless, two of the Respondents, Alicia Wagner and Dennis Moskol, appeared *pro se* in an oral hearing in Milwaukee, Wisconsin, on March 10, 1992. At the close of the hearing the parties were given an opportunity to file proposed findings of fact, conclusions of law, and briefs in support thereof no later than April 21, 1992. Only the Government did so.

Findings of Fact

1. Complainant Kevin Kelsay is the divorced father of twin daughters who were five years old at the time of the hearing. He has been separated from his wife since 1988. The children stay with him every other weekend and two or three weekdays per week. Tr.21¹ In January of 1990, he was taking care of the children throughout each weekday. Tr.22.

2. Respondent Alicia Wagner, her husband and her daughter have lived in a multi-unit building at 1703 S. 115th Ct., West Allis, Wisconsin ("the Building") for about 11 years. Tr. 89. Respondent Wagner has been the resident rental manager for about six years. She shows apartments to prospective tenants, and she and her husband remove snow, vacuum hallways, cut the grass and otherwise maintain the Building and grounds. She also works part time for a temporaries service. At the time of the hearing her husband was unemployed. Tr.74-76.

3. The rent on the apartment occupied by Respondent Wagner and her family is reduced \$50 per month to compensate them for taking care of the Building. Tr.102.

4. Respondent Dennis Moskol has been the property manager of the Building for Respondent Mohammed Y. Kahn, the owner, for about six years. He makes the decision whether or not to rent to a prospective tenant. Respondent Kahn pays Respondent Moskol a flat salary of \$150 per month to manage the eight units in the Building plus two units in a townhouse also located in Milwaukee. Tr.100, 105. In addition to his management duties on behalf of Respondent Kahn, Respondent Moskol owns and operates a home improvement company that has no other employees. Tr.101.

5. All of the units in the Building are about equal in size (approximately 600 to 700 square feet), have two bedrooms of about 100 square feet each, and have approximately the same layout. Tr. 74, 100.

6. Whenever an apartment becomes vacant in the Building, Respondent Moskol places an advertisement in a local newspaper that provides Respondent Wagner's home telephone number. She responds to all telephone inquiries and

¹The following reference abbreviations are used in this decision: "Tr." for "Transcript"; and "SX." for "Secretary's exhibit."

shows the vacant apartment to prospective tenants. After an apartment has been rented, the Wagners' rent is reduced an additional \$25 for one month as compensation for Respondent Wagner's services as rental agent. The rent is reduced \$25 regardless of the amount of time and effort spent renting the apartment.

7. During the month of January 1990, Respondent Moskol advertised a vacant apartment in the *Milwaukee Journal* on four successive Sundays. SX.5. Complainant Kelsay read the advertisement on the third Sunday, January 21, 1990. The next day, after making an appointment by telephone, he was shown the apartment by Respondent Wagner. According to Complainant Kelsay, she was friendly, open, and helpful until she learned that Complainant Kelsay has twin daughters. Tr.24-28. Then her demeanor changed markedly, "like a bomb dropped." Tr.28.

8. When Complainant Kelsay told Respondent Wagner that he wanted the apartment, she told him that the apartment manager (later identified as Respondent Moskol) would be making the decision, that he would be called by the manager, and that he could not call the manager. Because Complainant was not confident he would be home to receive the apartment manager's call, he gave Respondent Wagner the telephone number of his retired mother. Tr.29-30.

9. When more than three days had elapsed without a call from the manager, Complainant telephoned Respondent Wagner on Thursday evening, identified himself, and asked if the apartment was still available. She replied that she did not know, but that someone would call him back. Tr.30; SX.1.

10. On Friday, January 25, 1990, Respondent Wagner telephoned Complainant Kelsay's mother and requested that Complainant return the call. Sometime later, at approximately 1:45 p.m., Respondent Wagner again telephoned Complainant Kelsay's mother, said that she had spoken with the apartment manager, and reported that the apartment had been rented to someone else. Tr.30-31; SX.1.

11. Complainant received Respondent Wagner's message less than two hours later, whereupon he telephoned Respondent Wagner, did not identify himself, asked if the apartment was available, and was told that it was. Complainant did not identify himself because his experience with Respondent Wagner had led him to suspect that she did not want to rent the apartment to him because of his children. Tr.32; SX.1. The apartment was again advertised in the Sunday edition of the *Milwaukee Journal*. SX.21, 5.

12. Prompted by contact with Complainant, the Metropolitan Milwaukee Fair Housing Council, a non-profit fair housing organization, conducted an investigation. The Council arranged to have two trained and highly experienced testers posing as prospective tenants telephone Respondent Wagner about the apartment. Tr.58, 61, 71. The tester who represented she was looking for an apartment for herself, her husband, and one child encountered no difficulties. Tr.71; SX.4. However, the other tester generated the following conversation after she told Respondent Wagner that she wanted to rent the apartment for herself and her two small children:

Wagner: Oh, that could be a problem.

Tester: It is?

Wagner: The apartment isn't large enough for kids [the tester thought Respondent Wagner could have said "two kids"].

Tester: But they are both boys. They can share a room.

Wagner: No, the owner is willing to go one child.

Tester: Are you the manager?

Wagner: No, I'm just showing the place for the owner.

Tester: Maybe you could talk to him. They are only 3 and 5.

Wagner: No, we have to think of the tenants.

Tester: Okay then....

Wagner. Goodbye.²

SX.3.

13. Before Complainant began looking for another apartment in early January 1990, he gave notice to his landlord that he would be vacating the apartment as of February 1. Tr.36-37. When he did not do so, he had to pay double rent for the month of February, totalling \$880. Tr.43-44.

14. In early February, Complainant found another apartment in Milwaukee on S. 76th Street, but he had to pay one half-month's rent, \$180, plus \$50 for some carpeting left behind, in order to induce the occupant to move out. Tr.37. Compared to the apartment in the Building, the S. 76th Street apartment is located on a busier, noisier street with more difficult parking, its bedrooms are smaller, and the kitchen is less modern. Unlike the Building, it has no nearby park. Tr.37-38.

²The tester, Ms. Terry Buck, testified that before she initiates a telephone test she writes out all of the questions she intends to ask. She writes down the answers virtually verbatim as they occur. Tr.65-67.

Subsidiary Findings and Discussion

The Congress passed the Fair Housing Act to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics." *United States v. Parma*, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *rev'd on other grounds*, 661 F.2d 562 (6th Cir.), *cert. denied*, 465 U.S. 926 (1982). See also *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *cf. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Act was designed to prohibit "all forms of discrimination [even the] simple-minded." *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir. 1974).

On September 13, 1988, the Act was amended to prohibit, *inter alia*, housing practices that discriminate on the basis of familial status.³ 42 U.S.C. Secs. 3601-19. "Familial status," as relevant to this case, is defined by the Act as "one or more individuals (who have not attained the age of eighteen years) being domiciled with --- (1) a parent or another person having legal custody of such individual or individuals" *Id.* at Sec. 3602(k); 24 C.F.R. Sec. 100.20. As the father of twins aged five, Complainant falls within this definition.

The Act makes it unlawful for anyone:

[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of ... familial status

42 U.S.C. Sec. 3604(a). Furthermore, the Act prohibits a housing provider from:

mak[ing] ... any ... statement ... with respect to the ... 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.

Id. at Sec. 3604(c). This provision applies to all written or oral statements made by a person engaged in the rental of a dwelling. 24 C.F.R. Sec. 100.75(b), (c)(1) and (2).

³In 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 that 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 found also that almost 20 percent of families with children were forced to live in undesirable housing due to restrictive housing policies. *Id.* Congress therefore intended the 1988 amendments to remedy these problems for families with children.

Finally, it is unlawful:

[t]o represent to any person because of ... familial status ... that any dwelling is not available for ... rental when such dwelling is in fact so available.

42 U.S.C. Sec. 3604(d).

The "deny" or "otherwise make unavailable" language in 42 U.S.C. 3604(a) proscribes any conduct which makes housing unavailable, as well as all practices that have the effect of denying dwellings on prohibited grounds, and that in any way impede, delay, or discourage a prospective buyer or renter. *United States v. Youritan Construction Co.*, 370 F. Supp. 643, 648 (N.D.Cal. 1973), modified on other grounds, 509 F.2d 623 (9th Cir. 1975); *Zuck v. Hussey*, 394 F. Supp. 1028, 1047 (E.D.Mich. 1975).

Special methods have been devised to analyze the proof adduced in cases alleging violations of civil rights. The framework to be applied in a case under the Fair Housing Act depends on whether the evidence offered to prove the alleged violation is direct or indirect. Direct evidence, if it constitutes a preponderance of the evidence as a whole, will support a finding of discrimination. *See Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir. 1990). However, in the absence of direct evidence of discrimination, the analytical framework to be applied in a fair housing case is the same as the 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*); *Pinchback, supra*, 907 F.2d at 1451. Under that test:

First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if the plaintiff sufficiently establishes a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its action. Third, if the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance [of the evidence] that the legitimate reasons asserted by the defendant are in fact mere pretext.

The shifting burdens analysis in *McDonnell Douglas* is designed to ensure that a complainant has his or her day in court despite the unavailability of any direct evidence of discrimination. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, (1984) (citing *Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977)).

Complainant presented a prima facie case of discrimination. As a parent of infant children who live with him a substantial amount of the time, he is a member of a protected class. The record shows he was qualified to enter into a contract to rent an apartment, attempted to do so, but was rejected. After that rejection the apartment remained available for rent. *See Phillips v. Hunter Trails*, 685 F.2d 184, 190 (7th Cir. 1982); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d

1032,1038 (2nd Cir. 1979); *Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir.), *cert. denied*, 419 U.S. 1021, 1027 (1974).

Respondents Moskol and Wagner attempted to rebut the prima facie case with testimony that the apartment was not rented to Complainant because it had been rented to someone else at an unspecified time before Respondent Wagner telephoned Complainant's mother on Friday, January 25, 1990. On the face of it, this constitutes a legitimate, nondiscriminatory explanation for their behavior, but I conclude that it is mere pretext for unlawfully discriminatory conduct.

Respondent Wagner testified that after learning from Respondent Moskol sometime between Thursday evening and Friday morning that the apartment had been rented, she was prompted by her husband and by Complainant's apparent desperation for an apartment to break her usual rule not to telephone prospective tenants. She said that, unbidden by Respondent Moskol, she telephoned Complainant's mother on January 25, 1992, to report that the apartment had been rented. Tr. 81-82. However, the Complainant testified that less than two hours after Respondent Wagner reported to his mother that the apartment had already been rented, he discovered that the apartment was in fact available for rent. Despite the obvious implication created by this evidence that the apartment had not been rented to someone else, neither Respondent made any attempt to substantiate their claim by identifying the alleged person who agreed to rent the property but who apparently cancelled the agreement between 1:45 p.m. and 3:30 p.m. on January 25. They did not proffer an application, a lease, a name, or any other description that might lend credibility to the claim. It is unlikely that both Respondents would have no memory whatever of the particulars of a person who reneged so abruptly on a rental agreement. Respondent Wagner had many memories of her contact with Complainant (albeit many of them incorrect). Furthermore, neither Respondent explained why no attempt was made to contact Complainant after the person who purportedly had agreed to rent the apartment had a change of heart. It is reasonable to expect that with an eager and apparently qualified prospective tenant in hand, Respondents would have attempted to contact him. They did not. Instead, they delayed renting the apartment and went to the unnecessary trouble and expense of running another newspaper advertisement in search of someone else.

Complainant's uncontradicted testimony shows that Respondent Wagner told him she would contact Respondent Moskol on Monday evening to report his interest in the apartment. Tr. 29. She also said that Respondent Moskol would contact him. Tr. 29. Respondent Moskol testified that he contacts Respondent Wagner every day or every other day when there is a vacancy to get the telephone numbers of prospective tenants. He said, "I will get the whole list of people and I will call them in one by one to meet with them." Tr. 97. But Respondents' rental procedures and their conduct in this case are inconsistent. If Respondent Wagner had telephoned Respondent Moskol as promised on Monday evening and the apartment had already been rented at that time, then she would have known that fact on Thursday evening when telephoned by Complainant. But she told Complainant on Thursday evening that she did not know whether the apartment had been rented. Further, if the apartment had *not* been rented by Monday evening, then according to Respondent Moskol's standard practice, he would have contacted Complainant during Tuesday, Wednesday, or Thursday, as Respondent Wagner said he would. And if

Respondent Moskol rented the apartment to someone else *after* Monday evening but before Wednesday evening, then it is reasonable to expect that he would have informed Respondent Wagner of that fact before Thursday evening when Complainant called her. Finally, if the apartment had been rented between Wednesday evening and Complainant's Thursday evening call to Respondent Wagner, there still is no explanation why Respondent Moskol did not follow his usual procedure and interview Complainant on Tuesday or Wednesday. In sum, Respondents' claim that the apartment was not rented to Complainant because it had been rented to someone else does not make sense. I therefore conclude that Respondents' explanation for their conduct is mere pretext for discrimination.

This conclusion is confirmed by evidence supplied by third-party, objective testers. A tester who represented to Respondent Wagner that she had one child provoked no opposition, but the tester who said she had two children, Ms. Terry Buck, met with an unequivocal refusal to negotiate from Respondent Wagner: "No, the owner is willing to go one child." SX.3. Ms. Buck wrote down the refusal to negotiate, essentially verbatim, at the time the words were spoken by Respondent Wagner. Respondent Wagner disputes this evidence and claims that she has never told a prospective tenant with two children that they could not have an apartment. Tr.78-79. That claim cannot be credited.

Ms. Buck's experience with Respondent Wagner is direct evidence of discrimination against Ms. Buck, but neither Ms. Buck nor the fair housing organization to which she belongs is a party to this case. Therefore, Ms. Buck's evidence only indirectly shows discrimination against Complainant. Her experience strongly implies that Complainant's experience with Respondent Wagner was not an aberration, and that Respondents had a policy against tenants with more than one child.

Respondent Wagner concedes, in effect, that she has followed a policy of discouraging prospective tenants with more than one child. She testified:

I do tell people, which obviously is not the right thing to say. I do tell people I don't think it's [the apartment] big enough for two children.

Tr. 78. Furthermore, the demographics of the Building reflect a policy to exclude tenants with two children. Although the Building has been experiencing increasingly higher turnover, Respondent Wagner could remember only two tenants with two children who have lived there during her 11-year tenancy, and one of those had the second child after moving in. Tr.84, 99-100. That numerous couples with one child have lived in the Building over the years is no defense; refusing to rent a two-bedroom apartment to a parent and two children is unlawfully discriminatory when the landlord will rent the same apartment to two adults and *one* child.

Despite Respondent Wagner's testimony to the contrary, the record of her conversation with tester Buck shows that rental policy and practice at the Building followed the dictates of the owner, Respondent Kahn: "No, the owner is willing to go one child." Tr.79; SX.3. Even if it is assumed for purposes of argument that Respondent Kahn did not direct Respondents Wagner and Moskol not to rent apartments to tenants with more than one child, nevertheless,

Respondent Kahn is liable for the discriminatory conduct of the other Respondents because they were his employees and agents, and he cannot delegate his responsibilities under the Act.⁴

Secretary's Motion for Default Judgment against Respondent Kahn

The Secretary has moved for a default judgment against Respondent Kahn on the ground that he did not answer the Charge.⁵ The Charge that initiated this proceeding was issued on December 3, 1991. The Certificate of Service for the Charge indicates Respondent Kahn was served with a copy of the Charge by certified and first-class mail on December 3, 1991.⁶ Return receipt cards submitted by the Government show receipt of documents by Respondent Kahn or by an agent on his behalf on December 11, 1991, and January 3, 1992, at two different addresses, one in Bayside, Wisconsin, and the other in Mequon, Wisconsin. Although the exhibit containing copies of the return receipt cards does not show the nature of the documents to which the cards were attached, counsel for the Government avers that they were attached to copies of the Charge. Motion, p.1. The notice attached to the Charge informed Respondent Kahn that he must file an Answer no later than January 2, 1992, if no election was made by a party to try the case in District Court. The notice also stated that if an administrative hearing were held, it would be held on March 10, 1992, in Milwaukee, Wisconsin. Respondent Kahn is a physician, according to Respondent Moskol, and therefore presumably capable of reading and understanding the Charge and accompanying notices. Tr.8, 94. Respondent Kahn did not answer the Charge.

According to counsel for the Government, Respondent Kahn did not receive service of any document forwarded to him by counsel for the Government after service of the Charge because he moved and left no forwarding address. Brief, p.13. That contention is supported by the fact that a December 31, 1991, Notice and Order issued by the Chief Administrative Law Judge and sent to the Bayside, Wisconsin, address was returned undelivered by the U.S. Mail with a stamp on the envelope indicating, "Forwarding Order Expired."⁷ However, Orders dated February 18, 1992, and April 20, 1992, sent to the same address by the Chief Docket Clerk have not been returned to date,

⁴*Hamilton v. Svatik*, 779 F.2d 383, 388 (7th Cir. 1985); *Green v. Century 21*, 740 F.2d 460, 465 (6th Cir. 1984); *Marr v. Rife*, 503 F.2d 735, 741 (6th Cir. 1974); *Saunders v. General Servs. Corp.*, 659 F.Supp. 1042, 1059 (E.D.Va. 1987); *Davis v. Mansards*, 597 F.Supp. 334, 344; *United States v. Youritan Construction Co.*, 370 F.Supp. 643, 649 (N.D.Cal. 1973), *modified on other grounds*, 509 F.2d 623 (1975), *cert. denied*, 421 U.S. 1002 (1975).

⁵The Government also moved to default the other two Respondents for failing to answer the Charge but later withdrew the motion as to them.

⁶Service is effected at the time of mailing. 24 C.F.R. Sec. 104.30(d)(2).

⁷At hearing, counsel for the Government said that Respondent Kahn's current address is on Waterleaf Drive in Mequon, Wisconsin, the same address that appears on one of the return receipt cards that counsel cites as proof that Respondent Kahn received service of the Charge. If the Mequon address is correct, it is unclear why the Government continued to send documents to the Bayside address while in possession of the correct address. It is similarly unclear why the Chief Docket Clerk was not informed of the presumably correct address.

giving rise to an inference that the Bayside address was correct. In any event, regardless of which address was actually correct at the time the Charge was issued, the record demonstrates that Respondent Kahn received notice of the Charge. Respondent Moskole testified that after the case began he spoke with Respondent Kahn about the case on several occasions, the last time a week or so before the hearing when he requested Respondent Kahn attend the hearing, but Respondent Kahn declined. Tr.95-96. Under these circumstances, I am persuaded that Respondent Kahn received notice of the charges against him, that he knew he had an opportunity to defend the charges personally, and that he knowingly chose not to do so. The Government's motion for a default judgment against Respondent Kahn will be granted. The Rules of Practice governing this proceeding provide that allegations in the Charge that are not denied shall be deemed admitted. 24 C.F.R. Sec. 104.420. By his failure to answer the Charge, Respondent Kahn has admitted all of the allegations in the Charge. The admitted allegations in the Charge are sufficient to show violations of the Fair Housing Act.⁸

In sum, I find that all three Respondents refused to negotiate for the rental of a dwelling to Complainant because of Complainant's familial status, in violation of 42 U.S.C. Sec. 3604(a). Further, Respondents represented to Complainant, because of his familial status, that a dwelling was not available for rental when such dwelling was in fact available, in violation of 42 U.S.C. Sec. 3604(d). By virtue of statements made by Respondent Wagner to the testers, both Respondents Kahn and Wagner are responsible for making statements with respect to the rental of a dwelling that indicated a preference, limitation, or discrimination based on familial status, in violation of 42 U.S.C. Sec. 3604(c).

Remedies

Section 812(g)(3) of the Act provides that upon a finding that a respondent has violated the Act, an administrative law judge shall order "such relief as may be appropriate, which may include actual damages suffered by the aggrieved person." 42 U.S.C. Sec. 3612(g)(3). Respondents have violated the Act through conduct that has caused actual, compensable damages to Complainant.

⁸See also, Rule 55 of the Federal Rules of Civil Procedure. Rule 55 authorizes judgment by default against a party who has failed to plead or otherwise defend.

Complainant's Damages

Out-of-Pocket Expenses

Complainant is entitled to compensation for his out-of-pocket expenses resulting from Respondents' discrimination. But for that discrimination, Complainant would have rented the apartment beginning February 1. After Complainant discovered on January 25 that he could not have the apartment in the Building, he was unable to find another apartment before February 1, the date on which he had promised to vacate his old apartment. As a holdover tenant, he was obligated to pay \$880, or two months' rent for February. When he finally found another apartment, he had to induce the tenant to move by paying the tenant \$180 for half of February's rent, plus \$50 for the tenant's carpeting. Tr.37. In other words, Complainant paid total rent of \$1,060 for a place to live in February (\$440+\$440+\$180=\$1,060). If he had moved into the Building before February 1, his rent would have been \$460. He will be awarded \$600 as compensation for his additional housing costs in February and \$50 for the forced carpeting purchase.

Emotional Damages

Actual damages in housing discrimination cases are not limited to out-of-pocket losses, but may also include damages for intangible injuries such as embarrassment, humiliation, and emotional distress caused by the discrimination.⁹ Damages for emotional distress may be based on inferences drawn from the circumstances of the case, as well as on testimonial proof.¹⁰ 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.¹¹ The amount awarded should make the victim whole.¹²

The Government requests an award of \$500 to compensate Complainant for his inconvenience and \$500 for the emotional injury caused by Respondents. Complainant testified that Respondents' treatment of him was distressing. As one of three children raised by their mother, he had experienced discrimination based on familial status before. He said:

⁹See, e.g., *HUD v. Blackwell*, Fair Housing-Fair Lending (P-H), para. 25,001 at 25,011 (HUDALJ Dec. 21, 1989) (hereinafter *Blackwell I*), *aff'd*, 908 F.2d 864 (11th Cir. 1990); *HUD v. Murphy*, Fair Housing-Fair Lending (P-H) para. 25,002 at 25,055 (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).

¹⁰*HUD v. Blackwell*, 908 F.2d 864, 872 (11th Cir. 1990)(hereinafter *Blackwell II*); *Murphy* at 25,055; See also *Marable v. Walker*, 704 F.2d 1219, 1220 (11th Cir. 1983); *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977).

¹¹See, e.g., *Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1245 (8th Cir. 1983); *Steele v. Title Realty Co.*, 478 F.2d at 384; *Blackwell I* at 25,011. See also *Blackwell II*, 908 F.2d at 872-73 (recovery for distress is not barred because amount of damages is incapable of exact measure).

¹²See *Murphy* at 25,056; *Blackwell I* at 25,013.

And I recalled my own -- the difficulties we had in securing housing before the law changed. And I couldn't believe that in 1990 this sort of thing was still going on, although I have since learned that it happens quite frequently. So I was angry and I was determined to do something about it. That's why two years later, I am still pressing the issue.

Tr.34-35. When Complainant discovered that Respondents would not permit him to rent the apartment he wanted simply because he has two children, he had less than a week to find other housing or face paying double rent for February. This time pressure can only have exacerbated Complainant's distress.

Complainants who suffer unlawful housing discrimination should receive compensation for their time and energy spent looking for alternative housing and prosecuting their cases. The record is clear that Complainant was significantly inconvenienced by prosecuting this case and searching for housing after being rejected by Respondents. In addition to the additional time he had to spend looking for another apartment, he had to take a day off from work to participate in the trial. To prepare for the trial, he made two trips to the Metropolitan Milwaukee Fair Housing Council and an uncounted number of telephone calls. Complainant will be awarded \$1,000 for the expenditure of time and energy and the inconvenience and emotional distress caused by Respondents' unlawfully discriminatory conduct and by Complainant's prosecution of this case.¹³

Lost Housing Opportunity

The Government prays for a \$2,000 award to compensate Complainant for a lost housing opportunity, arguing that as a result of Respondents' discriminatory conduct Complainant had to move into an apartment that, in comparison to the apartment in the Building, has smaller rooms; a less modern kitchen; a busier, noisier street location; more difficult parking; and no nearby park. However, the comparative desirability of the two apartments to the typical tenant is reflected in the different market values of the two properties: the apartment in the Building rented for \$460 per month, whereas Complainant's alternative apartment rented for \$360 per month, more than 20 percent less. Complainant cannot be compensated for living in a less expensive apartment, as such. Nevertheless, I find that some of the characteristics of the 76th Street apartment are more troublesome to Complainant than they would be to the typical tenant. Because he works at home during the day, he particularly values a quiet apartment, but he is subjected to a busier, noisier work environment than he would have had at the Building. If he goes out during the day, upon returning he must compete for a parking space with high school students from across the street. He would not have experienced parking difficulties at the Building. Similarly, as the father of two young children, he especially misses not having a nearby park such as the park close to the Building. In other words, Complainant's particular housing needs placed particular value on some characteristics of the Building not found in the alternative housing on 76th Street

¹³Inasmuch as the concept of "inconvenience" necessarily includes an emotional element, complainant will not also receive a separate award for "inconvenience."

and not reflected in the comparative market values of the two apartments. However, since Complainant was still living at the 76th Street address at the time of the hearing, more than two years after moving in, he apparently has not found the undesirable features of the 76th Street apartment vexing enough to prompt him to find another place to live. An award of \$350 therefore will suffice to compensate Complainant for the absence in the 76th Street apartment of those features of special value to him that he would have enjoyed if he had been able to rent the apartment in the Building.

Civil Penalties

To vindicate the public interest, the Act authorizes an administrative law judge to impose civil penalties upon respondents who violate the Act. 42 U.S.C. Sec. 812(g)(3)(A); 24 C.F.R. Sec. 104.910(b)(3). The Government requests imposition of civil penalties in the amount of \$500 against Respondent Wagner, \$2,000 against Respondent Moskol, and \$10,000 against Respondent Kahn. Determining an appropriate penalty requires consideration of five factors: (1) the nature and circumstances of the violation; (2) whether the respondent has previously been adjudged to have committed unlawful housing discrimination; (3) respondent's financial resources; (4) the degree of respondent's culpability; and (5) the goal of deterrence. *See Murphy* at 25,058; *Blackwell I* at 25,014-15; H. Rep. No. 711, 100th Cong., 2d Sess. at 37 (1988).

Nature and Circumstances of the Violation

The nature and circumstances of the violation in themselves do not merit imposition of the maximum possible penalty. There is no evidence that Respondents' unlawful discrimination was motivated by malice toward the Complainant personally, or for that matter, toward children in general, inasmuch as several tenants with one child have been permitted to rent apartments at the Building. Further, the harm done to Complainant, although not insignificant, was not extreme. He and his family did not suffer grievous harm, such as an eviction or public humiliation, at the hands of the Respondents.

Respondents' Previous Records

There is no evidence that any of the Respondents previously have 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, pursuant to 42 U.S.C. Sec. 812(g)(3)(A) and 24 C.F.R. Sec. 104.910(b)(3)(i)(A).

Respondents' Financial Circumstances

Evidence regarding respondents' financial circumstances is peculiarly within their knowledge, so they have the burden of introducing such evidence into the record. If they fail to produce credible evidence militating against assessment of a civil penalty, a penalty may be imposed without consideration of their financial circumstances. *See Campbell v. United States*, 365 U.S. 85, 96 (1961); *HUD v. Jerrard*, Fair Housing-Fair Lending (P-H) para. 25,005 at 25,092; *Blackwell I* at 25,015. The evidence bearing on Respondent Kahn's financial condition shows that he is a physician who owns a two-unit townhouse

in addition to the eight-unit Building. Respondent Moskol earns \$150 per month working four to six hours per month managing these two buildings for Respondent Kahn. Tr.106. He is also the sole proprietor and employee of a home improvement business. The record therefore does not contain any evidence indicating that Respondents Kahn and Moskol could not pay a civil penalty without suffering undue hardship.

Respondent Wagner's financial circumstances, on the other hand, militate against imposing anything more than a relatively small civil penalty upon her. While her husband has been unemployed, she has been working part time for a temporaries service. She reduces the family's rent only \$25 for each time she participates in the rental of an apartment, regardless of the number of times she has to answer telephone inquiries and show the apartment to prospective tenants. She and her husband earn another \$50 per month against the rent by performing routine maintenance on the Building and its grounds.

Culpability

Respondent Kahn's culpability rests not only on admissions made through his failure to answer the Complaint, but also, as noted *supra*, on evidence that shows that he determined the rental policy and practice at the Building. He therefore must be held responsible for the conduct of his agents that caused compensable harm to Complainant. As for Respondents Moskol and Wagner, they could not escape liability even if they were to argue that they were merely following instructions from Respondent Kahn. One who acts as a conduit for the discriminatory conduct of another is equally liable for the unlawful conduct, even if the former does not act with a discriminatory animus. *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1530-31 (7th Cir. 1990); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1223-26 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); *Diaz v. Pan Am. World Airways*, 42 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). According to Respondent Moskol and Respondent Wagner, Respondent Moskol was the person who actually made the decision that the apartment could not be rented to Complainant, ostensibly because it already had been rented to someone else. For that decision Respondent Moskol must be held accountable.

Deterrence

Respondents and other similarly situated housing providers need to be deterred from engaging in discriminatory treatment of families with children. They must come to understand that a landlord need not exclude all children in order to be guilty of unlawful discrimination. If an apartment may be rented to two adults and one child, then that same apartment must be made available to one adult and two children.

Because Respondent Wagner has already acknowledged error in her conduct, there is less need to impose a civil penalty upon her for deterrence purposes than upon her co-respondents. However, Respondent Kahn in particular has demonstrated an attitude that requires imposition of the severest possible civil penalty. He did not even trouble himself with answering the Government's Charge of Discrimination. Instead, he has left his agents to defend the Charge by themselves. Respondent Moskol testified:

A. I told him [Respondent Kahn] that it was important for him to be here [for the hearing] and he told me to come down here and handle it. That's what he's paying me for.

Q. And that's what he's told you all along, right?

A. Basically. Cause I act as a property manager for him.

Tr.95-96.

Imposition of a \$10,000 civil penalty against Respondent Kahn should teach him that he cannot ignore a lawfully issued Charge of Discrimination with impunity, that he cannot delegate his responsibilities under the Fair Housing Act, and that discrimination based on familial status is "not only unlawful but expensive." *HUD v. Jerrard*, Fair Housing-Fair Lending (P-H) para. 25,005 at 25,092 (HUDALJ Sept. 28, 1990). Civil penalties of \$250 against Respondent Wagner and \$1,000 against Respondent Moskol will be sufficient to vindicate the public interest.

Injunctive Relief

An administrative law judge may order injunctive or other equitable relief to make a complainant whole and protect the public interest in fair housing.¹⁴ 42 U.S.C. Sec. 3612(g)(3). The purposes of injunctive relief include: eliminating the effects of past discrimination, preventing future discrimination, and positioning the 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*, 605 F.2d 1033, 1036 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980). Once a judge has determined that discrimination has occurred, he or she has "the power as well as the duty to use any available remedy to make good the wrong done." *Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1985) (citations omitted). The injunctive provisions of the following Order serve all of these purposes.

¹⁴Injunctive relief should be structured to achieve the twin goals of insuring that the Act is not violated in the future and removing any lingering effects of past discrimination." *Blackwell II*, 908 F.2d at 875 (quoting *Marable v. Walker*, 704 F.2d 1219, 1221).

Order

It is hereby **ORDERED** that:

1. Respondents are permanently enjoined from discriminating against Complainant, any member of his family, and any tenant or prospective tenant, with respect to housing because of familial status, and from retaliating against or otherwise harassing Complainant or any member of his family. Prohibited actions include, but are not limited to, all those enumerated in the regulations codified at 24 C.F.R. Part 100 (1991).

2. Respondents and their agents and employees shall cease employing any policies or practices that discriminate against families with children, including any policy that prohibits or discourages people with children 18 years or younger from living in any residential rental real estate owned or operated by Respondents.

3. Consistent with 24 C.F.R. Part 109, Respondents shall display the HUD fair housing logo and slogan in all advertising and documents routinely provided to the public. Consistent with 24 C.F.R. Part 110, Respondents shall display the HUD fair housing poster in a prominent place in the building located at 1703 South 115th Court, West Allis, Milwaukee County, Wisconsin ("the Building") and in any rental office where Respondents conduct business.

4. Respondents shall institute internal recordkeeping procedures with respect to the operation of the Building and any other real properties owned or managed or acquired by Respondents adequate to comply with the requirements set forth in this Order. Respondents will permit representatives of HUD to inspect and copy all pertinent records at any and all reasonable times and upon reasonable notice. Such representatives of HUD shall endeavor to minimize any inconvenience to Respondents from the inspection of such records.

5. On the last day of each six month period beginning December 31, 1992 (or two times per year), and continuing for three years from the date this Order becomes final, Respondents shall submit reports containing the following information to HUD's Chicago Regional Office of Fair Housing and Equal Opportunity, 626 West Jackson Boulevard, Chicago, Illinois 60606-6765:

a. A log of all persons who applied for occupancy at the Building during the six-month period preceding the report, indicating the name and address of each applicant, the number of persons to reside in the unit, the number of bedrooms in the unit for which the applicant applied, whether the applicant was rejected or accepted, the date on which the applicant was notified of acceptance or rejection, and if rejected, the reason for such rejection. All applications described in the log shall be maintained at the offices of the Building.

b. A list of vacancies during the reporting period at the Building including: the address of the unit, the

number of bedrooms in the unit, the date Respondents were notified that the tenant would or did move out, the date the tenant moved out, the date the unit was rented again or committed to a new rental, and the date the new tenant moved in.

c. A list of all people who inquired, in writing, in person, or by telephone, about the rental of an apartment, including their names and addresses, the date of their inquiry, and the disposition of their inquiry.

d. A list of all tenants upon whom Respondents served a termination of tenancy notice, including the tenant's name, apartment number and address, date of such service, a statement of each reason for the termination notice and whether the tenant terminated the tenancy and the date of such termination.

e. A description of any changes in rules, regulations, leases, or other documents provided to or signed by current or new tenants or applicants (regardless of whether the change was formal or informal, written or unwritten) made during the reporting period, and a statement of when the change was made, how and when tenants and applicants were notified of the change, whether the change or notice thereof was made in writing, and, if so, a copy of the change or notice.

6. Within ten days of the date on which this Order becomes final, Respondents shall pay actual damages to Complainant Kevin Kelsay as follows: \$600 for additional rent, \$50 for carpeting, \$1,000 for inconvenience and emotional distress, and \$350 for lost housing opportunity.

7. Within ten days of the date upon which this Order becomes final, Respondent Kahn shall pay a civil penalty of \$10,000 to the Secretary of HUD.

8. Within ten days of the date upon which this Order becomes final, Respondent Moskol shall pay a civil penalty of \$1,000 to the Secretary of HUD.

9. Within ten days of the date upon which this Order becomes final, Respondent Wagner shall pay a civil penalty of \$250 to the Secretary of HUD.

10. Within ten days of the date this Order becomes final, Respondent Kahn shall inform all his agents and employees of the terms of this order and educate them as to such terms and the requirements of the Fair Housing Act. All new employees shall be informed of such no later than the evening of their first day of employment.

11. Respondents shall submit a written report to this tribunal within 15 days of the date this Order becomes final detailing the steps taken to comply with this Order.

12. The Government's motion for a default judgment against Respondent Kahn is granted.

This Order is entered pursuant to 42 U.S.C. Section 3612(g)(3) of the Fair Housing Act and the regulations codified at 24 C.F.R. Section 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.

THOMAS C. HEINZ
Administrative Law Judge

Dated: June 22, 1992.