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 Linda Wegner, and Jessica and Erica Wegner, Charging Party, v. Raymond J. Schuster and Coachlight Village Townhouse Association, Respondents.	HUDALJ 05-92-1363-1 Decided: January 13, 1995

Elizabeth Crowder, Esquire
For the Charging Party

Clay E. Konnor, Esquire
For the Respondent

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

INITIAL DECISION AND ORDER

Statement of the Case

This matter arose as the result of a complaint filed by Linda M. Wegner on behalf of herself and her two daughters, Jessica and Ericka Wegner ("Complainants") alleging discrimination based on familial status in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601, *et seq.* ("the Act"). On April 14, 1994, following an investigation and a determination that reasonable cause existed to believe that discrimination had occurred, the Department of Housing and Urban Development ("HUD" or "the Charging Party") issued a charge against the Coachlight Village Townhouse Association and Raymond J.

Schuster ("Respondents") alleging that they had engaged in discriminatory practices in violation of 42 U.S.C. §§ 3604 (a), (b), and (c).

A hearing was held in Milwaukee, Wisconsin on August 10-11, 1994. During the hearing, Respondents made a motion to dismiss this action stating that the Charging Party failed to establish a *prima facie* case of discrimination. Tr. 1, pp. 242-43.[1] Having found that the Charging Party established a *prima facie* case, *see infra* p. 11, I deny the motion to dismiss. Respondents also made a motion to strike portions of the Charging Party's exhibit 7, based on, *inter alia,* hearsay objections. The Charging Party did not object to the motion. Tr. 2, p. 4. Accordingly, the motion to strike is granted.[2]

The parties timely filed post-hearing briefs by October 11, 1994,[3] and rebuttal briefs by November 14, 1994. This case is now ripe for decision.

Findings of Fact

1. Coachlight Village is a well-maintained, 16-unit, townhouse condominium complex in New Berlin, Wisconsin. The complex is comprised of four buildings, each with four townhouses. C.P. Ex. 7, p. 14; Tr. 1, pp. 58, 112.

2. The complex was originally built and developed as rental properties by Thomson Realty in the early 1970's. By the fall of 1976, Thomson Realty had converted the complex into condominium units, selling all of the 16 units. Each of the 16 owners became a member of the condominium association, Respondent Coachlight Village Townhouse Association ("Association"). Tr. 1, pp. 245-46; C.P. Exs. 1, and 7 at 5; R. Ex. 8.

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[1]The following reference abbreviations are used in this decision: "Tr. 1" and "Tr. 2," followed by a page number for transcript volumes I and II; "C.P. Ex." for the Charging Party's Exhibit; and "R. Ex." for Respondents' Exhibit.

[2]The following portions of the Charging Party's exhibit 7 (Janette Loersch's trial deposition) are stricken: page 17, line 18 - page 20, line 18; page 21, line 20 - page 22, line 8; page 37, line 2 - page 39, line 5; page 40, line 22 - page 41, line 1; page 44, line 7 - page 49, line 3; and deposition exhibit 3.

[3]In their post-hearing brief, Respondents raised for the first time an issue of the adequacy of HUD's conciliation efforts. The Act requires that HUD "shall, to the extent feasible, engage in conciliation." 42 U.S.C. § 3610(b). By raising an issue at this late date in these proceedings, Respondents have precluded the Charging Party from submitting evidence in response to the allegation. In any event, the issue as framed by Respondents, fails to demonstrate inadequate conciliation. *See* Respondents' Closing Brief (Oct. 6, 1994) at 4.

3. The Association presently is a corporation which regulates the use and occupancy of the complex. The Association's bylaws set out, *inter alia,* the structure of the Association's Board of Directors, requirements for meetings, and voting guidelines. The Board of Directors is comprised of a president, vice-president, secretary, and treasurer. R. Ex. 8. The Board must approve all condominium sales and rentals by the owners. Tr. 2, pp. 24, 70; C.P. Exs. 1 at 4, and 3.

4. Respondent Raymond J. Schuster was the Board's president from 1980-1992. He has resided at Coachlight Village since 1976. Tr. 1, pp. 21, 40, 246. In 1993, Mr. Schuster became vice president and Robert Christie became president. Mr. Christie was vice president from 1987 prior to assuming his current Board position. Tr. 1, pp. 248, 291.

5. Complainant Linda Wegner is the mother of Jessica and Ericka, who were 11 and 15, respectively, in the summer of 1992. During the summer of 1992 until the time of the hearing, Ms. Wegner resided with her two daughters and a cat in a single family home at 3426 South Glen Park Court, New Berlin, Wisconsin. Ms. Wegner and her former husband purchased the house in 1982. They divorced in January of 1990, and Ms. Wegner became the sole owner of her home. Tr. 1, pp. 106-08.

6. In the spring of 1992, Ms. Wegner began to experience the financial and maintenance burdens associated with sole ownership of the house. Accordingly, she began searching for a condominium in New Berlin. Tr. 1, pp. 107-08. She wanted a three-bedroom unit in a complex that allowed pets. In addition, she wanted to remain in the New Berlin school district. Tr. 1, pp. 110-11.

7. On or around June 9, 1992, after viewing approximately 15 condominiums, Ms. Wegner noticed a listing at Coachlight Village that appeared to meet all of her prerequisites. She immediately contacted her real estate agent, Roger DuFour, who, in turn, contacted the listing broker, Joan Coufal of Wauwatosa Realty. Ms. Coufal faxed him a brochure. Mr. DuFour then called Ms. Wegner to recite the information that was contained in the brochure to her. Specifically, Mr. DuFour informed Ms. Wegner that the unit had three bedrooms, a living room, one and a half baths, a forced air furnace, a garage, and the complex allowed pets.[4] Tr. 1, pp. 67, 110-11; C.P. Ex. 4.

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[4]Ms. Coufal listed the information in the brochure. She had misrepresented some information. Specifically, she incorrectly listed that pets were allowed. Upon realizing her mistake, she corrected the sheet. Tr. 1, pp. 201-02, 213-14; R. Ex. 5. The record does not reflect whether Ms. Wegner was ever provided with a corrected copy of the brochure.

8. That same day, Ms. Wegner and Mr. DuFour visited the condominium. Because she was "very excited" about the unit, she returned that afternoon with her daughters, who also liked the condominium. On June 10, 1992, Ms. Wegner made an offer on the condominium for the asking price of $79,900, contingent upon the sale of her home. Tr. 1, pp. 72-73, 110, 113; R. Ex. 2.

9. A few days after her offer, Ms. Wegner requested that Mr. DuFour find out about any condominium rules and restrictions to ascertain the owners' responsibilities. Mr. DuFour provided her with a copy of Coachlight's Declaration of Condominium ("Declaration") and a document entitled "H.S.A" - "A Happy and Successful Association" ("H.S.A."). Ms. Coufal had provided Mr. DuFour with these documents. Tr. 1, pp. 59-61, 116; C.P. Exs. 1, 6.

10. The Declaration, which was written by Thomson Realty and recorded in the registry of deeds in 1974, contains the following language under "PURPOSES AND RESTRICTIONS OF USE OF UNITS":

> B. Units. Each of the units shall be occupied only by a family with the youngest child of no less than fourteen (14) Years of age, or two or more joint owners and their servants and guests. . . unless otherwise permitted in writing by the Board of Directors.
>
> E. Pets. No cat, dog, bird, reptile or animal of any kind shall be permitted, kept or harbored in the condominium unless the same, in each instance, be permitted in writing by the Board of Directors, and such consent, if given, may be revoked at any time by the Board of Directors in their sole discretion.

C.P. Ex. 1; Tr. 1, pp. 248-49. The document was provided to all original condominium owners, who, in turn, pass it on to prospective purchasers. Tr. 1, pp. 24-25, 285.

11. In July of 1987, the Board issued the H.S.A. as a "synopsis of the rules" to reiterate the complex's restrictions to the owners. Tr. 1, pp. 262-63. The H.S.A. states under "MISCELLANEOUS" that "[n]o pets or children under 14 allowed." C.P. Exs. 3, 6.

12. When Ms. Wegner read the restrictions on pets and children in the two documents, she "panicked." Tr. 1, p. 117. She contacted Mr. DuFour and requested that he find out whether the restrictions would prevent her from purchasing the property. After contacting Mr. Schuster, Mr. DuFour reported back to Complainant that neither

restriction would pose a problem. During his conversation with Mr. Schuster, Mr. DuFour informed him that Complainant had a child under 14 and a cat. Tr. 1, pp. 70-71, 89, 118-19.[5]

13. Based on Mr. DuFour's representation, Ms. Wegner proceeded with her plans to move into the complex. She placed her home on the market for the asking price of $130,000. Ms. Wegner planned to sell her home, pay off her existing mortgage, and purchase the condominium with the remainder of the proceeds from the sale of her house. Tr. 1, pp. 72, 119-21.

14. On June 19, 1992, Complainant was notified that the seller had received another offer without any contingencies. Therefore, Complainant contacted friends and relatives for loans to pay for the condominium without first having to sell her home. On June 22, 1992, Complainant waived the contingency on her offer. Tr. 1, pp. 72-73, 121-23 R. Ex. 2, p. 6.

15. Having waived the contingency on her offer, Complainant contacted Mr. DuFour to request written approval for her children and cat. Tr. 1, pp. 74, 121, 123. Mr. DuFour contacted Ms. Coufal who informed him that Complainant's cat posed a problem. Accordingly, Ms. Wegner decided to contact Mr. Schuster directly. Tr. 1, pp. 75, 124.

16. On or around July 3, 1992, Ms. Wegner telephoned Mr. Schuster to request written permission for her cat. He told her that the Association enforced the pet restriction and that she could not move in with her cat. Ms. Wegner was not concerned with the restriction on children because Mr. Schuster had already indicated that the Association did not enforce it. However, during their conversation about the cat, Mr. Schuster told Ms. Wegner that her children would be the only children in the

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[5]Mr. DuFour testified that Mr. Schuster informed him that neither restriction was a problem. Mr. Schuster testified that he told Mr. DuFour that the children were not a problem, but that a pet must be approved by the board of directors. Tr. 1, p. 22. I find Mr. Schuster's testimony more credible on this point than Mr. DuFour's because Mr. Schuster's testimony is consistent with the other association members' testimony that the pet restriction was enforced. *See infra* p. 12. Moreover, even if one were to believe that Mr. Schuster intended to discriminate based on familial status, it would make no sense for him to disavow the pet restriction, *i.e.,* a legal means of preventing Ms. Wegner's residency.

complex and that they might be "a little uncomfortable."[6] Tr. 1, pp. 37-38, 40-41, 125-26, 128.

17. Within a day of her conversation with Mr. Schuster, Ms. Wegner hand delivered a letter to each condominium requesting a change in the rules to allow her cat.[7] R. Ex. 1; Tr. 1, p. 128. She also contacted some of the Association members to persuade them to allow her to bring her pet. Most of her contacts were unsuccessful and one of them ended with Ms. Wegner telling the Association member, "I'll get you for this!" Tr. 1, pp. 78, 133, 137, 170; Tr. 2, p 20.

18. Although Mr. Schuster told Ms. Wegner that the Association forbade pets, because she was so insistent, he decided that he would contact the Association members to poll them informally on changing the bylaws. He was unable to contact all 16 owners. Of the owners that he did reach, nine of them (including the four Board members) voted not to change the pet restriction. Tr. 1, pp. 22-23, 37-38, 41, 46-49, 131, 204-06, 270-74, 278-79; Tr. 2, pp. 18-19, 43, 59-60, 74; R. Ex. 4.

19. During his conversation with one of the owners, Janette Loersch, he stated that "we can't keep the children out, that's been tried in court with other condominium associations and the association always loses, but I don't see why we should allow [pets] and we need you to vote no."[8] C.P. Ex. p. 11; Tr. 1, p. 39.

20. Ms. Wegner was informed that the Board would approve the sale if she agreed not to bring her pet. Ms. Wegner refused to move without her cat and on July 8, 1992,

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[6]While Mr. Schuster admits to informing Ms. Wegner about the composition of the complex, he testified that he did not remember if he commented about her children being "uncomfortable." Tr. 1, pp. 37-38. Because Ms. Wegner testified that he told her that the children would be uncomfortable and because Mr. Schuster did not deny making the statement, I find that he did, in fact, utter the entire statement.

[7]Although there is some dispute as to whether Ms. Wegner was requesting a waiver of the rule for her pet, or a change in the bylaws, her letter indicates that she was seeking the latter. R. Ex. 1. In addition, because Mr. Schuster denied her request for a waiver from the Board, under the Declaration and bylaws, the remaining recourse was to request an amendment of the pet restriction. *See* C.P. Ex. 1; R. Ex. 8.

[8]Ms. Loersch testified that Mr. Schuster spoke of Complainants' two cats. Mr. Schuster testified that he told Ms. Loersch that they had one cat. Because of inconsistencies between Ms. Loersch's testimony and that of her former tenant, Nancy Morgan, I credit Mr. Schuster. Ms. Loersch testified during her trial deposition that a resident, Harvey Odenbrett, had not received a waiver from Thomson Realty for his pet. However, Ms. Morgan testified that Ms. Loersch informed her that Mr. Odenbrett's pet had been "grandfathered in" by Thomson Realty. *Compare* C.P. Ex. 7, p. 16 and ex. 2 *with* Tr. 1, pp. 94-95.

she rescinded her offer. R. Ex. 3; Tr. 1, pp. 43, 185, 188, 220-21, 280-81, 294. Around the beginning of January 1993, Ms. Wegner stopped searching for a condominium and refinanced her home. Tr. 1, pp. 143-44.

21. On August 3, 1992, Ms. Wegner filed a complaint with HUD. C.P. Exs. 5, and 8 at 1.

22. Although Thomson Realty wrote the restrictions against pets and children, the company had liberally granted waivers to facilitate sales. Tr. 1, pp. 257, 288-89; C.P. Ex. 7, pp. 4-5, 32. Prior to converting the units into condominiums in 1976, Thomson Realty had granted at least two waivers to purchasers with cats, one waiver to a purchaser with a dog, three waivers to purchasers with children under 14, and two waivers to purchasers with children under 14 and dogs. Tr. 1, pp. 249, 251, 258, 288; Tr. 2, pp. 13, 17, 22, 32-33, 112; C.P. Ex. 7, pp. 4-6.

23. Since the Association's Board took control of the complex in 1976 until the filing of Ms. Wegner's complaint, there have been two known sales to purchasers with children under 14.[9] These sales were both in 1978. The purchasers were Helen Schmidt (a board member since 1987) whose son was 11 years old at the time and the Fischers who had an infant. The Fischers sold their condominium in 1980.[10] Tr. 1, pp. 36, 250,

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[9]Although the Board approved sales to other purchasers with children, either the children were over 14 years of age, they were born after the purchase, or Respondents were unable to ascertain the age of the children. Tr. 2, pp. 15-16, 28-29, 34, 46-47, 55, 68, 78, 92, 112.

Respondents proved that since Ms. Wegner's complaint, children have moved into two townhouses. Although normally Respondents' actions after filing of a fair housing complaint are irrelevant for purposes of determining whether discrimination occurred, Respondents offered evidence that the Board did not know of the complaint at the time it approved the sales of these two townhouses. In any event, Respondents were unable to prove that the Board knew that children would be residing at these townhouses at the time it approved the sales. First, neither buyer had children; rather, both purchasers leased their units to family members with children. Second, although the Board had knowledge of the leases, there was no evidence that the leases contained information about the children. Tr. 2, pp. 9-11, 69-70.

[10]In its rebuttal brief, the Charging Party asserts that the Fischers were original owners who purchased their condominium prior to 1978 from Thomson Realty. It bases this assertion on minutes from a November 29, 1976, Board meeting. The minutes show a "Joe Fisher" in attendance at one of the Association's first Board meetings. C.P. Ex. 7, p. 5 and ex. 2. Joanne Jonovic credibly testified that she purchased her townhouse from a "Robert Fischer," who bought the unit in 1978, and that the Fischers had a child under 14. Tr. 2, pp. 47-48. Accordingly, I find the following: (1) "Joe Fisher" is not "Robert Fischer," (2) the Fischers had a child under 14, (3) they purchased their unit in 1978 after Thomson Realty no longer owned the complex, and accordingly, (4) the Association's Board approved the sale to the Fischers even though they had a child under 14.

289; Tr. 2, pp. 12-13, 16-18, 47-48; C.P. Ex. 7, p. 23.

24. Since the Association's Board took control of the complex in 1976, it has never approved a sale to a purchaser with a pet. Tr. 1, pp. 30, 39. When Ms. Schmidt moved in in 1978, she had to put her dog to sleep. Another resident's daughter moved in with her. The daughter had a dog. The Board gave the resident 30 days to remove the dog from the complex. Tr. 1, pp. 35, 250, 259; Tr. 2, pp. 13, 17-18, 20-21. The Board refused to approve two sales to prospective purchasers with pets. The prospective purchasers for one of the units were a middle aged couple. Tr. 1, pp. 249, 259; Tr. 2, p. 46. One former resident was unable to lease her condominium because the prospective lessee was a blind woman who wanted a pet other than a seeing eye dog. C.P. Ex. 7, pp. 15, 33.

25. In the summer of 1992, three residents had pets. All three had cats. Two of these residents, Harvey Odenbrett and Carl Konrad, purchased their townhouses prior to the fall of 1976. They had received waivers for their pets from Thomson Realty. The third resident, Carrie Jost, moved in in 1991. She had not received a waiver or permission from the Association. In fact, the Board was unaware of the cat until disclosure during HUD's investigation, sometime between the summer and fall of 1992. Tr. 1, pp. 30-32, 258, 261, 288; Tr. 2, pp. 48-49, 90-91, 93; C.P. Ex. 7, p. 35.

26. Although the Board knew that the written language restricting children was illegal, around the early part of 1989, it decided not to delete it from the Declaration.[11] Tr. 1, pp. 252-54, 255, 279.

27. Since at least as early as 1987, the Association has never refused to approve a sale because a prospective purchaser had children under 14 years of age. Tr. 1, pp. 42, 44, 248, 252; Tr. 2, pp. 17, 18, 47; *see* C.P. Ex. 7, p. 30.

Discussion

The Fair Housing Act is intended to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers [in housing] 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

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[11]The Monday prior to hearing, the Board voted to eliminate the restriction on children. As of the date of the hearing, the Board was undecided on what action, if any, to take regarding the restriction on pets. Tr. 1, pp. 286-87, 292-93; Tr. 2, pp. 39-40.

1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975). One such impermissible characteristic is familial status.

On September 13, 1988, the Act was amended effective March 12, 1989, to prohibit housing practices that discriminate against families with children based on familial status. 42 U.S.C. §§ 3601-19. "Familial status" is defined as "one or more individuals (who have not attained the age of 18 years) being domiciled with [a] parent." *Id.* at § 3602(k); 24 C.F.R. § 100.20(b).

The Charging Party alleges that Respondents discriminated against Complainants because of familial status in violation of 42 U.S.C. §§ 3604(a) and (b). These sections of the Act state that it is unlawful:

> (a) To. . . make unavailable or deny, a dwelling to any person because of . . .familial status. . . .
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale. . . of a dwelling. . . because of. . . familial status. . . .

The Charging Party has the burden of proving, by a preponderance of the evidence, that Respondents discriminated against Complainants. The Charging Party may prove discrimination by either direct or indirect evidence. Direct evidence, if it constitutes a preponderance of the evidence as a whole, supports a finding of discrimination. *See TWA v. Thurston,* 469 U.S. 111, 121-22 (1985); *HUD v. Morgan,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,008, 25,134 (HUDALJ July 25, 1991), *aff'd,* 985 F.2d 1451 (10th Cir. 1993); *HUD v. Jerrard,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,005, 25,087 (HUDALJ Sept. 28, 1990).

Absent direct evidence, the Charging Party may prove discriminatory animus and establish a *prima facie* case by indirect evidence. *See HUD v. Blackwell,* 908 F.2d 864, 870 (11th Cir. 1990); *Pinchback v. Armistead Homes Corp.,* 907 F.2d 1447, 1451 (4th Cir.), *cert. denied,* 111 S.Ct. 515 (1990); *see also McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Once HUD has done so, the burden of production shifts to Respondents to articulate a nondiscriminatory reason for their actions. The Charging Party then may prove that the asserted legitimate reasons are pretextual. *See McDonnell Douglas,* 411 U.S. 792; *see also Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981). However, pretext alone does not necessarily prove discrimination. The Charging Party still maintains the burden to demonstrate that an asserted reason, even though pretextual, evidences an intent to discriminate. *See St. Mary's Honor Center v. Hicks,* 113 S.Ct. 2742; 125 L.Ed. 2d 407 (1993).

Alleged Violations of 42 U.S.C. §§ 3604(a) and (b)

The Charging Party alleges both direct and indirect evidence of discriminatory intent. The Charging Party contends that the following are direct evidence of violations of 42 U.S.C. §§ 3604(a) and (b): (1) Mr. Schuster's statement to Ms. Wegner that her children would be the only children at the complex and that they might feel uncomfortable; (2) the restriction on children in the Declaration; and (3) the restriction on children in the H.S.A.

Direct evidence is defined as evidence which "proves [the] existence of [the] fact in issue *without inference or presumption." Black's Law Dictionary* 413-14 (spec. 5th ed. 1979) (emphasis added). Mr. Schuster's statement to Ms. Wegner concerning her children is not direct evidence of discriminatory intent because an inference is required before determining that Respondents did not approve the sale because of the children. He did not tell her that the sale would not be approved or even that he opposed the sale because of her children; rather, he told her that there were no children in the complex. In addition, moments earlier, he had informed her that the sale would not be approved because of her cat, not because of her children. Accordingly, the statement is not direct evidence of discrimination. *See Rollins v. TechSouth, Inc.,* 833 F.2d 1525, 1528 (11th Cir. 1987).

The written restrictions in the Declaration and H.S.A. are direct evidence of discriminatory intent. However, a preponderance of the evidence as a whole does not support a finding of discrimination based on the written language. The record establishes that the language purportedly restricting children was never enforced by the Board. All four Board members offered unrefuted testimony that the language never operated as a restriction. Helen Schmidt has been treasurer of the Board since 1987. Joanne Jonovic has been the Board's secretary since 1981. Robert Christie was vice president since at least as early as 1988, and president since early 1993. Raymond Schuster was president from 1980 until 1993. All Board members testified that the Board never enforced or attempted to enforce the restrictive language and never prevented occupancy by families with children under 14 based on familial composition. Tr. 1, pp. 27, 42, 252-54; Tr. 2, pp. 13, 18, 45, 47. Their testimony is uncontradicted and is supported by other record evidence.

The Charging Party failed to produce any evidence that the Board rejected any prospective purchaser or renter because of familial status. To the contrary, the record demonstrates that the Board approved sales to purchasers with children under 14 years of age. Ms. Schmidt's son was 11 years old when she bought her townhouse and other purchasers, the Fischers, had an infant. The record also demonstrates that the Board

disavowed the written restrictions. For instance, in his initial conversation with Mr. DuFour, Mr. Schuster stated that Complainant's children were not an issue. Moreover, Ms. Wegner was informed that the Board would approve her transaction if she did not bring her cat. Accordingly, because the restrictions were never enforced, the written language does not constitute a preponderance of the evidence as a whole sufficient to establish a finding of discrimination.

The Charging Party also alleges indirect evidence of discriminatory intent. I find that HUD has carried its initial burden of proving indirect evidence by establishing a *prima facie* case of discrimination.

Under the circumstances of this case, the Charging Party must prove the following to establish a *prima facie* case: (1) Complainants are members of a protected class, (2) Ms. Wegner was qualified for and attempted to purchase a townhouse at Coachlight Village, (3) Respondents rejected Complainant, and (4) the townhouse remained available after the rejection. *See, e.g., Blackwell,* 908 F.2d at 870; *Robinson v. 12 Lofts Realty, Inc.,* 610 F.2d 1032, 1038 (2d Cir. 1979).

Complainants are members of a protected class - families with children. Ms. Wegner resided with her daughters, both of whom were under the age of 18. Accordingly, Complainants have attained familial status. *See* 42 U.S.C. § 3602(k); 24 C.F.R. § 100.20(b). Ms. Wegner was qualified for and attempted to purchase the townhouse. She originally had made an offer on the Coachlight unit that was contingent upon her selling her home. When another prospective purchaser made an offer without any contingencies, Ms. Wegner waived her contingency on her offer. She had borrowed money from friends and relatives to purchase the townhouse without first having to sell her own home. Therefore, the Charging Party has proved the second element.

The Charging Party also has established the third and fourth elements of a *prima facie* case. Respondents did not approve Complainant's purchase. Because the Board must approve all Association sales, it had the authority to, and did, in fact, reject Complainant as a purchaser of the townhouse. Finally, the townhouse remained available after the rejection. It was not until after the Board's rejection of Complainant's purchase that the individual who had made the other offer on the unit purchased the townhouse. Tr. 2, pp. 6-7. Because the Charging Party has carried its initial burden by establishing a *prima facie* case, it has shifted the burden of production to Respondents to articulate a nondiscriminatory reason for rejecting Complainants.

Respondents have articulated a nondiscriminatory reason for refusing to approve the sale. Respondents assert that their nondiscriminatory reason for rejecting

Complainants is their cat.

I find that the Association's restriction on pets is valid and that it was the reason Respondents rejected Complainant. Although there were three residents with pets, two, Carl Konrad and Harvey Odenbrett, had been "grandfathered in" by Thomson Realty, and the third, Carrie Jost, housed a pet surreptitiously.[12] The record clearly establishes that ever since Thomson Realty relinquished control of the complex to the Association's Board, the Board has never approved a sale to a purchaser with a pet. Indeed, the Board has taken actions to restrict pets. Specifically, the Board (1) gave one resident an ultimatum requiring that she remove a pet from the complex within 30 days, (2) refused to approve two sales to prospective purchasers with pets, (3) declined to permit a lease to a prospective lessee with a pet, and (4) approved a sale only upon the condition that the purchaser not bring her dog. *See supra* finding no. 24. Accordingly, the Board told Ms. Wegner that as long as she insisted on bringing her cat with her it would not approve the sale. Thus, even though the language of the written restriction allows pets if "permitted in writing by the Board of Directors," the evidence demonstrates that the Board never permitted any such waivers and it considered the restriction to be an all encompassing one.

The Charging Party asserts that the pet restriction was pretextual for numerous reasons. However, I find none of the reasons persuasive.

The Charging Party contends that Mr. Schuster's statements reveal an intent to exclude children. He told Ms. Loersch that "we can't keep the children out, that's been tried in court with other condominium associations and the association always loses, but I don't see why we should allow" pets and "we need you to vote no." There is no evidence, that his statement expresses an intent to restrict children; rather, the statement is a recitation of the facts. It acknowledges his understanding of the law - that discrimination against families with children is illegal but that the pet restriction is legal and need not be compromised. Mr. Schuster also commented to Ms. Wegner that her children would be

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[12]The Charging Party contends that a fourth resident, Nancy Morgan, a former renter, had a cat. However, because the Charging Party's contention is based on evidence that was stricken from the record, it is unable to prove its contention. *See supra* note 2. Moreover, Ms. Morgan, herself, testified that only these three residents had pets. Tr. 1, pp. 94-95. In addition, Ms. Morgan's testimony further demonstrates that the restriction on pets was enforced by the Board. Ms. Morgan testified that when she rented her townhouse from Ms. Loersch, Ms. Loersch had informed her about the pet restriction. *Id.*

HUD also contests that Mr. Odenbrett had received a waiver from Thomson Realty. While Respondents were unable to produce written evidence of a waiver, testimony established that Mr. Odenbrett had his pet as early as 1978 and that he had indeed received a waiver from Thomson Realty. Tr. 1, pp. 33, 94-95, 258, 286; Tr. 2, pp. 30, 40, 111.

the only children in the complex and that they might feel uncomfortable. Neither, in these circumstances, is this statement evidence of an intent to exclude children. The statement is a factual one informing her of the composition of the complex. Immediately before making this statement about her children, Mr. Schuster had told Ms. Wegner that her sale would not be approved unless she left her cat behind. Accordingly, the statement about her children could just as easily have been an attempt to lessen her disappointment at not being able to purchase the townhouse. It does not demonstrate Mr. Schuster's intent to exclude children, particularly because he had, moments earlier, told Ms. Wegner that the cat was the reason her sale would not be approved.

The Charging Party asserts that Respondents' actions concerning the written restrictions are evidence of their desire to prohibit families with children. Specifically, the Charging Party points to Respondents' failure to remove the written restriction on children and the fact that they went "to lengths to assure that it was made known to prospective purchasers, including Ms. Wegner." Charging Party's Post-Hearing Brief (Oct. 11, 1994) at 20. While the record demonstrates that the Board failed to remove the restriction despite knowledge of its illegality, its inaction does not demonstrate an intent to exclude children. To the contrary, the Board did not delete the restriction because it saw no need to eliminate what was never enforced in the first place. Around the time that the amendments to the Act were implemented, the Board considered, but decided not to delete the restrictive language. Tr. 1, pp. 253-54. The Board chose not to expunge the language (or as Mr. Christie stated, it chose not to "go through all the effort") because the Board had "never denied somebody because of children under 14." Tr. 1, p. 254. The Board determined that because there were, in fact, children in the complex, circumstances demonstrated that the restriction was never utilized. Accordingly, the Board decided that there was no reason to eliminate what was never enforced. Tr. 1, p. 253. The Board left the language in its unaltered state just as it had been legally recorded in the Registry of Deeds in 1974.[13] Moreover, I disagree with the Charging Party's assertion that Respondents went to great lengths to publish the restriction. The Declaration and H.S.A. document were provided to Ms. Wegner pursuant to *her* request. In addition, Ms. Wegner's first contact with the Board (through Mr. DuFour's conversation with Mr. Schuster) resulted in an assurance that the restriction on children was not enforced. In fact, all contacts between Complainant and her agent and Respondents were attempts by Respondents to disavow the unenforced written restrictions on children. *See, e.g.,*

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[13]Prior to the 1988 amendments to the Act, the Board published the H.S.A. as a restatement of the rules in the Declaration. Because the underlying restriction on children in the Declaration was never implemented, the Board merely restated the same ineffective restriction in the H.S.A. In fact, Ms. Schmidt, who had a son under 14 years of age, was one of the authors of the H.S.A. Tr. 1, pp. 292, 296.

Tr. 1, pp. 27, 124, 215-16, 227-28.

The Charging Party also refers to the occupancy patterns at the complex, specifically, that the last sales to purchasers with children under 14 were in 1978. HUD, however, failed to prove that this was due to any discriminatory actions of Respondents, as opposed to the mere fact that no individuals with children under 14 attempted to purchase units at the complex. Indeed, the record indicates that the Board never rejected any purchaser because of familial composition. *See supra* pp. 10-11.

42 U.S.C. § 3604(c) Violations

The Charging Party also alleges that Respondents violated 42 U.S.C. § 3604(c). This section of the Act states that it is illegal to "make. . . or publish, or cause to be made . . . or published any notice [or] statement. . . with respect to the sale. . . 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." To prove a violation of 42 U.S.C. § 3604(c), the Charging Party must prove that (1) Respondents "made" or "published" the statement "with respect to the sale," and (2) the statement indicates a preference against families with children. A statement indicates or expresses a discriminatory preference either when an "ordinary" listener or reader may reasonably interpret it as such, or when the statement is intended to express such a preference. *See Soules v. HUD,* 967 F.2d 817, 824 (2d Cir. 1992); *Ragin v. New York Times,* 923 F.2d 995, 999-1002 (2d Cir.), *cert. denied,* 112 U.S. 81 (1991); *HOME v. Cincinnati Enquirer, Inc.,* 943 F.2d 644, 646-48 (6th Cir. 1991); *HUD v. Gutleben,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,078, 25,725 (HUDALJ Aug. 15, 1994).

The Charging Party alleges three violations of this section: (1) the restriction on children in the H.S.A. document, (2) the restrictive language in the Declaration, and (3) Mr. Schuster's statement to Ms. Wegner about her children. I find that Respondents made or published these statements with respect to the sale. Because the Board wrote the H.S.A. and because the H.S.A. was disseminated to prospective purchasers, the Board made the statement with respect to sales at the complex. Although the Board did not write the language in the Declaration, I find that it published the language with respect to sales at the complex because it intended that the Declaration be provided to prospective purchasers. Both Messrs. Schuster and Christie testified that each condominium owner is to provide prospective purchasers with the Declaration. Tr. 1, pp. 24-25, 285-86. In addition, despite the fact that the Board knew that this document continued to be disseminated, it did not eliminate the restrictive language, thus perpetuating it. Finally, Mr. Schuster made the statement to Ms. Wegner about her children while discussing the pet restriction and her prospects for residency. Because he was speaking as president of

the Board that would have to approve her sale prior to closing, the statement was made with respect to the sale.

Because the language in the H.S.A. and the Declaration communicates a restriction on children, it clearly expresses a preference against families with children. Respondents contend that because the restriction on children was never enforced it does not constitute a violation of the Act. I disagree.

When a respondent makes or publishes a statement "with respect to the sale. . . of a dwelling that indicates" a discriminatory preference, there is a violation of 42 U.S.C. § 3604(c), regardless of the absence of any application or enforcement of the language. 42 U.S.C. § 3604(c); *see also Ragin,* 923 F.2d at 1000 ("[T]he touchstone is nevertheless the message."); *United States v. Hunter,* 459 F.2d 205, 214 (4th Cir.), *cert. denied* 409 U.S. 934 (1972) (Discriminatory advertising is violative of the Act because "Congress is not limited to prohibiting only discriminatory refusals to sell or rent."); *HUD v. Denton,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,024 (HUDALJ Feb. 7, 1992) (A violation of subsection (c) was found despite the lack of violation of any other subsections of 42 U.S.C. § 3604.). Accordingly, Respondents are liable for two violations of the Act as found in the language in the H.S.A. and the Declaration.

Respondents are also liable for Mr. Schuster's statement to Ms. Wegner concerning her children because an ordinary listener may reasonably interpret the statement as expressing a preference against families with children. At the outset, I note that the statutory section is a disjunctive one, finding a violation *either* because a statement "indicates any preference. . . *or* an intention to make any such preference." 42 U.S.C. § 3604(c) (emphasis added). Similarly, the analysis for determining whether there has been a violation is also disjunctive, requiring the finding of *either* a discriminatory preference as reasonably interpreted by the "ordinary listener" *or* a respondent's intent to express such a preference. *See HOME,* 943 F.2d at 646; *Ragin,* 923 F.2d at 999-1000; *see also Soules,* 967 F.2d at 824. Thus, even though there is no evidence that Mr. Schuster intended to discourage Ms. Wegner because of her children or to express a desire not to approve Ms. Wegner's transaction because of her children, if the "ordinary listener" can reasonably interpret his statement as expressing a preference against or discouragement of children, the Charging Party has proved a violation of the Act. *See Fenwick-Schafer v. Sterling Homes Corp.,* 774 F. Supp. 361, 364 (D. Md. 1991); *Saunders v. General Servs. Corp.,* 659 F. Supp. 1042, 1058 (E.D. Va. 1987).

The "ordinary listener" is "neither the most suspicious nor the most insensitive." *Ragin,* 923 F.2d at 1002. The "ordinary listener" standard must be evaluated under the particular facts of each case. *Soules,* 967 F.2d at 824. In light of the circumstances of

this case, I conclude that the statement could indicate to an ordinary listener that Mr. Schuster had a predilection against children. Mr. Schuster made the statement to Ms. Wegner during their conversation *concerning her pet*, not her children; it was a nonsequitur. The comment was a gratuitous one, unsolicited by any question from Complainant. Ms. Wegner rightfully thought the comment to be "very out of place" and "irrelevant" to their conversation concerning the cat. Upon hearing his comment, she wondered whether Mr. Schuster had "something against" her children. Tr. 1, p. 126. Moreover, Respondents failed to offer any legitimate reason for his comment; rather, they chose to remain silent concerning the statement. Accordingly, I find that an ordinary listener could reasonably interpret the comment as indicating a preference against and discouragement of families with children in light of the circumstances in which the comment was made. *Cf. Soules,* 967 F.2d at 825-26 (Inquiries concerning a prospective tenant's children's ages and whether the children are noisy do not violate the Act when the speaker offers nonpretextual legitimate reasons for the inquiries.); *United States v. Grishman,* 818 F. Supp. 21, 23 (D. Me. 1993) (The statement that rental property was "more suited to people without children" indicates a preference based on familial status.).

Remedies

Because Respondents have violated the Act, Complainants are entitled to "such relief as may be appropriate, which may include actual damages. . . and injunctive and other equitable relief." 42 U.S.C. § 3604(g)(3). Moreover, Respondents may be assessed a civil penalty "to vindicate the public interest." *Id.*

The Charging Party seeks: $10,000 for emotional distress damages for Ms. Wegner; $3,000 each for emotional distress damages for Jessica and Ericka Wegner; an assessment of a $5,000 civil penalty against Respondent Schuster; an assessment of a $5,000 civil penalty against Respondent Association; and injunctive relief.[14]

Emotional Distress

Complainants are entitled to emotional distress caused by the Respondents' statements. "[C]ourts do not demand precise proof to support a reasonable award of damages [for emotional distress]." *Block v. R.H. Macy & Co., Inc.,* 712 F.2d 1241, 1245

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[14]The Charging Party's request for emotional distress damages and civil penalties includes an anticipated recompense for Respondents' rejection of Complainant's purchase. Also, the Charging Party seeks $11,950 for economic damages and $2,500 for lost housing opportunity resulting from Respondents' rejection. Because Respondents' rejection did not violate the Act, Complainants are not entitled to recovery for damages suffered because of the rejection.

(8th Cir. 1983). Such damages may be inferred from testimony and the circumstances surrounding the discriminatory act. *See Seaton v. Sky Realty Co., Inc.,* 491 F.2d 634, 636 (7th Cir. 1974); *see also HUD v. Blackwell,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,001, 25,011-13 (HUDALJ Dec. 21, 1989), *aff'd,* 908 F.2d 864 (1990).

Ms. Wegner was "very excited" about buying the townhouse. Her excitement quickly turned to "panic" upon reading the restrictive language in the Declaration and H.S.A. A portion of that panic, however, was caused by the legally enforceable pet restriction, in addition to the unlawful restriction on children. Moreover, the panic was short-lived. Immediately after receiving the Declaration and H.S.A., Ms. Wegner contacted her realtor, Mr. DuFour, to find out about the restrictions. When Mr. DuFour informed her that the restrictions were not enforced, she continued to make plans to purchase the townhouse.

After removing the contingency from her offer, Ms. Wegner contacted Mr. Schuster who told her that her daughters would be the only children at the complex and that they might feel uncomfortable. Ms. Wegner thought the comment irrelevant to their discussion on the pet restriction. She was insulted because she thought that Mr. Schuster had "something against" her children. In addition, Ms. Wegner's daughters knew about the comment. Ms. Wegner testified that she kept them informed "every step of the way." Tr. 1, p. 145. Ms. Wegner's daughters asked their mother why Mr. Schuster would have made such a comment. Ms. Wegner was unable to answer their inquiries. *Id.*

Respondents' written and oral comments caused Ms. Wegner to "panic" and feel insulted. Jessica and Ericka were perplexed as to why Mr. Schuster would have made a comment that could reasonably be interpreted as discouraging their residency solely because they were children. However, there was no evidence of severe or lasting emotional trauma or any physical manifestations of emotional distress. Accordingly, I conclude that Linda Wegner is entitled to $1,500, and Jessica and Ericka Wegner are entitled to $500 each for their emotional distress. *Cf., e.g., HUD v. Jancik,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,058, 25,569 (HUDALJ Oct. 1, 1993) (Tester was awarded $2,000 for the emotional distress suffered as a result of respondent's inquiries about her race.), *appeal filed,* No. 93-3792 (7th Cir. Dec. 6, 1993).

Civil Penalties

Assessment of a civil penalty is not automatic. *See* House Comm. on the Judiciary, *Fair Housing Amendments Act of 1988,* H.R. Rep. No. 711, 100th Cong., 2d Sess. at 37 (1988). In addition, the following factors must be considered in determining an appropriate amount: (1) the nature and circumstances of the violation; (2) the degree of

Respondents' culpability; (3) the goal of deterrence; (4) Respondents' financial resources; and (5) whether Respondents have previously been adjudged to have committed unlawful housing discrimination. *See id.*; *Jerrard,* 2 Fair Housing-Fair Lending at 25,092.

The nature and circumstances of Respondents' violations warrant imposition of a modest penalty. Respondents did not intentionally discriminate against Complainants. Nevertheless, the Board failed to take any action to eliminate the discriminatory and offensive language (until a Board vote a few days before hearing) despite its knowledge of the unlawfulness of the language. Similarly, although Mr. Schuster did not intentionally discriminate against Complainants by his comment, as president of the Board that would have to approve Ms. Wegner's purchase, he should have been cognizant of the effects that his statement might have.

I find the Board's culpability in failing to eliminate patently discriminatory language greater than Mr. Schuster's comment concerning Ms. Wegner's children. Mr. Schuster's one comment to Ms. Wegner must be contrasted with blatantly illegal written language in documents that the Board knew were distributed to prospective purchasers. Such language could discourage prospective purchasers from attempting to become residents at Coachlight Village.

Association Boards and other housing providers must be deterred from the same sort of knowing neglect that the Board exercised. In addition, housing providers must be aware that they cannot make comments such as the one communicated to Ms. Wegner, no matter what the intent.

The record does not indicate that Respondents are incapable of paying any penalty. Because Respondents have not "been adjudged to have committed any prior discriminatory housing practice," the greatest penalty that may be assessed is $10,000. 42 U.S.C. § 3612(g)(3)(A). I find that the maximum of $10,000 is not warranted here. Based upon consideration of the five elements, I conclude that Mr. Schuster should be assessed a civil penalty of $750.00 and that the Association should be assessed a penalty of $1,500.00.

Injunctive Relief

Once a finding of discrimination is made, an administrative law judge may order injunctive relief. Such relief is intended to eliminate the effects of past discrimination, prevent future discrimination, and place the aggrieved persons back in the positions they occupied prior to 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; *see also Blackwell,* 908

F.2d at 874. The provisions of the following Order serve all of these purposes.

Conclusion

The preponderance of the evidence demonstrates that Respondents Coachlight Village Townhouse Association and Raymond J. Schuster discriminated against Complainants Linda, Jessica, and Ericka Wegner on the basis of familial status in violation of 42 U.S.C. § 3604(c) and 24 C.F.R. § 100.75(a). Complainants suffered actual damages for which they shall be compensated. Further, Respondents will be assessed civil penalties, and injunctive relief will be ordered.

ORDER

It is hereby ORDERED that:

1. Respondents' Motion to Strike is *granted.*

2. Respondents' Motion to Dismiss is *denied.*

3. Respondents are permanently enjoined from discriminating with respect to housing because of familial status. Prohibited actions include, but are not limited to: making, printing, or publishing, or causing to be made, printed, or published, any notice or statement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on familial status.

4. Within sixty (60) days of the date on which this Order becomes final, Respondents shall eliminate any discriminatory language, which restricts occupancy because of familial status, from the Declaration, H.S.A., and any other condominium documents that are disseminated to prospective purchasers.

5. Within thirty (30) days of the date on which this Order becomes final, Respondents shall pay: $1,500.00 in actual damages to Complainant Linda Wegner to compensate her for her emotional distress; $500.00 in actual damages to Complainant Jessica Wegner to compensate her for her emotional distress; and $500.00 in actual damages to Complainant Ericka Wegner to compensate her for her emotional distress.

6. Within thirty (30) days of the date on which this Order becomes final, Respondent Raymond J. Schuster shall pay a civil penalty of $750.00 to the Secretary of HUD.

7. Within thirty (30) days of the date on which this Order becomes final, Respondent Coachlight Village Townhouse Association shall pay a civil penalty of $1,500.00 to the Secretary of HUD.

This Order is entered pursuant to 42 U.S.C. § 3612(g)(3) and 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 of HUD within that time.

SAMUEL A. CHAITOVITZ
Administrative Law Judge