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
Barbara King,

Charging Party,

v.

Jeff Edelstein,

Respondent.

HUDALJ 05-90-0821-1
Decided: December 9, 1991

Michael Kalven, Esquire
For the Government

David M. Neubauer, Esquire
For the Respondent

Before: THOMAS C. HEINZ
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This proceeding arises out of a complaint filed by Barbara King ("Complainant") alleging that Jeff Edelstein doing business as "Morse Creek Commons" violated the Fair Housing Act, 42 U.S.C. Sec. 3601 *et seq.,* (sometimes "the Act") by denying her and her child the opportunity to rent an apartment because of familial status. 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 against the Respondent on April 10, 1991.[1] The charge alleged violations of sections 804 (a), (b) and (c) of the Act (42 U.S.C. Secs. 3604(a), (b), and (c)).

An oral hearing was held in Columbus, Ohio, on July 30, 1991, at the close of which the parties were ordered to file proposed findings of fact, conclusions of law, and briefs in support thereof. The last brief was filed October 8, 1991.

Findings of Fact

[1] Although "Morse Creek Commons" was named in the Charge as a separate Respondent, that term is merely a name under which Respondent Jeff Edelstein conducts business. As recognized by the Government on brief, "Morse Creek Commons" is therefore not a separate legal entity and cannot denote a separate Respondent.

1. Barbara King is a single mother with a daughter who was 12 years old at the time of the hearing. She works full time managing residential property for Ohio State University in Columbus, Ohio, where she is also a part-time student in Ohio State's College of Business. Tr.5-6.[2]

2. For more than ten years, Jeff Edelstein has been the sole owner and operator of "Morse Creek Commons," a 70-unit complex of two-bedroom townhouses located in Columbus, Ohio. Tr.65, 96.

3. While living in the "Parliament Ridge" apartment complex in Columbus, Ohio, Complainant began looking for different housing for herself and her daughter in January of 1990. Sometime during April of 1990 she telephoned Morse Creek Commons to inquire about the availability of a unit and spoke with Respondent. During this conversation, Respondent explained the features of the townhouses, and stated that the rent was $325.00; but he made it clear to Complainant that he did not want to rent to people with children over the age of five. Tr.11.

4. After her telephone conversation with Respondent, Complainant spent an unspecified number of hours looking for another place to live. On August 4, 1990, she signed a lease for a townhouse in a development called "Springhouse Apartments," into which she and her daughter moved on August 12, 1990. They were still living at Springhouse Apartments at the time of the hearing. Tr.16. Complainant's rent for the first year of the lease was $359.00 per month. Tr.18.

5. The Springhouse Apartments' location requires Complainant to drive approximately ten minutes longer to get to work than it would have taken her to drive from Morse Creek Commons, which is three miles closer to the Ohio State University campus than Springhouse Apartments. Tr.18.

6. Complainant was paying $375.00 per month rent on a month-to-month lease for her Parliament Ridge apartment when she began her search for different housing in January of 1990. Tr.11.

7. With the exception of a short visit about ten years ago, Complainant has never visited Morse Creek Commons. Tr.7-8.

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[2]The following reference abbreviations are used in this decision: "Tr." for "Transcript"; "SX." for "Secretary's exhibit"; and "RX." for "Respondent's exhibit."

8. The lease form used by Respondent for tenants at Morse Creek Commons provides, *inter alia*, that "[c]hildren, under the age of eighteen (18) years of age, are not permitted in the swimming pool or adjacent area." SX.2, p.12.

9. For several years Respondent has run an advertisement in the Sunday edition of a local newspaper that includes the language, "1 Child, 1 Pet." RX.1; Tr.67-68.

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 mother of a 12-year-old daughter, Complainant falls within this definition.

The Act makes it unlawful:

> [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of ... familial status ....

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[3]In amending the Act, Congress recognized that "families with children are refused housing despite their ability to pay for it." H.R. Rep. No. 711, 100th Cong., 2d Sess., at 19 (1988). Congress cited a survey finding that 25 percent of all rental units exclude children and 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.

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

The Act also 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).

Respondent Violated Section 804(c) of the Act

In an April 1990 telephone conversation between Respondent and Complainant, Respondent made at least one statement evidencing an intent to discriminate against families with children. In the words of the Complainant, Respondent said, "[W]e do not rent to people with children over the age of five ... [,] a policy based on an accident that had happened at the apartment building." Tr.11. The basic thrust of that telephone conversation was confirmed in a telephone call later the same day between Respondent and Complainant's supervisor at work, Ken Payne. According to Mr. Payne, when he represented to Respondent that he was single and looking for "a quiet environment, an adult community," Respondent indicated "that wouldn't be a problem since basically they had a policy against permitting children." Tr.41-42.

HUD investigator Gordon Patterson interviewed numerous Morse Creek Commons tenants as well as Respondent and Ken Massey, a Morse Creek Commons employee who spent one to three hours every day answering the telephones for Respondent. Tr.52, 62, 92-93. Mr. Patterson testified that he spoke with Respondent concerning the discrimination complaint filed by Complainant on several occasions. Respondent first denied that he would not rent to families with children over the age of five. Rather, he claimed he refused to rent only to families with more than two children

over five years of age. Tr.46. In a later conversation Respondent said he would rent to anyone who insisted, but "that if they had older children he would steer them to other places because there had been some sort of accident [involving a child in the past.]" Tr.47. According to Mr. Patterson, Respondent reiterated that admission in a third, highly argumentative conversation in which Respondent angrily conceded "that when someone calls and if they have kids over the age of five that he tells them that they should rent somewhere else because he's concerned about their safety." Tr.49.

Respondent confirmed Mr. Patterson's testimony while attempting to justify and explain his policy in his own testimony at hearing. Tr.79. He testified:

> Okay. At that time we'd say [to a prospective tenant], well, do you have children? If they say yes, okay, well, how old are they? Well, they're "x" number of age. Okay. Well, we don't have any -- if they're over the age of adult supervision, per se, and when that would be, at that time we're probably saying around five, four or five, because we don't have good play facilities that we would suggest that you go somewhere else because we don't -- we're looking out for the well being of the children because we don't want there to be a death or a maiming with the type of clientele and people coming through there.

Respondent's policy against families with children over the age of five cannot be justified on safety grounds. Even if safety concerns may in some circumstances justify a landlord's attempt to discourage a prospective tenant from renting, Respondent has not demonstrated that his concerns were well-founded in the instant case. He said that only one accident involving an auto and a child had occurred on the premises in more than ten years and that he had no memory of the circumstances of that accident. He could not recall the nature or extent of the injuries (except that no death occurred), the age of the child, or whether the accident precipitated a money claim for damages. Tr.66, 102. Experiencing one apparently minor accident in more than a decade does not justify attempting to preclude all children over the age of five from living at Morse Creek Commons. In short, Respondent's stated safety concerns appear baseless on this record.

Mr. Patterson's conversations with Morse Creek Commons tenants and with Ken Massey regarding Morse Creek Commons rental policies further corroborate the conclusion that Respondent did not want to rent to families with children over infant age. Tr.50-52, 56.[4] That desire is reflected in the fact that out of 27 families with children

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[4]Ken Massey's hearing testimony claim that he did not discourage families with children from renting at Morse Creek Commons cannot be credited. He conceded that he told prospective tenants with children

who were or had been tenants at Morse Creek Commons, Mr. Patterson found only two families whose children were older than five when they moved in, and in both cases the children were nearing adulthood when their tenancies began. SX.6.[5] In short, Respondent unjustifiably intended to discourage families with children over the age of infancy from renting at Morse Creek Commons, and he succeeded. By telling Complainant, a parent with a 12-year-old child, that he did not want to rent to families with children over the age of five, Respondent made, in the words of the statute, a "statement ... with respect to the ... rental of a dwelling that indicates [a] preference, limitation, or discrimination based on ... familial status." 42 U.S.C. Sec. 3604(c). That statement violated the Fair Housing Act.

Respondent's advertisements in a local newspaper also violate the Act. Respondent regularly runs an advertisement seeking tenants with no more than "1 Child, 1 Pet." That advertisement on its face expresses a "preference, limitation or discrimination based on ... familial status ...." Respondent attempts to justify the language in the advertisement by arguing that it merely means, "children welcome." Tr.94. That argument has no merit; it is refuted by the plain language of the advertisement and by the fact that Respondent clearly did *not* welcome children of all ages (as we have seen) or in all numbers.[6] The language of the advertisement restricting tenants to one child, in addition to Respondent's testimony that he rents to families with no more than *two* children (Tr.95-96), proves that Respondent did not welcome children without limitation. Furthermore, whether or not Respondent is willing to rent to families with *two* children, the evidence does not show that limiting tenants to *one* child is a reasonable occupancy requirement. Therefore, the advertisement cannot be justified on that ground either.[7] Respondent's advertisement accordingly violates section 804(c) of the Act (42 U.S.C. Sec. 3604(c)).

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that the place was unsafe for children. These statements on their face are discouraging to families with children and cannot be justified as purely objective statements of fact under the circumstances of this case.

[5]One family had a daughter 19 or 20 when they first came to Morse Creek Commons. The other's son was 16 or 17. Tr.50-51.

[6]Language subjected to section 804(c) analysis is to be interpreted naturally as it would be interpreted by an ordinary reader. *United States v. Hunter,* 459 F.2d 205, 215 (4th Cir.), *cert. denied,* 409 U.S. 934 (1972); *Ragin v. New York Times Co.,* 923 F.2d 995, 999 (2nd Cir.), *cert. denied,* ___ U.S. ___, 112 S.Ct. 81 (1991).

[7]This decision expresses no opinion whether or not restricting tenants to two children would be a reasonable occupancy standard for Morse Creek Commons.

Respondent Violated Section 804(b) of the Act

Respondent's lease form prohibits children under the age of 18 from using the swimming pool. SX.2, p.12. That prohibition unlawfully discriminates against the children of tenants by depriving them of the privilege of using the swimming pool enjoyed by other residents of Morse Creek Commons. Stated otherwise, the lease discriminates in the provision of services and facilities based on familial status, in violation of section 804(b) of the Act (42 U.S.C. Sec. 3604(b)). Contrary to Respondent's argument, section 804(b) of the Act protects any "person", not just adults.

Respondent testified that he thought his lease complied with Ohio law. But that law is considerably less restrictive than Respondent's lease. Local law requires an adult to accompany any child under the age of 18 using a swimming pool like the pool at Morse Creek Commons where there is no lifeguard on duty. Government's Brief, Exhibits A, B, and C. Local law regulating swimming pool use therefore does not provide Respondent a refuge from liability under the Fair Housing Act.

Respondent Violated Section 804(a) of the Act

Moreover, Respondent violated section 804(a) of the Act (42 U.S.C. Sec. 3604(a)) when he suggested prospective tenants with children over the age of five should look elsewhere for housing. Tr.47, 79. That behavior constitutes unlawful "steering," a type of violation that falls within the "otherwise make unavailable" proscriptions of section 804(a).[8] Steering is not an outright refusal to rent to a person within a class of people protected by the statute; rather it consists of efforts to deprive a protected homeseeker of housing opportunities in certain locations. *See generally* Schwemm, *Housing Discrimination Law and Litigation*, Sec. 13-11 (1990). Contrary to Respondent's alleged justification for his conduct, a landlord cannot justify steering families with children away from housing by groundlessly claiming that the housing would be unsafe for resident children. As a general rule, safety judgments are for informed parents to make, not landlords.

Remedies

Section 812(g)(3) of the Act provides that upon a finding that 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

[8]Steering also violates section 804(f)(1) of the Act, but the Government did not allege a violation of that section in the instant case.

U.S.C. Sec. 3612(g)(3). Respondent has violated the Act through conduct that has caused actual, compensable damages to Complainant.

Complainant's Damages

The Government seeks on behalf of Complainant a total of $10,528.00 in damages in several categories: $1,080.00 in out-of-pocket damages, consisting of $720.00 in extra rental expense and $360.00 in extra travel costs; $2,000.00 for inconvenience; $2,500.00 for lost housing opportunity; and $5,000.00 for emotional injuries.

Out-of-pocket Damages

The Government contends Complainant suffered extra rental costs because of Respondent's unlawful discrimination totalling $720.00, consisting of $600.00 for the difference in rent between Morse Creek Commons and Springhouse Apartments for a year, and $120.00 for the difference in rent between Morse Creek Commons and Parliament Ridge for the months of June and July when she would have been in Morse Creek Commons but for Respondent's conduct. Expenses incurred in finding alternate housing and the difference in cost between the rent of a dwelling made unavailable by unlawful discrimination and the cost of more expensive alternate housing may be recovered, if the evidence shows that the expenses and the choice of alternate housing were reasonable. *Hamilton v. Svatik*, 779 F.2d 383, 388-89 (7th Cir. 1985) ($500 for additional rent and transportation expenses); *Young v. Parkland Village, Inc.*, 460 F.Supp. 67, 71 (D.Md. 1978) ($88 in rent differential); *Brown v. Ballas*, 331 F.Supp. 1033 (N.D. Tex. 1971) (up to $750 for lost work and expenses in finding alternative housing).

Complainant testified that she spent considerable time and energy from April until July of 1990 before she found Springhouse Apartments. Respondent testified that there are thousands of rental dwellings within a small radius of Morse Creek Commons, but he did not show that any of those dwellings were in fact available between April and August of 1990 at a cost lower than Complainant paid at Springhouse Apartments or that any of those dwellings were more comparable to Morse Creek Commons than to Springhouse Apartments. Tr.85. Although it would have been preferable for the Government to have adduced more definitive proof detailing the number of hours spent by Complainant searching for alternate housing, the number and descriptions of dwellings investigated, and the means of investigation, I am persuaded Complainant made a reasonable effort to find comparable alternate housing at the lowest possible cost.

The Government requests a $600 damage award for the extra rental cost at Springhouse Apartments for a year, calculated at the rate of $50 per month. However, the difference between a year's rent at Springhouse Apartments and a year's rent at Morse Creek Commons would have been only $408. The rent at Springhouse Apartments was $359 per month; the rent at Morse Creek Commons would have been $325 per month, as we know from Complainant's testimony that Respondent told her in April of 1990 that the rent at Morse Creek Commons was $325 per month, an amount she felt was "great." Tr.11. In other words, she expected to pay $325 per month at Morse Creek Commons, not $309 per month, the amount implicit in the Government's request for $600. Complainant therefore will be awarded $408 ($359 - $325 = $34 x 12 = $408).

In addition, Springhouse apartments is three miles farther from Complainant's work than Morse Creek Commons. As a result, over the course of a year, Complainant drove approximately 1,500 extra miles, for which she will be awarded $360 (250 days x 6 miles = 1,500 x $.24 [the Federal mileage reimbursement rate in 1990-1991] = $360).

Housing discrimination victims also may be awarded damages for having to live in unsatisfactory housing. *Woods-Drake v. Lundy*, 667 F.2d 1198, 1203 (5th Cir. 1982); *Pollitt v. Bramel*, 669 F.Supp. 172, 176-77 (S.D. Ohio 1987). Complainant wanted to move June 1, 1990. After being dissuaded from renting at Morse Creek Commons, she did not sign a lease at Springhouse Apartments until August. She had to stay at Parliament Ridge (which was unsatisfactory housing for a variety of reasons) for two extra months because of Respondent's unlawfully discriminatory conduct. Although Respondent testified that he cannot be certain whether a particular apartment will become available for new tenants until a matter of days before vacancy, it is not overly speculative to conclude that Complainant could have moved to Morse Creek Commons on June 1, 1990. Respondent presumably would not have advertised for new tenants on a regular basis without specifying an availability date unless he believed he would have vacancies in the near future. Complainant's rent at Parliament Ridge was $375 per month during the last months she and her daughter lived there. Complainant therefore will be awarded $100 for the difference in rent between Parliament Ridge and Morse Creek Commons for the months of June and July, 1990 ($375 - $325 = $50 x 2 = $100).

Inconvenience and Emotional Distress

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

The Government prays for an award of $2,000 to compensate Complainant for the "inconvenience" she suffered as a result of Respondent's unlawful conduct, citing four elements:

> 1. the extra time and energy spent providing parental counseling and support for her daughter who allegedly reacted badly to the move to a different school;
>
> 2. the extra time spent commuting to and from work while living at Springhouse Apartments for a year;
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> 3. the time and energy spent during May, June, and July looking for a place to live after her telephone conversation with Respondent; and
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> 4. the time spent prosecuting this case.

If Complainant had moved to Morse Creek Commons, her daughter would have been able to continue going to school in the same school district with the same group of friends (although she and her friends would have left grade school and entered middle school in the fall of 1990). Tr.18-20. The Government requests an award of damages for

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[9] *See, 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) (hereinafter *Murphy*); *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)(hereinafter *Marable*); *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977).

[11] *See, 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).

the time and energy Complainant says she spent providing counseling and support for her daughter, who, according to her mother, earned markedly lower grades and reacted badly after the change of schools and friends occasioned by the move to Springhouse Apartments. Tr.19-20. That request cannot be honored, because the Government did not convincingly establish the causal links between Respondent's conduct, the daughter's lower school marks and alleged distress, and Complainant's alleged expenditure of additional time and energy dealing with her daughter's problems. Complainant's daughter did not testify, nor did any teacher or other expert testify that the daughter's behavior was caused by changing to a different school in a different school district. In the absence of such evidence, it would be overly speculative to conclude that Respondent's conduct was the sole cause or the significantly contributing cause of the daughter's alleged problems, and by extension, the reported damages claimed by Complainant as a consequence of her daughter's behavior.

The Government has demonstrated that Complainant spent an additional 20 minutes per day traveling to and from work as a result of Respondent's unlawfully discriminatory conduct.[12] That extra commute time adds to more than 83 hours during the course of a year. (20 minutes x 250 days = 5,000 minutes / 60 minutes = 83.3 hours). Ten dollars per hour is reasonable compensation for this additional time.[13] Complainant therefore will be awarded $833 for her additional commute time.

Complainants who are unlawfully dissuaded from renting housing should receive compensation for the time and energy spent looking for alternate housing and prosecuting their cases. *See, e.g.*, *HUD v. George*, Fair Housing-Fair Lending (P-H), para. 25,157 at 25,166 (HUDALJ Aug. 16, 1991). The record is clear that Complainant was significantly "inconvenienced" by prosecuting this case and searching for housing after her April 1990 telephone call to Respondent. It would have been preferable if the Government had specified precisely how many hours were spent and what expenses were incurred by Complainant while looking for alternate housing and prosecuting this case. Nevertheless, she must be awarded significant compensation for that significant inconvenience, even though the award may have been greater if the proof had been more specific.

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[12]There is no merit to Respondent's complaint that the additional travel time should have been no more than three to five minutes each way. His calculations are based on the assumption that Complainant could traverse the additional distance using the freeway, but Complainant testified that she does not use the freeway and Respondent conceded that the freeway would not be a good route during rush hours. Tr.76.

[13]Evidence showing Complainant's pay per hour, her valuation of her leisure time and her activities during non-work hours would have been relevant and useful information for this calculation.

The Government requests $5,000 to compensate Complainant for emotional injuries. There are two components to this request: the first concerns the emotional distress Complainant's daughter allegedly suffered as a result of having to change schools and friends. This component of the request cannot be credited for the reasons discussed *supra*. The second component focuses on the two extra months Complainant was obliged to remain living at Parliament Ridge beyond the time she would have lived there if Respondent had not discouraged her from renting at Morse Creek Commons. According to Complainant's testimony at the hearing, she wanted to move from Parliament Ridge because the apartment had a number of maintenance problems; she wanted to find a place where the rent would be lower; her relationship with the man with whom she had been living for several years was coming to an end; and she feared a repeat of a violent confrontation between her boyfriend and neighbors that had ended in her front door being "bashed in." Tr.8-9. Respondent contends (and Complainant concedes) that before the hearing the only reason she had given Respondent for wanting to move from Parliament Ridge was her desire to find a less expensive place to live so that she could save money to buy a house. Tr.24-25. Nevertheless, the preponderance of evidence in the record demonstrates that Complainant's housing situation was unsatisfactory during the months of June and July of 1990. That is enough to support an award of more than nominal damages for whatever emotional distress she experienced during this period. Complainant will be awarded $1,000 for the expenditure of time and energy and the inconvenience and emotional distress caused by Respondent's unlawfully discriminatory conduct and by Complainant's prosecution of this case.

Lost Housing Opportunity

The Government requests an award of $2,500 to compensate Complainant for being:

> denied the opportunity to negotiate for and rent at Morse Creek Commons even though it would have been less expensive for her economically, more convenient to her work, and would have caused her daughter less of a trauma.

Brief, p.29. As discussed *supra*, Complainant will be compensated for the increased cost of the Springhouse Apartments housing and the greater cost and inconvenience caused by living three miles farther from her work, but she cannot receive compensation for her daughter's purported "trauma." Moreover, the record shows that Respondent discouraged and dissuaded Complainant from pursuing negotiations but he cannot fairly be said to have "refused" or "denied" Complainant the opportunity to negotiate for and rent housing. In any event, whether Complainant was discouraged from pursuing negotiations or denied an opportunity to negotiate, in both formulations the language does not describe

a category of damage separate and distinct from the categories of damage already discussed. Either formulation constitutes a global definition of this case as a whole, not a subset of the whole. Accordingly, inasmuch as the Government has failed to demonstrate how Complainant suffered any damages separate from those already discussed, no separate award will be made for a "lost housing opportunity."

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). Determining an appropriate penalty requires consideration of five factors: (1) the nature and circumstances of the violation; (2) the goal of deterrence; (3) whether the respondent has previously been adjudged to have committed unlawful housing discrimination; (4) respondent's financial resources; and (5) the degree of respondent's culpability. *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 Respondent's violations do not merit imposition of the maximum possible penalty. Respondent's unlawful discrimination apparently was not motivated by malice toward the Complainant personally or toward families with children in general, but rather was the result of a baseless universal policy ostensibly designed to preclude injuries to children. Further, the harm done to Complainant, although significant, was not extreme. However, Respondent is a professional housing provider who should have known in April of 1990, more than a year after the Fair Housing Act was amended, that the Act prohibits discrimination against families with children. Accordingly, a significant civil penalty should be imposed in this case.

Deterrence

The Respondent and other similarly situated housing providers need to be deterred from engaging in any form of discriminatory treatment of families with children. Housing providers must understand that they cannot justify discrimination using groundless safety concerns. Imposition of an appropriate civil penalty should send a clear message 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).

Respondent's Previous Record

There is no evidence that the Respondent previously has been found to have committed an unlawful discriminatory housing practice. Consequently, the maximum civil penalty that may be assessed against 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).

Respondent's 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 only evidence bearing on Respondent's financial condition shows he is the sole owner of Morse Creek Commons, a complex of 70 two-bedroom townhouses. In sum, the record does not contain any evidence indicating that Respondent could not pay a civil penalty without suffering undue hardship.

Culpability

Respondent was solely responsible for the management and operation of Morse Creek Commons, including the formulation and administration of the policy under which Complainant was damaged. He is a real estate professional with many years' experience, and, as noted above, he should have been fully aware of the proscriptions against discrimination based on familial status contained in the Fair Housing Act, but he convincingly claims he did not knowingly violate the Act. His offenses are only marginally mitigated by the fact that he has changed some, but not all of his unlawful practices since the violations occurred.[14]

* * *

[14]As shown, *supra,* Respondent continues to run improper advertisements. Furthermore, he apparently has not changed the lease provisions concerning use of the swimming pool by children under the age of 18.

The Government seeks a $10,000 civil penalty against the Respondent, the maximum permissible in this case. Maximum penalties should be reserved for the most egregious cases, where willful conduct causes grievous harm, that is, where all factors argue for the maximum penalty. This case does not fall into that category. A civil penalty of $5,000 will 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.[15] 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.

Conclusion

The preponderance of the evidence shows that Respondent discriminated against Complainant on the basis of familial status, in violation of sections 804(a), (b), and (c) of the Act. Complainant suffered actual damages for which she will receive compensatory awards. Further, to vindicate the public interest, injunctive relief will be ordered, as well as a civil penalty against Respondent.

Order

It is hereby **ORDERED** that:

1. Respondent, his agents, and employees are permanently enjoined from discriminating against Complainant Barbara King, any member of her 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 her family. Prohibited actions include, but are not limited to, all those enumerated in the regulations codified at 24 C.F.R. Part 100 (1991).

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[15] "Injunctive 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*, 704 F.2d at 1221).

2. Respondent, his agents, and employees shall refrain from using any lease provisions, rules and regulations, and other documentation or advertisements that indicate a discriminatory preference or limitation based on familial status. Respondent shall revise his lease form to remove the provision prohibiting persons under the age of 18 from using the swimming pool. All current tenants shall be given a lease amendment to remove the prohibition. Any limitations on use of the swimming pool shall be in accordance with State and local law and shall not otherwise discriminate against families with children.

3. Consistent with 24 C.F.R. Part 109, Respondent 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, Respondent shall display the HUD fair housing poster in a prominent place in the principal office of Morse Creek Commons and in any other rental office where Respondent conducts business.

4. Respondent shall institute internal recordkeeping procedures with respect to the operation of Morse Creek Commons and any other real properties owned or managed or acquired by Jeff Edelstein adequate to comply with the requirements set forth in this order. Respondent 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 Respondent from the inspection of such records.

5. On the last day of each sixth month period beginning January 31, 1992 (or two times per year), and continuing for three years from the date this order becomes final, Respondent 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 Morse Creek Commons 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 Morse Creek Commons.

b. A list of vacancies during the reporting period at Morse Creek Commons including: the address of the unit, the number of bedrooms in the unit, the date Respondent, his agent or employee was 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 Respondent, his agents or employees 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, Respondent shall pay actual damages to Barbara King in the amount of $2,701, consisting of: $508 for rent differential, $360 for mileage differential, $833 for extra commuting time, and $1,000 for inconvenience and emotional distress.

7. Within ten days of the date upon which this order becomes final, Respondent shall pay a civil penalty of $5,000 to the Secretary of HUD.

8. Within ten days of the date this order becomes final, Respondent 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.

9. Respondent 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.

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.

/s/

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THOMAS C. HEINZ
Administrative Law Judge

Dated: December 9, 1991