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
Donna Graham-Baker

Charging Party,

v.

Shirley and Abraham Leiner
a/k/a Abraham and Shirley Unger
and F.M.B.S. Realty Corp.

Respondents.

CORRECTED COPY

HUDALJ 02-90-0051-1
Decision Issued: January 3, 1992

Abraham Leiner, *pro se*
Shirley Leiner, *pro se*

Sharon Cherry, Esq.

Louis Smigel, Esq.
For the Secretary

Before: WILLIAM C. CREGAR
Administrative Law Judge

INITIAL DECISION AND ORDER

This matter arose as a result of a complaint of discrimination based upon familial status and race in violation of the Fair Housing Act as amended, 42 U.S.C. Secs. 3601, *et seq*. ("Fair Housing Act" or "Act") and 24 C.F.R. Parts 103 and 104. An amended complaint was filed with the Department of Housing and Urban Development ("the Department" or "HUD") on November 21, 1990 . A Determination of Reasonable Cause was made and a Charge of Discrimination filed on behalf of the Complainant by the Secretary of the Department ("Secretary" or "the Government") on March 8, 1991.
A hearing was held in New York, New York, on September 11, 1991.[1] Post-hearing briefs[2] were filed by the parties on November 8, 1991.[3]

The Secretary alleges that Respondents, Abraham and Shirley Leiner, a/k/a Abraham and Shirley Unger and F.M.B.S. Realty Corp. ("FMBS") refused to rent an apartment to the Complainant, Donna Graham-Baker ("Ms. Baker"), because of her pregnancy and because she is black. The Secretary seeks $1,000 as damages for emotional distress, and $1,500 as damages for lost housing opportunity and inconvenience. The Secretary does not seek a civil penalty.

Respondents admit that they refused to rent an apartment to Complainant. They contend she was denied the apartment because she did not have proof of income, had no employment history, lacked a reference from a prior landlord, and threatened and intimidated Ms. Leiner and called her a "bitch" and an "old bitch" during the course of applying for the apartment.

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[1]The hearing was originally scheduled to commence on June 11, 1991. Because of a conflict with another matter on my docket, I rescheduled the hearing to July 1, 1991. As this date approached, the parties agreed to the terms of a settlement and the hearing was indefinitely postponed. The parties were unable to reach a settlement and, by order dated July 18, 1991, I scheduled the hearing to commence on September 11, 1991.

[2]With their Post-hearing Brief, Respondents attached a number of written "exhibits". There is no indication that these allied papers were served on the Secretary. In addition, Respondents have neither moved for the admission of these "exhibits", nor have they demonstrated that they contain "new and material evidence" not readily available before the end of the hearing; that the "evidence" was timely submitted; and that its admission will not unduly prejudice the rights of either the Secretary or the Complainant. 24 C.F.R. Sec. 104.810. Accordingly, neither the attachments to Respondents' Post-hearing Brief, nor any references in Respondents' brief to matters outside the record in this case have been considered in reaching this decision.

[3]The date originally set for the filing of Post-hearing briefs was October 28, 1991. At an October 21, 1991, post-hearing telephone conference call, I granted the Secretary's unopposed request to extend this date to November 8, 1991.

Statement of Facts

Complainant Donna Graham-Baker is a black woman. During October 1989, she lived with and paid rent to her mother. Because she was three months pregnant and, because she felt her mother's rental charges were excessive, she looked for another apartment. Tr. p. 24.[4]

FMBS owns apartment buildings located at 2523 and 2525 Aqueduct Avenue, Bronx, New York. Res. Ex. 1; Tr. pp. 112, 120, 129. Mr. Leiner is the president of the corporation and his wife, Shirley, is employed as a rental agent.[5] Her duties include showing apartments to prospective tenants, answering the telephone, completing leases and interviewing applicants. Tr. p. 121.

Responding to Respondents' advertisement, Complainant telephoned Ms. Leiner on October 24, 1989, and made an appointment to view one of Respondents' units. Sec. Ex. 1; Tr. p. 21. Ms. Leiner requested that they meet at the apartments and that

[4]The following reference abbreviations as used in this decision: "Sec. Ex." for Secretary's Exhibit; "Res. Ex." for Respondents' Exhibit; and "Tr." for transcript.

[5]Mr. Leiner denied knowing the identity of other officers. He claims the company was purchased by others for his benefit and that, although he owns shares in the corporation, he shares ownership with other individuals whom he refused to name. Tr. pp. 129-130, 133-136.

Ms. Baker bring a pay stub. Later that day, Ms. Baker met with Ms. Leiner and was shown an available apartment. After seeing the apartment, Ms. Baker mentioned that she was pregnant. Ms. Leiner asked how she would take care of a baby after it was born. Ms. Baker replied that her grandparents would take care of the child. They then went to the apartment management office where Ms. Baker filled out a rental application. At Ms. Leiner's direction she wrote on the application, "Baby on the way". Sec. Ex. 2; Tr. pp. 19, 57. Before Ms. Baker left, she gave Ms. Leiner the requested recent pay stub. The stub reflected that she was employed by Springmaid and that her annual salary was $23,000. Sec. Ex. 3. Ms. Leiner stated that she would also need a
W-2 from Ms. Baker and that her application would have to be approved by the landlord who was out of town. Tr. p. 20.

On the following day Ms. Baker telephoned Ms. Leiner. Ms. Leiner told her that the landlord was still out of town. Ms. Baker called the next day with the same result. On the following day Ms. Leiner told her that the apartment had been rented. Suspecting prevarication, Ms. Baker asked Diane Tomaschek, a co-worker, to place a call and inquire about the apartment. Ms. Tomaschek placed the call and was told by Ms. Leiner that an apartment similar to that sought by Ms. Baker was available. Following the exchange between Ms. Tomaschek and Ms. Leiner, Ms. Baker telephoned Ms. Leiner revealing that she had asked Ms. Tomaschek to make the call on her behalf and stating that the conversation had been recorded, although it had not been. During the call Ms. Leiner raised her voice, used profanity, made racial remarks, and hung up on Ms. Baker. Tr. p. 21. Ms. Baker called Ms. Leiner back, telling her that "she could either make it easy or could make it hard." Ms. Leiner replied that just because
Ms. Baker was black that she thought she could do anything to anybody. She told
Ms. Baker to "go to hell" and hung up. Tr. p. 22.

On November 17, 1989, Ms. Baker filed a discrimination complaint with HUD. Sec. Ex. 1. Ms. Leiner submitted a signed, written response, dated December 8, 1989, to the complaint in which she stated, "We cannot effort (sic) to rent apartments to persons who appear to be a bed (sic) risk. I know from experience that single women with babies *do not* pay the rent." Sec. Ex. 4. (emphasis in original) Responding to questions posed by the HUD investigator, Frank Della-Penna, Ms. Leiner made additional revealing statements. In the course of a telephone interview conducted on November 22, 1989, she stated:

> These people do not pay their rent. I know that from experience. My husband is in court now because of our tenant's not paying rent. . . These people are very shrewd. . . My daughter is 39 years old with a Phd degree. She has no kids. She wants a career, a home, a job. If you are a responsible person you don't have children. . . These people, they have a dollar, they buy whatever they want, a pair of shoes or a blouse. The last thing they pay is the rent. . . These people, no matter how much their income is, they can't budget. These people, they eat outside, they don't pay rent, they don't clean their apartments, they leave it like a pigsty. . . You put five blacks or Hispanics in an apartment and you have a pigsty.

Sec. Exs. 5a, 5b; Tr. pp. 65-67.

After Ms. Leiner informed Ms. Baker that the apartment was unavailable, she moved into

her great-grandmother's house. She continued looking for an apartment. She moved into her present apartment on January 4, 1990.[6] Respondents' apartment building had the advantage of being within walking distance of a train that she could take to work, an advantage not shared by her great-grandmother's house. While living with her great-grandmother, she has had to hire cabs in order to reach a train station, resulting in an additional commuting cost of $3 to $6 per day. She also had to endure the close association with a relative whom she describes as "nerve-racking". Tr. pp. 25-26. Despite the desirability of Respondents' location, Ms. Baker did not look for other apartments in the same neighborhood as Respondents' apartments. She generally used listing agents who had no listings in Respondents' location. She believed that she could not approach an apartment manager and inquire about a listing without first having gone through an agent. Tr. pp. 53-54.

Respondents presently rent to pregnant women, families with children and blacks. They have rented to 18 black families since December 6, 1989, and presently 33 out of a total of 52 units[7] are occupied by black tenants Res. Ex. 1; Tr. pp. 111-113.[8] Respondents have had problems collecting rent from single women with babies. Tr. p. 124, 128.

Governing Legal Framework

Respondents have been charged with having violated 42 U.S.C. Secs. 3604(a),(c), and (d); and 24 C.F.R. Secs. 100.50(b),(4), and (5); 100.60(a); 100.75 and 100.80(b)(5). Among other things, these sections prohibit certain actions by housing providers taken "because of" or "based on" race and familial status.

Subsection 3604(a) of 42 U.S.C. makes it unlawful "[t]o refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of" race or familial status. Subsection 3604(c) makes it unlawful "[t]o make, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates a preference, limitation, or discrimination based on [race or familial status] . . . or an intention to make any such preference, limitation, or discrimination." It is

[6]Ms. Baker's best friend rather than Ms. Baker entered into the lease. Ms. Baker's explanation for not entering into the lease herself is that because of her job and the large number of medical appointments, she lacked the time. Tr. p. 42. Respondents argue that this explanation is merely a pretext and that the actual reason is that she was unable to qualify for an apartment in her own name. I have no basis upon which to conclude that Ms. Baker's explanation is false, or that it provides a sufficient basis for concluding that she could not qualify as a tenant.

[7]Ms. Leiner gave the following figures: 33 units are occupied by black tenants, 12 by Hispanics, 2 by whites including themselves, and 5 units are vacant. Tr. p. 112.

[8]Respondents attempted to introduce evidence at the hearing regarding the familial and racial composition of their apartments at the time of the alleged discrimination. Because Respondents refused to obey an order compelling the disclosure of this information prior to the hearing, I granted the Secretary's motion to exclude this evidence. *See*, Secretary's First Set of Interrogatories, No. 10; Order of June 3, 1991; Tr. pp. 132, 137-138.

also unlawful "[t]o represent to any person because of [race or familial status] . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." 42 U.S.C. Sec. 3604(d).

Subsections 3604(a) and (d)

Where direct evidence of discrimination is presented, such evidence, if established by a preponderance of evidence, is sufficient to support a finding of discrimination. *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir.), *cert. denied*, 111 S. Ct. 515 (1990). *Secretary of HUD v. Jerrard*, Fair Housing-Fair Lending (P-H) para. 25,005 at 25,087 (HUDALJ Sept. 28, 1990).

Discrimination under Subsections 3604(a) and (d) can also be demonstrated by the application of the three-part test formulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See also, Pollit v. Bramel*, 669 F. Supp. 172, 175 (S.D. Ohio 1987); *Secretary of HUD v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990). The purpose of the analysis required by the three-part test is to insure that a plaintiff has his day in court despite the unavailability of direct evidence of discrimination. The analysis can be summarized as follows:

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

Pollitt, 669 F.Supp. at 175 (quoting *McDonnell Douglas*, 411 U.S. at 802, 804). The elements of a *prima facie* case are not fixed, but rather depend on the particular discrimination alleged to have occurred. *Id.*

If a *prima facie* case is established, the burden of production shifts to Respondents to articulate a legitimate, nondiscriminatory reason for their action. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). If the articulation of a legitimate, nondiscriminatory reason for the challenged conduct raises a genuine issue of fact, the burden again shifts to the Secretary to demonstrate that the articulated reason is a mere pretext. *Asbury v. Brougham*, 866 F.2d 1276, 1279 (10th Cir. 1989); *Seldon Apartments v. HUD*, 785 F.2d 152, 159 (6th Cir. 1986).

Specifically, in the circumstances of this case, a *prima facie* case of familial status discrimination under Subsection (a) of Section 3604 would be demonstrated by proof that: 1) Complainant was pregnant at the time she applied for the apartment; 2) Complainant attempted to rent Respondents' apartment; 3) Respondents, having knowledge of her pregnancy, denied the apartment to Ms. Baker; and 4) the apartment remained available for rent. A *prima facie* case of familial status discrimination under Subsection (d) of Section 3604 would be demonstrated by evidence that 1) Ms. Baker was pregnant; 2) Ms. Leiner knew Ms. Baker was pregnant; 3) Ms. Leiner represented that an apartment was not available; and 4) an apartment was, in fact, available.

In the circumstances of this case, a *prima facie* case of racial discrimination under Subsection (a) would be demonstrated by proof that: 1) Complainant is black; 2) she attempted to rent Respondents' apartment; 3) Respondents, having knowledge of her race, denied the apartment to Ms. Baker; and 4) the apartment remained available for rent. A *prima facie* case of racial discrimination under Subsection (d) would be demonstrated by evidence that 1) Complainant is black; 2) Ms. Leiner knows Ms. Baker is black; 3) Ms. Leiner represented that an apartment was not available; and 4) an apartment was, in fact, available.

Subsection 3604(c)

Proof of a violation of this Subsection would consist of evidence that Respondents, while acting in a commercial capacity, made statements that either indicated a preference, limitation, or discrimination based on familial status race, or indicated the intention to prefer, limit or discriminate based upon Ms. Baker's familial status or race.

If either the direct or circumstantial evidence analysis establishes by a preponderance of evidence that either familial status or race was a significant motivating factor in Respondents' denial of the apartment to Ms. Baker, a violation of the Act has been established. *Secretary of HUD v. Blackwell*, Fair Housing-Fair Lending (P-H) para. 25,001 at 25,006 (HUDALJ Dec. 21, 1989), *affd*. 908 F.2d 864 (11th Cir. 1990);*United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978); *United States v. Peltzer Realty Co.*, 484 F.2d 438, 443 (5th Cir. 1973), *Secretary of HUD v. Jerrard*, Fair Housing-Fair Lending (P-H) para. 25,005 at 25,087 (September 28, 1990).

Discussion

Subsections 3604(a) and (d)

Direct Evidence of Discrimination

Direct evidence of discrimination is the written and oral statements Ms. Leiner made to the HUD investigator, Frank Della-Penna. In her written response to the HUD investigator dated December 8, 1989, she states that "we cannot effort (sic) to rent apartments to persons who appear to be a bad risk," and that she "knows from experience that single women with babies do not pay the rent." Sec. Ex. 4. During
Mr. Della-Penna's November 22, 1989, telephone interview of her, she made references to "these people" not paying their rent and characterized "these people" as being "very shrewd" by spending their earnings on everything but rent. The indefinite reference to "these people" is made definite by her statements that "responsible people don't have children" and that five or more blacks and Hispanics transform an apartment into a "pigsty". It is also clear from the context of the interview that Ms. Leiner was referring to Complainant, a pregnant black woman. These statements evidence stereotyping of mothers with children, blacks (and Hispanics), and they establish that the reason
Ms. Leiner did not want to rent to Ms. Baker was because she is a black, single mother.

Ms. Leiner denies having made these statements, characterizing them as "lies". Mr. Leiner has also attacked Mr. Della-Penna's credibility, claiming that Mr. Della-Penna solicited a bribe by telling Mr. Leiner that if he were given $1,000, the matter would be dropped, or words to that effect. According to Mr. Leiner, the statement was

accompanied by the gesture of his putting his hand under the table. Tr. p. 124. Respondents claim that Mr. Della-Penna fabricated the statements attributed to Ms. Leiner at least in part because of Mr. Leiner's refusal to pay the solicited bribe.[9]

[9]Mr. Della-Penna denies having solicited a bribe by placing his hand under the table or stating that the money should be paid to him. He claims that the discussion of the $1,000 figure occurred during his attempt to conciliate this case, as a figure which, if paid, would settle the case. Tr. p. 80. I credit Mr. Della-Penna's testimony that he did not solicit a bribe.

Mr. Leiner demonstrated a lack of forthrightness regarding an unrelated issue, the ownership and management of F.M.B.S. realty. According to Mr. Leiner, F.M.B.S., a closely held corporation which owns the apartment which he and his wife manage, is owned by others. Despite the facts that the Leiners have been associated with F.M.B.S. for 13 years and that Mr. Leiner is president of F.M.B.S, he denied knowing the names of the either the other owners or the other officers. Tr. pp. 129-130, 133-134. That he was concealing his knowledge of the owners is indicated by his statement that the owners ". . . don't want to be mixed into it. They don't want anything to do with this." Tr. pp. 133-134. Because of the lack of forthright testimony by Mr. Leiner regarding the ownership of F.M.B.S., and based upon my observation of Mr. Della-Penna's demeanor, I credit Mr. Della-Penna's denial rather than Mr. Leiner's assertions.

Mr. Della-Penna's demeanor and direct responses to questions did not manifest false testimony, nor is his testimony contradicted by other record evidence. The oral statements attributed by him to Ms. Leiner are consistent with the signed letter furnished by her to him in which she associates single women with children and non- payment of rent. In contrast to the statement of Mr. Della-Penna, the record reflects that Ms. Leiner testified falsely regarding the authorship of F.M.B.S.'s written response to the HUD investigation, and fabricated a claim that Complainant called her a "bitch" during the course of their conversations.

Ms. Leiner furnished false testimony regarding the authorship of the December 8, 1989, letter sent to Mr. Della-Penna containing the statement that single women with babies do not pay rent. At the hearing she denied having written this letter. She claims that it was written by a friend and that, although she signed the letter, she did not read it prior to signing it. Tr. pp. 85-86. I do not credit this patently absurd claim. Even if it were somehow plausible that someone would sign a response to a claim of discrimination without reading it, her claim at the hearing is contradicted by testimony she gave during a deposition in which she admits to writing, typing, and signing the letter. Tr. p. 92.

In the response to the Charge of Discrimination and at the hearing, Ms. Leiner asserted that she did not rent to Ms. Baker because Ms. Baker called her an "old bitch and a "bitch" during their October 24, 1989, interview and during subsequent telephone conversations. Tr. pp. 108-109. If, as Ms. Leiner contends, Ms. Baker's alleged epithets played a role in her decision not to rent to Ms. Baker, I am confident that she would have brought this to the attention of the investigator at the earliest opportunity. Yet she failed to tell either Mr. Della-Penna that Ms. Baker had used these epithets or, or refer to them in her letter of December 8, 1989. Sec. Exs. 4, 5a, 5b, 6; Tr. p. 143. Based on her failure to mention that Ms. Baker had called her these names, I conclude that
Ms. Leiner fabricated the claim that Ms. Baker used these epithets.

Respondents have introduced evidence that two-thirds of the present occupants of their apartments are black, and that at present their apartments include both pregnant women and families with children. They also aver that they have risked violence and have suffered vandalism from neighborhood whites because of their willingness to rent to blacks. Res. Ex. 1; Tr. pp. 111-113. Accordingly, they argue that these allegations are patently absurd. The evidence of the present racial and familial composition of their apartments does not establish the composition of the apartments as of the date of the alleged discrimination. Because of Respondents' failure to comply with an order compelling discovery, they were not permitted to introduce evidence of the composition of their apartments by race and familial status as of the dates of the alleged discrimination.

Assuming, *arguendo*, that Respondents apartments were occupied by the same number of blacks, pregnant women, and families with children in October 1989 as at present, and that in the past they risked vandalism and violence in order to integrate their apartments, this evidence still would not overcome the direct and unambiguous evidence of stereotyping reflected in Ms. Leiner's statements. These statements establish that Respondents applied a different standard to blacks and pregnant women than to other applicants at the time of Ms. Baker's application.[10]

[10]Respondents' rental to significant numbers of blacks, pregnant women and families with children does not, by itself, establish that they did not intend to discriminate. See, e.g., *Davis v. Mansards*, 597 F. Supp. 334 (N.D. Ind. 1984). In *Mansards*, the Defendants sought to control the Black population by

selecting only those who appeared to be the "most promising". Id. at 345. In addition, even a high percentage of minority occupancy is not dispositive of a claim of intentional discrimination. *Asbury v. Brougham*, Fair Housing-Fair Lending (P-H) Para. 15,635 at 16,266 (10th Cir. January 30, 1989).

Indirect Evidence of Familial Status and Racial Discrimination

The Secretary has established a *prima facie* case of familial status discrimination under Subsections (a) and (d) of Section 3604. Thus, the record reflects that 1) Complainant was pregnant at the time she applied for the apartment; 2) she attempted to rent Respondents' apartment; 3) Respondents, having knowledge of her pregnancy, denied the apartment to Ms. Baker; and 4) the apartment remained available for rent.
The Secretary has also established that 1) Complainant was pregnant at the time she applied for the apartment; 2) Ms. Leiner knew Ms. Baker was pregnant; 3) Ms. Leiner represented that an apartment was not available; and 4) an apartment was, in fact, available.

The Secretary has also established a *prima facie* case of race discrimination under Subsections (a) of Section 3604. The record reflects that 1) Complainant is black; 2) she attempted to rent Respondents' apartment; 3) Respondents, having knowledge of her race, denied the apartment to Ms. Baker; and 4) the apartment remained available for rent. A *prima facie* case of race discrimination under Subsection (d) is demonstrated by evidence that 1) Complainant is black; 2) Ms. Leiner knew Ms. Baker is black; 3)
Ms. Leiner represented that an apartment was not available; and 4) an apartment was, in fact, available.

There is no dispute that Ms. Baker, a black woman, was approximately three months pregnant at the time she applied for the apartment at Respondents' building. Sec. Ex. 1; Tr. p. 23. It is also undisputed that on or about October 24, 1989, Ms. Baker completed an application after being shown an apartment by Ms. Leiner; that Ms. Baker wrote the words "Baby on the way" on her application as well as telling Ms. Leiner she was three months pregnant; and that Ms. Leiner represented that the unit was rented when, in fact, it remained available. Sec. Ex. 2; Tr. p. 19, 21.

Respondents have proffered two non-discriminatory reasons for not renting to Ms. Baker.[11] First, they claim that Ms. Baker was not qualified to rent the apartment because she did not furnish proof of income, a prior employment history, or a prior landlord reference, as she was living with her relatives. Second, Respondents assert that Ms. Baker called Ms. Leiner an "old bitch", a "bitch," and threatened to "knock her out", a statement which so frightened Ms. Leiner that she feared physical violence. Tr. pp. 107-109.

Respondents' asserted reasons for refusing to rent to Ms. Baker are pretextual. With regard to the first assertion, I conclude that Ms. Baker furnished proof of income contrary to Ms. Leiner's claims that Ms. Baker furnished neither the pay slip, nor the

[11]Mr. Leiner proffered a possible third reason. He testified that after their babies were born, single women would typically leave owing rent because they had difficulty carrying their baby carriages up to the third and fourth floor apartments in a building without elevators. Tr. p. 124. There is no evidence that this rationale played a role in the Leiners' decision to decline to rent to Ms. Baker. Furthermore, Ms. Leiner asserted that she subsequently rented the same apartment to a single pregnant woman. Tr. p. 111.

W-2 form with her to the October 24, 1989 interview. Ms. Baker testified credibly that she handed Ms. Leiner her pay slip during the interview and was only asked to obtain the W-2 after she handed Ms. Leiner the pay slip. Tr. p. 20. For the reasons discussed above, I do not find Ms. Leiner to be a credible witness. In addition, Ms. Leiner did not make the claim that she was not given the pay slip in either her December 8, 1989, letter or in her interviews with Mr. Della-Penna. Accordingly, I credit Ms. Baker's testimony that he handed her pay slip to Ms. Leiner.[12] Nor does the record support Respondents' claim that Ms. Leiner's refusal to rent the apartment to Ms. Baker resulted from her lack of employment history or a prior landlord. It has not been Respondents' practice to delve into the employment history of applicants. Their application requests only the identity of the present employer and the address of the current residence. Sec. Ex. 2. Ms. Leiner admitted that they rent to people even if they do not have records of prior employment or of prior apartments. Tr. p. 119. Finally, if Ms. Leiner was truly concerned that Ms. Baker was being ejected by her own relatives, she could have contacted Ms. Baker's mother, Rosemary Graham, whose name and address appear on the application. Sec. Ex. 2. Ms. Leiner told Mr. Della-Penna that she did not do so because she knew "from experience" that "these people" don't pay their rent. Tr. p. 66.

For the reasons discussed above, I do not credit Ms. Leiner's assertion that Ms. Baker called her an "old bitch" and a "bitch". Nor do I credit her statement that she feared that Ms. Baker would harm her. In both her December 8, 1989, written statement and her November 22, 1989, telephone conversation with Mr. Della-Penna, she alludes to threats and harassment on the part of Ms. Baker but fails to mention threats of physical violence. It is also clear from the context of both the letter and Mr. Della-Penna's interview that the threats and harassment to which she refers occurred during the course of Ms. Baker's phone calls, not during the face-to-face interview of October 24, 1989.

The record demonstrates that familial status was one of the factors in Ms. Leiner's decision not to rent to Ms. Baker. Both Mr. and Ms. Leiner recalled bad experiences with both pregnant women and women with children. Thus, Mr. Leiner testified that "as soon as they have a baby, they move out because they don't want to carry the carriage up. We are losing money." He also stated that he has had "quite a few" bad experiences with tenants with babies who moved out when they owed rent. Tr. pp. 124, 128. Ms. Leiner testified that she believed that Ms. Baker would not be able to pay the rent because she was a single, pregnant woman. Tr. pp. 107-108. This belief caused her to deny the apartment to Ms. Baker without attempting to verify her salary or conduct a credit check.

The record also reflects that Ms. Leiner harbored negative views regarding black tenants. As she stated to Mr. Della-Penna, "You put five blacks or Hispanics in an apartment and you have a pigsty." Sec. Exs. 5a, 5b; Tr. pp. 65-67. This statement establishes that race, in addition to familial status, was a factor in Respondents' decision to deny the apartment to Ms. Baker.

Accordingly, a preponderance of the evidence, both direct and indirect, establishes that Respondents discriminated against Ms. Baker because of her familial status and race in violation

[12]Ms. Baker's income was sufficient to enable her to make the monthly rent payments. Her application states that she earned $500 per week. Sec. Ex. 2. Her employer verified her annual salary during October 1989, as being $23,000. Sec. Ex. 3. Ms. Leiner stated that had she known that Ms. Baker earned this amount she would have met Respondents' income qualifications. Tr. p. 113.

of 42 U.S.C. Sec. 3604(a) and (d); and 24 C.F.R. Secs. 100.50(b)(5); 100.60(a); and 100.80(b)(5).

Subsection 3604(c)

In addition to discriminating against Ms. Baker, Ms. Leiner made statements in violation of Subsection 3604(c).[13] During their final telephone conversation, Ms. Leiner told Ms. Baker that, "just because [Ms. Baker] is black, [she] think[s] [she] can do anything [she] want[s] to do to anybody," followed by the phrase, "go to hell". These statements, on their face, convey to an ordinary person Ms. Leiner's conviction that blacks are willing and able to persecute non-blacks who do not agree to their demands.[14] The statements, taken together, convey the additional message that Respondents will not be intimidated by these perceived acts of persecution, i.e, that under no circumstances will Ms. Leiner agree to rent to an individual who, because of her black race, will persecute her. These statements, on their face, demonstrate race-based stereotyping. This stereotyping "indicates . . . discrimination" against Ms. Baker "with respect to" the rental of the apartment "based on" her race in violation of 42 U.S.C. Sec. 3604(c).

The Secretary asserts that the question posed by Ms. Leiner to Ms. Baker regarding her ability to pay the rent after the baby was born violates Subsection 3604(c). Unlike the racially based statements discussed above, this question is not discriminatory on its face. Rather, it purportedly seeks legitimate information about the ability of the prospective tenant to pay the rent. However, the question implies a preference, limitation or discrimination based on familial status. *Secretary of HUD v. Downs*, Fair Housing-Fair Lending (P-H) para. 25,022 at 25,180 (September 20, 1991). Thus, the statement was 1) made to a pregnant woman, and 2) conveyed information which the ordinary person would interpret as discriminatory towards tenants with children, i.e., the statement manifests the conviction that tenants with children cannot or will not pay their rent. It evidences a preconceived opinion that disregards potentially contradictory facts. Accordingly, the Secretary has established, *prima facie*, that the statements were made with the intent to discourage the Complainant from renting the apartment because of her pregnancy.

Respondents may overcome a *prima facie* showing by articulating a legitimate non-discriminatory reason for having made the statement. *Id.* Respondents contend that Ms. Leiner made this inquiry because she believed there was some question of Ms. Baker's ability to pay the rent after the baby was born. She testified that because Ms. Baker

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[13]The Secretary also asserts that two statements, made to the HUD investigator, not to Ms. Baker. also violated Subsection 3604(c). These statements are 1) that "you put five blacks or Hispanics in an apartment and you have a pigsty," and 2) "I know from experience that women with babies do not pay the rent." Determination of Reasonable Cause and Charge of Discrimination, paras. 17, 18; Sec. Post-hearing Brief, p. 12. The Secretary cites no support for his contention that statements made to an investigator are not only evidence of discrimination but are also independent violations of Subsection 3604(c). Since the Secretary has not sought a civil penalty and there has been no showing that Ms. Baker was damaged by these statements, I do not reach this question.

[14]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).

indicated on her application that she had only been on the job nine months,[15] she was concerned that this was an insufficient period in which to earn maternity leave. Additionally, she contends that since Ms. Baker had no record of prior employment and was moving out of her mother's apartment, it appeared to her that Ms. Baker would be more likely to stay home with the baby than to keep her job. Tr. pp. 107-108.

[15]The application reflects that Ms. Baker had been employed for one year, not nine months as claimed by Ms. Leiner. Sec. Ex. 2.

Although Respondents have articulated legitimate, non-discriminatory reasons for asking Ms. Baker how she would manage the rental payments after the baby was born, the record demonstrates that her asserted reasons for asking the question are pretextual. Ms. Leiner had formed a stereotyped, fixed opinion that single, pregnant women cannot pay rent and are, for that reason, unacceptable as tenants. She told Mr. Della-Penna that she did not accept Ms. Baker because she knew "from experience" that "these people" do not pay their rent. Tr. p. 66. Ms. Leiner further stated in her letter of December 8, 1989, that she cannot afford to rent to persons who appear to be a bad risk and that she "knows from experience. . . that single women with babies do not pay the rent." Sec. Ex. 4. Accordingly, the record reflects that she had already decided that Ms. Baker could not pay the rent when she asked the question. This conclusion is further supported by the fact that Ms. Leiner made no effort to contact Ms. Baker's employer or her mother to determine her credit-worthiness.

Accordingly, the Secretary has demonstrated that Respondents violated 42 U.S.C. Sec. 3604(c) and 24 C.F.R. Secs. 100.50(b)(4) and 100.75.

Remedies

Because Respondent violated 42 U.S.C. Secs. 3604(a), (c) and (d), Complainant is entitled to appropriate relief under the Act. The Act provides that where an administrative law judge finds that a Respondent has engaged in a discriminatory practice, the judge shall issue an order "for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief." 42 U.S.C. Sec. 3612 (g)(3).

The Act further provides that the "order may, to vindicate the public interest, assess a civil penalty against the Respondents." 42 U.S.C. Sec. 3612 (g)(3). The maximum amount of such civil penalty is dependent upon whether Respondents have been adjudged to have committed prior discriminatory housing practices.

The Secretary and the Complainant seek $1,000 as compensation for emotional distress, humiliation and embarrassment; $1,500 for lost equal housing opportunity, and inconvenience; and injunctive and other equitable relief. The Secretary does not seek a civil penalty.

Emotional Distress

It is well established that the amount of compensatory damages which may be awarded in a Civil Rights Act case includes damages for the emotional distress caused by the discrimination. *See, e.g.*, *Parker v. Shonfeld*, 409 F. Supp. 876, 879 (N.D. Ca. 1976). Such damages can be inferred from the circumstances of the case, as well as proved by testimony. *See Marable v. Walker*, 704 F.2d 1219, 1220 (11th Cir. 1983); *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977).

Because of the difficulty of evaluating emotional injuries resulting from deprivations of civil rights, courts do not demand precise proof to support a reasonable award of damages for such injuries. *Secretary of HUD v. Blackwell*, Fair Housing-Fair Lending (P-H) para. 25001 at 25,011; *Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241, 1245 (8th Cir. 1983).

In *Marable, supra,* where the defendant challenged the plaintiff's claim for compensatory damages on the basis that it was based solely on mental injuries and that there was no evidence of "pecuniary loss, psychiatric disturbance, effect on social activity, or physical symptoms," the

court stated:

> It strikes us that these arguments may go more to the amount, rather than the fact, of damage. That the amount of damages is incapable of exact measurement does not bar recovery for the harm suffered. The plaintiff need not prove a specific loss to recover general, compensatory damages, as opposed to actual or special damages.

704 F.2d at 1220-21.

Ms. Baker testified credibly that she was "angry", "humiliated", and "embarrassed" by Ms. Leiner's refusal to rent the apartment. Tr. pp. 21-22. She testified that she presently feels that she was unjustly treated and that "this shouldn't happen to anyone." Tr. p. 27. Ms. Baker's reaction to Respondents' discriminatory actions was not unreasonable. Based on the above considerations, Complainant is entitled to compensation for mental distress in the amount sought by the Secretary of $1,000.

Lost Housing Opportunity and Inconvenience

The Secretary has not preferred evidence regarding housing opportunities missed as a result of the Leiners' actions. Nor does the record reflect that Complainant's present residence is inferior in quality or costs more than the Leiners' apartment. Accordingly, the record is insufficient to support any award for lost housing opportunity.

However, the Secretary has demonstrated that Ms. Baker suffered inconvenience as a result of Respondents' actions. After being denied the Leiners' apartment, Ms. Baker continued her search for approximately two months. She moved into her present apartment on January 4, 1990. Tr. p. 53. During this period she lived in her great-grandmother's house and had to endure the behavior of a relative whom she described as "nerve-racking". Tr. p. 25. She was required to pay $3 to $6 per day for cab fare that she would not have had to pay had she moved into Respondents' apartment. Finally, Ms. Baker spent time and effort seeking HUD assistance in redressing her injury, including filling out forms, meeting with HUD officials, and testifying in this matter.

Based upon the above considerations, Complainant is entitled to an award of $1,500 for inconvenience.

Injunctive Relief

An administrative law judge may order injunctive relief, *inter alia*, to insure that the Act is not violated in the future. *Secretary of HUD v. Properties Unlimited, supra* at 25,155 n. 25; *Secretary of HUD v. Blackwell,* 908 F.2d 864, 875, *quoting Marable,* 704 F.2d at 1221. In this case, injunctive and associated equitable relief is appropriate and necessary to eliminate the effects of past discrimination and prevent future discrimination on the part of Respondents. The injunctive relief set forth in the attached Order serves this purpose.

ORDER

Having concluded that Respondents violated 42 U.S.C. Secs. 3604(a), (c) and (d), it is hereby **ORDERED** that:

1. Respondents Shirley Leiner, Abraham Leiner and F.M.B.S. Realty Corp., and their agents and employees are hereby permanently enjoined from discriminating with respect to housing because of race and familial status. Prohibited actions include, but are not limited to:

a. Refusing or failing to sell or rent or refusing to negotiate for the sale or rental of a dwelling to any person because of race or familial status;

b. otherwise making unavailable or denying, a dwelling to any person because of race or familial status;

c. discriminating against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services in connection therewith, because of race or familial status;

d. making, printing or publishing, or causing to be made, printed or published, any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicate any preference, limitation, or discrimination based on race or familial status;

e. coercing, intimidating, threatening, or interfering with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by the Fair Housing Act;

f. retaliating against Complainant Donna Graham-Baker or anyone else for their participation in this case or for any matter related thereto.

2. Shirley Leiner, Abraham Leiner and F.M.B.S. shall cease to employ any policies or practices that discriminate against persons because of race or familial status.

3. Shirley Leiner, Abraham Leiner and F.M.B.S. shall refrain from using any lease provision, rules and regulations, and other documentation or advertisements that indicate a discriminatory preference or limitation based on race or familial status.

4. Consistent with 24 C.F.R. Part 109, Respondents shall display the HUD fair housing logo and slogan in all advertising and documents routinely provided to the public. Consistent with 24 C.F.R. Part 110, Respondents shall display the HUD fair housing poster in a prominent place in the office where rental applications are distributed and prospective tenants are interviewed in the buildings at 2523 and 2525 Aqueduct Avenue, Bronx, New York.

5. Respondents shall institute internal record-keeping procedures with respect to the operation of the apartment buildings at 2523 and 2525 Aqueduct Avenue, Bronx, New York and any other real property managed, leased, or acquired by Respondents, which are adequate to comply with the requirements set forth in this order. These will include all records described in this Order. Respondents will permit representatives of HUD to inspect and copy all pertinent records at any and all reasonable times and upon reasonable notice. Respondents will also permit representatives of HUD to inspect and copy all pertinent records once each year upon reasonable notice. Representatives of HUD shall endeavor to minimize any inconvenience to

Respondents resulting from the inspection of such records.

6. On the last day of every six-month period beginning with date this decision becomes final, and continuing for three years from that date, Respondents shall submit reports containing the following information to the HUD New York Regional Office of Fair Housing and Equal Opportunity, 26 Federal Plaza, New York, N.Y. 10278-0068:

a. A log of all persons who applied for occupancy at any of the properties owned, operated, leased, managed, or otherwise controlled in whole or in part by Abraham Leiner, Shirley Leiner, and F.M.B.S. or any successor entity during the six-month period proceeding the report, to include the name, address, race and familial status of each applicant, the address of the unit applied for, 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 rejection. All applications described in the log shall be maintained at Respondents' office;

b. a list of vacancies during the reporting period at properties owned, operated, leased, managed, or otherwise controlled in whole or in part by Abraham Leiner, Shirley Leiner, and F.M.B.S. or any successor entity, including the address of the unit, the date Respondents were contracted by the unit's owner to lease it (if applicable), the date Respondents were notified that the former tenant would or did move out, the date the unit was again rented or a commitment made to enter into a rental, and the date the new tenant moved in;

c. sample copies of advertisements published during the reporting period, specifying the dates and media used or, if applicable, a statement that no advertisements have been published during the reporting period;

d. a list of all people who inquired in writing, in person, or by telephone about renting a unit, including their names and addresses, the date of their inquiry, the address and description of the unit, and the disposition of their inquiry.

7. Respondents shall post at the F.M.B.S. office or any other offices associated with Respondents or any successor entity, a list of all available units, specifying for each unit its address, rent, and date of availability.

8. Within ten days of the date this Order becomes final, Respondents shall pay compensatory damages to Donna-Graham Baker as follows: $1,000 for emotional distress and $1,500 for inconvenience.

9. Within ten days of the date this Order becomes final, Respondents shall inform all agents and employees of the terms of this Order and educate them as to such terms and the requirements of the Act. All new employees shall be informed of such no later than the evening of the first day of employment.

This **ORDER** is entered pursuant to 42 U.S.C. Sec. 3612(g)(3) and 24 C.F.R. Sec. 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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WILLIAM C. CREGAR
Administrative Law Judge

Dated: January 3, 1992.