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 Metropolitan Milwaukee Fair Housing Council, Inc.,

Charging Party,

v.

Kenneth S. Wilkowski, Sr.,

Respondent.

CORRECTED COPY

HUDALJ 05-90-0931-1
Dated: May 18, 1993

Kenneth S. Wilkowski, Sr., pro se

Katherine L. Charlton, Esquire
For Complainant

Antoinette Barksdale, Esquire
For the Government

Before: THOMAS C. HEINZ
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This proceeding arises out of a complaint filed by Metropolitan Milwaukee Fair Housing Council, Inc., ("Complainant") alleging that Kenneth S. Wilkowski, Sr., ("Respondent") violated the Fair Housing Act, 42 U.S.C. § 3601

et seq. (sometimes "the Act"), by placing a classified newspaper advertisement in the *Hartford Times-Press* that stated a preference, limitation, and discrimination on the basis of familial status. The Department of Housing and Urban Development ("HUD," "the Secretary," or "the Charging Party") investigated the complaint, and after deciding that there was reasonable
cause to believe that a discriminatory act had occurred, issued a Charge of Discrimination against the Respondent on September 30, 1992, alleging violations of § 804(c) of the Act (42 U.S.C. § 804(c)) and §§ 100.50(b)(4), 100.75(a), (c)(1) and (2) of the regulations codified in Part 24 of the Code of Federal Regulations.

Respondent filed an Answer to the Charge on December 17, 1992.[1] After Complainant was granted permission to intervene, an oral hearing was held on January 12, 1993, in Milwaukee, Wisconsin, 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 received March 19, 1993.

Findings of Fact

1. Complainant is a private, nonprofit organization with four major programs: counseling victims of housing discrimination; providing a variety of educational and informational services concerning housing; investigating housing discrimination complaints received from members of the community; and researching housing discrimination patterns in the greater Milwaukee area. TR. 6-7.[2]

2. At all times material herein, Respondent was the sole owner of a two-unit residential townhouse located at 523 and 525 East Avenue, Hartford, Wisconsin. Stipulation; TR.1.

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[1]Respondent's Answer was filed untimely; it should have been filed on or before October 30, 1992. On December 10, 1992, before Respondent filed his Answer, the Charging Party moved for a default judgment based on Respondent's failure to prosecute his case. Although Respondent's failure to file a timely Answer could have justified a default Order, the Charging Party's motion was denied because Respondent had appeared in the proceeding *pro se.*

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

3. The *Hartford Times-Press* is a newspaper published in Hartford, Wisconsin, a town near Milwaukee. In early March of 1990 Respondent placed an advertisement in the *Hartford Times-Press* advertising an apartment for rent. TR. 128.

4. The following classified advertisement appeared in the March 8, 1990, issue of the *Hartford Times-Press*:

FOR RENT

> Deluxe, two family town house, 2 bedroom, 1 1/2 baths, attached garage with opener. Private full basement w/w d. hookups. Big yard, patio, sand box, swing set. One child, no smoking, no pets. May 1. $550.

SX. 4. The same advertisement, with the addition of a telephone number, 673-2733, appeared in subsequent issues of the *Hartford Times-Press* on March 22, March 29, and April 5, 1990. SX. 5-7. Respondent's telephone number in 1990 was 673-2733. TR. 128.

5. On May 23, 1990, Complainant filed a familial status housing discrimination complaint with HUD that cited the *Hartford Times-Press* advertisement. Respondent was notified of the complaint on May 29, 1990. Stipulation; TR. 1, 120. Nevertheless, similar advertisements were published in later editions of the *Hartford Times-Press* on June 28, July 5, July 12, July 26, and August 2, 1990. The advertisement published on June 28, 1990, and those that followed omitted the date ("May 1") that had appeared in earlier advertisements and added the phrase, "Immediate occupancy." SX. 8-12.[3]

6. The *Hartford Times-Press* billed Respondent for the advertisements described in Findings of Fact 4 and 5; Respondent did not protest the bills or the content of the advertisements; and the bills were paid. RX. 1, 2, 3; TR. 103-04, 125.

7. The *Hartford Times-Press* prohibits its employees from composing the text of classified advertisements. TR. 18-19, 67-68.

8. Members of Complainant's staff discovered the March 8 advertisement while researching housing advertisements in

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[3]The Charge of Discrimination was amended at hearing to include all nine of the advertisements that were introduced into evidence. TR. 46-51.

Milwaukee-area publications. That discovery prompted the staff to contact the *Hartford Times-Press,* prepare a memorandum regarding the advertisement, discuss the matter with legal counsel, prepare a complaint, and forward the complaint to HUD. SX.3, TR. 13. These activities engaged complainant's staff for a total of two hours at a cost of $50 per hour. SX.3.

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. 1981), *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.[4] 42 U.S.C. §§ 3601-19. "Familial status," 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 § 3602(k); 24 C.F.R. § 100.20. In other words, the Act prohibits discrimination

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[4]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 also found 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.

against families with children.

Section 804(c) of the Act makes it unlawful to:

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

Language subjected to section 804(c) analysis is to be interpreted naturally as it would be interpreted by an ordinary reader. *Ragin v. New York Times Co.,* 923 F.2d 995, 999 (2nd Cir.), *cert. denied,* ___ U.S. ___, 112 S.Ct. 81 (1991); *United States v. Hunter,* 459 F.2d 205, 215 (4th Cir.), *cert. denied,* 409 U.S. 934 (1972). I find that the phrase, "One child," in the advertisements at issue would be interpreted by the ordinary reader to mean that the unidentified housing provider did not want to rent to tenants with more than one child and preferred to rent to tenants with one or no children. In other words, the advertisement on its face expresses a preference, limitation, or discrimination based on familial status. It is therefore an unlawful advertisement. *See HUD v. Edelstein,* 2 Fair Housing-Fair Lending (P-H) para. 25,018 at 25,238 (HUDALJ Dec. 9, 1991), *aff'd without op.,* No. 92-3025 (6th Cir. Oct. 23, 1992)(The phrase "1 Child" in newspaper advertisements violated familial status provisions of § 804(c) of the Act.).

In defense, Respondent contends that the Charging Party failed to prove that the offending advertisements were his. Furthermore, he asserts that when he and his girlfriend went to the offices of the newspaper to place a "For Rent" advertisement, he told the newspaper representative (presumably Mrs. Jeanette Kroening, the Office Manager[5]): "Kids OK." He argues that he did not request use of the phrase, "One child,"

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[5]Respondent's description of the newspaper representative fits the description of Mrs. Kroening. TR. 124-25.

or any other language to that effect.

Respondent's defenses must be rejected. The Charging Party satisfied its burden to prove that the unlawful advertisements were placed by Respondent. Although the March 8, 1990, advertisement did not contain any information identifying Respondent, all of the subsequent versions of that advertisement included Respondent's telephone number. Furthermore, the description of the property in the advertisement matches Respondent's own description of his rental property as set out in his Answer to the Charge of Discrimination. The advertisements at issue describe Respondent's rental property.

The Office Manager for the *Hartford Times-Press,* Mrs. Jeanette Kroening, directly contradicted Respondent's contention that he did not choose the wording of the advertisement. She said that she clearly remembered Respondent coming into the office to place an advertisement and that she believed she served him, although she conceded the possibility that someone else in the office could have taken his advertisement.[6] She also testified that she did not choose the phrase, "One child," for use in Respondent's advertisement, because, consistent with company policy, she never composes classified advertising copy. She said that, with the exception of obviously unacceptable language, her newspaper publishes exactly what the customer wants, word for word. The newspaper offers only minor editorial assistance to its classified advertising customers, and customers are always asked to review and approve advertising copy before publication. TR. 41-42.

I conclude that Mrs. Kroening was a more credible witness than Respondent. After examining her at some length about her duties and the advertising operations of the newspaper, I found her testimony, although arguably subject to quibble on occasion, basically forthright, consistent, and believable. Her demeanor was that of someone honestly attempting to recount the truth to the best of her ability. She did not claim to remember either too much or too little about events that occurred more than three years ago -- indications of a less-than-candid witness. Further, unlike Respondent, she has no apparent economic interest in the outcome of this proceeding.

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[6]Inasmuch as Respondent's description of the person with whom he dealt fits Mrs. Kroening, her memory on this point appears sound. *See* TR. 45-46.

Respondent's version of events cannot be credited. The Charging Party's original Charge of Discrimination focused on the advertisement published on March 8, 1990. At trial the evidence showed that offending advertisements had been published nine times from March 8 through August 2, 1990. The Charging Party notified Respondent on May 29, 1990, that a complaint had been received concerning the March 8 advertisement, yet similar advertisements with the same offending language were published five more times over the next two and a half months. When pressed on cross-examination to explain why he failed to take corrective action, Respondent first attempted to avoid answering the question, then suddenly and for the first time in this proceeding claimed that he had, in fact, contacted the newspaper to complain, but that he could not remember when or with whom he spoke. TR. 123-26.[7] To credit Respondent's story one would have to suppose that Mrs. Kroening, without authority and for no apparent reason, decided on her own to limit Respondent's prospective tenants to those with no more than one child. Further, one would have to suppose that the newspaper promptly and accurately responded to a request to remove "May 1" and add "Immediate occupancy" to advertisements appearing after May 29, 1990, but refused to honor Respondent's request to delete the phrase, "One child." Considering the record as a whole, these are unbelievable suppositions.

Despite Respondent's claims to the contrary, he is responsible for the phrase, "One child," that appeared in the advertisements. When Respondent placed the advertisements with the *Hartford Times-Press,* the newspaper and Mrs. Kroening became his agents. Even if we assume, *arguendo,* that Mrs. Kroening composed the advertisement copy rather than Respondent, Respondent nevertheless remains responsible, because the duty of a housing provider to prevent housing discrimination cannot be delegated to an agent. *See Walker v. Crigler,* 976 F.2d 900, 908 (4th Cir. 1992); *Hamilton v. Svatik,* 779 F.2d 383, 388 (7th Cir. 1985); *Green v. Century 21*, 740 F.2d 460, 465 (6th Cir. 1984); *Marr v. Rife,* 503 F.2d 735, 741 (6th Cir. 1974); *Michigan Protection & Advocacy Service v. Babin,* 799 F.Supp. 695, 717 n.46 (E.D.Mich. 1992); *Saunders v. General Servs. Corp.*, 659 F.Supp. 1042, 1059 (E.D.Va. 1987); *Davis v. Mansards*, 597

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[7]Mrs. Kroening had no memory of Respondent's alleged complaint. TR. 103-04.

F.Supp. 334, 344 (N.D. Ind. 1984); *United States v. Youritan Construction Co.*, 370 F.Supp. 643, 649 (N.D.Cal. 1973), *modified on other grounds*, 509 F.2d 623 (9th Cir. 1975), *cert. denied,* 421 U.S. 1002 (1975); *See also Restatement (Second) of Agency,* Sec. 94 (1958). The preponderance of the evidence shows that Respondent has violated § 804(c) of the Act. 42 U.S.C. § 3604(c).[8]

Damages

Section 812(g)(3) of the Act provides that upon a finding that a respondent has violated the Act, an administrative law judge shall order "such relief as may be appropriate, which may include actual damages suffered by the aggrieved person." 42 U.S.C. § 3612(g)(3). Respondent has violated the Act through conduct that has caused actual, compensable damages to Complainant. The time and money that a fair housing organization like Complainant spends pursuing a legal remedy for housing discrimination diverts time and money away from the organization's other functions and goals. In other words, discrimination costs the organization the opportunity to use its resources elsewhere. These "opportunity costs" for the diversion of resources should be recouped from the party responsible for the discrimination. *See United States v. Balistrieri,* 981 F.2d 916, 933 (7th Cir. 1992)(Damages awarded to a fair housing organization [Complainant in the instant case] for time and money deflected to legal efforts by housing discrimination.); *Village of Bellwood v. Dwivedi,* 895 F.2d 1521, 1526 (7th Cir. 1990)("These are opportunity costs of discrimination, since although the counseling is not impaired directly, there would be more of it were it not for the discrimination."); *Saunders v. General Servs. Corp.,* 659 F. Supp. 1042, 1060 (E.D. Va. 1987)($2,300 for "diversion of resources"); *Davis v. Mansards*, 597 F. Supp. 334, 348 (N.D. Ind. 1984)($4,280 for out-of-pocket expenses).

Before hearing, Complainant's staff spent a total of two hours on this case at a total cost of $100. That time could

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[8]Respondent mistakenly argues, "the Defendant accused must be allowed the constitutional right to the presumption of innocence until the proof of guilt is established beyond a shadow of a doubt for any wrong doing." This is a civil, not a criminal, proceeding. In order to prevail, the Charging Party need only prove its case by a *preponderance* of the evidence.

have been spent on other matters but for Respondent's discriminatory conduct. TR. 107-109. Complainant will receive an award of $100 as compensation. Although Complainant requested damages of $250 on its own behalf, there is no evidence in the record to support an award larger than an amount sufficient to compensate Complainant for the diversion of resources caused by Respondent.

Civil Penalties

To vindicate the public interest, the Act authorizes an administrative law judge to impose civil penalties of no more than $10,000.00 upon first-time violators of the Act. 42 U.S.C. § 3612(g)(3); 24 C.F.R. § 104.910(g)(3). The Government requests civil penalties in the amount of $500.00 against Respondent.

The legislative history of the 1988 Fair Housing Amendments Act includes these comments about civil penalties:

> The Committee intends that these civil penalties are maximum, not minimum, penalties, and are not automatic in every case. When determining the amount of a penalty against respondent, the ALJ should consider the nature and circumstances of the violation, the degree of culpability, and any history of prior violations, the financial circumstances of that respondent and the goal of deterrence, and other matters as justice may require.

H. Rep. No. 711, 100th Cong., 2d Sess. at 37 (1988). Respondent has no history of housing discrimination violations. Although the discrimination was intentional, there is no evidence that any particular homeseeker was injured by Respondent's conduct. As the owner of only one rental unit, Respondent is not the sort of professional landlord who could be expected to have been fully aware of all of the familial status provisions of the Act in early March of 1990, less than a year after the effective date of the amendments providing protection to tenants with children.[9]

Evidence regarding respondents' financial circumstances is peculiarly within their knowledge, so they have the burden of introducing such evidence into the record. If, as here, a respondent fails to produce credible evidence militating against assessment of a civil penalty, a penalty may be imposed without consideration of financial circumstances. *See Campbell v. United States,* 365 U.S. 85, 96.

Respondent and other similarly situated housing providers must come to understand that advertising, standing alone, may violate the Fair Housing Act, and that a landlord need not exclude all children in order to be guilty of unlawful discrimination. The need for deterrence is particularly acute in this case because Respondent continued to run unlawful advertisements long after the Government notified him that the advertisements were illegal, ignored the Charge of Discrimination until he was faced with a default motion shortly before trial, and then attempted to shift responsibility for his unlawful conduct onto the *Hartford Times-Press.* These facts alone would support a civil penalty far larger than the $500.00 penalty sought by the Charging Party but I will impose the penalty the Charging Party seeks.

Injunctive Relief

To preclude future discrimination, the Act authorizes the injunctive relief requested by the Secretary in the following

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[9]Respondent asserts for the first time on brief that he has never discriminated against families with children during the four years he has owned the rental property, and that all of his tenants except one have had two children. That assertion cannot be credited: it is too late, self-serving, and not submitted under oath.

Order. 42 U.S.C. § 3612(g)(3). *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).

Order

It is hereby ORDERED that:

1. Respondent is permanently enjoined from advertising the rental of a dwelling in any manner that indicates a preference, limitation, or discrimination based on familial status;

2. Respondent shall cease using any advertisement for the rental of a dwelling that expresses a limit on the number of children acceptable, such as "One child";

3. Respondent shall institute internal recordkeeping procedures adequate to comply with the requirements in this Order with respect to the rental of 523-525 East Avenue, Hartford, Wisconsin, and any other real properties he owns or manages or hereafter acquires or manages. 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;

4. On the last day of each six-month period beginning June 30, 1993, (twice a 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 523-525 East Avenue, Hartford, Wisconsin, and any other residential rental property owned or managed by Respondent 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; and

b. A copy of any advertisements for the rental of the property at 523-525 East Avenue, Hartford, Wisconsin, or any other residential rental property Respondent owns or manages during the period this Order is effective;

5. Within ten days of the date upon which this Order becomes final, Respondent shall pay actual damages of $100.00 to Complainant;

6. Within ten days of the date upon which this Order becomes final, Respondent shall pay a civil penalty of $500.00 to the Secretary of HUD;

7. Respondent shall submit a written report to this tribunal within fifteen 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. Sec. 3612(g)(3) and the regulations codified at 24 C.F.R. Sec 104.910, and will become final upon the expiration of thirty days or the affirmance, in whole or in part, by the Secretary within that time.

/s/

THOMAS C. HEINZ
Administrative Law Judge

Dated: May 18, 1993.