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 Cyril Edwards, Gymetta Oliver, and Fair Housing Foundation of Long Beach,

Charging Party,

v.

John E. Cox, Trustee, John E. Cox, Trust; Josephine M. Cox, Trustee; Josephine M. Cox, Trust; and Helen Rancatti,

Respondents.

HUDALJ 09-89-1641-1
HUDALJ 09-89-1642-1
HUDALJ 09-89-1709-1

Decided: September 26, 1991

Jon M. Seward, Esquire
For the Secretary and the Complainants

Steven B. Atkinson, Esquire
Karen E. Gilyard, Esquire
For the Respondents

Before: ALAN W. HEIFETZ
Chief Administrative Law Judge

INITIAL DECISION

Statement of the Case

This matter arose as a result of complaints filed by Gymetta Oliver, Cyril Edwards, and the Fair Housing Foundation of Long Beach ("Complainants") alleging racial discrimination in violation of the Fair Housing Act as amended, 42 U.S.C. §§ 3601, *et seq.* ("the Act"). Following an investigation and a determination that reasonable cause existed to believe that discrimination occurred, on February 14, 1991, the Department of Housing and Urban Development ("HUD" or "the Secretary") issued a charge against John E. Cox, Trustee, the John E. Cox Trust, Josephine M. Cox, Trustee, the Josephine M. Cox Trust, and Helen Rancatti ("Respondents") alleging that they had engaged in discriminatory practices in violation of section 804 of the Act, 42 U.S.C. § 3604.

A hearing was held in Fullerton, California on May 20-21, 1991. The parties filed posthearing briefs on July 31, 1991. Respondents' brief asserts, in part, that the action should be dismissed as to Respondents John and Josephine Cox based on the Secretary's failure to join indispensable parties, the Coxes' partners. The Secretary responded with a motion to strike that portion of Respondents' argument, or in the alternative, to file a reply brief on the issue. Secretary's Motion to Strike Argument B of Respondents' Posthearing Brief or, in the Alternative, for Leave to File a Reply Brief (Aug. 8, 1991). The basis for the Secretary's motion is that Respondents raised the issue for the first time in their brief.

The Secretary had notice, however, early on in these proceedings of the ownership interests of the Coxes' partners. Respondents' Memorandum in Opposition to Secretary's Motion to Strike (Aug. 15, 1991) at 3-5. Accordingly, the Secretary's Motion is denied. Nevertheless, Respondents' argument concerning the Secretary's failure to join indispensable parties is not persuasive. The Coxes' partners are not indispensable parties to this action. *Cf. Temple v. Synthes Corp., Ltd.*, 111 S. Ct. 315 (1990) ("It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit."). The Secretary need not have named them

as additional respondents, and accordingly, I reject Respondents' contention that the case should be dismissed as to John and Josephine Cox based on this reasoning.[1]

Findings of Fact

[1]While it is not clear why the Secretary failed to name the other partners, the record indicates that the Coxes had "hands on" involvement in the relevant apartment building whereas the other partners appeared to be passive investors. In any event, the Secretary exercised his discretion in charging only these individual Respondents.

1. The Euclid Apartments building ("the Euclid") located at 206 Euclid Avenue, Long Beach, California, is owned by John E. Cox, his former wife, Josephine M. Cox, and three other individuals. Mr. Cox and his ex-wife are white. Each have a 23.5% ownership interest in the building. Tr. 354.[2] Mr. Cox has ownership interests in seven other apartment buildings as well. Tr. 353. He performs management functions at these buildings for which he earns a management fee. Tr. 354, 413. Of the seven apartment buildings, five, including the Euclid, have resident managers. Mr. Cox supervises these resident managers. Tr. 354. His supervision includes at least monthly visits to the resident managers, discussions with them concerning their obligations under the Act not to discriminate, and the preparation of the tax papers for all of the owners of the buildings. Tr. 360-61, 364, 414. His management fee at the Euclid is approximately four percent of the building's gross income. Tr. 413. Before her divorce from her husband, Josephine Cox used to "do all the books" for the apartment buildings. Tr. 414. Since approximately 1983, however, her involvement in the buildings has been limited to summarizing the records for purposes of paying taxes on the buildings, and helping the Coxes' daughter with assorted paper work and computer entries. Tr. 414-15.

2. The monthly rents at the Euclid range from between $600 for a one-bedroom to $950 for a two-bedroom apartment. S. Ex. 15, 16. All of the units have one bedroom, except numbers 201, 301, and 401, the only two-bedroom apartments in the building. Tr. 367. *See* S. Ex. 15, 16.

3. In the summer of 1989, Gymetta Oliver and Cyril Edwards, who are friends, were searching for their own individual apartments in the Long Beach area. Tr. 17-19.

4. Ms. Oliver earns between $440 and $600 a week as an executive secretary and graphic designer at Apple One. Her job involves frequent contact with professionals and executives. Tr. 16-17. She was born and raised in Chicago where she attended grammar and high schools, and took some college courses. She also pursued a college degree in California after moving there. She discontinued her education to provide financial assistance for her daughter's college education. Tr. 16. Her only child is a daughter, Leona Yvonne Oliver, who is in her mid-twenties. Tr. 17.

5. Mr. Edwards is an affirmative action officer at Cypress College, earning approximately $1,000 a week. Prior to his present position, he was employed by HUD in the areas of housing discrimination and labor relations. He also held faculty positions at various colleges, including a chairmanship at the University of Santa Clara. Tr. 71-74. He is originally from Brooklyn, New York, where he graduated from high school. He

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[2] The following reference abbreviations are used in this decision: "S. Ex." for "Secretary's Exhibit," "R. Ex." for "Respondents' Exhibit," and "Tr." for "Transcript."

The legal owners of the building are the John E. Cox Trust of which Mr. Cox is trustee, the Josephine M. Cox Trust of which Ms. Cox is trustee, John Martin and John Van Riper who each own a 20% interest, and Herbert Allen who has a 13% ownership interest.

attended Dillard University in New Orleans, and later Arizona State University where he earned Bachelor of Science and Master of Arts degrees in sociology. He has a doctorate in medical sociology from the University of California at San Francisco. Tr. 70-71. Mr. Edwards has been told that his voice "has some distinctive qualities [but that he's] not quite sure what that [means]." Tr. 78.

6. On July 29, 1989, at approximately 5:00 p.m., Ms. Oliver and Mr. Edwards visited the Euclid Apartments, each seeking to rent their own apartment. Tr. 19, 20. They were driven by Ms. Oliver's daughter who parked her car immediately in front of the apartment building. While they approached the Euclid Apartments, Ms. Oliver's daughter remained in the car. Tr. 21-23. All three individuals are African-American.[3] Tr. 14, 60, 77. They saw on the front lawn a sign identifying the Euclid, with two smaller signs attached at the bottom, one stating "one-bedroom," and the other, "two-bedroom." Tr. 21, 76, 298-300, R. Ex. 10a.

[3] Upon motion of the Secretary, this tribunal took notice of the fact that the terms "Black," "Afro-American," and "African-American" are synonymous. Tr. 159. *See also* Tr. 337.

7. Ms. Oliver and Mr. Edwards never entered the apartment building. Rather, at the entrance to the building, Mr. Edwards inquired of the apartment manager through the intercom about vacancies. He was told that there were no apartments available. Tr. 24, 76.

8. The next day, on the afternoon of July 30th, they returned to the Euclid Apartments to inquire again about rentals. The Euclid sign was still displayed. At the entrance to the building, Ms. Oliver and Mr. Edwards saw a posted index card noting that there was a one-bedroom apartment for rent. The index card also noted that the manager was gone for the day and that interested applicants should leave a name and telephone number, which Ms. Oliver and Mr. Edwards did. Tr. 25-26, 77-78.

9. Although they both owned answering machines capable of receiving messages at any time of the day, neither Ms. Oliver nor Mr. Edwards were ever contacted about the posted vacancy. Tr. 26-27, 78-79.

10. Ms. Oliver and Mr. Edwards filed housing discrimination complaints with HUD, and Mr. Edwards contacted the Fair Housing Foundation of Long Beach ("the Foundation") to request a test at the Euclid Apartments. S. Ex. 1, 2, 4, 5; Tr. 81.

11. The Foundation investigates allegations of housing discrimination, provides landlord-tenant counseling, and offers community outreach programs. Tr. 110.

12. On August 1-2, 1989, the Foundation performed a test at the Euclid Apartments. Tr. 117-18, 174-75; S. Ex. 8, 12. At approximately 9:30 a.m. on August 1, 1989, Ingrid Bullock, an African-American tester from the Foundation, arrived at the Euclid Apartments to inquire about vacancies. The resident manager, Helen Rancatti, who was in the lobby with a man at the time, noticed Ms. Bullock attempting to use the intercom. Ms. Rancatti cracked open the glass door at the entrance to the building just far enough to speak with Ms. Bullock. Ms. Rancatti informed Ms. Bullock that there were no vacancies because she had rented a two-bedroom unit the night before and a one-bedroom apartment to the man standing in the lobby with her. Tr. 118-20; S. Ex. 8.

13. Later on that morning of August 1, 1989, Robyn Poliner-Johnson, a white tester from the Foundation arrived at the apartment building and contacted Ms. Rancatti through the intercom to inquire about available units. Ms. Rancatti stated that although there were vacancies, she currently was unable to show any apartments because she was on her way out. At Ms. Poliner-Johnson's request, Ms. Rancatti told her that she could return the next day. Tr. 176-78, 199-200, 227; S. Ex. 10.

14. On August 2, 1989, Ms. Poliner-Johnson returned to the building and Ms. Rancatti showed her three apartments. The first apartment was a fourth-floor two-bedroom that had been cleaned and was described as being immediately available. It faced the front of the building. Tr. 179-81. The second apartment was a one-bedroom unit on the third floor, also clean and described as immediately available. It faced the back of the building. Tr. 180-81. The last apartment that Ms.

Poliner-Johnson saw was an occupied one-bedroom unit on the second floor. Ms. Rancatti said that it would soon become available because the current male tenant was in the process of moving. This second-floor apartment faced the front of the building and was described by Ms. Poliner-Johnson as having a patio with such "a lot of foliage" that she considered the view of the street to be "obscure[d]." Tr. 181-82, 209. After showing her the apartments, Ms. Rancatti gave her a rental application. Tr. 183; S. Ex. 11. Ms. Poliner-Johnson identified the apartments she saw as numbers 211, 309 and 408. While she was positive of the identification of 408, she was uncertain as to her recollection of the numbers of the two remaining apartments. Tr. 187-88. She was also certain that apartment 408 was the two-bedroom she had seen. Tr. 206.

15. Helen Rancatti was the resident manager at the Euclid from 1975 until approximately September of 1989. Tr. 355-56, 430, 432. She had also managed three other apartment buildings in which Mr. Cox had a financial interest. Tr. 356-57. She performed her duties as Euclid's resident manager in exchange for an $800 a month rent-free apartment. Tr. 322. *See* S. Ex. 15, 16. She resided in apartment 201, a second-floor two-bedroom apartment that has a balcony facing the street. The apartment overhangs the walkway leading to the front entrance of the building where the intercom is located. Tr. 443-49; R. Ex. 11a, 11d, 11e. To see either the walkway under the apartment, or the entrance to the building where the intercom is located, one would have to hang suspended from a side window far enough to see under the overhang. Tr. 309-11, R. Ex. 11b, 11d, 12. The intercom is of such poor quality that voices may sound "garbled." Tr. 450-51.[4]

16. From apartment 201, a view of the street, the sidewalk, and the beginning of the walkway leading to the intercom is possible *only* from the balcony or from the living room leading out to the balcony. Tr. 307-09, 313-14, R. Ex. 12. The balcony of Ms. Rancatti's apartment was cluttered with items such as plants, planting supplies, a green, two-foot tall, ceramic elephant, planting tubs, redwood lattice work, and fiber glass sheets of the type surrounding swimming pools. There was an overgrown tree immediately outside of the balcony that spanned the balcony's width and had branches flowing into the balcony. Ms. Rancatti's paraphernalia and the tree combined to obscure any view from inside of the apartment of the street below, the sidewalk, or the beginning of the walkway leading to the front entrance. To see the street, the sidewalk, or the beginning of the walkway while standing on the balcony would require one to come out onto the balcony and look out over the barrier of clutter. Tr. 304-05, 313-14, 317-18, 443-49; R. Ex. 11a, 11b, 11d.

[4] The Secretary attempts to discredit the testimony concerning the intercom's audio quality because it is from Vernon Moore, Ms. Rancatti's replacement, who is hard of hearing. This witness, however, also testified that his telephone is set on a high volume and therefore, the intercom's failings are unrelated to his hearing problem. Rather, he hears "high volume garbled messages." Tr. 457-58.

17. At the time of the hearing Ms. Rancatti was frail, 76 years old, and very close to death.[5] She was white. At least as early as the summer of 1989, she suffered from multiple physical and mental ailments, including emphysema, forgetfulness, incoherence, and alcoholism. She was on various medications and taking oxygen. Tr. 184, 257-60, 264, 276-77, 314-15, 335-36, 349, 410, 426-27, 433-42. By the summer of 1989, her oxygen intake was up to two liters per hour for virtually 24 hours a day. In her living room, she kept a large stationary oxygen unit by a reclining chair in which she slept. She also had a portable oxygen unit for movements away from the large stationary unit. Tr. 305-06, 313. She slept in the recliner because it was easier for her to breathe in an elevated, rather than in a prone position. The chair was also close to the stationary oxygen unit, and provided easy access to a telephone, her television set, and the kitchen. Tr. 306.

18. Beginning from approximately May of 1989, Ms. Rancatti's mental acuity deteriorated noticeably. Tr. 261-63. While she could appear lucid and alert at times, Tr. 261, 275-76, she was often nonsensical and confusing, Tr. 277, 380, 426, 433-34. There were instances when she thought that apartments were available when, in fact, they were not. Tr. 334. Conversely, she also believed that apartments were occupied and rented when they actually were vacant and available. Tr. 439-42. Her mental state was further aggravated by her drinking problem. Tr. 314-15.

19. During the period from approximately February to August of 1989, Ms. Rancatti was involved in four automobile accidents, one of which resulted in cancellation of her insurance policy. Tr. 268-69; R. Ex. 16, 17, 19. She also was cited for weaving or crossing the center line of a thoroughfare. Tr. 273. In July of 1989, as a result of a fall in the garage at the Euclid, she suffered from head and other injuries that impaired her ambulatory ability. Tr. 276.

20. Ms. Rancatti had a daughter, Ms. Suzanne English, a 44-year-old married woman with children of her own. Tr. 256-57, 260, 264. Ms. Rancatti was a single working mother and the sole provider for her family. In the 1950s and 1960s, Ms. Rancatti had herself experienced discrimination based on sex and physical stature. Because of this experience, she cautioned her daughter to resist any discriminatory attitudes. She reared Ms. English in a racially mixed neighborhood and impressed upon her that she should not prejudge an individual based on race. Tr. 264-65.

21. Ms. English recounted various incidents when her mother became disturbed by racial epithets and discriminatory attitudes. As a wedding present Ms. English received a dog nicknamed "nigger" by its previous owners. Upon hearing Ms. English's husband call the dog "nigger," Ms. Rancatti became visibly upset and rebuked her son-in-law, warning "don't start that." Tr. 290. Ms. English also recalled attending a

[5] Ms. Rancatti, who was too ill to testify, died three weeks after the hearing, on June 9, 1991. Attachment A to Respondents' Posthearing Brief (July 31, 1991).

mother/daughter campfire girl dinner. One African-American mother and her daughter were also in attendance and had brought a chicken dish. While no one else would sample the chicken, Ms. Rancatti "stepped up there very loudly" and asked the mother if hers was the chicken dish. Ms. Rancatti then proceeded to eat the chicken and compliment the mother's cooking in front of the group. Tr. 291. Finally, Ms. English ran track in high school, but could not win a race against an African-American

classmate. When her coaches told her that she didn't "have the natural talent" of the other student, Ms. Rancatti, rejecting any racial stereotypes, informed her daughter that she just wasn't "fast enough." Tr. 292.

22. The resident managers at the apartment buildings in which Mr. Cox had a financial interest submitted monthly statements of rental receipts to him. The statements, which were "sent in anywhere between the 7th and 10th of [each] month," were intended to reflect what apartments were available and the amount of rent or other payments that had been made during the previous month. Ms. Rancatti's statements were usually the first ones received by Mr. Cox. Tr. 360. Ms. Rancatti's July monthly statement for the Euclid lists the status for the following apartments as of early July:

Apt.No.	Status
204	tenant moving
208	pending
209	rent paid until August 14th, tenant purchased condominium
309	vacant
408	Lili Wong paid $675 in rent.

S. Ex. 15.[6] While the statement indicates that all the other apartments were rented and that their full monthly payments had been received, it contains a notation at the bottom of the first page that states "401 awaiting order (Paper) being transferred over-seas. Federal worker." Ms. Rancatti had correctly added the monthly rental receipts and $311.50 for "Wash & Dry" for a total $17,209. She had deducted $800 (the amount that reflects the rent for her apartment, but which is not actually paid in cash) from the total receipts, for a net balance of $16,409. S. Ex. 15.

23. The August monthly statement for the Euclid lists the status for the following apartments in early August:

[6] Lili Wong was Ms. Rancatti's friend who moved abroad and for whom Ms. Rancatti wished to save an apartment upon her return. Tr. 372-73. The Secretary argues that Mr. Cox's testimony, which forms the basis for this finding, is not supported by any other evidence. Secretary's Post-Hearing Brief (July 31, 1991) at 19. However, not only do I find Mr. Cox to be a credible witness, but also the July rental receipts statement includes a $675 payment for an apartment for Ms. Wong.

Apt. No.	Status
204	tenant moved August 4th
208	"pending" and "problem turned over to Attorney Pintek"
209	p.1 - vacant with a notation to see p.3 which shows Patricia Knudson paid rent on August 1st, p.1 also shows rent paid on August 15th
301	"pending," tenant "said moving"
309	p.1 - "vacant" and also "9-1-89 Andrew Johnson moving in," p.2 - Mr. Johnson paid security deposit on 7-28-89, moving in on 9-1-89
401	vacant and also listed as "rented 9-1-89"
408	vacant and also Ms. Wong listed as a tenant.

S. Ex. 16. The statement shows the remaining apartments as rented and occupied.

24. Ms. Rancatti had written the following on the August monthly statement: "Re: 301__ Moved A `Bum,' `Eugly,' Blk Man in also! So, I ask [sic] her to move and stated today 8-9-89 she has found a place!" S. Ex. 16 at 2 (internal quotation marks in original).[7]

25. Earlier in 1989, Ms. Rancatti described to her daughter a non-tenant, who was living at the Euclid with another tenant, as an "ugly Black man." She complained that he was noncooperative for refusing to fill out a rental application. Tr. 296-98.

26. Ms. Rancatti wrote the following note to Mr. Cox: "I had 408 Vacant that Lili Wong was in - But, I rented it yesterday Coming in Saturday! All fee's Paid - Helen Now I have only 204 - (he left the 4th) and I can save that for Lili Wong - (ha ha)." R. Ex. 6. Respondent Cox wrote the following on Ms. Rancatti's note: "# 408 HAJIME TAKADA JAKARTA? VERY DARK." Tr. 373; R. Ex. 6.[8]

27. By the beginning of August 1989, Ms. Rancatti had rented apartment 408 to a gentleman from Jakarta, Indonesia, described as being very dark-skinned. Tr. 373-74. She had rented apartment 209 on or about July 25th to Patricia Knudson who paid a deposit of $1,480 plus the monthly rent of $675. Ms. Knudson moved in on or about August 5th. Tr. 371, S. Ex. 16. Apartment 309 was rented by July 28th to Andrew Johnson. Tr. 368-69, S. Ex. 16, R. Ex. 5.

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[7] It was not uncommon for Ms. Rancatti to misspell words or to spell words phonetically. Tr. 282-83. "Eugly" was her notation for "ugly." Her daughter testified that Ms. Rancatti did not have "a vast vocabulary." Tr. 267. Ms. Rancatti used the word ugly not only to describe a person's physical appearance, but also to describe a person's actions. Tr. 267, 289. She once criticized her grandson for his "ugly actions," meaning that she did not approve of his behavior. Tr. 267.

[8] Respondents' Exhibit 6 also contains the notation, "over," apparently indicating that there was information on the back side. *See* Tr. 388. It was offered to show Ms. Rancatti's confusion concerning which apartments were available, not for the truth of the matter asserted in the document. Tr. 374-75.

Mr. Cox made notations on the exhibit in preparation for his deposition to help him recreate the events of the summer of 1989. Tr. 375-76.

28. At the time of the alleged discriminatory incident, there were two African-American tenants residing at the Euclid, Mr. Leslie Johnson and a Dr. Matthews. Tr. 337, 342. Ms. Rancatti and Mr. Johnson were friends. They exchanged Christmas and birthday gifts. Although he declined to do so, Ms. Rancatti invited Mr. Johnson to call her "Mom." Tr. 341-42.

29. In June of 1989, as one of her last acts as a manager at the Belmont, another building in which Mr. Cox had a financial interest, Ms. Rancatti rented an apartment to two gentlemen, one of whom was African-American. Tr. 358, 422-23.

Discussion

Section 804 of the Fair Housing Act makes it unlawful to "refuse to . . . rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race [or] color . . . ." 42 U.S.C. § 3604(a). It is also illegal to "represent to any person because of race [or] color . . . that any dwelling is not available for inspection . . . or rental when such dwelling is in fact so available." *Id*. § 3604(d). The Secretary has charged Respondents with engaging in such illegal activity.

In deciding whether Respondent's actions are in fact discriminatory, the legal framework to be applied is the three-part test set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See, e.g.*, *Secretary of HUD v. Blackwell*, Fair Housing-Fair Lending (P-H) ¶ 25,001, 25,005 (HUDALJ Dec. 21, 1989), *aff'd*, 908 F.2d 864 (11th Cir. 1990); *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1451 (4th Cir. 1990), *aff'g* 689 F. Supp. 541 (D. Md. 1988), *cert*. *denied*, 111 S. Ct. 515 (1990). The three-part test first requires that the Secretary demonstrate a *prima facie* case of discrimination by a preponderance of evidence.

The elements for proving a *prima facie* case "are not fixed." *Pinchback*, 689 F. Supp. at 549. They will vary depending on the facts. Here, a *prima facie* case requires the Secretary to show the following: (1) that Ms. Oliver and Mr. Edwards are members of a racial minority, and that Respondent Rancatti knew that they were; (2) that they wished to inspect and/or rent the property at issue; (3) that Respondent Rancatti refused to deal with them; and (4) that after her refusal the property remained available for inspection and/or rental. *See Asbury v. Brougham*, 866 F.2d 1276, 1279 (10th Cir. 1989); *Phillips v. Hunter Trails Community Ass'n*, 685 F.2d 184, 190 (7th Cir. 1982); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1979).

Once established, a *prima facie* case creates a rebuttable presumption that unlawful discrimination has occurred. *See Williams v. Matthews Co.*, 499 F.2d 819, 826 (8th Cir.), *cert. denied*, 419 U.S. 1021, 1027 (1974). The burden then shifts to Respondents to articulate legitimate, nondiscriminatory reasons for the alleged discriminatory actions. To meet this burden, Respondents' evidence must raise a "genuine issue of fact" as to whether Complainants suffered discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Furthermore, that evidence

must be admissible and must enable the trier of fact "rationally to conclude" that Respondents' actions were not motivated by "discriminatory animus." *Id.* at 257.

Finally, if Respondents proffer legitimate reasons for their conduct, the Secretary has the opportunity to show that the reasons asserted are, in fact, mere pretext. *See Selden Apartments v. HUD*, 785 F.2d 152, 160 (6th Cir. 1986). The Secretary need not prove that race was the sole factor motivating Respondents. He need only demonstrate by a preponderance of the evidence that race was one of the factors that motivated Respondents; that is, that race did in fact play a part in their decisional process. *See Robinson*, 610 F.2d at 1042; *United States v. Mitchell*, 580 F.2d 789, 791 (5th Cir. 1978).

1. There is no *prima facie* case of discrimination.

There are two types of discrimination cases: disparate treatment and disparate impact. *Familystyle of St. Paul, Inc. v. City of St. Paul,* 728 F. Supp. 1396, 1401 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991). The instant case is classified as one of disparate treatment where "discriminatory motive is crucial." *Id*. (citing *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)). To establish discriminatory motive, the alleged discriminatory actor must have knowledge of the complainant's minority status, the very factor upon which discriminatory animus relies. Disparate treatment is volitional, not accidental. It is an action of the will, having as its end a conscious choice among known alternatives. Therefore, knowledge of the alternatives is a necessary predicate for the exercise of that will. Indeed some courts have explicitly adopted this proof of knowledge as an element of the *prima facie* case. *See Hamilton v. Svatik*, 779 F.2d 383, 387 (7th Cir. 1985); *Kaplan v. 442 Wellington Cooperative Bldg. Corp.*, 567 F. Supp. 53, 56 (N.D. Ill. 1983).

The evidence demonstrates that Ms. Oliver and Mr. Edwards are, in fact, members of a racial minority; that they arrived at the Euclid to rent, or at least to inspect an apartment; that Ms. Rancatti declined to permit them to inspect or rent an apartment; and that it is more likely than not that although no apartments were available for occupancy, there were some available for inspection. However, a *prima facie* case has not been made because proof of the essential prerequisite of knowledge of Complainants' race is lacking.

Ms. Rancatti did not know, prior to her alleged discriminatory actions, that Ms. Oliver and Mr. Edwards are African-American.[9] Complainants went to the Euclid on two occasions. On the first occasion, they walked directly under Respondent's apartment,

[9] The Secretary asserts Respondents' answer to the complaints of discrimination filed August 23, 1989, admits that Ms. Rancatti knew of Complainants' race. Secretary's Brief at 22 & n.8. This answer, however, is not a formal pleading as is Respondents' Answer to the Determination of Reasonable Cause and Charge of Discrimination filed on March 29, 1991, which avers insufficient information or belief to respond to the allegation. The Answer therefore denies knowledge that Complainants are African-American.

thus providing her an *opportunity* to observe them from her living room or balcony as they either exited the car or approached the building. Respondent also had an opportunity to see Ms. Oliver's daughter who remained in her car on the street. It would have been impossible, however, for the Respondent to observe them on the walkway leading to the entrance or at the intercom because apartment 201 is directly above the walkway and intercom.

Because of the overgrown tree, and the wall of clutter on the balcony, there was, in fact, no view of the street or the front access to the building from *inside* the apartment. Even the view from the balcony was obscured, requiring a concerted effort to descry pedestrians below. The existence of the obstructed view from the balcony was corroborated by Ms. Poliner-Johnson who testified that the second-floor apartment facing the street had "a lot of foliage," and that because of the profuse growth, it was difficult to see the street. Given her frail condition, it is highly unlikely that Ms. Rancatti would happen to be out on her balcony at precisely the time on that late July afternoon that Complainants arrived, see them heading for the entrance of the building, walk back into her apartment encumbered by her portable oxygen unit cart, and immediately answer Mr. Edward's call, only then to settle back into her recliner next to the stationary oxygen unit. Had she done so, it is equally unlikely that her journey out onto the balcony and return would not have been detected by Complainants or Ms. Oliver's daughter, or that such a taxing physical effort for Ms. Rancatti would not have caused a shortness of breath so severe that Complainants would certainly have detected it over the intercom. However, no one testified that they saw or heard Ms. Rancatti on the balcony or heard labored breathing over the intercom.

Even if Ms. Rancatti did not see Mr. Edwards, Ms. Oliver or her daughter, the Secretary conjectures that Ms. Rancatti knew Mr. Edwards' race from his "distinctive vocal characteristics." However, while his voice may have a distinctive timbre, upon hearing his testimony I was unable to discern, nor was there any other evidence upon which to conclude, that his voice or speech was characteristic of any particular racial or ethnic background. All that can be said about any distinction in his speech is that an occasional word revealed his Brooklyn heritage.[10]

Complainants had no contact with Ms. Rancatti on their second visit to the apartment building. The posted index card stated that she was not home. And even if she were, it is just as unlikely that she would have seen Complainants on this second visit as on the first. On this occasion, they left their names and telephone numbers in response to the index card advertising the availability of a one-bedroom apartment. They never received a response to their messages. However, while there may be a number of possible reasons for Ms. Rancatti's failure to contact them, none has been proved on the record beyond conjecture. Credible and corroborated testimony shows

[10] Even if the Complainant's voice revealed an ethnic or racial background, it is questionable whether such lineage could have been distinguished, given the intercom's poor quality.

that Ms. Rancatti's answering machine was extremely unreliable and oftentimes malfunctioned, but there is no direct evidence of function or malfunction on the critical dates. Tr. 278-79, 380. Because the record does not demonstrate that Ms. Rancatti ever saw Ms. Oliver or Mr. Edwards on either of their visits to the Euclid, or that she knew or had any reason to know their race, I conclude that Ms. Rancatti's treatment of them has not been shown to have been motivated by discriminatory animus.

2. Respondent's treatment of the testers was not fueled by discriminatory animus.

When she opened the glass entrance door to speak to Ms. Bullock, Ms. Rancatti obviously saw that she was African-American. Ms. Rancatti told this tester that no apartments were available. On the other hand, on the very next day she showed three apartments to Ms. Poliner-Johnson, the white tester to whom Ms. Rancatti spoke through the intercom on the previous day, but whom she saw for the first time that day. Nevertheless, and for the reasons stated below, while Respondent's treatment of the testers was differential, it was not based on any discriminatory animus.

Helen Rancatti was not the type of woman to engage in discriminatory conduct. Nothing in her background, history or character was indicative of discriminatory animus. She raised her daughter in a racially mixed neighborhood, and taught her to respect and not to denigrate anyone on account of race. She had rented to African-Americans, both at the Euclid and at another building that she was managing at the same time. At the time critical to this case, she had just rented an apartment at the Euclid to a man from Jakarta, Indonesia, who was described as having very dark skin. Moreover, she had a warm friendship with Leslie Johnson, one of her African-American tenants. She and Mr. Johnson, who testified on her behalf in this case, exchanged birthday and Christmas gifts, and she invited him to call her "Mom."

Ms. Rancatti's numerous health problems, both physical and mental, were so severe as to compel the inference that her treatment of the testers, as well as the exercise of her regular managerial duties was affected by the random effects of her debilitative afflictions. In the absence of any evidence tending to show discriminatory animus, her combination of emphysema and alcoholism, two disabling diseases, as well as various physical injuries, likely explain her disinclination to exert the energy necessary to show apartments on demand. Although her stated reasons differ, on August 1, 1989, she would not show an apartment to either tester.[11] Furthermore, her mental condition had deteriorated to the extent that she was experiencing periods of incoherence and confusion that permeated all aspects of her life, as well those related to her duties at the Euclid.

[11]She told the white tester that she was on her way out of the building. However, that explanation seems unlikely since her ambulatory ability had been impaired by head and other injuries suffered in a fall the previous month, and, as a result of multiple motor vehicle violations, her automobile insurance had been cancelled.

Documentary evidence of rental records and Ms. Rancatti's notes corroborate her mental confusion and put in issue the questions whether any apartments were actually available for rent, and if so, whether they were the ones inspected by Ms. Poliner-Johnson. Although the evidence is not conclusive because the confusion in the records is exacerbated by Ms. Poliner-Johnson's highly unreliable testimony,[12] it is more likely than not that no one-bedroom apartment was available for occupancy at the time of inspection. Further, it appears that those apartments that Ms. Poliner-Johnson did inspect were not necessarily those that would become available in the foreseeable future.

There are five one-bedroom apartments at the Euclid that must be considered: numbers 204, 208, 209, 309, and 408. In addition, the status of at least one two-bedroom apartment has been placed in issue by the tester, although it is not apparent from the record that either Ms. Oliver or Mr. Edwards was interested in a two-bedroom unit.

[12] In addition to the inaccuracies in her testimony and written records memorializing the test, she was unwavering in her imprecision. For example, in identifying the two-bedroom apartment that she inspected as number 408, she stated that she was "obviously very clear that it was" that apartment. Tr. 188. On cross-examination, when asked whether she was "positive" as to the identification, she stated, "Yes. Well -- correct." Tr. 206. The now undisputed evidence, however, reveals that the only two-bedroom unit on the fourth floor is number 401.

I do not find compelling Respondents' attempt to discredit the methods of testing based on their argument concerning the so-called "24-hour rule." This so-called rule seeks optimal test results, but it has not been shown to be prerequisite to a valid test.

While apartments 209 and 309 were vacant, they had already been rented at the time they were shown to the tester. Apartment 209 was rented around July 25th and the new tenant moved in on August 5, 1989. The monthly statements[13] show that deposits and rent were paid either on August 1st or 15th. Apartment 309, which was the third-floor apartment that Ms. Poliner-Johnson inspected on August 2nd, was rented by July 28th, the date that the monthly statement reflects that the prospective tenant paid the security deposit.

Apartment 408 was eventually rented to the man from Jakarta, but it is more likely than not that apartment 408 was, in fact, available at the time of Ms. Poliner-Johnson's visit. However, she did not see this apartment. Although she testified that she was certain that she saw apartment number 408, she also stated that the apartment that she saw on the fourth floor was a two-bedroom apartment. If she did see a two-bedroom unit, it would had to have been number 401, because there was only one two-bedroom apartment on each floor, they were in the same relative location, and they were similarly numbered - 201, 301 and 401.

Apartment 208 may have been technically available, but, according to the August monthly statement, its actual status was uncertain because of pending legal action. In any event, and as discussed below, Ms. Poliner-Johnson saw only one second-floor apartment, but it was not number 208.

On the second floor, Ms. Poliner-Johnson inspected *only* the apartment described as occupied by a man who was in the process of moving. The August monthly statement similarly describes apartment 204. Thus, apartment 204 must have been the one that she inspected on the second floor. However, although this was the only one-bedroom apartment that was both inspected by Ms. Poliner-Johnson and in fact available for occupancy after her inspection, Ms. Rancatti intended to reserve it for her friend, Ms. Wong.[14]

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[13] Although Ms. Rancatti was confused at times, she did maintain certain regimens and was able to focus on certain aspects of her job. For instance, a former tenant, Leslie Johnson, stated that even during the summer of 1989 she would never shirk her responsibility to ensure that rents were paid as of the first of each month. If a tenant didn't timely pay rent, there would be a reminder from her. Tr. 349-50. She was regularly the first of Mr. Cox's resident managers to submit her monthly statements, and those statements routinely contained correct mathematical computations. Tr. 360; S. Ex. 15, 16.

[14] Although at one time or another Ms. Rancatti may have intended to reserve *either* apartment 204 or 408 for Ms. Wong, after renting number 408 to the man from Jakarta, apartment 204 became the only one-bedroom unit available for her friend.

Of the three two-bedroom apartments at the Euclid, Ms. Poliner-Johnson saw only number 401. Ms. Rancatti resided in apartment 201, and according to her monthly statements, apartment 301 was occupied and rent was current as of July 1989. The August monthly statement shows that the tenant said that she "stated today 8-9-89" that she found other accommodations. As the statements were sent in anywhere between the 7th and 10th of the month, it is unlikely that this apartment was available for inspection prior to August 7th, or August 9th, at the earliest.[15]

The July statement shows that apartment 401 was rented for that month. The August statement contains two notations for that apartment; the first one "Vacant," and the second one, "Rented 9-1-89." Although it may have been unoccupied for a short period of time between the end of July and early August, the monthly statements compel the conclusion that it was rented at least as early as August 10th. However, there are reasons to presume that it was not available at the time of the testers' visits. First, the index card advertised only a one-bedroom apartment. No significance may be attached to the Euclid sign at the front of the building which advertised the existence of one *and* two-bedroom units, because it was always on display. Tr. 299-301. Ms. Poliner-Johnson confirmed that it was common practice for landlords to display "apartment availability signs" on a permanent basis. Tr. 231. Second, given the index card advertisement of only a one-bedroom apartment, Ms. Rancatti's statement to Ms. Bullock that a two-bedroom had been rented the night before cannot be summarily discounted in the absence of contrary evidence. Of course, Ms. Rancatti may have been confused about the availability of both the one and the two-bedroom apartments. Nevertheless, even assuming that the two-bedroom was available for rental or inspection at the time of the testers' visits, there is, as discussed above, no proof that Ms. Rancatti's actions were motivated by discriminatory animus.

3. Respondents' asserted reasons for Ms. Rancatti's actions are not pretextual.

Relying primarily on the "eugly black man" notation on the August monthly statement, the Secretary maintains that Respondents' reasons for Ms. Rancatti's actions are mere pretext. Her scribbling, however, was not a racial epithet, but rather her means for describing what she considered to be a very disagreeable situation.

[15] Unlike apartment 204, the tenant in this apartment had not previously informed Ms. Rancatti that she desired or intended to move. Rather, according to the August monthly statement, Ms. Rancatti asked the tenant to vacate. *See* S. Ex. 16 at 2.

An African-American male, who was not a tenant in the building, resided with one of the tenants. Because he was living at the building, on numerous occasions Ms. Rancatti requested that he fill out a rental application, but he refused to do so. Tenant Leslie Johnson described this man as "evasive" and thought at one time that he might have been "bunking out" on the back stairway. He was unsuccessful in his attempts to engage him in conversation, which Mr. Johnson characterized as unusual for an otherwise friendly apartment building. Tr. 344-45. Because of his refusal to identify himself or fill out a rental application, Ms. Rancatti described this man as "ugly," which was her way of stating that someone was unpleasant. She had in fact used this word in referring to her grandson when she did not approve of his actions. Given the circumstances, her character, and her prior use of the word "ugly" to apply generally to someone or something she found to be distasteful, I cannot conclude that her notation reveals any racial animosity or is evidence that the asserted reasons for her actions with respect to Complainants were pretextual.

Conclusion

This case presents an unfortunate human tragedy. Ms. Oliver and Mr. Edwards are extremely credible, articulate individuals who reasonably suspected that they might be the victims of discrimination when they saw the Euclid sign, were told that there were, nevertheless, no vacancies, and heard nothing in response to messages they left. Regrettably, the Foundation's test converted their suspicions into a genuine belief, and from that juncture, they suffered damages as victims of discrimination reasonably would. The test, however, not only fell short of any semblance of the type of thorough investigation which would have disclosed the true reasons for the conduct alleged to be discriminatory, but it became the catalyst for Complainants' distress. Absent the test, Ms. Oliver and Mr. Edwards would have been left only with their suspicions, and the Secretary would not have had a basis for determining that reasonable cause existed to believe that discrimination occurred.

Rather than delving into any extenuating facts that might exist, the Foundation conducted a sterile test and too easily assumed an act of discrimination. With even meager scrutiny, the Foundation could have ascertained whether there were minorities living at the Euclid. But making such a determination was not seen as part of its function. Tr. 134, 195. Even after HUD alerted the Foundation that there were, in fact, minority tenants, the Foundation deigned not to interview those African-American tenants. Tr. 134-35, 220. Nor was an inquiry made concerning the minority composition at the other buildings owned, or partially owned, by the Coxes.

Furthermore, if the Foundation and HUD had attempted meaningful conciliation with the Coxes and Ms. Rancatti, the real reasons for her actions would have come to light, and accordingly, Complainants could have had their suspicions allayed, and Ms. Rancatti's daughter could have avoided what obviously resulted in a very painful experience recounting her mother's illnesses and human foibles. As with any dramatic tragedy, the ending does not hold happiness for any of the actors.

ULTIMATE CONCLUSION AND ORDER

The Secretary has failed to prove by a preponderance of the evidence that Respondents engaged in any discriminatory housing practices. There is no *prima facie* case of discrimination concerning Ms. Rancatti's dealings with Ms. Oliver and Mr. Edwards. Even assuming the existence of a *prima facie* case, Respondents have asserted legitimate, nondiscriminatory reasons for her actions which the Secretary has failed to establish as merely pretextual. Accordingly it is,

ORDERED that, the charges of discrimination are dismissed.

_____/s/_____
ALAN W. HEIFETZ
Chief Administrative Law Judge

Dated: September 26, 1991