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 Laura Friend, Charging Party, v. Holiday Manor Estates Club, Inc.; Esther Hosier, President; Dale Webb; Jack Burwell, Respondents.	HUDALJ 05-89-0533-1 Decided: November 26, 1991

William Byer, Sr., Esquire
For the Respondents

Richard L. Gilman, Esquire, and
Richard S. Bennett, Esquire
For the Secretary and the Complainant

Before: ROBERT A. ANDRETTA
Administrative Law Judge

INITIAL DECISION

Jurisdiction and Procedure

This matter arose as a result of a complaint filed by Laura Friend ("Complainant"), alleging that she had been denied, by a mobile home park management, authorization to rent a mobile home in the park on the basis of her familial status in violation of the Fair Housing Act, 42 U.S.C. Sections 3601, *et seq.*, as amended by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 120 Stat. 1626 (1988) ("Fair Housing Act"

or "Act"). It is adjudicated in accordance with Section 3612(b) of the Act and the regulations of the Department of Housing and Urban Development ("HUD") that are codified at 24 CFR Part 104, and jurisdiction is thereby obtained.

On January 31, 1991, following an investigation of the allegations and a determination that reasonable cause existed to believe that discriminatory housing practices had taken place, HUD's Assistant General Counsel for Fair Housing issued a Determination Of Reasonable Cause And Charge Of Discrimination against Holiday Manor Estates Club, Inc., Esther Hosier, the Holiday Manor president, Dale Webb, and Jack Burwell ("Respondents")[1] alleging that they had engaged in discriminatory practices on the basis of familial status in violation of sections 804(a), (b), (c) and (d) of the Act, which are codified at 42 U.S.C. Sections 3604(a), (b), (c) and (d) and incorporated into HUD's regulations that are found at 24 CFR 100.60, 100.65, 100.75, and 100.80 (1989). A trial was conducted on May 7 and 8, 1991 in Anderson, Indiana, and post-hearing briefs were submitted by July 5, 1991.

On June 11, 1991, in accordance with an Order during the trial, Respondents filed a letter from an insurance company regarding coverage for damages that may result from this proceeding, and on June 21, 1991 counsel for the Secretary filed a motion for leave to amend the charge of discrimination to conform to evidence adduced at the trial. Specifically, the Secretary moved to include a charge of discrimination in violation of section 818 of the Act, 42 U.S.C. Section 3617; 24 CFR 100.400(b). The Secretary's Motion also requested an order compelling additional information regarding the respondents' insurance coverage. On July 12, 1991 I issued a set of rulings on these and other motions which granted the Secretary's motions to amend the complaint and to compel further evidence regarding insurance coverage, reopened the record for admission of further evidence regarding the amendment to the complaint and the issue of insurance coverage, and permitted the submission of supplemental briefs limited to these two issues. Supplemental briefs were filed by October 3, 1991 and, thus, this case became ripe for decision on that date.

Findings of Fact

Holiday Manor Estates Club, Inc. ("HMECI") is a nonprofit corporation organized under the laws of Indiana that operates Holiday Manor, an 83-site mobile home community in Elwood, Indiana. (S 3).[2] It does not itself own, sell or rent any of the mobile home sites. (S 5). HMECI's Board of Directors ("Board") administers the corporation, including enforcement of the rules and bylaws that govern the operation of Holiday Manor. (S 8). Respondent Esther Hosier was the president of the Board in May, of 1989.

[1] Jack Burwell and Dale Webb were dismissed as Respondents prior to the hearing.

[2] The secretary's exhibits are identified with a capital S and an exhibit number; those of the Respondents are identified with an R. The transcript of the hearing is cited with a capital T and a page number. The letter A followed by a number refers to a paragraph in the Respondents' Answer.

No one may purchase, own, or lease property in Holiday Manor unless first accepted as a member by the corporation. (S 8; A 8). Prospective members must submit an application with a $25 fee to the Board for approval. (S 5, 8). Members have a right to own or lease lots on which they may install their own or leased mobile homes. (S 1, 8; A 7). On October 18, 1983 Holiday Manor adopted rule 37, which, among other things, prohibits the acceptance of any new member with a child under the age of 18 who would reside with that person in Holiday Manor. (S 8; A 11).[3] Rule 37 was in effect until May 22, 1989. (S 1, 8, 9, 22).

In April and May 1989, Complainant Laura L. Friend was a 36-year-old mother of two sons; Trevor, age 17, and James Allen, age 10. (T 47, 57). In April, Friend resided at 207 E. Garfield Street, Alexandria, Indiana with her husband and two sons. (T 43, 83). At that time, her relationship with her husband was poor in that he was physically and emotionally abusing her. She therefore determined to find a safe and affordable place for herself and the younger son to live.[4] (T 53, 89, 130, 244).

At the time of the events leading to this proceeding, Friend's parents, Barbara and Gene Little, were long-time residents of Holiday Manor.[5] (T 53, 125, 130). The Littles also were owners of a second mobile home in Holiday Manor that they rented to others from time to time. (T 125). This 12 x 56-foot second home has two bedrooms, one bathroom and a living room. (T 126).

In April 1989, Complainant decided to move with her younger son to Holiday Manor so that they could leave her abusive husband, live near her parents, and more easily afford a clean and safe place to live. (T 53, 89, 244). On the 6th of April she completed a membership application so she could live in her parents' second trailer. (T 57). Mr. Little, as an owner intending to rent a unit in the park, got the application from the Board and gave it to Friend to complete. (T 127). He then submitted the application to Respondent Hosier. (T 54, 124, 184; A 13).

When Little submitted Friend's application, Hosier told him that the Board would deny the application on the basis of Respondent's minor child. (T 129). She submitted the application to the "Investigating Committee" for review and soon thereafter Friend was contacted by Margaret Heller, a committee member, regarding the application.

---

[3] Rule 37 also provided that any club members with children under the age of 18 at the time of the rule's adoption would be allowed to continue living in Holiday Manor but would be prohibited from having any further children under the age of 18. Violators of Rule 37 were to be removed from the club. (S 1, 8).

[4] Complainant never intended that Trevor live with her in new housing, and he is not involved in this case. (T 108).

[5] Gene Little is Laura Friend's stepfather. At the time of the hearing, the Littles were engaged in divorce proceedings. (T 123, 218).

(T 58, 211). Heller asked who would be living in the trailer, and Friend told her about James Allen. (T 58, 213). Heller's recommendation to Hosier was that Friend should be rejected because of the minor child. (T 213-16). On May 5, 1989 Hosier informed Little that the application was rejected because of the minor child, and Little told Friend of the rejection. (T 61, 185).

Shortly after learning of the rejection of the application, Friend spoke to Hosier to plead with her to understand her "desperate need" for housing and to let her know that she did not intend to live in Holiday Manor for long, but only until she could "get on [her] feet and get [her] life going, and that [she] had no place else to go because [she] could [not] afford to live any place else." (T 61-62). Hosier responded that "absolutely no way would [Respondents] allow [Complainant] to move in, because of [her] 10 year old son." (T 62). She further said that if her intended residence was "on the dog leg," a section of Holiday Manor where minor children are permitted to reside, it would have been a different decision, but that Club rules prohibited children "in the north end of the park, in the adult end." (T 62; S 7). During that conversation, Friend told Hosier that she intended to file a fair housing complaint against Holiday Manor.
(T 63; S 7).

As a result of the rejection of her application, Friend felt "humiliated," "downhearted," "shocked," and "indignant." (T 64-65, 137). She believed it was unfair to be denied housing because she had a ten-year-old son. She was "hurt because [her] child was suffering." (T 64). She was "depressed" and "despondent" because of her overall situation, and blames her mental state during that period for a decline in the quality of her work on her job and a subsequent failure to get a $0.25/hour raise that her co-workers got. (T 49, 84).

More significantly, in late August or early September of 1989, Friend felt that her situation at home was such that she had to leave. Since she could not move to the affordable housing at Holiday Manor, she moved with her son to a shelter for battered women in Anderson, Indiana, which is about 15-20 miles from Alexandria. (T 66, 72; S 7). The shelter had four bedrooms, each with four-five bunkbeds for women and their children. There are two bathrooms and a kitchen which all the residents share. (T 73). Complainant and her son were assigned to a bedroom with seven or eight infant children and their mothers, where she used the lower bunk and he slept in the upper bunk. (T 72). Friend and the other women were responsible for cleaning duties throughout the shelter. (T 72). However, she and her son found the other people to be "dirty" and "unsanitary," and frequently James Allen could not bear to eat; his "health suffered." (T 73, 137, 248). The boy had no privacy and could not play as he was accustomed; *i.e.*, "go outside," "skateboard," or "ride his bike." (T 137). Friend was humiliated by living in the shelter and did not tell her mother that she was there.
(T 248).

Before moving to the shelter, Complainant's son had attended a school that he "loved" in Alexandria. (T 247). During the residency at the shelter, Friend was obliged to

drive round trip to Alexandria so that the boy could continue at his school, incurring additional costs that she could ill afford at the time. (T 85). She also had to do the 20-mile round trip in the opposite direction to get to her job in Elwood. (T 73).

Later in September, Complainant Friend moved with her son from the shelter to her parents' vacant unit at Holiday Manor without submitting another application. (T 76-77). She was reluctant to move into the park without an approved application because she was "afraid" of how she, her son, and her parents would be treated. (T 248). The Littles believed that the other Club members would ostracize them and subject them to harsh treatment for allowing Complainant the use of their trailer and that Complainant and her son would not be welcome. (T 138-39, 244).

Immediately after Friend and James Allen moved into the trailer, Respondent HMECI and its attorney sent her parents a number of letters of complaint. (T 78, 139, 259; S 10-14). A letter dated September 20, 1989 from Respondent's attorney states that the Littles had an unauthorized occupancy. (S 10). A letter dated October 5, 1989 from HMECI's Board states that the Littles were in noncompliance with Club rules in that numerous cats were roaming the park and destroying neighbors' property. (S 11). A letter dated October 23 from the attorney states that they were in noncompliance with park rules with regard to unapproved construction of a nonconforming porch, harboring of animals which disturb neighbors, and having a nonconforming yard light. (S 12). Another letter from the attorney, dated November 21, states that despite Mr. Little's contentions that his porch is no different from others, it is in violation and it is in the Board's discretion whether to act against other members with nonconforming porches. (S 13). A December 12 letter from the attorney states that the wiring on top of the Littles' yard light was exposed and the bulb in the light was incorrectly located. This letter also reiterated the complaints regarding the porch and the feeding of stray animals. (S 14).

The Littles have three cats that remain indoors at all times. (T 167, 261). The couple has been feeding stray animals since they moved into Holiday Manor in 1981. (T 169). When they first moved in, they received a complaint about feeding the animals, but they did not receive any further complaints regarding their own pets or stray animals until Complainant Friend moved into Holiday Manor with her son in the spring of 1989. (T 170, 263).

Mr. Little built his porch in 1986. (T 148, 261). The Littles did not receive any letters or other complaints about the porch until Complainant Friend moved into Holiday Manor. The porch is similar to many others in the trailer park. (T 147; S 13; R 1J). Mr. Little made the necessary corrections to his yard light and also ceased other minor violations of park rules, such as parking his truck on the front road and keeping a pile of gravel in his driveway.

The Littles received more letters from the Respondents during the eight months of Complainant's residency at Holiday Manor than at any other time in the years they have resided there. (T 147, 199). They also received more than those mentioned in this

decision and marked as S 10-14. (T 147). No other club members received letters concerning violations of club rules during the period that Complainant lived in the park. Friend and the Littles believed that the letters were a form of harassment because of Friend's use of the Littles' trailer. (T 78, 148, 273).

The mailboxes at Holiday Manor are grouped together and have no locks. (T 118). During Friend's residency at Holiday Manor, unknown parties tampered with her mail. (T 78, 117). She did not receive all the mail addressed to her there. Instead, she found much mail waiting for her when she left Holiday Manor and returned to the house on Garfield Street, which her husband had vacated, in April 1990. (T 82). On the items of mail there were notations indicating that she did not live at Holiday Manor and that the item should be returned to Garfield Street. (T 118-20). She received none of her magazines while living at Holiday Manor, and her complaints to the post office were to no avail. (T 118). Ms. Little did not receive any of her magazines while her daughter lived in Holiday Manor, but she started getting them again after Friend's departure. (T 250). James Allen was told by an unknown party that he could not use the mailbox for outgoing mail to mail his mother's letters. (T 79). The Littles also received an anonymous letter that states that they would be happier living in another community or on "an island somewhere." (T 251, 263; S 31). These actions and the letters caused the Littles and Friend some emotional trauma and stress, and they hired an attorney to help them respond to them. (T 148, 172).

On May 22, 1989, after Friend's application was rejected and after she told Hosier that she would file a complaint against Holiday Manor, Respondent HMECI amended Holiday Manor's rules and declared it to be "housing for older persons."[6] The amendment stated that Holiday Manor henceforth "shall be intended for and solely occupied by persons 62 years of age or older and/or intended and operated for occupancy by at least one person 55 years of age or older per unit." (T 102; S 9, 22). On May 5, 1989, the date that Friend's application was turned down, and thereafter, Holiday Manor was not and has not been solely occupied by persons 62 years of age or older, although 31 of the residents were at least of that age at that time. (S 4, 26). Subsequently, most, but not all, people moving in to Holiday Manor have been 62 years old or older. (S 4). On that date in May, at least 80% of the units in the park were occupied by at least one person aged 55 or older. (T 27).[7]

Neither on May 5, 1989 nor thereafter did Respondents inform their members about the new rule and that Holiday Manor had become housing for persons 55 or older. (T 135). They never kept a log of occupants' ages nor ever required proof of prospective

---

[6] Prior to this amendment of the rules, rule 37 was in effect, but it did not prohibit people between the ages of 18 and 55 from living at Holiday Manor. (T 226). Moreover, rule 37 was not always honored since children were often permitted to live in units located in the "dog leg" section of the park. (T 62, 150, 245).

[7] During the hearing, it was strongly alleged that Holiday Manor also enforces an "unwritten rule" that prohibits blacks, Hispanics, and other minorities from residing in the park (T 229-31).

residents' ages. (T 163, 541). As of the time of the hearing, Respondents had never advertised Holiday Manor as being housing for older persons, and there are no signs or billboards stating that is the case. (T 164, 495, 563). Moreover, even though Respondent HMECI must approve all advertising for sale or rental of units in Holiday Manor, it has never required that such advertising include notice that Holiday Manor is housing for older persons. (T 164-65). One longtime resident is a former member of the Board and is an active real estate agent who does business in Holiday Manor. He never previously advertised units in Holiday Manor as being for persons 55 or older, but he was doing so at the time of the hearing. (T 165).

Members of Holiday Manor Club pay dues of $20 per month which has always been understood to be for water, sewerage, snow removal, trash pick-up, street maintenance, grass cutting in the few, small common areas, electricity for the clubhouse, and general maintenance. (T 151, 288, 495; S 5). In August of 1990, Holiday Manor was annexed into the city of Elwood. Since then, the city has provided the park's trash pick-up, common area snow removal, street maintenance, water and sewerage, fire protection, ambulance service, and police patrols, as it provides to all other Elwood citizens. (T 374, 381; S 29). However, the members of the club continued to pay the $20 monthly dues.
(T 382).

Holiday Manor has an unair-conditioned clubhouse that is maintained in "fair condition" and kept locked at all times that it is not in use. (T 154, 286). It contains a meeting room with tables and chairs, a small, ill-equipped kitchen, a single bathroom, a few shelves of books, a pool table, and a piano. (T 284, 287) The Board uses the meeting room once per month, and about 30 residents have a "pitch-in" dinner as often. (T 153, 236, 497). Some members play bingo after the pitch-ins, and the piano is occasionally played. (T 157, 236). A women's club of 12 to 15 members gets together in the clubhouse, but there are no regularly-scheduled guest speakers or lecturers and no entertainment for club members at the clubhouse. (T 422). The "library" contains only about ten books, the pool table is used by four or five men once per week, the bathroom shower is nonfunctioning, and the entire facility is nonhandicapped-accessible. (T 155, 287, 442).

There are no social or recreational programs or activities offered at Holiday Manor by Respondents or any other person or entity. (T 234). There is no social coordinator. There are no clubs or programs for aerobics or other exercise, reading, woodworking, gardening, art, crafts, entertainment, or anything else. (T 159, 234). There are no exercise facilities, tennis courts, putting greens, or shuffleboards, and there is no swimming pool. (T 156, 504). There are no continuing education classes, and there is no counseling. (T 158, 235). There is no emergency or preventative health care; not even blood pressure and cholesterol checks. (T 235). There are no homemaker services, and there is no transportation to outside facilities for those who do not drive. (T 233, 391). There is no security guard and no patrol. (T 159). In fact, there are no facilities or services provided by Holiday Manor that have been adapted for the particularized needs

of older persons, and Respondent HMECI has made no changes in the club's facilities and services over the past twenty years, nor, more particularly, since it declared the park to be for older persons in May 1989. (T 237, 509).

Members of Holiday Manor are generally of moderate income, and the mobile homes in the park, including the lots upon which they are situated, range in value approximately from $20,000 to $55,000 and are owned debt free. (T 112, 222, 389, 448). Prices of comparable homes in Elwood, which is an economically depressed area, are similar to those at Holiday Manor; *e.g.*, at the time of the hearing the average asking price for homes for sale in Elwood was $26,000. (T 222, 291). As of May 9, 1991, 9 of the 82 homes (11%) at Holiday Manor were vacant. (T 557).

There is federally-subsidized housing for the elderly in Elwood, and some former club members have moved there. (T 292, 278). Anderson, Indiana is in the same area as Elwood and also has federally-subsidized housing for the elderly (T 292). This housing is designated as housing for persons 55 or older, and it has a congregate dining area, three meals per day, transportation, social activities, movies, 24-hour security, and health counseling. The monthly rent for this housing is approximately from $300 to $450. (T 292).

Applicable Law

Congress enacted the Fair Housing Act to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers [which] operate invidiously to discriminate on the basis of impermissible characteristics." *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir.), *cert. denied*, 422 U.S. 1042 (1974). The Act was designed to prohibit "all forms of discrimination, [even] simple-minded." *United States v. Parma*, 494 F. Supp. 1049, 1053 (N.D. Ohio), *aff'd in relevant part*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 465 U.S. 926 (1982).

On September 13, 1988 Congress amended the Act to prohibit, *inter alia*, housing practices that discriminate on the basis of familial status.[8] 42 U.S.C. Sections 3601-19. 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., 2nd Sess. (1988) ("House Report"). In addition, Congress cited a HUD survey that found 25% of all

[8] The term "familial status" is defined in the Act, at 42 U.S.C. Section 3602(k), as

> ... one or more individuals (who have not attained the age of 18 years) being domiciled with --
>
> (1) a parent or another person having legal custody of such individual or individuals; or
>
> (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

rental units exclude children and that 50% of all rental units have policies that restrict families with children in some way. *See* Marans, *Measuring Restrictive Rental Practices Affecting Families With Children: A National Survey*, Office of Policy, Planning and Research, HUD, (1980). The HUD survey also revealed that almost 20% of families with children were forced to live in less desireable housing because of restrictive policies. Congress recognized these problems and sought to remedy them by amending the Fair Housing Act to make families with children a protected class.

Accordingly, the amended Act and HUD regulations make it unlawful, *inter alia*:

> (1) to refuse to ... rent after making a bona fide offer, or to refuse to negotiate ... for the rental of, or otherwise make unavailable or deny, a dwelling to any person because of ... familial status ....[9] 42 U.S.C. Section 3604(a); 24 CFR 100.50(b)(1) and (3), and 100.60(b)(1) and (2).
>
> (2) to discriminate against any person in the terms, conditions, or privileges of ... rental of a dwelling, or in the provision of services or facilities in connection therewith, because of ... familial status .... 42 U.S.C. Section 3604(b); 24 CFR 100.50(b)(2) and 100.65 (1990).
>
> (3) to make, print, or publish, or cause to be made, printed, or published, any notice [or] statement ... with respect to the ... rental of a dwelling that indicates any ... limitation or discrimination based on ... familial status, ... or an intention to make any such ... limitation or discrimination. 42 U.S.C. Section 3604(c); 24 CFR 100.50(b)(4) and 100.75 (a)-(c).
>
> (4) to represent to any person because of ... familial status ... that any dwelling is not available for ... rental when such dwelling is in fact so available. 42 U.S.C. Section 3604(d); 24 CFR 100.50(b)(5) and 100.80.
>
> (5) to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of [that person] having exercised or enjoyed, ... any right granted or protected [under the Act]. 42 U.S.C. Section 3617; 24 CFR 100.400(b).

---

[9] A "dwelling" includes "any building, structure, or portion thereof which is occupied as, or intended for occupancy as, a residence by one or more families." 42 U.S.C. Section 3602(b). Mobile homes and mobile home lots in mobile home parks are dwellings. *See* 24 CFR Ch. I, Subch. A, App. I, at 567. *See also, HUD v. Murphy*, Fair Housing-Fair Lending (P-H), para. 25,002 (July 13, 1990).

The Act provides two exemptions for "housing for older persons" from its bar against discrimination on the basis of familial status. These exemptions are for housing for persons 62 years of age or older and housing for persons 55 years of age or older, and each exemption has its own tests. To establish that certain housing is exempt as being for persons aged 62 or older, the housing provider must show that the housing is intended for, and solely occupied by, persons 62 years of age and older. 42 U.S.C. Section 3607(b)(2)(B). There is also a transition provision which allows certain housing to be exempt, even though some persons residing there are under 62 years of age, if all new residents of the housing after September 13, 1988 were 62 years of age or older at the times that they took up occupancy. *Id.*, at 3607(b)(3)(A).

To establish the exemption for housing for persons 55 years of age or older, the housing provider must show that, at the time of the discrimination on the basis of familial status, it satisfied all of the following three requirements: (1) at least 80% of its units were occupied by at least one person 55 years of age or older; (2) it had published and adhered to policies and procedures which demonstrate the owner's or manager's intent to provide housing for persons 55 years of age or older; and (3) (a) it provided significant facilities and services specifically designed to meet the physical or social needs of older persons, or (b) if the provision of such facilities and services was not practicable, that the housing was necessary to provide important housing opportunities for older persons. 42 U.S.C. Section 3607(b)(2)(C).

Discussion

HUD's Chief Administrative Law Judge, Alan W. Heifetz, articulated the burden of proof test to be applied in housing discrimination cases brought under the Fair Housing Act in *HUD v. Blackwell*, Fair Housing - Fair Lending (P-H) para. 25,001, 25,005 (HUDALJ No. 04-89-0520-1, Dec. 21, 1989) (hereinafter cited as *Blackwell*). This statement of law was upheld by the United States Court of Appeals in *Secretary, HUD On Behalf Of Heron v. Blackwell*, No. 90-8061 (11th Cir. Aug. 9, 1990). It is that the well-established three-part test that is applied by the federal courts to employment discrimination cases which are brought under Title VII of the Civil Rights Act, as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), should also be applied to housing discrimination cases that are brought before this forum. *See, e.g., Politt v. Bramel*, 669 F. Supp. 172, 175 (S.D. Ohio 1989). *See also*, Schwemm, *supra*, 323, 405-10 & n. 137. That burden of proof test is 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, undiscriminatory [sic] 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 ....

Politt, supra, at 175, *citing McDonnell Douglas, supra*, at 802, 804.

The shifting burdens of proof format from *McDonnell Douglas*, which is spelled out above, is designed to assure that the "plaintiff [has] his day in court despite the unavailability of direct evidence." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1984), citing *Loeb v. Truxton, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979) (disapproved on other grounds in *Trans World Airlines, Inc., supra*). Therefore, in *Murphy, supra*, it was further established that where Complainant and the Government can produce direct evidence of discrimination, the shifting burdens of proof analysis set forth in *McDonnell Douglas* need not be applied. *Citing Trans World Airlines, supra*, at 121; *see also Teamsters v. U.S.*, 431 U.S. 324, 358, n. 44 (1977).

In this case, there is direct evidence that Respondents discriminated on the basis of familial status by refusing to accept Friend's application to live in her parents' trailer. In fact, Respondents do not deny that they refused to let her live in Holiday Manor with her minor son. Instead, they defend themselves by claiming that they were in their rights to refuse the Complainant because Holiday Manor enjoys the exemption from the Act that arises because of a claim to be housing for older persons. Their claim appears to be some sort of hybrid combination which would arise under Holiday Manor's claim to be housing for persons 62 and older as well as 55 and older. Since there is no provision of the Act or HUD's regulations which sets forth a set of criteria providing the exemption for combined over 62 and over 55 housing, and since there is no precedent in the case law for such an inquiry, I have determined that Respondents' claims to be housing for 62 and housing for 55 must be viewed one at a time, and must stand or fall, each on its own merits.

In allocating the burden of proof regarding the application of statutory exemptions, courts consistently apply two general rules of construction: (1) one who claims a benefit of an exemption bears the burden of proving that it is qualified for such benefit; and (2) a party does not have the burden of establishing facts peculiarly within the knowledge of his adversary. The first rule is well-established in the federal cases. *See, e.g., United States v.Oates*, 560 F.2d 45, 75 (2nd Cir. 1977) (Federal Rules of Evidence); *United States v. First City National Bank of Houston*, 386 U.S. 361, 366 (1967) (Clayton Antitrust Act); *Wirtz v. C & P Shoe Corp.*, 336 F.2d 21, 28 (5th Cir. 1964) (Fair Labor Standards Act). Thus, since the Respondents wish to benefit from the exemption for housing for older persons, they bear the burden of showing that they are qualified for it.

The second rule of construction, that a party does not have the burden of establishing facts peculiarly within the knowledge of his adversary, is also well established by federal case law. *See, e.g., United States v. An Article of Device*, 731 F.2d 1253, 1262 (7th Cir. 1984) (Food, Drug and Cosmetic Act); *Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals*, 523 F.2d 25, 36 (7th Cir. 1975). Key

elements of the tests for the exemptions that Respondents claim, such as their intent, the manner in which they have operated and maintained the community, and the club's financial particulars, are peculiarly within their knowledge. Thus, the Respondents here are uniquely able to establish whether they qualify for the exemptions for older persons.

In interpreting the Act in housing discrimination cases, this forum and other courts have recognized these two principles and placed the burden of proof on housing providers claiming the exemptions to show that their facilities qualify. *Murphy* at 25,044; *United States v. Keck*, Fair Housing-Fair Lending (P-H), para. 15,563, 16,445 (W.D. Wash. 1990); *Lanier v. Fairfield Communities, Inc.*, Fair Housing-Fair Lending (P-H), para. 15,632, 16,251 (M.D. Fla. 1990).[10] Accordingly, Respondents here bear the burden of establishing that, at the time of their discrimination, Holiday Manor met the criteria for the 62 and older exemption or the 55 and older exemption, both of which they have claimed.

Housing for 62 and Older

[10] Courts have also placed the burden of proof on housing providers claiming other exemptions under the Act. *See, e.g., Singleton v. Gendason*, 545 F.2d 1224, 1226 (9th Cir. 1976) (owner of three single-family houses selling one within 24-month period); *Johnson v. Zaremba*, 381 F. Supp. 165, 166 (N.D. Ill. 1973) (owner-occupied dwelling containing living quarters for only four families).

On May 5, 1989 Holiday Manor was not solely occupied by persons 62 years of age or older. (S 4, 26). At that time, at least 31 residents were under 62 years old. Moreover, not all of the people who moved in to Holiday Manor from September 13, 1988 to May 5, 1989, the date of the discriminatory action, were 62 years old or older. (S 4, 27). Thus, Respondents have failed to meet the basic test for the exemption for housing for persons 62 years of age and older and have also failed to meet the criteria for the "transition" exemption.[11] Accordingly, I find that the Respondents are not exempt from the Act on the basis of providing housing for persons at least 62 years old.

Housing for 55 and Older

First Test

As mentioned above, to maintain that Holiday Manor was qualified for the 55 or older exemption at the time of the discrimination, the Respondents must meet all three elements of the test, the last of which is an either/or element. Failure to meet any of the three is fatal to their argument. *Murphy*, at 25,044; *Keck*, at 16,446. The Secretary does not contest that on May 5, 1989 at least 80% of Holiday Manor's units were occupied by at least one person aged 55 years or older. Thus, the Respondents meet the first test.

Second Test

The second test asks whether the Respondents published and adhered to policies and procedures that demonstrate their intent to provide housing for persons 55 or older. HUD's regulations set out six factors that are drawn from the Act's legislative history which are to be used in determining whether a housing facility meets this requirement. These six factors are: (1) written rules and regulations; (2) the manner in which the housing is described to prospective residents; (3) the nature of advertising; (4) age verification procedures; (5) lease provisions; and (6) the actual practices of the owner or manager in enforcing relevant lease provisions and relevant rules and regulations. 24 CFR 100.304(c)(2). They were applied in *Murphy* at 25,050, where the administrative law judges stated:

> These tests are designed to establish whether a housing provider has demonstrated an intent to provide housing for persons 55 or older by its adoption and adherence to policies and procedures which manifest that intent. The focus of the tests is on whether: (1) the housing provider holds itself out as providing housing for persons 55 or older, and (2) the housing provider has demonstrated that it has consistently done so.

[11] Respondents' lack of resolve in meeting the criteria for becoming housing for persons 62 years of age and older is further illustrated by the fact that not all new Holiday Manor residents since May 5, 1989 have reached that age. (S 4).

Since 1983, Respondents have had a published policy excluding families with children under 18 years old. Rule 37 of Holiday Manor's Rules and Regulations was in effect on May 5, 1989. This rule did not exclude membership in the club or residency to a person under the age of 55 who did not have a child under 18. At that time, Respondents had no rule relating to age other than rule 37. It was not until May 22, 1989, after Respondents' denial of Friend's application and after they became aware that she was filing a complaint that they amended HMECI's Rules and Regulations to assert that Holiday Manor shall be "housing for persons 62 or older and/or 55 or older." This ambiguous rule change came too late to fulfill the first test.

Respondent HMECI's membership application requires prospective members to read the Rules and Regulations, which, as of May 5, 1989, did not contain a reference to housing for older persons but, rather, only restricted persons with children under 18. The evidence also showed that the Respondents do not advertise Holiday Manor as a retirement community for persons either 62 or 55 years of age and older. Nor do Respondents require members to inform realtors that a Holiday Manor unit for sale is only available to older persons. Thus, parts two and three of the second test are not fulfilled.

Respondents do not employ age verification procedures; *e.g.*, they do not ask applicants for drivers' licenses or birth certificates. Although the application form asks for the age of the applicant and is required to be notarized, not everyone discloses age, and Respondents do not enforce the requirement. (S 5). Respondents maintain no list, log, or chart of people moving in and out and their ages, and they never sought to learn what percentage of people residing in Holiday Manor are 55 or older until this matter arose. There are no sale or lease requirements concerning age. Finally, the testimony showed that even Complainant would have been allowed to move in with her minor dependent had she sought housing on the "dog leg," where Respondents permit children to reside. So, the final three tests are failed.

A housing provider cannot meet the policies and procedures requirement simply by amending its rules and regulations when it learns of a pending complaint against it. Rather, the housing provider must unequivocally hold its housing out to the public as housing for persons 55 or older, and must do so consistently. These six factors are meant to test that by determining an intent both in theory and practice to provide housing that is reserved for people of the qualifying age. *See* 24 CFR Ch. I, Subch. A, App. I at 572 (1990). While Respondents in this case took some half-hearted steps towards implementing a policy of changing Holiday Manor to housing for persons 55 or older, their actions were too little and too late: they were after the fact and they failed to fulfill any of the six tests required to show that they had published and adhered to appropriate policies and procedures.

<u>Third Test, First Alternative</u>

If they had met the six tests, the Respondents would still have to show that Holiday Manor either provided significant facilities and services specifically designed to meet the physical or social needs of older persons or, if the provision of such facilities and services was impracticable, that the housing was necessary to provide important housing opportunities for older persons. The exact facilities and services that are "significant" in a particular instance will necessarily vary based upon the needs of the residents and the location of the housing. But it is clear that Congress intended that the facilities and services must truly be substantial. *See* House Report at 32.

To determine that the facilities and services are significant, a housing provider must show that they have been "designed, constructed, or adapted to meet the particularized needs of older persons." *Murphy* at 25,004.[12] He must show that the facilities and services indicate a "genuine commitment to serving the special needs of older persons." *Keck* at 16,446. In finding that the facilities and services offered in *Murphy* did not meet the physical and social needs of older people, the administrative law judge focused on the fact that the respondents' facilities and services : (1) failed to exhibit significant design, construction, or adaptation for the handicapped or infirm, and (2) did not indicate significant use by or for older persons. For example, the judge specifically cited the inability of an unassisted person in a wheelchair to gain access to the mobile home park's clubhouse and the absence of fixtures for the handicapped in the clubhouse lavatories. He also noted explicitly the lack of social or recreational programs offered at the park. *Murphy* at 24,045.

Next, the judge in *Murphy* focused on the fact that the facilities and services set out as examples in HUD's regulations were not well represented in the park. For example, the mobile home park provided no emergency or preventative health care, or information, counseling, or homemaking services. It had no congregate dining facilities, and it provided no transportation to the park's residents even though the closest bus stop was three or four miles away and the nearest grocery store was two miles away. Further, there was no coordinator, organizer, or any educational, social, or recreational activities *Id*. at 25,046. He also rejected the respondents' attempt to rely on the availability of facilities and services that were available elsewhere locally. While acknowledging that it is possible to have a situation where other facilities or services are "so integrally related to the community claiming the exemption that [they are], in effect, on the premises," he articulated the more appropriate general rule that "the availability of senior centers elsewhere in the same geographic location does not tend to set a particular community

---

[12] Significantly, in formulating this test, the administrative law judge who decided *Murphy* noted that:

> Congress did not establish an unqualified right for older persons to live in childless surroundings. The three part statutory test is intended to require the party claiming the exemption to prove by objective evidence that the special needs of the older persons residing in the community are such that they legally justify and permit the exclusion of families with children.

apart." *Id*. The administrative law judges who decided *Keck* and *Lanier* reached the same conclusion through the same analysis. (16,446; 16,249).

As with other requirements of the housing for persons aged 55 years or older exemption, a housing provider must establish that the housing facility had significant facilities and services as of the date that he discriminated on the basis of familial status. A review of the facilities and services Holiday Manor provided on the date of Respondents' discrimination, as noted above in the Findings of Fact, reveals that Respondents failed to show that Holiday Manor meets this part of the statutory requirements for the exemption. This conclusion is inevitable when Respondents' paltry facilities and nearly non-existent services are compared to those facilities and services that are listed in HUD's regulations at 24 CFR 100.304(b)(1) or to those found to be inadequate in *Murphy, Keck* and *Lanier*.[13]

Third Test, Second Alternative

If a housing provider fails the significant facilities and services test, the Act provides an alternative means to complete the third requirement for those housing facilities where it is impracticable to provide significant facilities and services. This alternative was created for "those unusual circumstances where housing without such facilities and services provides important housing opportunities for older persons." 134 Cong. Rec. S10456 (daily ed. Aug. 1, 1988). This alternative route consists of a two-part test requiring the housing provider to show that "the provision of such facilities and services is not practicable, [and] that such housing is necessary to provide important housing opportunities for older persons." 42 U.S.C. Section 3607(b)(2)(C)(i); 24 CFR 100.304(b)(2).

The HUD regulation cited immediately above was carefully drawn from the legislative history of the Act and lists seven factors to be considered in determining whether a housing facility meets this alternative to the significant facilities and services requirement. The seven factors are:

> (1) whether the owner or manager of the facility has endeavored to provide significant facilities and services designed to meet the physical or social needs of older persons;
>
> (2) the amount of rent charged, if the dwellings are rented, or the price of the dwellings if they are offered for sale;[14]

[13] Compare, for example, the facilities and services found to be inadequate in *Murphy* that are listed and discussed at para. 25,045.

[14] Typically, at a mobile home park, the trailer is bought new or from the previous owner, and the lot that it occupies is rented from the park manager. Thus, in considering this second factor, one must look to the average value of the trailers and the rental rates for the lots. At Holiday Manor the lots as well as the

(3) the income range of the residents;

(4) the range of housing choices for older persons in the area;

(5) the demand for housing for older persons in the area;

trailers are individually owned, and owners may lease both.

> (6) the availability of other, similarly priced housing for older persons in the area; and
>
> (7) the vacancy rate of the facility.

It is clear from the testimony that Holiday Manor has never had significant facilities and services for the elderly, nor has it ever endeavored to acquire them. Respondents say that providing the facilities and services would be too costly, but they never looked in to what would be required of the residents, what it would cost, and what the residents would be willing to pay. Thus, Holiday Manor fails to meet the impracticability test because it has made no effort to provide facilities and services or even to asses their feasibility. *See Murphy* at 25,047; *Keck* at 16,446.

The remaining six factors listed in HUD's regulation relate to whether the housing is necessary to provide an important housing opportunity for older persons in the community. In *Murphy* the administrative law judge said:

> These factors bear on the question whether older persons living in the community have nowhere else to go after it has been determined that (1) significant facilities and services are not available in the community, and (2) that it is impracticable to provide significant facilities and services for those older persons. This test only comes into play if the "impracticability" test has been satisfied. It is designed to deal with the unusual situation where a community not meeting the tests of 3607(b)(2)(C) will still be allowed to exclude families with children because the older persons in the area are deprived of affordable housing. (at 25,048).

Although Respondents failed to introduce evidence of Holiday Manor's residents' incomes, the Secretary admits that it is "moderate." (Secretary's Post Hearing Memorandum of Law, p. 91). The trailers range in value from $20,000 to $55,00, and most of them are owned debt free. (T 222, 389, 423, 448). Residents pay a fee of $20 per month to the club, but the amounts that they pay as rent for the trailer lots, here this is the case, is not in evidence. There was also no evidence regarding the level of demand for housing for older persons in the area in general or at Holiday Manor in particular. However, as of May 11, 1989 Holiday Manor had nine vacant homes for a vacancy rate of 11%. This was so in spite of the fact that Elwood has a 30% population rate of persons age 55 or older. (T 557). The evidence also shows that there is alternative housing, including some HUD-subsidized housing, for older persons, in the 62 and older category as well as 55 and older, in Anderson and Elwood. (T 292, 387). The housing in Anderson includes many facilities and services designed specifically for older persons. (T 293). Finally, the other housing in the area that is available to older persons is similarly priced. Thus, Respondents have failed to establish that Holiday Manor provides an important housing opportunity for older persons. More importantly, Respondents have

failed throughout the "testing" process to show that Holiday Manor qualifies for a housing for older persons exemption by failing the second and third tests entirely.

Section 818 of the Act

Section 818 of the Act makes it unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person having exercised or enjoyed, any right granted or protected under the Act. 42 U.S.C. Section 3617; 24 CFR 100.400(b). By my Orders of July 12 and August 20, 1991, I permitted the Secretary to amend the Complaint to conform to the evidence and permitted both parties to do additional discovery and submit supplemental briefs on the issue, *inter alia*, of whether Respondents harassed and interfered with Complainant in retaliation for her having moved in to Holiday Manor and filing the complaint. The Secretary further argues that Friend and her son were constructively evicted by such treatment.[15]

In April 1990, Complainant and her son vacated Holiday Manor. The Secretary claims that they left because Respondents created a hostile environment for them at Holiday Manor by "bombarding" the Complainant's parents, the Littles, with a "barrage" of letters regarding club rule violations. The Secretary further charges that Respondents "facilitated and encouraged" other Holiday Manor members to engage in acts further perpetuating a hostile environment toward Complainant and her son. The acts complained of were alleged tampering with Friend's and her mother's mail, intimidating Complainant and her son to keep them from depositing mail in the mail collection box, and sending "hate mail" and a barge of letters of complaint to the Littles.

In *HUD v. Williams*, I stated that harassment can constitute a cause of action within prohibitions of discrimination if it creates a hostile environment. Fair Housing - Fair Lending (P-H) para. 25,007, 25,120 (Mar. 22, 1991). Moreover, I further stated that the creation of such an hostile environment could be taken to cause a constructive eviction if the effected resident actually left the premises:

> With regard to the allegation of constructive eviction, it is well established that an eviction may be actual or constructive. A disturbance of a tenant's possession by a landlord, or by someone acting under the landlord's authority, which deprives a tenant of the beneficial enjoyment of the premises, causing him to abandon it, amounts to constructive eviction, provided the tenant abandons the premises within a reasonable time. Am. Jury. 2d *Landlord and Tenant,* Sec. 301 at 316 (1970).

[15] The Secretary was permitted to amend the original charge adding these allegations because they were reasonably within the scope of the original charge and were tried in part by the express and implied consent of the parties during the hearing. *See* 24 CFR 104.440(a)(3).

The doctrine of constructive eviction is also well established in Indiana law. In *Sigsbee v. Swathwood*, 419 N.E. 2d 789 (Ind. App. 1981), the court stated that:

> ... if an act or omission by the lessor materially deprives the lessee of the beneficial use or enjoyment of the leased property, the lessee may elect to abandon the property and avoid further obligations under the lease. If the lessee so elects, the abandonment of the property must occur within a reasonable time after the act or omission.

This statement of law was later recognized as the "concise summary" of the theory of constructive eviction. *T & W Building Co. v. Merrillville Sport & Fitness, Inc.*, 529 N.E. 2d 865, 866 (Ind. App. 1988).

In construing section 818, the Office of Administrative Law Judges has determined that a three-part test can be used to establish a prima facie case of retaliation. *Murphy* at 25,051.[16] The three parts are: (1) an aggrieved person was engaged in activity protected by the statute; (2) the housing provider took adverse action against him; and (3) a causal connection exists between the protected activity and the adverse action. This test for retaliation is also applicable to determining whether a person has been unlawfully harassed on the basis of his protected class.

In this case, the Complainant was not engaged in activity protected by the statute. While section 818 expressly proscribes interfering with the right to quiet use and enjoyment of a dwelling because of familial status, it does not grant such rights to persons who unlawfully occupy a dwelling. To live in Holiday Manor, prospective residents must submit an application, accompanied by a fee to HMECI, and the Board of Directors must approve it. The Secretary does not contest the validity of this requirement.[17] In fact, in its post-hearing brief, the government states that "no one may purchase, own, or lease property in Holiday Manor until first becoming accepted by the corporation as a member."[18] (p. 5). Thus, Friend and her son were living in the Littles' mobile home as unapproved tenants in violation of HMECI's rules, and they had no legal right to be there. This activity was not protected by the Act, and the government has failed to make out the required prima facie case. *Murphy*, at 25,052.

---

[16] The judge in *Murphy* also permitted amendment of the Secretary's charge to include a section 818 claim in conformance with the evidence adduced at trial. (para. 25,051 n. 54).

[17] Indeed, if the government maintained that the requirement is not valid it would be difficult to maintain a cause of action for denying acceptance of an application on any grounds.

[18] The more usual situation is that the trailer park owns the lots and leases them to people for the placement of their personally-owned homes. In such cases, the complaint arises when the park manager or owner refuses to lease a lot to a person wishing to purchase the trailer that occupies it. *See, e.g., HUD v. Guglielmi and Happy Acres Mobile Home Park*, Fair Housing - Fair Lending (P-H) para. 25,070 (HUDALJ 02-89-0450-1, Sep. 21, 1990); *Murphy, supra.*

Procedural Issues

The Act requires the Secretary to complete an investigation of an alleged discriminatory housing practice within 100 days of the filing of the complaint, unless it is impracticable to do so. 42 U.S.C. Section 3610(a)(1)(B)(iv); 24 CFR 103.225. If the Secretary is unable to complete the investigation within the 100-day period, he is required to notify the parties in writing of the reasons for not doing so. 42 U.S.C. Section (a)(1)(C); 24 CFR 103.225. Respondents have repeatedly moved this forum to dismiss this case because HUD failed to complete its investigation of the complaint within 100 days and failed to notify the parties of the reasons for the delay as the Act requires.

Failure to comply with this requirement does not preclude the Secretary from Maintaining the cause of action. *HUD v. Baumgardner*, Fair Housing - Fair Lending (P-H), para. 25,006 at 25,097 (1990). It has been further held by this forum that:

> [Section 3610(a)(1)(B)(iv)] relates to the Department's investigatory function and not to the Department's right to institute an action in this forum. It contains neither a statute of limitations nor a jurisdictional requirement, because it does not contain an express time limit for the issuance of the notice, and because it states an exception to the intended time period for completion of the investigation. *Murphy*, at 25,018, n. 2.

Respondents also contend that the Secretary failed to comply with his obligations under the Act with regard to completion of the Final Investigative Report ("FIR"). Section 810(b)(5) of the Act requires the Secretary to complete a FIR and make it available to any aggrieved person and respondent, at any time, upon request and following completion of the investigation. There are no jurisdictional time limits imposed. 42 U.S.C. Sections 3610(b)(5) and (d)(2); 24 CFR 103.230. In this case, HUD completed its FIR in conformance with the above requirements, and the Respondents received a copy of it in January 1991. Thus, Respondents' objection is without merit, and the motions for dismissal are denied.

Ultimate Conclusions

The Secretary has established that the respondents denied Ms. Friend's application to live with her minor son in Mr. Little's trailer on the basis of the son's age being less than 18 years. The Secretary has also established that respondents have for some time maintained a rule against children occupying Holiday Manor housing other than in the section known as the "dog leg," and that they established a more restrictive rule providing against occupancy by anyone under 18 years of age at the time this case arose.

More specifically, by refusing to allow Ms. Friend and her son to reside in the Littles' trailer because of their familial status, Respondents have violated the provisions of the Fair Housing Act that are codified at 42 U.S.C. Sections 2604(a) and HUD's regulations that are found at 24 CFR 100.50(b)(1) and (3), and 100.60(b)(1) and (2). By limiting families with children to certain areas of the park because of their familial status, Respondents have violated the provisions of the Fair Housing Act that are codified at 42 U.S.C. Section 3604(b) and HUD's regulations that are found at 24 CFR 100.50(b)(2) and 100.65. By adopting a rule prohibiting acceptance as club members any families with children under the age of 18 years, Respondents have violated provisions of the Fair Housing Act that are codified at 42 U.S.C. Section 3604(c) and HUD's regulations that are found at 24 CFR 100.50(b)(4) and 100.75(a)-(c).

Remedies

Section 812(g)(3) of the Act provides that where an administrative law judge finds that a respondent has engaged in discriminatory practices, 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 equitable relief." 42 U.S.C. Sec. 2613(g)(3). That section further states that the "order may, to vindicate the public interest, asses a civil penalty against the respondent." The maximum amount of a civil money penalty is dependent upon whether the respondent has been adjudged to have committed prior discriminatory practices. Where, as in this case, the respondent has not been adjudged to have committed any prior discriminatory practices, any civil money penalty assessed against the respondent cannot exceed $10,000. *See also* 24 CFR 104.910(b)(3) (1990).

The government, on behalf of itself and the complainant, has prayed for: (1) an award of damages to compensate Complainant for economic losses, inconvenience, and emotional distress; (2) the imposition of a civil penalty of $10,000 on each respondent; and (3) injunctive relief to ensure that Respondents do not engage in unlawful housing practices in the future.

Damages

The Fair Housing Act provides that relief may include actual damages suffered by the Complainant. 42 U.S.C. Section 3612 (g)(3). In this case, Ms. Friend claims that she had to pay overdue bills and make house payments over the amount she was paying her parents in rent because of being forced to leave Holiday Manor and moving back to her house at Garfield Street. Since I have found that she was not in legal residence at Holiday Manor and, therefore, could not have been forced to leave in violation of the Act, these additional expenses are not compensable in this forum. Moreover, since she had only asked to stay at Holiday Manor on a temporary basis, it is reasonable to assume that she would have taken over the house at Garfield Street when her husband turned it over to her whether Holiday Manor was urging her departure or not.

In addition to actual damages, a Complainant is entitled to recover damages for inconvenience and emotional distress caused by a Respondent's discrimination. *See,*

e.g., Blackwell, supra, at 25,001; *Parker v. Shonfeld*, 409 F. Supp. 876, 879 (N.D. Ca. 1976). Because these abstract injuries are not subject to being quantified, courts have ruled that precise proof of the actual dollar value of the injury is not required. *Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1245 (8th Cir. 1983); *Steele v. Title Realty Co.*, 478 F. 2d 380, 384 (10 Cir. 1973).

In this case, Complainant is entitled to damages for the inconveniences suffered by herself and her son when they were denied the housing they sought and for the emotional distress that they suffered because of that denial. First, as a result of Respondents' unlawful rejection of Complainant's application, Friend and her son found it necessary to move into the crowded and dirty shelter for battered women. Second, after enduring the humiliation and inconveniences of living at the shelter, she and her son had to move again.[19] Finally, as to inconveniences, she had to transport James Allen 40 miles round trip each day so that he could remain in the school that he knew and liked. The costs of these moves are not of record, but it is not unreasonable to say that they cost about $300 for a total of $600. Complainant was at the shelter for about three weeks. Forty miles per day for 15 days, at the Internal Revenue Service rate of 25 cents per mile, yields $150. Thus, Complainant ought to be compensated $750 for inconvenience, and will be in the Order below.

The administrative law judge assigned to decide a case of housing discrimination is accorded wide discretion in setting damages for emotional distress, and is guided in determining the size of the award by the egregiousness of the Respondent's behavior and the Complainant's reaction to the discriminatory conduct. R. Schwemm, *Housing Discrimination Law*, 260-62 (1983). Awards for emotional distress in relevant federal case law range far and wide, depending on the circumstances.[20] Therefore, a review of federal cases is not very helpful as guidance here.

---

[19] Even though Complainant had not established a right to move to Holiday Manor, she would have had to move out of the shelter after a short stay.

[20] *See, e.g., Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241 (8th Cir. 1983) ($12,402 award for plaintiff's mental anguish, humiliation, embarrassment and stress); *Grayson v. S. Rotundi & Sons Realty Co.*, 1 Fair Housing-Fair Lending (P-H) para. 15,516 (E.D.N.Y. Sep. 5, 1984) (compensatory damage awards of $40,000 and $25,000 for two plaintiffs' embarrassment and humiliation); *Parker v. Shonfeld, supra* ($10,000 compensation award for embarrassment, humiliation, and anguish); *Phillips v. Hunter Trails Community Ass'n.*, 685 F.2d 184 (7th Cir. 1982) (allowance of $10,000 to each plaintiff at a time when that court had never before exceeded $5,000). *Cf. Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303 (7th Cir. 1985) (in employment discrimination case, jury award of $75,000 as compensatory damages for plaintiff's mental distress found excessive, and $35,000 awarded based upon the record).

However, awards of damages for emotional distress have already been made by this forum in housing discrimination cases, and these can be looked to for some guidance. In *Blackwell*, $40,000 was awarded to a black couple for the embarrassment, humiliation, and emotional distress of having been denied a house because of their race. This was a clear case of open and blatant racial discrimination perpetrated by a real estate agent. In *Murphy, supra*, awards of $150, $400, $800, $1,000, and $5,000 were made for emotional distress and loss of civil rights, with the award of $150 being made to a party who "... suffered the threshold level of cognizable and compensable emotional distress." (at 25,057). In *HUD v. Guglielmi and Happy Acres Mobile Home Park*, Fair Housing - Fair Lending (P-H), para. 25,070 at 25,079, I awarded $2,500 to the Complainant where I found that the Respondents had "... contributed significantly to [Complainant's] actual and perceived loss of civil rights, feelings of embarrassment and humiliation, and general emotional distress" for the better part of a year, and in *HUD v. Baumgardner*, Fair Housing - Fair Lending (P-H), para. 25,094 at 25,101, I awarded $500 to a young man who had been discriminated against on the basis of sex "because men are messy tenants". He did not appear to be a man of vulnerable constitution, but he said that he was angry, hurt, and frustrated by the denial of the house he wanted and that it was a source of anger and distress for a few months. Finally, in *HUD v. Riverbend, et al*, HUDALJ 01-89-0676-1 (Oct. 15, 1991), at p. 18, I awarded $2,000 to a complainant who had been denied a two-bedroom apartment for his himself, his wife and two infant boys because of an occupancy standard limiting occupancy of a two-bedroom apartment to three people.

Complainant Friend was shocked that her application was rejected. She was "indignant" that she was denied the opportunity to live in the park because of her ten-year-old son, and she felt "hurt" and "upset" when he expressed that he believed he was to blame for their housing situation. (T 63-68). She also felt "depressed" and "despondent." (T 136). She was "humiliated" when she called to plea that she only needed the trailer temporarily until she could get back on her feet. (T 62).

Living in the shelter was the worst part emotionally for the Complainant and her son. She had never had to live in a shelter before, and she found it degrading. (T 70). The shelter was crowded and its residents were dirty and unsanitary. (T 72). It was so humiliating for her to be in a shelter that she did not at first tell her mother that she had moved there. (T 248). Living in the shelter was very upsetting to James Allen. (T 137). He had no privacy, and "could not do the things that kids do;" he could not play, use his skateboard, or ride his bike while living at the shelter. (T 138). The conditions for eating and the other residents of the shelter were so dirty that the boy stopped eating. (T 73, 238). Friend found it "painful" to see her son suffer due to his housing conditions. Comparing the circumstances of this case to those described above, I conclude that Complainant should be awarded damages of $4,000 for emotional distress.[21]

[21] The Government asked for damages of $25,000 to compensate for the emotional distress as described, plus all that due to problems encountered during the period that Complainant occupied the trailer. However, since Complainant's occupancy of her parents' trailer was not protected by the Act she

The government also seeks damages in the amount of $3,000 for the Friends' loss of housing opportunity. Because of Respondents' unlawful rejection of Complainant's application, she and her son were initially denied the opportunity to live where they wanted. They were denied the home that would have permitted them to escape an abusive husband and would have put them close to Complainant's supportive parents. Compared to the shelter they were forced to occupy, the Respondents denied Friend and her son the ability to move to a "nice, clean, and safe place." (T 54). However, since Complainant soon unlawfully availed herself of the housing opportunity by moving into the Littles' trailer, she cannot be compensated for a loss of housing opportunity for the time she lived there; only for the time she was at the shelter. Accordingly, she will be compensated $500 in the Order.

Civil Penalty

---

cannot be compensated, in this forum and under this Act, for the emotional distress she suffered at the hands of the respondents during that time.

The Government has also asked for the imposition of a civil penalty of $10,000 for each of the two respondents. This is the maximum that can be imposed on a respondent who has not been adjudged to have committed any prior discriminatory housing practices. *See* 42 U.S.C. Section 3612(g)(3)(A); 24 CFR 104.910(b)(3). In addressing the factors to be considered when assessing a request for imposition of a civil penalty, the House Report on the Fair Housing Amendments Act of 1988 states:

> 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.

The nature and circumstances of the violation in this case are serious. While discrimination is often subtle and difficult to show, in this case the Respondents openly stated to Complainant that she could not live in her father's trailer because of her young son. They turned down her application to become a member of Holiday Manor Club on that basis. As to the degree of culpability, unlike in *Blackwell* and *Baumgardner*, where the offending respondents were real estate agents, and *Riverbend*, where the respondents were large corporate apartment owners and property managers, the respondents in this case are a club made up for the most part of resident retirees and the president of that club, who is a resident of Holiday Manor and a volunteer office holder. Moreover, the events upon which this case is based took place within days of the effective date of the Act.

No evidence of prior violations of the Act was entered into evidence. Therefore, I find that the respondents have not been previously adjudged in violation of the Act. I further find, based upon its being insured against personal injury, that Respondent HMECI's financial circumstances do not make it unable to withstand a reasonable fine. Based upon Respondents' failure to show differently, I also find Respondent Esther Hosier is able to withstand a reasonable fine. Finally, in a case such as this, where there is intentional wrongdoing, it is important to deter like activity in the future by Respondent and others.

Based upon a consideration of the factors directed by Congress, including consideration of the manner in which the Government handled Ms. Friend's Complaint, and to vindicate the public interest, I conclude that it is appropriate in this case to impose a civil penalty of $2,000 upon Respondent HMECI. This amount contrasts appropriately with the maximum permissible penalty of $10,000 that was imposed in *Blackwell* for an egregious case of racial discrimination in which the Government went to great lengths to investigate and prepare its case in detail, and the $4,000 that was imposed in *Baumgardner* where the discrimination was open and blatant, and the discriminating

respondent was also a real estate agent of long experience. It is in accord with the $2,000 civil penalties that were imposed in *Murphy* and *Guglielmi* where discrimination was found but there were mitigating circumstances similar to those in this case.[22]

While it is not entirely fair to impose a fine on a volunteer office holder for upholding the rules of an organization, it is appropriate that office holders be held accountable for their actions and shown that they should lead their organizations to rightful actions rather than following them to wrongful ones. Accordingly, Esther Hosier will be required to pay a penalty of $200 by the Order entered below.

Injunctive Relief

Section 812(g)(3) of the Fair Housing Act also authorizes the administrative law judge to order injunctive or other equitable relief. Here, injunctive relief is necessary to ensure that the respondents will not again conduct themselves in like manner. To that end, the Government has requested that they be ordered to cease certain activities and undertake certain other actions. Substantially all of these requests are reasonable and are deemed appropriate under the totality of the circumstances of this case. Accordingly, for the most part, they will be imposed, and the specific provisions of injunctive relief are set forth in the Order issued below.

ORDER

Having concluded that Respondents Holiday Manor Estates Club, Inc., and Esther Hosier violated provisions of the Fair Housing Act that are codified at 42 U.S.C. Sections 3604(a)-(c), as well as the regulations of the U.S. Department of Housing and Urban Development that are codified at 24 CFR 100.50(b)(1)-(4), 100.60(b)(1)-(2), 100.65, and 100.75(a)-(c), it is hereby

ORDERED that,

1. Respondents are permanently enjoined from discriminating against Complainant, Laura Friend, or any member of her family, with respect to housing, because of familial status, and from retaliating against or otherwise harassing Complainant or any member of her family. Prohibited actions include, but are not limited to, all those enumerated in the regulations codified at 24 CFR Part 100 (1989).

[22] In *Murphy*, it was found that the Respondents discriminated against families with children in an erroneous attempt to qualify for the exemption from the Act for housing for older persons that is provided at 42 U.S.C. Section 3607(b). In *Guglielmi*, it was also found that the Respondents discriminated against families with children in an attempt to maintain their unqualified trailer park as housing for older persons. Moreover, as in this case, the laws and regulations prohibiting discrimination on the basis of family status took effect only days before the events complained of began to take place.

2. Respondent HMECI shall institute record-keeping of the operation of Holiday Manor which is adequate to comply with the requirements set forth in this Order, including keeping all records described in paragraph 3 of this Order. Respondent HMECI shall permit representatives of HUD to inspect and copy all pertinent records at reasonable times after reasonable notice.

3. On the last day of every third month beginning March 31, 1992, and continuing for three years, Respondent HMECI shall submit reports containing the following information regarding the previous three months, for all properties owned or otherwise controlled by Respondent, to HUD's Chicago Regional Office of Fair Housing and Equal Opportunity, 626 West Jackson Blvd., Chicago, Illinois 60606-5601, provided that the director of that office may modify this paragraph of this Order, as deemed necessary to make its requirements less, but not more, burdensome:

a. a duplicate of every written application, and written description of every oral application, for all persons who applied for occupancy of all Respondent HMECI's trailer lots, including a statement of the person's familial status, whether the person was rejected or accepted, the date of such action, and, if rejected, the reason for the rejection;

b. a list of vacancies at all Respondent HMECI's trailer lots including the departed person's familial status, the date of termination notification, the date moved out, the date the lot was next committed to occupancy, the familial status of the new occupant, and the date that the new occupant moved in;

c. current occupancy statistics indicating which of Respondent HMECI's trailer lots are occupied by families or groups including children under 18 years old;

d. sample copies of advertisements published or posted during the reporting period, including dates and what, if any, media was used, or a statement that no advertising was conducted;

e. a list of all persons who inquired in any manner about renting or buying one of Respondent HMECI's trailer lots, including their names, addresses, familial status, and the dates and dispositions of their inquiries; and

f. a description of any rules, regulations, leases, or other documents, or changes thereto, provided to or signed by any applicants for membership in HMECI.

4. Respondent HMECI shall inform all its agents and employees, including officers and board members of the club, of the terms of this Order and shall educate them as to these terms and the requirements of the Fair Housing Act.

5. Within forty-five days of the date on which this Initial Decision and Order is issued, Respondent HMECI shall pay damages in the amount of $5,250 to Complainant to compensate her for the losses that resulted from Respondent's discriminatory activity.

6. Within forty-five days of the date that this Initial Decision and Order becomes final, Respondent HMECI shall pay a civil penalty of $2,000 and Respondent Esther Hosier shall pay a penalty of $200 to the Secretary, United States Department of Housing and Urban Development.

7. Within fifteen days of the date that this Order becomes final, Respondent HMECI shall submit a report to HUD's Chicago Regional Office of Fair Housing and Equal Opportunity that sets forth the steps it has taken to comply with the other provisions of this Order.

This Order is entered pursuant to section 812(g)(3) of the Fair housing Act, which is codified at 42 U.S.C. Section 3612(g)(3), and HUD's regulation that is codified at 24 CFR 104.910, and it will become final upon the expiration of 30 days or the affirmance, in whole or in part, by the Secretary within that time.

/s/

_____

ROBERT A. ANDRETTA
Administrative Law Judge

Dated: November 26, 1991.