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 Sara Kirschenbaum, Charging Party, v. John DiBari and Grace DiBari, Respondents.

HUDALJ 01-90-0511-1
Decided: September 23, 1992

John DiBari, *pro se*
For the Respondents

Marvin H. Lerman, Esquire

Jennifer V. Almeida, Esquire
For the Secretary and Complainant

Before: Robert A. Andretta
Administrative Law Judge

INITIAL DECISION

Jurisdiction and Procedure

This matter arose as a result of a complaint filed on September 12, 1990, and amended on November 15, 1990, by Sara Kirschenbaum ("Complainant"). (R 1).[1] The complaint was filed with the U.S. Department of Housing and Urban Development ("HUD") and alleges violations 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") based on familial status.[2] It is adjudicated in accordance with Section 2612(b) of the Act and HUD's regulations that are codified at 24 CFR Part 104, and jurisdiction is thereby obtained.

On February 26, 1992, following an investigation of the allegations and a determination that reasonable cause existed to believe that discriminatory housing practices had taken place, HUD's Regional Counsel in Boston, Massachusetts, issued a Determination Of Reasonable Cause And Charge Of Discrimination against John DiBari and Grace DiBari ("Respondents") alleging that they had

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[1] The transcript of the hearing is cited with a capital T and a page number. The Secretary's exhibits are identified with a capital S and an exhibit number; those of the Respondent are identified with an R.

[2] 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 --
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> (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. The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

engaged in discriminatory practices on the basis of familial status in violation of sections 804(a) and (c) of the Act, which are codified at 42 U.S.C. Sections 3604(a) and (c) and incorporated into HUD's regulations that are found at 24 CFR 100.60 and 100.75 (1989). A hearing was conducted in Boston on May 19, 1992, and the parties were ordered to submit post-hearing briefs by July 8, 1992. That time was extended to August 10, 1992, and the briefs were timely submitted. Thus, this case became ripe for decision on this last named date.

Findings of Fact

The dwelling[3] that is involved in this case is apartment #5, a four-room unit in a six-unit building located at 21 Woodman Street, Jamaica Plain, Massachusetts. The Respondents have owned it and another, three-unit building, at 32 Custer Street, where they have resided, since 1973. (T 13-14, 69). In August, 1990, Respondent John Dibari[4] retained the services of ERA Pleasant Realty of Jamaica Plain to find a tenant for the subject dwelling which was vacant and available for $650 per month. (T 14-15, 66). During that period, Constance Cervone was the rental manager for ERA. (T 37).

[3] 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).

[4] Respondent Grace DiBari did not take part in the facts of this case. Therefore, for the sake of brevity, the term "Respondent," used alone, refers to John DiBari.

When he placed the listing for the subject dwelling, Respondent informed ERA Pleasant Realty that the apartment contained lead paint and that the agents should therefore not show the apartment to families with "kids." (T 15). DiBari did not specify particular ages of children that he wished to preclude from becoming tenants, and there is no evidence or testimony to show that anyone at the agency informed him that he was prevented by law from so restricting tenant qualification.

Complainant Sara Kirschenbaum was six months' pregnant during the period of the events of this case. She and her husband, Bud Bedell, were seeking rental housing in Jamaica Plain because the owner of their apartment wanted to take back possession of it. (T 60-61). They met on August 18, 1990, with Ms. Cervone, and she showed them several apartments. (T 37, 61). One of these apartments was the subject dwelling.
(T 38, 61).

After viewing apartments with Cervone, Respondent and her husband decided that they would like to rent the subject apartment. (T 62). They returned to the ERA office the same day that they viewed the apartment and filled out a rental application form. Complainant and Bedell paid Cervone a deposit for the apartment at 21 Woodman Street, and Cervone called DiBari to inform him that she had found prospective tenants for his apartment. (T 39, 62, 114).

DiBari responded positively when Cervone told him she had a couple who wanted to rent the apartment, and he gave his permission for them to remove some wallpaper. (T 15, 16, 114, 118). At the end of this conversation, Cervone informed DiBari that Kirschenbaum was pregnant (T 16, 39, 114). As soon as Respondent had been so informed, he told Cervone that they could not rent the apartment. (T 16, 39). He complained to Cervone that he had already instructed ERA Pleasant Realty not to show the apartment to people with children. (T 40).

At that time, Cervone informed DiBari that it is unlawful to refuse to rent to applicants because they have children or are pregnant, but DiBari persisted in his refusal to rent to Kirschenbaum and Bedell. (T 39). Cervone informed DiBari that ERA could not do business in that way and that the agency would have to stop servicing his apartment. (T 40-41). Cervone informed Respondent and her husband regarding the conversation with DiBari and that DiBari would not rent the apartment to them because of Kirschenbaum's pregnancy. (T 37, 62-64).

Kirschenbaum and her husband looked at another approximately 30 apartments during the next five days. Their search was full time for that period, and Kirschenbaum described it as "an exhausting, trying, and awful experience."

(T 67, 85). The apartment they rented for the next year was a five-room unit at 287 Chestnut Street, Jamaica Plain, at $750 per month, not including utilities. (T 68; S 1). They remained in that apartment for twelve months. (T 71-71). A year later, DiBari rented the subject dwelling to a single person for $400 per month. (T 19, 138).

DiBari's refusal to rent to Kirschenbaum and Bedell, or to other people with children, stemmed from his having heard of a law that could be used by a tenant with children to force him to undertake major repairs of his apartments. (T 132). He feared

that he would be sued and thus forced to spend great sums of money to remove lead paint from the apartments. (T 114-115, 121, 125).

The Massachusetts Childhood Lead Poisoning Prevention Act requires property owners to remove or cover dangerous levels of lead in any residential premises occupied by children under the age of six.[5](T 2a). The term, "dangerous levels of lead," is defined in the Code of Massachusetts Regulations.[6] (S 2c). The state law also provides that it is unlawful under the state anti-discrimination law for the owner of any residential premises to refuse to rent, or to otherwise deny or withhold such premises because they do or may contain dangerous levels of lead, or because the rental would trigger duties under the lead law or regulations.[7] (S 2b). Finally, the state law on childhood lead poisoning provides that refusing to rent to families with children in violation of the anti-discrimination law shall not constitute compliance with the lead law and regulations.[8] (S 2a).

As of the date of the hearing, DiBari did not know with absolute certainty whether the apartments he and his wife own contain dangerous levels of lead, because he had never had them tested in accordance with the regulations. (T 17, 92). Instead, he relied on the word of a painter who looked at the building of which the subject dwelling is one of the units and told Dibari that it contained lead-based paint.

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[5] Massachusetts General Laws (M.G.L.) chapter 111, sections 190-199A at 197(a).

[6] Chapter 105 of the Code of Massachusetts Regulations (C.M.R.), section 460.020, defines "dangerous levels of lead" in dried paint as (1) a positive reaction with 6% to 8% sodium sulfide solution indicative of more than 0.5% lead by dry weight; or (2) more than 1.2 milligrams lead per square centimeter of surface as measured on site by a mobile x-ray florescence analyzer or comparable equipment.

[7] M.G.L. ch. 151B, section 4(11); M.G.L. ch. 111, section 199A(a).

[8] M.G.L. ch. 111, section 199A(b).

(T 19, 35). Since Respondent's buildings are over 60 years old, Respondent's belief that they would contain lead-based paint is not unreasonable and is consistent with the evaluation he received.

As of the date that Complainant applied for the apartment, Respondent had no specific knowledge of the cost of a lead inspection or of the cost to remove or cover dangerous levels of lead ("delead") in his buildings. (T 17, 92). However, he had read in the paper that it would cost thousands of dollars per apartment. (T 17). Respondent also had not investigated the cost of an actual lead inspection of his buildings. (T 17).

The cost of a lead inspection can be obtained by telephoning lead inspection firms. (T 93-94; S 3). For apartments comparable to Respondent's, such inspections cost from $90 to $200 per unit, depending upon the firm and the type of lead test used.
(T 94-95; S 3). Thus, inspection of Respondent's buildings, which contain a total of nine apartments, would cost in the range of $810 to $1,800 plus a sufficient amount to test the common areas. Inspection and deleading firms can also provide estimates of the cost of deleading. Those procedures cost from $2,200 to $5,000 for a four-room apartment. (T 95-96; S 3). Thus, deleading Respondent's buildings would cost in the range of $26,400 to $60,000 plus an amount sufficient to delead the common areas.

Respondent advertises by informing people he meets that he has "rooms" available for rent, once the apartments are cleaned and repaired. He only tells people that the apartments are available by stating orally that anyone looking for rooms should see him. (T 24, 29, 30). As of the time of the hearing, Respondent was still telling his "customers" that the apartments contain lead paint and that he therefore will not rent to people with children under six years old. (T 34). In the two years since the complaint was filed, DiBari has only rented one of the six vacant apartments in his buildings; the subject apartment, at $400 per month. (T 19, 138).

As a result of learning that she and her husband could not rent the subject apartment because of her pregnancy, Ms. Kirschenbaum felt shocked and upset. (T 64-65). She felt "desperate" because the owner of the apartment where she and her husband had been living was also expecting a child and wished to take over their apartment to accommodate the baby. (T 60). Kirschenbaum was eager to locate an apartment quickly because she knew that she and her husband were competing for living space with many students who move to the city during that part of the year.

After being denied the apartment, Kirschenbaum felt more and more upset as September 1 approached and they had not found a suitable apartment. She was "shaken up" because she was pregnant and had not settled where she would be living when her baby was born. She claims that up to the date of the hearing she continued to feel angry and upset as a result of the respondent's refusal to rent to her. (T 60, 65-66).

John and Grace DiBari are immigrants to this country for whom English is a second language. She is extremely ill and house-bound, and he stays home to care for her. (T 2, 120). Respondent, who is 75 years old, is ill himself with dizzy spells, "high sugar," and diabetes. (T 133). The DiBaris live on a fixed social security income of $819 per month. Rent for the apartments is their only other income; but most of them remain vacant because Respondent does not have the money to clean and repair them and because he generally does not advertise their availability. (T 31-34, 134). The DiBaris' major expenses are for taxes and insurance on the apartments and their medical and medications bills. (T 137). Respondent recently paid $18,000, nearly all his savings, to refurbish the porches of the larger building and make them safe, and he is now saving to do the same to the other building. (T 103). However, as of the date of the hearing, he only had about $1000 in each of three bank accounts. He has no other assets and no other debts. (T 135). He believes in saving money to invest in his buildings, which he hopes to be able to leave to his grandchildren, rather than taking loans. (T 136, 140).

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. 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 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 .... 42 U.S.C. Section 3604(a); 24 CFR 100.50(b)(1) and (3), and 100.60(b)(1) and (2).
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> (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).
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> (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 preference, limitation or discrimination because of ... 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).
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> (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.
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> (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).

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. These exemptions are not applicable in this case.

Discussion

In this case, the statements made by Respondent to his real estate agent during their short telephone conversation constitute direct evidence of Respondent's discrimination on the basis of familial status. Respondent said that he does not rent to "kids" because of the danger to them of lead poisoning and because of his fear of being sued and forced to undertake expensive deleading of the apartments. Unfortunately for Respondent, health and economic considerations are not included in the Act's exceptions that are described above.

Ultimate Conclusions

The Secretary has established that Respondent denied Complainant the opportunity to apply for housing for herself and her husband in Respondent's apartment house because he did not allow children to be residents in the property. By not allowing residence by a pregnant adult, Respondent has violated the provisions of the Fair Housing Act that are codified at 42 U.S.C. Section 3604(a). By making a statement indicating a preference not to have Complainant's expected baby as a tenant, Respondent has violated the provisions of the Fair Housing Act that are codified at
42 U.S.C. Section 3604(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 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 her inconvenience in the amount of $1,000, for the difference in her rent in the amount $1,200, for emotional injury in the amount of $2,000, and for loss of housing opportunity in the amount of $500; (2) the imposition of a civil penalty of $2,000; and (3) injunctive relief to ensure that Respondent does 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, the government, on behalf of Complainant, claims that Complainant and her husband were inconvenienced by having to spend an additional five days searching for housing. In *Baumgardner v. HUD*, where the damages for inconvenience were requested and awarded by this forum on the basis of additional searching for housing, the Sixth Circuit Court of Appeals determined that inconvenience is an intangible injury and suggested that it should not be made as a claim separate from any claim for emotional distress.[9] Thus, there will be no separate award for inconvenience in this case.

The next claim for economic loss is for the difference in the cost of the housing denied to Complainant and the cost for housing that she and her husband had to pay. To recover the increased cost of alternative housing, a complainant must have made a reasonable effort to seek comparable housing and to minimize damages.[10] In fair housing cases, a failure to "cover" has been taken to preclude recovery for the greater cost of alternative housing, even where the defendant did not actively set out to prove during the proceeding that the complainant failed to seek comparable housing and minimize damages.[11] Thus, where a complainant

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[9] 960 F.2d 572 (6th Cir. 1992).

[10] *See* D. Dobbs, *Handbook on the Law of Remedies*, section 7.1 (1973). According to Dobbs, a plaintiff has the burden of proving damages, and a defendant has the burden of proving that the plaintiff should have minimized those damages.

[11] *See, e.g. Smith v. Ancjor Building Corp*., 536 F.2d 231, 234 n.4 (8th Cir. 1977) (plaintiff declined defendant's offer of apartment); *Young v. Parkland Village, Inc*., 460 F.Supp. 67, 71 (D. Md. 1978). *Cf. HUD v. George*, 2 Fair Housing-Fair Lending (P-H) paras 25,010, 25,166 (HUDALJ Aug. 16, 1991) (respondent's illegal refusal to sell did not *per se* force complainant to buy a more expensive property; furthermore, complainant passed on its increased costs of alternative housing to nonprofit agency that

has reasonably sought to find comparable and comparably-priced housing, he should recover the greater expense of the alternative housing. That the alternative housing in a particular case costs more than the denied housing does not necessarily mean that the alternative housing is not comparable; one must look to size, style, proximity to transportation, and other characteristics of the property.

In this case, Complainant looked at approximately 30 additional apartments and leased one with an additional bedroom at $100 per month more than the subject unit. The secretary seeks to recover the difference in rent for the 12-month term of the lease. However, there was no showing that Complainant was forced to get the bigger, more expensive apartment.[12] She may as well have decided she wanted more space. Thus, since the alternative housing was not comparable there will be no award of damages for the difference in rent for the year even though Respondent did not prove that comparably-priced alternative housing was readily available.

An additional actual damage amount is requested by the government for Complainant's need to return to Boston from her new home in Oregon for the hearing, including the use of three vacation days. The secretary's counsel did not specify the amounts for these items; rather, they were rolled into the amount requested for inconvenience, which will be considered next as part of the consideration for emotional distress. Nonetheless, it must be said that, to the extent that this part of Complainant's claim is for the costs of transportation, the value of the vacation days, and other expenses related to litigation, it is not compensable under the "American Rule" that in the absence of a specific statutory provision to the contrary, each party to a proceeding bears its own expenses of litigation.[13]

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operates homes).

[12] A complainant may recover the greater cost of superior alternative housing if the complainant can show that comparable housing at a comparable price was unavailable. *See, e.g., Miller v. Apartments and Homes of N.J., Inc*., 646 F.2d 101, 112 (3rd Cir. 1981) plaintiffs forced to pay more for substantially same value after reasonable search); *HUD V. Morgan*, 2 Fair Housing-Fair Lending (P-H) para. 25,008 (HUDALJ July 25, 1991) ($7,362 awarded for increased carrying costs from purchase date to decision date).

[13] *See* Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2D*, section 1331 (1987 & Supp. 1991) (under the American Rule, even litigants who are defeated in court do not face the risk of having to bear their opponents' expenses as they would in England and most other countries). *See also Hodge v. Seiler*, 558 F.2d 284, 287 (5th Cir. 1977) (upheld trial court decision not to award airfare to and from trial, but would not rule out such an award if appropriately made within broad discretion of trial judge, citing strong policies which lie behind remedial civil rights legislation, and the need to ensure that those who defend their rights are not financially penalized).

The Secretary also claims that Complainant has suffered inconvenience, emotional distress, and a loss of housing opportunity as a result of Respondent's actions. In addition to actual damages, a Complainant is entitled to recover for these categories of damage. *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).

But see Blackwell, 2 Fair Housing - Fair Lending (P-H) at 25,011 (lost wages for time to consult with attorneys and to attend hearing on temporary restraining order and hearing before ALJ); *Properties Unlimited*, 2 Fair Housing - Fair Lending (P-H) at 25, 150 (complainant awarded costs for missing four days' work, including two days for hearing and two days for travel to and from hearing); *TEMS Ass'n Inc.*, 2 Fair Housing - Fair Lending (P-H) at 25,311 (complainant awarded litigation expenses incurred in separate but related litigation in another forum); *Murphy*, 2 Fair Housing - Fair Lending (P-H) at 25,311 (complainant entitled to lost wages, baby sitting fees, and travel expenses incurred to attend hearing).

The Act authorizes awards of attorneys' fees and traditional litigation costs to a prevailing respondent or intervenor after the decision becomes final. 42 U.S.C. Sec. 3612(p). *See, e.g., HUD v. Dedham Housing Auth.*, 2 Fair Housing - Fair Lending (P-H) 25,031 (HUDALJ May 26, 1991) (complainant/intervenor awarded $6,173 in attorney's fees and $17 in costs).

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.[14] Therefore, a review of federal cases is not very helpful as guidance here.

However, awards of damages for emotional distress have 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 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. Jeffre*, Fair Housing - Fair Lending (P-H), para. 25,020, *et seq*., I awarded $500 for inconvenience, $1,500 for emotional injury, and $2,500 for loss of housing opportunity to a complainant who had been denied an apartment for herself and a minor daughter on the basis of her familial status.

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[14] *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).

Complainant's visits to additional apartment houses over a period of a few days is apparently the inconvenience for which the government claims compensation on her behalf. Complainant leased a larger apartment with an additional room. It is not known whether she chose to do so or had to settle for additional space at greater expense. If she did choose to seek larger housing, it is not known what effect this had on her search. Given the circumstances of this case, and the fact that I awarded $750 in *Baumgardner* and $500 in *Jeffre* for inconvenience, where the amounts of inconvenience shown in the records were similar, $200 will be awarded to Complainant for her emotional distress due to inconvenience in the Order below.

Complainant says that she was upset, shocked and angered over being denied the opportunity to rent Respondent's apartment and that she remained upset over the incident until the time of the hearing. As noted above, in determining the size of an award for emotional distress, the judge should be guided by the egregiousness of the Respondent's behavior and the Complainant's reaction to the discriminatory conduct. Here, Respondent did not discriminate for reasons likely to raise a great deal of frustration and anger. Although he was wrong to do so, he excluded Respondent to protect her expected infant from the effects of lead poisoning from the paint in the apartment and to protect himself and his wife from a possible law suit because of the lead. This was an act devoid of malice. *See HUD v. Edelstein*, Fair Housing - Fair Lending (P-H), para. 25,018 (HUDALJ 05-90-0821-1, Dec. 9, 1991). While it angered Complainant to be denied the apartment, she was not exposed to the additional stress that would evolve from an act that involves malice. I noted in the hearing that Kirschenbaum appeared to be a person of strong constitution. It is hard to believe that these circumstances would leave her much effected for very long.

The discrimination against Complainant took a form similar to that committed against the complainants in *Baumgardner* and *Jeffre*. In all three cases, the complainants were denied the opportunity to lease in a short phone conversation. In *Baumgardner*, I held that the emotional injury from such an action is not limited to the length of time of the conversation, but continues for an indefinite time thereafter. In *Baumgardner*, as here, the complainant did not appear to be a person of vulnerable constitution, and he said himself that the emotional distress caused by the Respondent "was kind of easy to get over." In *Jeffre*, the Complainant also did not appear to be a person of vulnerable constitution, but I found that her injury was greater because she is a single parent, responsible also for the well being of a child, rather than a single adult. I also found that, although the government did not make such a claim, practically speaking, the child's uneasiness can only be compensated under these circumstances through compensation to the parent. In light of the fact that I awarded $1,500 for emotional injury in *Jeffre*, where a much greater amount of emotional distress was described than in this case, and in light of the above discussion concerning malice, $200 in compensation for Complainant's emotional injury is deemed reasonable and will be awarded in the Order below.

The government also seeks $500 in damages for the complainant's loss of housing opportunity. The federal courts have held that damage from the deprivation of a constitutional right can be presumed "even in the absence of evidence that the complainant has suffered any emotional distress, embarrassment, or humiliation." *Citing Hodge v. Seiler*, 558 F.2d 284 (5th Cir.

1977). It is also relevant that it has been held that the amount of compensatory damages should be adequate to redress the deprivation of a complainant's civil rights. *See Corriz v. Narajo*, 667 F.2d 892 (10th Cir. 1981). However, as a general rule, while the amount of damages awarded should compensate for the injury suffered, it should not provide the injured party with a windfall. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

In *Baumgardner*, I determined that the respondent's denial of the complainant's right to choose where and under what conditions he would live was a compensable injury, and I awarded $2,500 in damages to the Complainant. The discrimination in this case took a form similar to that in *Baumgardner*, and again, the effect was to take away Complainant's right to choose where and under what conditions she would live with her new baby. However, this form and amount of compensation was overturned by the Sixth Circuit Court of Appeals in *Baumgardner v. HUD ex rel. Holley* 960 F.2d 572 (1992). The Court held that that award was an "unwarranted, subjective, additional assessment beyond the proper measure of compensatory damages proven" in the case. It based this holding on a short line of Supreme Court cases that make it doubtful whether more than a nominal award for the loss of a civil right would survive the Court's scrutiny.

In *Cary v. Piphus*, 435 U.S. 247 (1978), where school officials were found to have suspended students without the benefit of due process, the Supreme Court held that because the right to due process is absolute, its denial is actionable for nominal damages without proof of actual injury. In *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), a case brought for violation of First Amendment rights, the Supreme Court specifically held that where the basic statutory purpose of awarding damages is to compensate persons for injuries caused by the deprivation of constitutional rights, only nominal damages may be awarded for the vindication of the lost right itself. The Court further stated that, while a trier of fact may not award damages based on a "subjective perception of the importance of constitutional rights," a jury could award both compensatory and punitive damages.[15]

Thus, I am without jurisdiction to award the $500 requested by the government for the Complainant for the purpose of redressing her loss of "housing opportunity." Instead, I award the "nominal damages" of $1 which appears to be the maximum amount permitted by the Supreme Court.

Civil Penalty

[15] *Id*. at 308. *See also*, Schwemm, *supra*, at para. 25.3(2)(b).

The Government has also asked for the imposition of a civil penalty of $2,000, which is one-fifth of the maximum that can be imposed on a respondent who has not been previously adjudged to have committed 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.

While Respondent openly stated his refusal to rent on the basis of familial status, he did not do so with the malice indicated in some other cases. Rather, he had practical, safety-related and financial reasons for doing so. Although the effect of his actions -- denying Complainant and other unknown people the housing they sought -- was serious, the act itself was not. *See HUD v. Edelstein*, at 25,242.[16] Thus, consideration of the nature and circumstances of the violation does not demand a major penalty.

The fact that Respondent was motivated by safety concerns and concerns for the well-being of his wife and himself, both of whom are aged and ill, does not preclude the imposition of a civil penalty, but it certainly tempers the hand of justice. Moreover, while people are held accountable for the consequences of their own actions, here the Respondent retained a real estate agency to find him a tenant, and he told the agency about the limitation he wished to be imposed and the reasons for it. That agency had a duty to instruct Respondent with regard to

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[16] In *Edelestein* a $5,000 civil penalty was imposed despite recognition that the unlawful discrimination "apparently was not motivated by malice toward the Complainant personally or toward families with children in general, but rather was the result of a baseless universal policy ostensibly designed to preclude injuries to children." Here, Respondent's policy was not baseless since his apartment buildings are old enough it is reasonable to assume that they contain lead-based paint. In *Edelstein*, the administrative law judge stated that even if safety concerns may in some cases justify attempts to discourage a prospective tenant from renting, the respondent in that case failed to demonstrate that his concerns were well-founded.

the Act at that time. It was negligent, if not devious, to avoid such instruction until it simply stated the law at the end of a phone conversation meant to introduce and get approval of a particular tenant. While ERA Pleasant Realty is not a party in this case, I consider it far more culpable than Respondent for the events that have transpired and their consequences.[17]

Further as to culpability, Respondent is a small landlord, for whom English is not his first language, who controls only a few units. It is reasonable to believe that he did not know that excluding people with children is illegal under an Act that became effective during the year prior to the events in this case. While ignorance is not a complete defense, it is not inappropriate to consider it when determining culpability. Thus, Respondent's level of culpability does not demand a stiff penalty.

[17] Restatement (Second) of Agency para. 381 (1958). Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principle information which is relevant to affairs entrusted to him and which, as the agent has notice, the principle would desire to have and which can be communicated without violating a superior duty to a third person. The Restatement further says, at para. 411 cmt. b, that in the absence of evidence of contrary intent, it is inferred that the principle does not consent that the agent shall do an unlawful act. From this it is clear that the realty company should have adequately instructed Respondent when it took the listing and, if Respondent then insisted on his position, should have declined the listing.

There is no evidence that the respondent in this case has been adjudged to have committed any prior discriminatory housing practice. Consequently, the maximum civil penalty that may be imposed in this case is $10,000. Moreover, that Respondent has not been previously adjudged to have violated the Act is additional reason to temper the government's reaction to this violation, which was committed soon after the effective date of the Act by a person not adjudged to be much cognizant of changes to the civil law.

The next factor to be considered in calculating a civil penalty is the respondent's financial circumstances. Because evidence regarding their financial circumstances is peculiarly within respondents' knowledge, respondents in Fair Housing cases have the burden of producing such evidence. *Blackwell*, at 25,015; *Jerrard*, at 25,092. In this case, Respondent stated that he only owns these two dilapidated apartment buildings, that he has no other assets but for a few bank accounts containing a few thousand dollars, that he and his wife only receive about $800 per month of social security payments, and that they both have considerable medical bills, even though they only pay 20% under Medicare. There was no testimony or other evidence to the contrary. Thus Respondent's financial circumstances indicate that nearly any amount of civil penalty will be destructive to him and his wife.

As noted above, the congress also desired that a civil penalty be imposed in part to achieve the goal of deterring like conduct. To ensure that Respondents and others get the message and understand that discriminatory tenancy restrictions are outlawed by the Act, a civil penalty should be assessed. In that way, housing providers will realize that conduct such as Respondents' is "not only unlawful but expensive." *HUD v. Jerrard*, Fair Housing - Fair Lending (P-H) para. 25,005, at 25,092 (1990). However, under the circumstances listed above, a penalty does not need to be high to indicate deterrence.
In fact, all of the considerations directed by the congress point toward a low assessment of civil penalty. Accordingly, a penalty of $200 will be imposed by the Order that follows later.

Injunctive Relief

Section 812(g)(3) of the Fair Housing Act also authorizes the administrative law judge to order injunctive or other equitable relief to make the complainant whole and to protect the public interest in fair housing. "Injunctive relief should be structured to achieve the twin goals of insuring that the Act is not violated in the future and removing any lingering effects of past discrimination." *Blackwell II*, 908 F.2d 864, at 874 (quoting *Marable v. Walker*, 704 F.2d 1219, 1221 (11th Cir.

1983)).

The purposes of injunctive relief in housing discrimination cases include the elimination of the effects of past discrimination, the prevention of future discrimination, and the positioning of the aggrieved persons as close as possible to the situation they would have been in but for the discrimination. *See, Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1036 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980). Once a judge has determined that discrimination has occurred, he has "the power as well as the duty to use any available remedy to make good the wrong done'." *Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1975) (citation omitted).

Here, injunctive relief is necessary to ensure that Respondent will not conduct himself in like manner. To that end, the Government has requested that the Respondent be ordered to cease certain activities and undertake certain other actions. These requests are reasonable and are appropriate under the totality of the circumstances of this case. Accordingly, they will be imposed, and the specific provisions of injunctive relief are set forth in the Order issued below.

Order

Having concluded that Respondents, John DiBari and Grace DiBari, violated provisions of the Fair Housing Act that are codified at 42 U.S.C. Sections 3604(a), and (c), as well as the regulations of the U.S. Department of Housing and Urban Development that are codified at 24 CFR 100.60 and 100.75, it is hereby

ORDERED that,

1. Respondent is permanently enjoined from discriminating against Complainant, Sara Kirschenbaum, or any member of her family, with respect to housing, because of race, color, or 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).

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

3. Consistent with 24 CFR Part 110, Respondent shall display the HUD fair housing poster in a prominent common area in all the buildings in which he maintains rental units.

4. On the last day of every third month beginning December 31, 1992, and continuing for three years, Respondent shall submit reports containing the following information regarding the previous three months, for all properties owned or otherwise controlled by Respondent, to HUD's Boston Regional Office of Fair Housing and Equal Opportunity, 10 Causeway Street, Boston Massachusetts 02222-1092, 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 such Respondent's property, 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 such Respondent's properties including the departed tenant's familial status, the date of termination notification, the date moved out, the date the unit was next committed to rental, the familial status of the new tenant, and the date that the new tenant moves in;

c. current occupancy statistics indicating which of the Respondent's properties are occupied by families with children;

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 one of Respondent's units, 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 tenants or applicants.

5. Respondent shall inform all his agents and employees, including resident managers, of the terms of this Order and shall educate them as to these terms and the requirements of the Fair Housing Act.

6. Within forty-five days of the date on which this Initial Decision and Order is issued, Respondent shall pay damages in the amount of $401 to Complainant to compensate her for the losses that resulted from Respondent's discriminatory activity.

7. Within forty-five days of the date that this Initial Decision and Order is issued, Respondent shall pay a civil penalty of $200 to the Secretary, United States Department of Housing and Urban Development.

8. Within fifteen days of the date that this Order is issued, Respondent shall submit a report to HUD's Boston Regional Office of Fair Housing and Equal Opportunity that sets forth the steps he 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 regulations that are codified at 24 CFR 104.910. It will become final upon the expiration of thirty days or the affirmance, in whole or in part, by the Secretary within that time.

/s/

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Robert A. Andretta
Administrative Law Judge

Dated: September 23, 1992.