UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

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| The Secretary, United States Department of Housing and Urban Development, on behalf of James O. and Deplores Bad Horse and Christina Antelope (minor child),<br><br>Charging Party,<br><br>v.<br><br>Richard D. Carlson and Dale Summy,<br><br>Respondents. | HUDALJ 08-91-0077-1<br>Decided: June 12 , 1995 |

Joseph H. Reed, Esquire
For Respondent Carlson

Thomas W. Clayton, Esquire
For Respondent Summy

Dorothy Crow-Willard, Esquire
For the Government

Before: Constance T. O'Bryant
Administrative Law Judge

# INITIAL DECISION ON REMAND

## Statement of the Case

This matter arose as a result of a complaint filed by James O. and Deplores Bad Horse and Christina Antelope Bad Horse (minor child), ("Complainants") alleging discrimination based on national origin and familial status in violation of the Fair Housing Act, as amended, 42 U.S.C. § 3601 *et seq.* ("the Act"). On April 29, 1994, following an

investigation and a determination that reasonable cause existed to believe that discrimination had occurred, the Department of Housing and Urban Development ("HUD" or "the Charging Party") issued a "Charge of Discrimination" ("Charge") against Richard D. Carlson and Dale Summy ("Respondents") alleging that they had engaged in discriminatory practices in violation of 42 U.S.C. § 3604 (a), (b) and (c).

Respondents filed a prehearing Motion to Dismiss the Complaint based on alleged delay by the Government in bringing this action. By Order dated July 29, 1994, the Motion was denied. The Motion was renewed at the hearing and again denied in the Initial Decision.

On November 14, 1994, I issued an Initial Decision ("I. D.") dismissing the charges against Respondents, finding that the Charging Party had not proved by a preponderance of the evidence that Respondents had discriminated on the basis of national origin or familial status in violation of 42 U.S.C. § 3604 (a) (b) and (c).

On December 7, 1994, the Secretary of Housing and Urban Development remanded the I. D. to permit consideration of the Charging Party's November 29, 1994, Motion for Reconsideration and any opposition thereto. *See* 24 C.F.R. § 104.932 (a) and (d).

The Charging Party moves for reconsideration pursuant to 24 C.F.R. § 104.450 (a) (1991) of that portion of the I. D. that found no violation of 42 U.S.C. § 3604 (a) (b) and (c) and requests assessment of damages against Respondents. HUD seeks $1,608 in out-of-pocket expenses and $22,000 in total damages. It also seeks a civil penalty of $5,000 against Respondent Carlson and a civil penalty of $250 against Respondent Summy.

Respondents filed a brief opposing the Motion for Reconsideration arguing that the I. D. was well reasoned and contains no clear error, and accordingly, that the determination should not be modified.

The Charging Party cites several alleged errors in the Initial Decision. They argue that the I. D. erred: (1) by failing to impute Mr. Summy's knowledge of Ms. Madrid's discriminatory motivation against the Complainants as Native Americans to his principal, Mr. Carlson; (2) by failing to analyze all direct evidence which they allege required a finding of discrimination; (3) by not finding that Respondents' occupancy policy injured Complainants; and (4) by failing to consider whether Respondents' statement of preference was in violation of the Act independent of the extent to which it injured the Complainants.

Having considered the arguments presented by the parties, I conclude that there is merit to the Charging Party's arguments 3 and 4 above, and that the I. D. should be reconsidered. Accordingly, the Charging Party's Motion will be granted.

After reconsideration of the evidence and arguments, I find that the Charging Party has failed to prove by a preponderance of the evidence that Respondents intentionally discriminated against Complainants based on their national origin or on the basis of their familial status. However, I find that the Charging Party has proved by a preponderance of the evidence that Respondents enforced an occupancy standard which had a disparate impact on families with children, specifically on Complainants, in violation of the Act. Further, I find that the Respondent Carlson made a statement with respect to the

rental of a dwelling that violated § 3604 (c). Accordingly, I have assessed damages and awarded civil penalties and provided injunctive relief.

## Findings of Fact[1]

1. Richard D. Carlson, a resident of Houston, Texas, owned rental property in Sioux Falls, South Dakota. The property consisted of two rental units - a downstairs apartment at #1311 South Duluth Avenue, and an upstairs apartment #1311-1/2 South Duluth Avenue. He acquired the property in 1975 and lived for the next two years in the downstairs unit. In 1977, while working for a Legal Aid group, he and his family moved onto an Indian Reservation in Missions, South Dakota. He made Native American friends during the two years that he worked and lived there. Later he took a job as a postal inspector and moved to Houston, Texas. He has rented the upstairs unit since 1975 and the downstairs unit since 1979. In 1993 he sold the property in question and no longer owns rental property. (TR. 25, 263, 289, 431-33, RC's Answer #8).[2]

2. Dale Summy, a 77 year old resident of Sioux Falls, and a former renter from Mr. Carlson, has been on social security disability since 1973 due to a fused right leg that is 1-3/4 inches shorter than his left. He assisted Mr. Carlson in managing his Sioux Falls rental properties for several years, including October 1990; however, there was never a formal employment agreement between them. Mr. Summy's duties included showing the units for rental to prospective renters, communicating with prospective renters concerning the terms and conditions of tenancy, and signing leases for rental on behalf of Respondent Carlson. (TR. 289, 429, 471-473; Summy's Answers #9 and 10 of 5/29/94).

3. In early October 1990, Mr. and Mrs. Bad Horse and their daughter Christina moved to Sioux Falls, South Dakota. Upon arriving in Sioux Falls they saw an ad in the local newspaper, the Argus Leader, for a two-bedroom unit (the 1311-1/2 South Duluth Avenue property). (TR. 68-69). They called the listed number and spoke to Mr. Summy about possibly renting the place. (TR. 69, 144, 204).

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[1]The Findings of Fact have been modified and supplemented to reflect the decision after reconsideration.

[2]The following reference abbreviations are used in this decision: "TR" for "Transcript;" "GX" for "Government's exhibit;" "RCX" for "Respondent Carlson's exhibit;" "RSX" for "Respondent Summy's exhibit;" "Stip." for "Stipulation by the parties;" "G's Motion" for Government's (Charging Party's) Motion for Reconsideration and Memorandum of Points and Authorities; "RC's Response" for Respondent Carlson's response to the G's Motion; "RS' Response" for Respondent Summy's response to the G's Motion; and "G's Reply" for the Government's reply to Respondents' response to the Motion.

4. On October 3, 1990, the Bad Horses met with Mr. Summy who showed them the apartment unit at 1311-1/2 South Duluth Avenue. The unit had a total of 670 square feet of living space. (GX-1). One of the two bedrooms had been fashioned out of a sunroom[3]. The bedrooms covered 118 square feet and 114 square feet, respectively. The Bad Horses found it to be comfortable, affordable, quiet and convenient to Mr. Bad Horses' job, to shopping, and to the hospital where Mr. Bad Horse's mother resided. (TR. 69, 144, 204).

5. The lease agreement called for a deposit and payment of the first month's rent. (GX-3). Mr. Bad Horse had limited funds and did not have the full amount for payment of the deposit plus the first month's rent. Mr. Summy nevertheless agreed to allow them to move in with a partial payment. Instead of paying $450 up front ($100 security deposit and first month's rent of $350), Mr. Bad Horse was allowed to pay $275, with an agreement to pay the remaining amount of $175 in two weeks. (TR. 69-72, 133-36, 156, 220, 474-475, 482).

6. When Mr. Summy agreed to rent the unit to the Bad Horses he knew that they were Native American. He also knew that they were a family and that a young child would reside in the apartment. (TR. 468, 475-476).

7. On October 3, 1990, Mr. Summy called Mr. Carlson in Texas and informed him that he had signed a lease agreement with the Bad Horse family. (RCX-5). Mr. Summy told Mr. Carlson that the Bad Horse family consisted of Mr. Bad Horse, his wife and a child who would be moving into the property. (TR. 475-76). Mr. Carlson agreed to the lease. (GX-11; TR. 433, 476). At the time Mr. Carlson approved the lease he knew that the Bad Horse family were Native American. (TR. 433, GX-13). Also, at the time Mr. Carlson approved the lease he understood that there would be three family members living in the apartment unit -- Mr. Bad Horse, his wife, and the small child.[4] (TR. 475-76).

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[3]Mr. Bad Horse described it as a "porch", but said it was made into a bedroom that was a good size ... big enough for a little girl. (Stip. p.4)

[4]The factual allegations in the Determination of Reasonable Cause and Charge of Discrimination ("Charge") suggests a different chronology. According to the allegations, Mr. Summy entered into a lease with Complainants and allowed them to move in *before* he informed Mr. Carlson that he had rented the unit to Complainants. That Mr. Carlson, upon learning of the rental to the Bad Horse family, directed Mr. Summy to ask them to move out because he did not like their "kind." *Charge, ¶¶14 -18.* I do not credit this chronology, but find that Mr. Carlson approved the lease before the Bad Horses were allowed to move in, and that at the time he approved the lease he knew they were Native American and a family of three. This is based on the statement of Mr. Carlson in January, 1991 (GX-11), the trial testimony of both Respondents, and the records of telephone calls made between Mr. Summy and Mr. Carlson on and after October 3, 1990. The telephone records show a call to Mr. Carlson from Mr. Summy at 5:28 p.m. on October 3, 1990 lasting 20 minutes (RCX-5); a call from Ms. Madrid to Mr. Carlson at 7:40 p.m. returned by Mr. Carlson at 8:36 p.m., and then a subsequent call by Mr. Carlson to Mr. Summy at 9:18 p.m. It would appear that the Bad Horses moved in between 5:28 p.m. and 7:40 p.m. According to Mr. Bad Horse it was at night (Stip. p.4) and Ms. Madrid's call was made at 7:40 p.m. (RCX-2, 5). The records reflect no call to Mr. Carlson by Mr. Summy *after* the Complainants moved in.

8. On October 3, 1990, near night time, the Bad Horses moved into the apartment unit at 1311-1/2 South Duluth Avenue. (TR. 67, 71, 475). The apartment on the first floor of 1311 South Duluth was rented out to two persons - Brenda Madrid and her friend, Jeff Olson. During the time the Bad Horses moved in, Brenda Madrid was on the premises and observed the move. (RCX-4)

9. Mr. Bad Horse hired a man to help him move. (TR. 102). While helping the Bad Horses to move, the hired helper stated in response to questions from Ms. Madrid that there would be up to 10 people moving into the apartment with the Bad Horses. This statement upset Ms. Madrid. (RCX-4; TR. 68, 102, 142, 143, 222-223, 434, 438-439).

10. During the time the Bad Horses were moving in, Brenda Madrid complained a lot. She specifically complained that they would use too much hot water, stating that the two units shared the same hot water heater and that there would not be enough hot water for her with so many of them upstairs. She also complained that she would have to pay the heating bill. (RCX-4; Stip. -- Mr. Bad Horses' statement to Mr. Burke; TR. 103, 223, 227, 434, 438-439).

11. On October 3, 1990, Brenda Madrid called Mr. Carlson in Texas. (RCX-4, 5; TR. 433-34). Mr. Carlson was not home, so she left a message on his answering machine to return her call. He returned her call. Their conversation lasted 20 minutes. (RCX-5; TR. 461) She was very angry -- "breathing fire" as he described her. (TR. 434). She stated that the Bad Horses had damaged the property while moving in -- they had damaged the lawn, trampled flowers, broken the front door and damaged a front foyer table. She was also very upset because she had been told that there would be up to 10 people living in that upstairs property, including 4-5 adults and 2-3 children. She didn't know how many people would be living there and complained that there would not be enough hot water for her downstairs if so many people lived upstairs. (TR. 438-439; 476). She told Mr. Carlson that either he tell the Bad Horses to move or she would move. (TR. 438-440).

12. Ms. Madrid had never called Mr. Carlson to complain about any tenant before. Mr. Carlson considered her a "very good tenant." Her complaints about trampled flowers and lawn damage made immediate sense to him because he was aware

that she had planted flowers in the front yard, had fertilized the lawn, and made other improvements in the house. (TR. 435-38).

13. Based on Ms. Madrid's complaints and his belief that there would be continuous conflict between the two tenants and that there would be at least four persons moving into the unit instead of the three persons that he agreed to, Mr. Carlson decided that he would resolve his dilemma by asking the Bad Horses to move. (GX-11; TR. 272, 275, 280, 284, 440-43).

14. On that same evening (October 3, 1990), Mr. Carlson called Mr. Summy (RCX-5; TR. 440). In that conversation Mr. Carlson directed Mr. Summy to ask the Bad Horses to move. He hoped that they would be willing to leave upon his request. (TR. 458). During his 15 years as a landlord, Mr. Carlson's usual practice for dealing with problems involving his tenants was to ask them to leave. They had always complied. He had never had occasion to go through the process of evicting anyone. (TR. 431-32).

15. The Bad Horses spent the night at the apartment unit at 1311-1/2 South Duluth Avenue. (TR. 75-86). Early the following morning, on October 4, 1990, Mr. Summy went to the Bad Horses with the "bad news" and told them that Mr. Carlson thought that it would be better if they found a different accommodations, (TR. 96, 476-77) and asked if they would move. (GX-14; 96, 272, 275, 440, 476-77). In delivering the message, Mr. Summy was apologetic, not hostile or threatening of forceful eviction.[5] Mr. Bad Horse seemed a "little bit surprised" but did not raise his voice to Mr. Summy, nor did he appeal to Mr. Summy to try to get Mr. Carlson to change his mind. He simply said "well, so be it." (TR. 479-480). The Bad Horses decided to comply because they felt they had no good alternative (TR. 76-77), and because they "thought that it would be the best thing for everybody right then and there." (RSX-1). As permitted by Mr. Carlson, Mr. Summy told them they could stay on at 1311-1/2 South Duluth until they could find another place. (TR.78, 443, GX-14).[6]

16. The Bad Horses moved on October 13, 1990, to an apartment in a complex some three miles away. (TR. 99).

17. When the Bad Horses moved to Sioux Falls they had wanted to rent at an apartment complex, one with a washer and dryer. However, Mr. Bad Horse didn't have

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[5]The Charging Part asserts that Mr. Carlson's action was tantamount to an "eviction." Respondents never took or threatened to take legal action against Complainants. The preponderance of the evidence shows that the Bad Horses were asked to leave, and they complied. (TR. 272, 275, 440). This is consistent with the allegation in the *Charge*, (see ¶17) and in other prehearing documents (see Pre-Hearing Statement, B. Facts Stipulated by the Parties #3).

[6]Mr. Carlson testified that he knew the Bad Horses were going to be inconvenienced in having to move out and to find new accommodations, so he thought it "only reasonable on my part to allow them adequate time to find another place." (TR. 443).

the amount of money that was needed to rent at an apartment complex. He had only $275, which is why he made the arrangement with Mr. Summy to rent at 1311-1/2 South Duluth Ave. By October 13, he had received a paycheck and could afford to move to an apartment complex. The new apartment had a washer and dryer, both conveniences desired by Complainants. (TR. 133-146).

18. During the period between October 4 and October 13, Ms. Madrid "was chronically complaining about everything." (TR. 144). When Mr. Bad Horse turned in the keys to Mr. Summy on October 13, 1990, he thanked Mr. Summy and told him that Mr. Carlson had done him a favor by letting him leave without honoring the lease -- that he was glad to get away from the neighbor downstairs. (TR. 117, 482).[7]

19. Within weeks after the Bad Horses moved out of 1311-1/2 South Duluth Avenue, the Respondents rented the unit to George and Colleen Donnell, a Native American couple with two children under the age of 18. They resided in the upstairs unit during the month of November 1990, and then moved downstairs in December 1990, where they stayed until May, 1992. (TR. 166-67; 180; 187; 483, GX-10).

20. During the period between October 4, 1990, and December 21, 1990, Mr. Bad Horse discussed what had happened to him with his supervisor at work. His supervisor questioned how he could "let them do that to" him. It was then that Mr. Bad Horse decided to file a complaint. (TR. 101). On December 21, 1990, the Bad Horses met with Mr. Thomas Burke of the Sioux Falls Human Rights Commission and filed a complaint alleging discrimination based on national origin. (GX-4, TR. 97). Although Mr. Bad Horse was aware that it was unlawful to discriminate against families with children, he related no facts to Mr. Burke which supported a complaint of discrimination based on familial status. (TR. 144).

21. When Mr. Carlson was notified of the complaint filed by the Bad Horses alleging discrimination based on their being Native Americans, he was "shocked' and deeply embarrassed. He had never before been accused of discrimination. (TR. 444-45.)

22. By letter dated January 8, 1991, Mr. Carlson responded to the charge. He denied ever discriminating against anyone on the basis of race or national origin, stating that he had known that the Bad Horses were Native Americans when he rented to them and that had he not wanted to rent to them, he would not have done so. He gave as his reason for asking them to move the conflict that had developed with the tenant downstairs, Ms. Brenda Madrid, and the fact that there were four people moving in with the Bad Horse family instead of the three they had agreed to.

23. In his letter of January 8, 1991, Mr. Carlson made the statement, *inter alia,*

[7]According to Mr. Summy, whose testimony I credit, Mr. Bad Horse stated that he was glad to get away from "the blister (substituted by Mr. Summy for another b---- word) downstairs." (TR. 482).

that his instructions to Mr. Summy was to rent the apartment "to a single person or at the most a married couple/two single persons." (GX-11).

24. After considering the statements by Mr. Carlson in his letter, Mr. Burke informed the Bad Horses that there was grounds to file a complaint of discrimination on the basis of familial status. (TR. 97). On January 22, 1991, the Bad Horses executed an amended complaint showing discrimination based on national origin and familial status. (GX-8).

25. On March 6, 1991, Mr. Carlson responded to the amended complaint, which now alleged discrimination based on familial status. He denied that he discriminated against the Complainants based on their being a family with a child. He stated that it made no difference to him whether the four people moving into the apartment were all adults, all children or any combination there of. He did not want four people living in the apartment. He stated that he was aware before the Bad Horses moved in that they had one child and if he had not wanted them to live there because they had a child he would not have allowed them to move in. (GX-13)

26. Mr. Carlson had previously rented the upstairs unit to Native Americans (GX-14, TR. 432). The tenants immediately preceding the Bad Horses were two Native American women who left because of nonpayment of rent, with no indication of other problems.

27. Neither Mr. Summy or Mr. Carlson knew at the time Mr. Carlson instructed Mr. Summy to ask the Bad Horses to leave, that Ms. Madrid had a bias against Native Americans, or that her bias motivated her complaints.

28. Mr. Carlson had an informal policy which preferred limiting rental of the upstairs unit to two persons. The policy as applied allowed the rental of the unit to a married couple, two single individuals, or a parent and a minor child. He made an exception to the policy to rent to the Bad Horse family of three. He had rented to three persons in the past. When Mr. Carlson made an exception to allow rental to three persons, he didn't care whether one or two of the three persons were children. (GX-13; RS' Answer to Charge, ¶22).

29. Respondents had rented to families on many occasions. In the four-year period from July 1986 to July 1990, three of the four tenants who resided at 1311 and 1311-1/2 South Duluth Avenue were families consisting of at least one parent and one minor child, with one family with two minor children. (GX-11, GX-14, TR. 431-32). Neither Mr. Summy nor Mr. Carlson had ever turned down any applicant for rental because the household included a child. (TR. 431, 445).

## The Charging Party's Theories of Discrimination

The Charging Party alleges in the Determination of Reasonable Cause and the Charge of Discrimination that Respondents, directly or through an agent, discriminated against Complainants on the basis of national origin in violation of 42 U.S.C. § 3604 (a) and (b) by: (1) requesting and/or requiring Complainants to move out of their rented unit, and (2) by "stating that the owner did not rent to 'your kind' of people and (stating) that the owner had had problems with Native Americans in the past." In its post-hearing briefs, the Charging Party advanced an alternate theory of intentional discrimination. It argued that Respondents knowingly and intentionally discriminated against Complainants when they asked them to move based on complaints by Brenda Madrid knowing that her complaints were motivated by bias against Native Americans. In this regard, the Charging Party asserts that Respondent Summy had knowledge of Ms. Madrid's motivation, and that as Respondent Carlson's agent, his knowledge must be imputed to Respondent Carlson.

With regard to the charge of familial status violations under 42 U.S.C. § 3604 (a) and (b), the Charging Party has advanced both "disparate treatment" and "disparate impact" analyses. They argue in support of the disparate treatment analysis that Respondent used complaints made by Ms. Madrid as a pretext to discriminate against Complainants because they were a family with a child. In addition, they argue that certain statements made by Respondents in letters to Mr. Burke of the Sioux Falls Human Rights Commission directly evidence intentional discrimination. Further, they argue that Respondent Carlson's alleged policy of preference in renting to a single person, or, at most, to a couple or two single persons is proof of his dispreference for families; and that in asking the Bad Horses to move, Respondent enforced an occupancy standard which had a disparate impact on families with children and a discriminatory effect on the Complainants.

## The Respondents' Explanation

Respondents deny that national origin or familial status considerations played any part in their request that Complainants vacate the apartment at 1311-1/2 South Duluth Avenue. They assert that they rented to Native Americans and to families before and after Complainants. They assert, further, that they had a legitimate non-discriminatory reason for their actions. According to Respondents, the reason Mr. and Mrs. Bad Horse and child were asked to leave the apartment Respondents had just leased to them was due to problems that quickly developed between the Bad Horses and the downstairs neighbor, Brenda Madrid. Respondents assert that Mr. Carlson acted to resolve an immediately acrimonious tenant-to-tenant dispute, and did so without regard to race, national origin or familial status. On the basis of complaints from Ms. Madrid, Respondent Carlson had reason to believe that the Complainants had damaged the property and that they intended to move in more persons than he had approved. Mr. Carlson concluded that immediate response on his part was required in order to quickly resolve the matter. To this end he asked the Bad Horses to leave, and they complied. (Respondent Carlson's Brief, pp. 11-13; Respondent Summy's Brief pp. 7-8).

## Subsidiary Findings and Discussion

### Legal Framework

The Congress passed the Fair Housing Act to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics." *United States v. Parma,* 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *rev'd on other grounds,* 661 F.2d 562 (6th Cir. 1981), *cert. denied,* 465 U.S. 926 (1982). *See also United States v. City of Black Jack,* 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975); *cf. Griggs v. Duke Power Co.,* 401 U.S. 424 (1971). The Act was designed to prohibit "all forms of discrimination [even the] simple-minded." *Williams v. Matthews Co.,* 499 F.2d 819, 826 (8th Cir.) *cert. denied,* 419 U.S 1027 (1974).

The Act makes it unlawful for anyone to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race...." 42 U.S.C. § 3604(a). Furthermore, the Act prohibits a housing provider from "discriminat[ing] against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race...." 42 U.S.C. §3604(b).

Special methods have been devised to analyze the proof adduced in cases alleging violations of civil rights. The framework to be applied in a case under the Fair Housing Act depends on whether the evidence offered to prove the alleged violation is direct or indirect. Direct evidence, if it constitutes a preponderance of the evidence as a whole, will support a finding of discrimination. *See Pinchback v. Armistead Homes Corp.,* 907 F.2d 1447, 1452 (4th Cir.) *cert. denied*, 498 U.S. 983 (1990). However, in the absence of direct evidence of discrimination, the analytical framework to be applied in a fair housing case is the same as the three-part test used in employment discrimination cases under Title VII of the Civil Rights Act as set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). *See HUD v. Blackwell,* 908 F.2d 864, 870 (11th Cir. 1990); *Pinchback,* 907 F.2d at 1451. Under that test:

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

*Pollitt v. Bramel,* 669 F.Supp. 172, 175 (S.D. Ohio 1987); *see also McDonnell Douglas,* 411 U.S. at 802, 804. The shifting burdens analysis in *McDonnell Douglas* is designed to

ensure that a complainant has his or her day in court despite the absence of any direct evidence of discrimination. *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121, (1984) (citing *Teamsters v. United States,* 431 U.S. 324, 358 n. 44 (1977)).

Direct evidence establishes a proposition directly rather than inferentially.[8] The Charging Party contends that there is direct evidence of discrimination in this case, both as to national origin and as to familial status. If such evidence is present, and is established by a preponderance of the credible evidence, it is sufficient to support a finding of discrimination. For the reasons discussed below, I find that the direct evidence in this case does not establish discrimination.

Disparate Treatment

A. National Origin -- Impute Theory:

[8]For examples of direct evidence of discriminatory intent, see *Pinchback v. Armistead Homes Corp.*, 907 F. 2d 1447 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 515 (1990).

Mr. Summy testified that Ms. Madrid made statements to him indicating a bias against Native Americans. (TR. 298). According to his testimony, she said that "she had trouble with these kind of people" (meaning Native Americans) and "had moved to Sioux Falls expecting never to be bothered by them." (TR. 298-300). The Charging Party contends that these statements and the fact that the evidence shows that the property was not as severely damages as Ms. Madrid claimed, show that Ms. Madrid was motivated by racial animus when she lodged complaints against the Bad Horses. The Charging Party contends that "the most logical inference is that Ms. Madrid lied to Respondent Carlson about the nature and extent of the damage the Bad Horses actually had caused," and that she did so because she was prejudiced against Native Americans G's Motion at pp. 23-24). The Charging Party also asserts that Mr. Summy knew of her prejudice and her motivation and that his knowledge must be imputed to Mr. Carlson, his principal.

Case law supports the proposition that complainants may prove discrimination by showing that respondents acted in response to the discriminatory wishes of a third party. *See Cato v. Jalik,* 779 F. Supp 937 (N. D. Ill. (1991). *See also Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1531 (7th Cir. 1990); and *Peoples Helpers, Inc. v. City of Richmond,* FH - FL ¶15,755 (E.D. Va. 4-13-92). However, I held in the I. D. that the Charging Party had failed to prove knowledge by either Mr. Summy or Mr. Carlson of Ms. Madrid's unlawful motivation. After reconsideration, I find no reason to modify the I. D. in this regard.

The facts in this case are distinguishable from those in *Cato,* the case relied upon by the Charging Party. In that case the respondent admitted that he rejected the African American applicant based on comments made by another tenant to him and whose comments the respondent knew to be racially motivated. Similarly, in *Peoples Helpers,* the City of Richmond admitted that they were well aware of the discriminatory motives behind the complaints of the neighbors. In the Memorandum opinion denying the City's Motion for Summary Judgment, the court stated that liability is established if complainants show that respondents acted for the sole purpose of effectuating the desires of the neighbors, that racial or other unlawful considerations were a motivating factor behind the desires of the neighbors, and that respondents were aware of their motivation. *Id. at 16,931.*

The Charging Party acknowledges that it is not clear based on the evidence of record when Ms. Madrid made the statement to Mr. Summy. (G's Motion at p. 24, n.14). Mr. Summy's deposition testimony was that "one day" Ms. Madrid told him this. (TR. 300). However, based on other testimony by Mr. Summy at the hearing, the Charging Party states that his testimony "*suggests*" that the statement was made by Ms. Madrid "contemporaneously with her complaint to Respondent Summy about the Bad Horses' breaking a flower pot or vase." (*Id.* at pp. 24 and 27). Although the Charging Party infers from his testimony that her comment was made on the day the bad Horses moved

in,[9] Mr. Summy's testimony is that the complaints about the flower pot or vase were made to him on the morning of October 4, 1990, the day after Mr. Carlson directed him to ask the Bad Horses to move. (TR. 298). Furthermore, Respondent Carlson credibly testified that his direction to Mr. Summy was not motivated by racial animus. In short, the preponderance of the evidence does not show that Respondent Summy had knowledge of Ms. Madrid's attitude toward Native Americans on October 3, 1990.

B. Familial Status:

[9]The Charging Party states that "Respondent Summy's testimony *suggests* that she specifically directed her statement of bias and moving to Sioux Falls to get away from Native Americans at the Bad Horses." To reach that conclusion required drawing an inference upon an inference. At footnote 14, the Charging Party states:

> "...Since Respondent Summy's response to Ms. Madrid's statement of bias, Tr. 300, and to Ms. Madrid's complaints about her new Native American neighbors, Tr. 477, was the same, and since it appears that he made that response to Ms. Madrid only once, it is reasonable to infer that Ms. Madrid's statement of prejudice was made the day the Bad Horses moved in, and she directed it specifically at them."

In the I. D., I held that the Charging Party had failed to prove by a preponderance of the evidence that Respondents discriminated against Complainants on the basis of familial status. I reasoned that the evidence established that the Respondents rented to Complainants knowing that they were a couple with a 5-year old child; that Respondents rented to them even though they had a legitimate basis for declining to rent to them were they so inclined (Complainants did not have enough money to pay the required deposit and first month's rent);[10] and that they rented to families with children both before and after the Bad Horses. (I. D. at 16-17, 20). I stated that "[b]ut for the complaints that were lodged with Mr. Carlson by Ms. Madrid, there is reason to believe that this family of three would have been allowed to reside in the unit indefinitely. The Respondents' action in renting the unit to a family of four within weeks thereafter suggests the same." (I. D. at 16).

The Charging Party contends that implicit in that "but-for" rationale is the application of a legal principle that Complainants were required to establish that the only reason for Respondents' adverse actions against the Bad Horses was discrimination. The Charging Party cites a number of cases and asserts that to prevail the Complainants need only show that Ms. Madrid's discriminatory animus was one of the factors that motivated the eviction of the Bad Horses, and argues that had the correct principle been applied, a different result would have been compelled. This argument has no merit. I did not conclude in the I. D. that this is a mixed motive case. I found no unlawful motivation on the part of the Respondents.

The Charging Party also argues that certain statements made by Respondents in their response to the original complaint (characterized as admissions) compel the conclusion that Respondents discriminated against Complainants on the basis of their familial status. That argument has no merit.

[10]The Charging Party incorrectly argues that there is no evidence that a deposit was required. The written contract signed by the Bad Horses calls for agreement to pay, in addition to monthly payment, an amount "to be returned at termination of this tenancy, provided 2 keys to said property are returned to agent, premises is left in acceptable condition and said tenant, ... has caused no damage to property ... and owes no rents or penalties to said agent." (GX-3). Although there is no provision specifically designated "security deposit", the terms and condition can reasonably be considered a requirement for a security deposit. Mr. Summy testified that once the applicant showed interest in the apartment, he would show them a copy of the lease and explain the contents to them. (TR. 294). This was the same contract that Mr. Summy required the Donnells to sign. The Donnells paid a deposit (GX-10) as did the tenants who immediately preceded the Bad Horses. (TR. 269). Moreover, Mr. Bad Horse, himself, testified that he did not have money for the deposit and full first month's rent and that Mr. Summy allowed him to move in with a promise to pay the balance in two weeks. (TR. 156). Finally, Mr. Summy testified to returning $100 as "refund of the deposit" to Mr. Bad Horse when he turned in the keys. (TR.479-480).

To prove disparate treatment of Complainants by Respondents on the basis of familial status, the Charging Party relies exclusively on selected statements by Respondents in letters to Mr. Burke of the Sioux Falls Human Rights Commission responding to a complaint alleging discrimination based on national origin.[11] These statements include: (1) a statement from Mr. Summy's answer to the initial complaint, in which he gives as the reason the Bad Horses were asked to move that "Mr. Carlson directed me to ask Mr. Bad Horse to leave because Mr. Carlson wanted the apartment rented preferably to a single person." (GX-14); (2) Mr. Summy's hearing testimony confirming that Respondent Carlson had directed him to rent the unit "preferably to single persons" (TR. 290); and (3) Respondent Carlson's statements in his January 9, 1991, letter to Mr. Burke in answer to the original complaint, that [t]he instructions to Mr. Summy was [sic] to rent the apartment to "a single person or at the most a married couple/two single persons;" that he "had had problems in the past with families moving out;" that the unit was "too small for a family;" and that between mid-October and December 15, 1990, the apartment could have been rented to families but was not." (GX-11). Taken together, they form the basis of the Charging Party's assertion that Respondent Carlson had a policy that preferred renting to adults only and against renting to families with children, and that pursuant to that policy, Respondent Carlson directed Mr. Summy to ask the Bad Horses to move because they were a family with children.

Taken at face value, these statements indicate discriminatory animus, but when viewed in context and considered with the other evidence of record, they do not compel a

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[11]In the I. D. I found Mr. Bad Horse's testimony incredible that he filed the Amended Charge alleging familial status discrimination because one reason Mr. Summy gave for requiring them to move was because they had a child. The Charging Party asserts that Mr. Bad Horse did not testify that Mr. Summy *orally* told him that he was being asked to move because they were a couple with a child. I find no merit to that contention.

Mr. Bad Horse's testified as follows (TR. 118-19):

> Q. Now, did Mr. Summy ever tell you, either on his own behalf or on Mr. Carlson's behalf, that you should move because on (sic) the basis of your family?
> A. Yes, because of the family size. We were told that.
> Q. By who, told by who?
> A. Mr. Summy had said Mr. Carlson wanted the place rented to two singles, a couple, at most he said maybe a parent and a child.
> Q. And when did he say that to you?
> A. That was after we were evicted out.
> Q. After you were evicted out. When was that?
> A. Which was the 4th of October. (Tr. 118-19).

While still testifying on the subject of the familial status claim, Mr. Bad Horse testified as follows:

*** Q. So it's a statement from Mrs. Madrid that was the basis of your family status discrimination complaint, wasn't it?

> A. No.
> Q. Then whose was it?
> A. I was told by Mr. Summy *that morning* for the reason why I had to leave.... (TR. 121).

finding that Respondents asked the Bad Horses to leave because they were a family. Mr. Carlson denied that he had a policy that preferred renting to adults only. He asserts that the statement of his instruction to Mr. Summy is not a full an accurate description of his instructions and that when accurately stated it would include rental to a two-person family, i.e. a parent and a child. I credit Respondent's testimony that the statements cited above did not accurately reflect his instructions to Mr. Summy. The weight of the evidence supports finding that Mr Carlson had a policy that preferred renting to two persons, regardless of relationship.

Mr. Carlson's statements, when viewed in context, show that in instructing Mr. Summy, his concern was about the number of people rented to. He stated:

> The instructions to Mr. Summy [was] to rent the apartment to a single person or at the most a married couple/two single persons. I have rented the apartment to families with 1 child on a couple of previous occasions and without exception the family moved out as soon as possible because in their words, 'The apartment is to [sic] small for a family'.
>
> So when Dale Summy called me in October and told me he had rented the apartment to a married couple with a child I was upset. He assured me they appeared to be a good family and that they were desperate for an apartment. It was with reluctance that I agreed with them moving in because I knew it would not be long before the apartment would not be large enough.

Thus, although these statements are relied upon by the Charging Party to prove a policy of rental to adults only, they also provide some support for Mr. Carlson's claim that he was concerned with the number of persons rented to, not with familial status. The letter shows that Mr. Carlson's stated reason for his instructions was that "families with 1 child" found his unit "too small." The clear indication is his concern that the unit was too small for three people. This is consistent with his testimony that renters found the unit too small for "three people." (TR. 446). When Mr. Carlson applied an exception in this case and rented to the Bad Horses, his reluctance went to the fact that there were three persons in the family, not to the fact that the family included a child.

However, even conceding that Mr. Carlson had a policy that preferred rental to adults only, as alleged, it is his actions and motivation in this case that are critical to the evaluation of his motivation in asking the Bad Horse family to move. In this case, it is clear that in spite of the policy, he rented to the Bad Horses -- a family of two adults and a child. The issue is Mr. Carlson's reason for asking the Bad Horses to move. Mr. Carlson addressed that issue in his January 18, 1991, letter. He discussed developments relating to the complaints from Ms. Madrid that occurred after he made his decision to rent to the Bad Horses and stated:

> With the information that there were in fact four persons living in the

> apartment and that it was obvious there was going to be constant conflict between upstairs/downstairs neighbors I decided it was necessary for the Bad Horses to move. (GX-11).

In his letter of March 2, 1991, to Mr. Burke in response to the complaint of familial status, Mr. Carlson reiterated that he asked the Bad Horses to leave because he did not want four people living in the unit and because of the animosity that developed between the upstairs and downstairs tenants. He denied asking Complainants to leave because they were a family with a child, stating that it did not make a difference to him whether the four people moving into the apartment were all adults or a mix of adult and children. He asserted that if he had not wanted the Bad Horses to live in the apartment because they had a child, he would not have rented to them in the first place. (GX-13).

The only evidence which directly contradicts Mr. Carlson's reasons for asking the Complainants to move is Mr. Summy's statement that Mr. Carlson asked them to move because he wanted the unit rented to "a single person." (GX-14). Rental to a single person would, of course, preclude rental to a family. However, I do not credit this statement. There is no other support in the evidence for the contention that Mr. Carlson wanted to rent the unit to one person. The rental history going back nearly five years consistently shows rental to at least two people.

Further, the Charging Party has cited to a portion of a paragraph from Mr. Summy's letter. It is important to consider the statement in full context. The paragraph reads:

> It has been in compliance with the owner's wishes that the rental of the apartment at 1311-1/2 S. Duluth Avenue, Sioux Falls, SD, should be to single persons. This apartment has been rented in the past to single couples with no children and to a single parent with one child. I made an exception to the owner's policy, without his knowledge, to allow Mr. Bad Horse to rent the apartment with his wife and one approximately 3 year old child. Upon notification of Mr. Carlson that the apartment was rented to a couple with one child, Mr. Carlson directed me to ask Mr. Bad Horse to leave because Mr. Carlson wanted the apartment rented preferably to a single person. (emphasis added in Charging Party's Motion). (See GX-14).

When the underlined statement is viewed in the context of the entire paragraph, it can be seen that the statement is both inaccurate and ambiguous. Mr. Summy's statement that he made an exception to Mr. Carlson's policy and rented to the Bad Horses, without Mr. Carlson's knowledge, is contrary to all the other evidence in the case, including Mr. Summy's own testimony. (See also n.4). This inaccuracy seriously undermines the reliability of Mr. Summy's further statement that "[u]pon notification of Mr. Carlson that the apartment was rented to a couple with one child, Mr. Carlson directed me to ask Mr. Bad Horse to leave because Mr. Carlson wanted the apartment rented preferably to a single person." Further, the first sentence of the paragraph of the paragraph quoted above describes "the owner's wishes" that the apartment should be

rented to single persons. In describing the single persons rented to in the past, the statement includes a single couple with no children and "a single parent and one child." This statement shows that rental to a parent and child couple complied with the owner's wishes and supports Mr. Carlson's testimony that he was concerned about the number of persons rented to, not their age or familial status. The inaccuracies and ambiguities of Mr. Summy's statements regarding Mr. Carlson's action prohibit giving them more than minimal weight.

Moreover, other evidence of record is persuasively contradicts the assertion that Mr. Carlson had a discriminatory animus against children or families with children, and that he asked the Bad Horses to leave because they were a family. Mr. Carlson credibly testified that he had no problem renting to families with children. The evidence established that neither Mr. Carlson nor Mr. Summy ever refused to rent the unit to anyone at any time. (TR. 287-88, 431-32). There is no evidence that Respondents ever expressed a stereotypical view of children or demonstrated evidence of animus against children or families with children. Respondents never complained to anyone that a child resident was too noisy, or destructive, or posed too great a danger of being hurt on the property, or gave them any reason for concern whatever because of his/her child status. Mr. Carlson's history of renting at South Duluth Avenue shows that he rented to many families with children. Jan Cavanaugh testified that she and her son lived in the unit rented to the Bad Horses for nearly four years, from late summer 1986 to July 1990. (TR. 195). In 1986 when she moved in, her son was about 4 years old. According to Ms. Cavanaugh, during the four-year period she lived in the upstairs unit, there was a change three times in the tenants who rented downstairs. Two of the three were families, with one family consisting of one parent and two children. Thus, during the four-year period almost immediately preceding Respondents' rental to the Bad Horses, three of the four residents of Respondents units were families with minor children.

Finally, the testimony of Mr. and Mrs. Donnell establishes that Mr. Carlson rented the upstairs unit to the Donnell family of four, including two minor children, from November 1, 1990, to December 1, 1990. Mr. Carlson's inaccurately remembered that between October 13, and December 15, 1990, the unit could have been rented to families but was not. Accordingly, Mr. Carlson's inaccurate memory does not prove that he asked the Bad Horses to leave because they were a family.

In considering what weight to give to the statements by Respondents Carlson and Summy, I find their hearing testimony more reliable. The record suggests that by the time they came to hearing they had a better understanding of the legal definition of "family" and "familial status" than they had at the time they made the statements that facially implicated them with familial status discrimination. The use of the term "family" to some might suggest a husband and a wife and at least one child, i.e. three persons. This is not the regulatory definition. The regulatory definition includes a two-person family of a parent and one child. See 24 C.F.R. § 100.20.

Having considered the alleged direct and indirect evidence of discriminatory intent,

I conclude that the Charging Party has failed to establish that Respondents intentionally discriminated against Complainants on the basis of familial status.

Disparate Impact Analysis

Although I find that the Charging Party has failed to prove by a preponderance of the evidence that Respondents intentionally discriminated against Complainants, I find merit in the Charging Party's alternate contention that the evidence shows discrimination based on "disparate impact." Mr. Carlson stated in his letter March 6, 1991, that he asked the Complainants to move, in part, because he did not want four people living in the unit and that had the Complainants informed him that there would be four occupants he would not have rented to them in the first place. (GX-13). He did not want more than three persons in the unit "under any circumstances." *Id.* Based on these statements, I find that Mr. Carlson asked Complainants to leave, in part, to enforce a facially neutral occupancy standard which limited rental to a maximum of three persons.[12] That leaves the question whether the three-person maximum occupancy standard had a disparate impact on families with children.

A policy or practice that is neutral on its face may be found to be violative of the Act if the record establishes a *prima facie* case that the policy or practice has a disparate impact on members of a protected class, and the Respondent cannot prove that the policy is justified by business necessity. *HUD v. Mountain Side Mobile Estates v. HUD,* __F.3d__ (10th Cir. 1995).

The Charging Party introduced the 1990 Census of Population and Housing for Sioux Falls data, showing that the average family with children (3.61 persons) is excluded by Respondents' asserted policy or practice limiting rentals to a three-person maximum, whereas the average household without children (1.81 persons) is not excluded by the policy. (GX-15). The evidence further shows, using national statistics, that approximately 58.8% of families with minor children in Sioux Falls would be prevented from living in Respondent's unit by the practice of limiting occupancy to no more than three people.[13] In contrast, only about 3.6% of households without minor children in Sioux Falls are prevented from living in the unit by the three-person maximum limit. (GX-16). The Charging Party also produced evidence that under the Sioux Falls Housing Code, the unit rented by Complainants was larger than required for two persons. The unit with two bedrooms of 118 and 114 square feet, respectively, were more than big enough to satisfy the 90 square feet of floor space required for two persons per bedroom. (GX-17). Thus, the evidence shows that Respondent's limitation on the dwelling to no more than three persons was not justified based on the local housing code. In short, the Charging Party has established a *prima facie* case of

[12]One might argue that preference for two persons rather than three persons should be applied. However, whether the analysis is using a two person occupancy standard or a three person standard, the result is the same.

[13]In *Betsey v. Turtle Creek,* 736 F.2d 983,988 (4th Cir. 1984), it was held that a policy affecting 54.3% of the protected class established disparate impact.

disparate impact based on census statistics and local occupancy standards.

The Respondent has the burden to overcome the *prima facie* case by establishing a business necessity for the policy. This business necessity must be supported by objective evidence, as opposed to subjective opinion. *Mountain Side.* In this regard, the only reason advanced by Mr. Carlson for his policy was his experience that when he had rented to three persons in the past, they became dissatisfied with the apartment because it was too small for them and they soon moved out.[14] This reason, standing alone, does not provide the type of objective evidence required to meet the business necessity standard, thus, he has not demonstrated a business necessity. Accordingly, Respondent Carlson's three-person occupancy policy resulted in a disparate impact on families with children and discriminated against Complainants based on their familial status in violation of the Act. Accordingly, Respondent Carlson's three-person occupancy limit violated § 3604 (b) of the Act.

Statement of Preference

The Secretary has charged that Respondent Carlson had a stated preference for renting the unit in question to "a single person or, at most, to a married couple/two single persons" and that he instructed Mr. Summy to act according to his preference. In doing so, Mr. Carlson "published, made and/or caused to be made notices or statements indicating a limitation based on familial status" and injured Complainants in violation of 42 U.S.C.A. § 3604 (c).

Section 3604 (c) provides that:

> it shall be unlawful -- (c) to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make such preference, limitation, or discrimination. 42 U.S.C. § 3604 (c).

In this case, to prove a violation of § 3604 (c), the Complainants must establish by a preponderance of the evidence that Respondents made the alleged statement and that such statement "indicates" discrimination based on familial status.

Respondents' articulation of a preference that is unlawful would constitute a violation of the Act even if it did not cause the Bad Horses an injury. A violation may be proved without any demonstration that a respondent intended to make an unlawful statement. *See HUD v. Denton*, Fair Housing- Fair Lending ¶25,024 at 25,279. (HUDALJ 1992).

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[14]Mr. Carlson testified that he did not believe he would have lost a great deal of money in his business if he had not asked the Bad Horses to move. (TR. 270).

A preference to rent to a "single person, or at most a married couple/two single persons" does not violate the Act, *per se*. Courts usually apply an "ordinary reader" or "ordinary listener" test[15] to determine whether the preference "indicates" discriminatory intent. Here, the evidence of the statement of preference was of an oral statement communicated by Mr. Carlson to Mr. Summy.[16] It was reduced to writing in a letter sent to Mr. Burke. Although Mr. Carlson asserted that the preference as stated in the written correspondence to Mr. Burke is not an accurate reflection of his instructions to Mr. Summy and of his intent, he did not deny making the statement. Applying the "ordinary listener" test, I conclude that to the ordinary listener, each of the phrases -- "a single person", "a married couple" and "two single persons" -- indicates adult persons. Thus, the stated preference limiting rental to persons in these categories "indicates" discrimination based on familial status.

Accordingly, I find that the Charging Party has proved a violation of § 3604 (c). Although I find a violation of § 3604 (c), there has been no showing that the Complainants were damaged as a result of the violation. The statement was not made to them and they did not become aware of it until months after they were asked to leave.

## DAMAGES

The Act provides that where violations are proved, Complainants are entitled to "such relief as may be appropriate, which may include actual damages ... and injunctive or other equitable relief." 42 U.S.C. § 3612 (g) (3). Having found that Respondents' violated §§ 3604 (b) and (c) of the Act, Complainants have suffered injury from Respondents' actions and are entitled to appropriate compensation.

The Charging Party requests $1,608 in economic damages. It also seeks awards of $10,000 each for Mr. Bad Horse and $12,000 for Mrs. Bad Horse in intangible injuries, including damages for embarrassment, humiliation, emotional distress, inconvenience, and loss of housing opportunity caused by the discrimination.

### Out-of-Pocket Expenses

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[15]The circuits courts that have dealt with the "indicates" aspect of § 3604 (c) have employed a straightforward approach. An objective "ordinary reader" standard should be applied in determining what is "indicated" by an ad or statement. Thus, the statute is violated if an ad for housing or a statement suggests to an ordinary reader that a particular protected group is preferred or dispreferred for the housing. *Ragin v. New York Times Co.*, 923 F. 2d 955 (2d Cir.) *cert. denied* 112 S. Ct. 81 (1991). Although no showing of subjective intent is necessary, evidence of such intent is not irrelevant.

[16]A statement of unlawful preference made by a landlord to his agent can constitute a violation of § 3604 (c) pursuant to 24 C.F.R. § 100.75(b).

The Bad Horses are entitled to out-of-pocket expenses which were incurred as a result of Respondents' actions. *See, e.g., HUD v. Morgan*, 2 Fair Housing - Fair Lending (P-H) ¶ 25,008, 25, 138 (HUDALJ July 25, 1991), *modified on other grounds,* 985 F.2d 1451 (10th Cir. 1993); *HUD v. Blackwell*, FH-FL ¶25,001 at 25,010 (HUDALJ 1989), *aff'd* 908 F.2d 864 (11th Cir. 1990). They are entitled to costs associated with obtaining new housing. *See Hamilton v. Svatik,* 779 F.2d 383 (7th Cir. 1985), and to recover expenses incurred from expenses related to their pursuit of this complaint and participation in these proceedings. *See TEMS Ass'n*, 2 Fair Housing-Fair Lending at 24,311; *HUD v. Murphy*, 2 Fair Housing-Fair Lending (P-H) ¶ 25,002, 25,054 (HUDALJ July 13, 1990). I find that the requested expense are reasonable and that the Bad Horses are entitled to $1,608 in out-of-pocket losses as a result of being required to move out of Respondent's apartment. This includes $15 for the cost of the move, $533 in additional rent at their new apartment where they lived for 4 months and 19 days ($115/month); $450 in extra travel costs to and from work; $20 for telephone calls and $7.65 in facsimile transmissions to HUD in connection with the case; $165 for mileage expense to appear at trial; and $417 in lost wages ($139/day x 3 days) for two days of hearings and two half days of travel.

Emotional Damages

The Complainants are entitled to damages for embarrassment, humiliation, emotional distress, inconvenience, and loss of housing opportunity caused by the discrimination. *HUD ex rel. Herron v. Blackwell,* 908 F.2d 864, 872-73 (11th Cir. 1990); *Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974). Key factors in determining the amount of compensation for emotional distress are the complainants' reaction to the discriminatory conduct and the egregiousness of respondents' behavior. *HUD v. Properties Unlimited,* 2 Fair Housing-Fair Lending (P-H) ¶ 25,009, 25,151 (HUDALJ Aug. 5, 1991). Because it is difficult to evaluate the emotional injuries which result from civil rights deprivations, courts do not demand precise proof to support a reasonable award of damages in such cases. *Blackwell*, 908 F. 2d at 874.

The $10,000 in emotional damages for Mr. Bad Horse and the $12,000 in emotional damages that the Charging Party has requested ($22,000 family total), were based on a requested finding of intentional discrimination on the basis of national origin. I have not found intentional discrimination on the part of Respondents against the Complainants. The Charging Party concedes that the Bad Horses had no basis for alleging familial status discrimination until alerted by Mr. Burke, months after they have vacated the property in question. Further, Complainants were not damaged as a result of the § 3604 (c) violation. Accordingly, their request for compensation must be based on the emotional distress, inconvenience, and loss of housing opportunity that resulted from Respondents' enforcement of an occupancy standard that unfairly impacted upon them as a family.

Respondents asked Complainants to leave after complaints were lodged by another tenant and after Respondents had reason to believe that Complainants had misrepresented the number of people who would live in the unit. In asking Complainants

to leave, Mr. Summy was apologetic -- not hostile, badgering or harassing. He did not pressure them to leave immediately, but gave them time to find alternative housing.

With regard to the reactions of the Complainants to their being asked by Respondents to leave, Mrs. Bad Horse testified that she was shocked and hurt when she heard Mr. Summy say they had to move. She wanted to know what they had done to deserve it. She worries to this day that discrimination might happen to her again. She became more suspicious of people, and anxious about finding another place to live. In assessing damages, I have not considered this reaction because it was based on her belief that they were asked to move because they were Native American.

Mrs. Bad Horse also testified that the move was very stressful for her, having been accomplished by just her and her husband. She strained her back, causing such her to take a pain reliever and to lie down for a couple of days, during which time she could not spend time with her child. (TR. 86, 210-215). She is entitled to compensation for this stress and inconvenience.

Mr. Bad Horse testified that he was shocked at being told to move out "right out of the blue" when he felt he had done nothing wrong. (TR. 83). He moved without protest because he and his wife did not want to be where they were not wanted. He had never suffered discrimination before and this experience made him realize that discrimination "is nationwide and happens all the time" and made him worry that it might happen to his family again. In assessing damages, I have not considered this reaction because, again, it was based upon his belief that he was discriminated against because he was Native America.

Mr. Bad Horse also testified that he worried because he had a new wife and little girl and "hardly no money and no place yet to go." He had trouble concentrating on his work worrying about where he would find another place to live. (TR. 77, 84, 86). These worries surely were eliminated once he found new housing. The evidence also shows that the new apartment was three miles farther from Mr. Bad Horse's work. Thus, a degree of added inconvenience in his commute to work may be considered. I find that Mr. Bad Horse was inconvenienced by the requirement to move and that he is entitled to compensation on that basis.

However, Mr. Bad Horse's testimony shows that when his family moved to Sioux Falls, they really wanted to rent at an apartment complex with a washer and dryer but they did not have enough money to do so at the time. His pay day came while he was at 1311-1/2 South Duluth Avenue. After getting paid he had enough money to rent at an apartment complex. He moved to an apartment in a complex that had a washer and a dryer. (TR. 133). The evidence also shows that Mr. Bad Horse's reaction to having to move was to give a sigh of relief. He told Mr. Summy that Ms. Madrid complained all the time and he was glad to get away from her and that Mr. Carlson had done him a favor by not requiring him to honor his lease. (TR. 482).

Having considered all these factors, I conclude that Mr. Bad Horse is entitled to compensation for emotional distress, inconvenience and lost housing opportunity in the amount of $500, and Mrs. Bad Horse in the amount of $250.

## Civil Penalties

The Charging Party asserts that the nature and circumstances of the violations, including intentional discrimination based on national origin and familial status, argue for the imposition of a substantial civil penalty. Although Mr. Carlson no longer owns rental property, the Charging Party argues that he may in the future and that deterrence objectives should be considered not only to apply to Mr. Carlson but to deter others. The Charging Party urges the court to assess a civil penalty of $5,000 against Respondent Carlson and a civil penalty of $250 against Mr. Summy.

Large civil penalties would be inappropriate in this case. Neither Respondent engaged in intentional discrimination; neither had received any training about the Fair Housing Act; both had only minimal involvement in the housing business; and both have since left the business. A civil penalty of $1,000 against Respondent Carlson and $250 against Respondent Summy will suffice to vindicate the public interest.

## Injunctive Relief

The Act also authorizes "injunctive or other equitable relief". 42 U.S.C.

§ 3612 (g) (3). The purposes of injunctive relief are to eliminate the effects of past discrimination, prevent future discrimination, and return aggrieved persons to the positions they would have been in absent the discrimination. See Blackwell, *908 F.2d at 874; Park View Heights Corp. v. City of Black Jack,* 605 F.2d 1033, 1036 (8th Cir. 1979), *cert. denied,* 445 U.S. 905 (1980). In its proposed injunctive order, the Charging Party requests only that Respondents be enjoined from discriminating in the future. I have incorporated this injunction into the following Order.

## ORDER

It is hereby ORDERED that:

1. Respondents Richard D. Carlson and Dale Summy are permanently enjoined from discriminating against any person, or persons, with respect to housing based on familial status. Prohibited actions include, but are not limited to, those enumerated in 24 C.F.R. § 100.50.

2. Within forty-five (45) days of the date on which this Order becomes final, Respondents shall pay the following damages: $1,608 in out-of-pocket expense to Complainants Mr. and Mrs. Bad Horse; $500 for inconvenience, lost housing opportunity and emotional distress to Mr. Bad Horse; and $250 for inconvenience, lost housing opportunity and emotional distress to Mrs. Bad Horse.

3. Within forty-five (45) days of the date on which this Order becomes final, Respondent Carlson shall pay a civil penalty of $1,000 to the Secretary of HUD.

4. Within forty-five (45) days of the date on which this Order becomes final, Respondent Summy shall pay a civil penalty of $250 to the Secretary of HUD.

This Order is entered pursuant to 42 U.S.C. § 3612 (g)(3) and 24 C.F.R. § 104.910, and will become final upon the expiration of 30 days or the affirmance, in whole or in part, by the Secretary of HUD within that time.

/s/

_____
CONSTANCE T. O'BRYANT
Administrative Law Judge