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 Deborah Smerling, Michael Smerling, Diane J. Hoag, and Vernon Hoag, Charging Party, v. Robert L. Denton and Mary Jane Denton, Respondents.	HUDALJ 05-90-0012-1 HUDALJ 05-90-0406-1 Decided: November 12, 1991

Michael Kalven, Esquire
For the Secretary and the Complainants

Michael J. Cieslewicz, Esquire
For the Respondents

Before: ALAN W. HEIFETZ
Chief Administrative Law Judge

INITIAL DECISION

Statement of the Case

This matter arose as a result of complaints filed by Deborah and Michael Smerling, and Diane and Vernon Hoag ("Complainants"), alleging discrimination based on familial status in violation of the Fair Housing Act as amended, 42 U.S.C. §§ 3601, *et seq.* ("the Act"). On April 10, 1991, 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 Secretary") issued a charge against Robert L. and Mary Jane Denton ("Respondents") alleging that they had engaged in discriminatory practices in violation of Section 804 of the Act, 42 U.S.C. § 3604.

A hearing was held in Milwaukee, Wisconsin on July 16, 1991. The parties' briefs originally were due on or before August 12, 1991. The Secretary, however, requested an extension of time until September 13, 1991, to file his brief. Respondents' counsel did not object to the requested extension and further stated that he would not seek a similar extension, but rather would file his brief on August 12th. Accordingly, Respondents filed their brief on August 12, 1991, and the Secretary filed his brief on September 13, 1991.[1]

Findings of Fact

1. The Westwood Apartments ("the Westwood") consists of four buildings that contain a total of 72 units located at 1701, 1703, 1711, and 1713 Elder Street, Waukesha, Wisconsin. Tr. 104-05, 120. The building located at 1701 Elder Street has 16 units, all of which are two-bedroom apartments. The other three buildings contain two-bedroom, one-bedroom, and efficiency apartments. Tr. 104-5, 140-1.[2]

2. Respondents have owned the Westwood since January 1, 1986, when they purchased the property from a Wisconsin general partnership comprised of five partners. Mr. Tim Davies was the only partner involved in the day-to-day management of the building. Tr. 120.

3. Although they employ a resident manager, both Respondents take an active role in managing the Westwood. Tr. 147-48. Mr. Denton usually visits the complex once every one or two weeks. Tr. 111-12. Respondents' office is located in their home.

4. Mr. Denton has been involved in the rental business for over 25 years. Tr. 132. The Dentons have been married for over 25 years and have children. Tr. 148.

5. The bedrooms in the two-bedroom apartments at the Westwood measure approximately ten feet, three inches by ten feet, one inch; and twelve feet, five inches by twelve and a half feet. The distance from floor to ceiling is approximately seven feet, ten inches. Tr. 71-72; S. Ex. 18, 19.

6. For other than community-based residential facilities, the Wisconsin Administrative Code requires minimum sleeping areas for buildings to be 400 cubic feet

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[1]By his letter dated September 17, 1991, Respondents' counsel notified this forum that he had not yet received the Secretary's brief and he requested that this matter be decided only on the record and Respondents' brief. The Secretary's counsel attached a copy of the certificate of service to his reply which asserted that his brief was mailed on September 13th to Respondents' counsel. *See* Letter from Michael Kalven (Sept. 30, 1991). Because service may be effected by mailing, the brief was timely filed. 24 C.F.R. § 104.40(b). *See also* 24 C.F.R. § 104.30(d)(2). Accordingly, both briefs were considered in issuing this decision.

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

for each occupant over 12 years old and 200 cubic feet for each occupant 12 years old and younger. S. Ex. 22 at ILHR 57.04 (1)(a) and (b).

7. Nikki Fuchs was the resident manager at the Westwood from July 1973 until February 1, 1989. Tr. 94. Mr. Davies imposed an occupancy restriction of one child per two-bedroom unit. Tr. 95. At the request of Mr. Davies, Ms. Fuchs drafted a written rental policy containing occupancy restrictions ("the Westwood's policy" or "the policy"). Tr. 98. The policy contains the following limitation: "Reminder - no more than two singles in any one apartment. No children except one only in the two bedroom apartments." S. Ex. 5 at 1 (emphasis in original). It also states, "Visiting and resident children are to be kept from running and/or playing in the hallways and basements and from ringing the buzzers." *Id.* There are presently, and there have been for the last several years at least seven or eight children residing at any one time in the Westwood buildings. Tr. 97, 104.

8. The policy also prohibits tenants from parking more than two cars in the parking lot per apartment. Tenants in efficiency apartments are limited to one vehicle. In addition, "unused and inoperable vehicles" are not allowed in the parking lot. S. Ex. 5 at 2.

9. When the Dentons purchased the Westwood, Mr. Denton authorized Ms. Fuchs to substitute the name of Mr. and Mrs. Denton for Mr. Davies' name in the written statement of the Westwood policy. Tr. 98-99, 122. Mr. Denton understood that the policy was to be applied to all tenants, and, in fact, he told Ms. Fuchs to use that policy.[3] Tr. 99, 122.

10. Ms. Fuchs did not recall at the hearing that Respondents' policy restricted the number of people to a two-bedroom unit to three. Rather, she remembered Respondents' policy to be the same as that of the previous owners of the Westwood, i.e., no more than one *child* in a two-bedroom unit. Ms. Fuchs never rented a two-bedroom apartment to one adult with two children. Tr. 95-96. She rented only three apartments to families with two children: the Smerlings, the Hoags, and the Wilkins. However, she made an explicit exception to the policy only for the Hoags.[4] Tr. 100.

11. Mr. Denton does not believe that the Westwood facilities are able to accommodate four people in a two-bedroom apartment because the second bedroom is not big enough "to take two children;" there are no facilities for a playground; the halls have "no facilities whatsoever for children to play;" there is no place at all "for that many

[3]Mr. Denton testified that he never used the policy as "written rules and regulations." Tr. 122. However, the meaning of this testimony was never made clear. There is no doubt on the record that the policy was employed.

[4]The Smerlings originally listed only one child on the rental application. S. Ex. 11. The record does not contain evidence of the circumstances surrounding the Wilkins' tenancy.

children to play;" and the water heating system was not designed for that number of people. Tr. 126. His opinion is based on his 25 years of rental experience. Tr. 132.

12. Charles F. Aldrian is an architect and engineer with approximately 25 years experience. He is a licensed architect in ten states and is currently employed by a firm that is primarily involved in the design and construction of multifamily housing. Tr. 137-38. After reviewing the Westwood's floor and site plans and visiting the complex, he is of the opinion that the water heater for 1701 Elder Street is not adequate for four people per unit, regardless of whether the people are adults or children. It is, however, large enough to accommodate three people per apartment. Tr. 139-46. He also believes that, based primarily on the measurements for the second bedroom, a three person occupancy standard is reasonable for the two-bedroom units at the building. Tr. 141-42.

13. Deborah and Michael Smerling resided at 1701 Elder Street, Apartment 102, from about November 1987 until the summer of 1989. Tr. 31, 43; S. Ex. 12, 13, 14. The Smerlings were given a copy of the Westwood's policy when they moved into the building. Tr. 42. The Smerlings have four children from their own and previous marriages. At the time of the hearing their children's ages were as follows: Michael, seventeen; Jennifer, sixteen; Ishmell, fourteen; and Mickey, eight. Tr. 31. At the time that Mr. and Mrs. Smerling moved into the Westwood, only Mickey, then age five, was living with them. Ishmell, who was living in Colorado, joined the Smerlings at the Westwood after the school year in June 1988. Tr. 31-32, 57-58; S. Ex. 11. The Smerlings had a month-to-month lease. S. Ex. 12. Their rent was originally $510 a month. It was increased to $530 upon Ishmell's arrival at the Westwood and the installation of new carpeting.[5] Tr. 33-34, 37.

14. The rental application completed by the Smerlings on October 1, 1987, lists only their son Mickey as an additional occupant.[6] S. Ex. 11.

15. Mr. Smerling operates a maintenance business. Tr. 53. Soon after moving into the Westwood, Mr. Smerling began to do maintenance work for Mr. Denton at the

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[5]Mr. Smerling testified at one point that the rent increased to $535, and later that it increased only to $530, Tr. 33-34, 37. The Secretary's brief states that the rent increase was to $530. Secretary's Post-Hearing Memorandum of Law (Sept. 13, 1991) at 11. Accordingly, I find that the amount was $530.

[6]Mr. Smerling testified that "roughly about the time we were moving in," he told Ms. Fuchs that Ishmell would be joining his family later. Tr. 32. He also testified that he notified Mr. Denton about a second child one or two weeks later. *Id.* However, Mrs. Smerling testified that they notified Ms. Fuchs of a second child when they were filling out the rental application, a month before moving in. Tr. 54-5.

Ms. Fuchs recalls making *only one* conscious exception to the policy of renting to a family with two children, when she rented to the Hoags. *See* Tr. 100. Ms. Fuchs was a very credible witness. Her testimony was forthright and without any equivocation. Based on her recollection, the discrepancies between the Smerlings' statements, and the Smerlings' general lack of credibility as discussed *infra*, I find that neither Ms. Fuchs, nor Respondents knew, when the Smerlings moved in, that the family would later include a second child.

Westwood and other properties. Tr. 34, 133. Mr. Denton allowed Mr. Smerling to charge items to his account at the local hardware store. Tr. 53. At the time of their eviction, Mrs. Smerling was not employed. Tr. 58.

16. Vernon and Diane Hoag, their son Michael, and their daughter Tracy, resided at 1701 Elder Street, Apartment 104, from about March 1987 until June 1989. Tr. 10-11, 17; S. Ex. 2, 4. The Hoags were given a copy of the Westwood's rental policy when they moved into the building. Tr. 23. At the time of the hearing, Tracy was nine, and Michael was eleven. Tr. 10. The Hoags had a month-to-month lease. Their rent originally was $500 and was later increased to $570. Tr. 10-11, 13; S. Ex. 2.

17. Ms. Fuchs knew that the Hoags had two children at the time they applied for an apartment. However, she thought that they would be good tenants, and she recommended that Respondents make an exception to their policy by renting to the Hoags. Tr. 10-11, 99-100. Mr. Denton authorized Ms. Fuchs to rent to the Hoags, knowing that they were a family of four. Tr. 128-29.

18. Roxanne Morris is the resident manager who replaced Ms. Fuchs in February of 1989. Tr. 103. During her tenure as resident manager, Ms. Morris has never applied the Westwood's policy or distributed it to tenants. Tr. 103-04. In the summer of 1990, Ms. Morris rented a two-bedroom apartment to a single parent with two children. Tr. 105, 114. She is responsible for enforcing Respondents' occupancy restriction which she understands to allow three *people* per two-bedroom apartment, two people per one-bedroom apartment, and one per efficiency apartment, unless occupants are a married couple, in which case they may rent an efficiency apartment.[7] Tr. 105-06.

19. Mr. Hoag is a carpenter. At the time of his eviction from the Westwood, he was employed by IPC, a company engaged in the business of building rental properties. Tr. 16. Mrs. Hoag also was employed at the time of the eviction. Tr. 26.

20. Complainants received eviction notices dated April 27, 1989, signed by Robert Denton. S. Ex. 3, 13; Tr. 12, 35. The notices terminated Complainants' tenancies as of May 31, 1989. S. Ex. 3, 13. Respondents also sent letters dated April 28, 1989, to Complainants stating, "It has always been the policy of the building to limit the number of children in a two bedroom apartment to one. We are aware that you have two children, and must by our past policy ask you to move." S. Ex. 4, 14. A similar letter was sent to a Mr. and Mrs. Wilkins. Tr. 73-74, 119. The eviction notices and the accompanying letters that were sent to Complainants were drafted by Mr. Denton and typed by Mrs. Denton. Tr. 148-49.

[7]Mr. Denton testified that his current policy is four people to a two-bedroom apartment. He recently initiated this policy "only to stay out of these courtrooms." Tr. 136-37.

21. Mr. Denton drafted the eviction letter with the knowledge that the four people in each two-bedroom apartment consisted of a husband, a wife, and two children. Tr. 125.

22. Mr. Denton considered the Hoags to be good tenants. Tr. 130-31. The Hoags had never previously been evicted, and they were surprised by Respondents' notice terminating their tenancy. Tr. 12. The Hoag children were extremely upset by the eviction because they thought that they were at fault. Tr. 13. Mrs. Hoag and her children cried a lot because of the eviction. Mrs. Hoag was "very upset" and was worried that the eviction would be "on our file." Tr. 25. Mr. Hoag was teased by his friends who questioned what he had done to cause his eviction. Tr. 12-13. The eviction affected the Hoags' ability to choose other housing because they were fearful they would be similarly evicted in the future. Tr. 22-23.

23. The Smerlings breached the terms of their lease with Respondents on numerous occasions. Tr. 130. Because Mr. Smerling did maintenance work for Respondents, he had a master key that permitted access to the boiler room. He bypassed the computer controls in the boiler room and replaced his apartment thermostat that limited heat to 70 degrees or less, with one that permitted heat up to 90 degrees. Tr. 41. Mr. Smerling also worked on automobiles in the Westwood parking lot. At times, he had up to three cars in the lot. Tr. 43-44. Their son Mickey ran up and down the hallways. Tr. 41-42, 55. At one time, their children had possession of Mr. Smerling's master key. Tr. 46. Mickey urinated on the walls in the hallways and outside the building in the bushes, sometimes while prospective tenants were viewing the apartment complex. Tr. 41, 55, 107. He threw balls and rode his bicycle in the hallways, disturbing other tenants. Tr. 107-08. He was also suspected of starting a fire in the basement of the 1701 Elder Street building. Other children in the building claimed that Mickey Smerling started the fire. Tr. 45, 58, 108-09. The fire occurred approximately a month before the eviction notices were mailed. Tr. 46. On various occasions, Mrs. Smerling cared for other children in her apartment.[8] Tr. 112.

24. Mr. and Mrs. Smerling had received complaints from the resident manager about their children's behavior. Tr. 41, 55. They were informed that their son was urinating in public. They were also aware of his mischief in the hallways. *Id.* In addition, they knew about the fire in the basement and that Mr. Denton held Mickey Smerling responsible for the fire. Tr. 45-46, 58.

25. Respondents were motivated to evict the Smerlings because of the numerous instances of their misconduct. Respondents were hesitant to evict the Smerlings because Mr. Denton did not want to insult Mr. Smerling, with whom he had a

[8]Although Mrs. Smerling took exception to applying the term "baby-sitting" to her activities, and she testified that she was never compensated for her services, she did admit to caring for at least two children who were not her own. Tr. 57. She gave varying explanations of this activity to Ms. Morris. Tr. 112.

working relationship, by evicting his family because of their behavior. Tr. 123, 133-34. However, Respondents felt compelled to take action after the fire in the basement. Tr. 123-24. Respondents evicted the Hoags because they had two children. Tr. 118, 131, 136. Mr. Denton informed Mrs. Hoag that this was the reason, and he also mentioned that he was evicting the "troublemakers," referring to the Smerlings. Tr. 25.

26. Before instituting the eviction action, Mr. Denton contacted the Waukesha Housing Authority ("the Authority") for advice, mistakenly thinking that it was a local HUD office. Tr. 127. He called the Authority because he felt compelled to evict the Smerlings, and he wanted to find out how to evict them without running afoul of the familial status provisions of the new fair housing law. Tr. 134-35. He asked what actions he could take against families of four in light of the Westwood's policy limiting the number of children to one.[9] He was advised that he should treat all families of four consistently; that is, if one were to be evicted, all should be evicted. Tr. 128, 134-36; S. Ex. 16.

27. After Complainants filed housing discrimination complaints with HUD, Respondents cooperated fully with the investigation, granting the HUD investigator access to all files in their office, agreeing to be interviewed, and making copies of documents for the investigator. Tr. 73-76.

28. In response to the HUD investigation, on November 19, 1989, Respondents wrote a letter to HUD cataloguing a dozen lease violations by the Smerling family, and explaining Respondents' rationale for the evictions. The letter states:

[9]At some unspecified time after Nikki Fuchs left the Westwood, Mr. Denton instituted a new occupancy policy that, *inter alia*, limits to three, the number of *people* in a two-bedroom apartment. *See supra* p.5, ¶ 18. However, based on his testimony and the language of Secretary's Exhibit 16, I find that his conversations with the Authority related to his concerns about how he could lawfully enforce his old policy restricting the number of *children* in a two-bedroom apartment.

> We are aware of a housing law dealing with renting to children [that] went into effect in March, 1989. [S]ince the law was confusing to us we contacted the Waukesha HUD office. We were informed that the law at that time was still undefined and that we were within our rights to limit the children to one in keeping with our past policy and the policy of the building when we purchased it which the HUD Office in Waukesha was aware of.
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> * * *
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> Mr. & Mrs. Smerling complain they were evicted for having two children. This claim is incidental in comparison to the many large and real reasons for their eviction. There is no cause here for complaint and we ask that this complaint of Mr. & Mrs. Smerling be dismissed.

S. Ex. 16 at unnumbered 1, 4; Tr. 70.

29. After their eviction, the Smerlings moved to 327 North Grandview Boulevard, a three-bedroom townhouse located a few feet away from the Westwood. Their rental payment was $675 a month. Tr. 37-38. They were eventually evicted from this address because their children tore up the yard. Tr. 39. At the time of the hearing, the Smerlings resided at 436 Maple Avenue, a "Milwaukee flat" that is a large, older home with individual upstairs and downstairs rental units. The Smerlings rented the four-bedroom upstairs unit for $585 a month. Tr. 39-40. They wanted larger quarters because their daughter was returning to live with the family and the Smerlings felt that she should not share a bedroom with the boys. Tr. 40.

30. The Smerlings rented a van for $20 to move out of the Westwood. They spent approximately $20 in gasoline and an unspecified amount for meals. Also although Mr. Smerling didn't check a calendar, he "think[s that he] missed the Friday of work that month." Tr. 36.

31. After their eviction, the Hoags moved to 1925 Bonnie Lane, an apartment about one mile from the Westwood, where they currently reside. Tr. 13. Whereas Mrs. Hoag only had to walk three blocks to work from the Westwood, she now must walk a mile. Tr. 29-30. Their new residence is also a two-bedroom apartment and is approximately the same size as the Westwood apartment. They now pay $550 a month in rent, plus heating and water costs. Tr. 13, 14, 15.

32. For their move to Bonnie Lane, the Hoags rented a trailer for $22 and spent approximately $15 in gas. Their meal costs were about $90 and they paid $33.05 to reconnect their telephone. In addition, Mr. Hoag's relatives assisted in the move, which

required that they drive 800 miles round-trip. Tr. 14, 20. Mr. Hoag has so far reimbursed his relatives approximately $25-$50 for their expenses. Tr. 20.

33. While it was not of major concern to the Smerlings that their children remain at the same school, it was important to the Hoags. One reason is that their daughter requires special educational services which she received while attending the school near the Westwood. Tr. 23, 37. The evictions did not result in Complainants' children changing schools. Tr. 14-15, 46-47.

34. All of the Complainants and their children were content and comfortable living at the Westwood. Tr. 11, 24-25, 35, 55, 151. Mr. and Mrs. Hoag occupied the smaller of the two bedrooms in their apartment. Tr. 151. Before the eviction notice, the Hoags had no plans to move. Tr. 12. Although at some point in the future, they knew they would require separate bedrooms for their son and daughter, because of costs and other factors, the Hoags did not regard this as an immediate concern. Tr. 16, 29.

35. In addition to their eviction from the Grandview Avenue apartment, the Smerlings were previously evicted from at least two other buildings for not paying their rent. Tr. 37-38. At the time of the hearing, they still owed rent to Respondents. Tr. 130.

36. With Mr. Denton's approval, Ms. Morris rented a two-bedroom apartment to four college students for a period of 12 months, beginning June 1, 1989. Tr. 63, 110-11; S. Ex. 20, 21. Four names are on the lease and the lease application. S. Ex. 20, 21. However, at the time she rented the apartment, Ms. Morris thought that only three of the four signatories intended to remain for the full term of the lease, because the fourth planned to leave at the end of the summer to return to school.[10] Tr. 110-11.

Discussion

The Fair Housing Act is intended to ensure the removal of artificial, arbitrary, and unnecessary barriers that operate invidiously to discriminate on the basis of impermissible characteristics. *United States v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)), *cert. denied*, 422 U.S. 1042 (1975). On September 13, 1988, Congress amended the Act by extending fair housing protection to familial status, effective March 12, 1989. "`Familial

[10]Janine Walker, one of the four students, testified that she originally intended to remain for the full term of the lease, but that she left at the beginning of September 1989. Tr. 64-65. Ms. Walker also stated that the remaining tenants intended to find a replacement for her, but that they were unsuccessful. Tr. 67. Respondents brought legal action against all four tenants because they left the Westwood owing rent. Tr. 68. I credit Ms. Morris' recollection of this incident, which included an uncontroverted description of the physical appearance of the student who was supposed to occupy the apartment only for the summer. *See* Tr. 116-17. Ms. Walker's testimony indicates that she had less than full knowledge of the facts and circumstances surrounding the application and lease of the apartment.

status'" means one or more individuals (who have not attained the age of 18 years) being domiciled with . . . a parent . . . ." 42 U.S.C. § 3602(k).

Among other proscriptions, the Act makes it unlawful to "make unavailable or deny, a dwelling to any person because of . . . familial status . . . ." 42 U.S.C. § 3604(a). HUD's regulations further define prohibited actions to include "[e]victing tenants because of their . . . familial status . . . ." 24 C.F.R. § 100.60(b)(5). The Act also prohibits discrimination against any person in the "terms, conditions, or privileges of . . . rental of a dwelling . . . because of . . . familial status." 42 U.S.C. § 3604(b). *See also* 24 C.F.R. § 100.65. It is also illegal 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 based on . . . familial status . . . or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. § 3604(c). By regulation, these prohibitions "apply to all written or oral notices or statements by a person engaged in the . . . rental of a dwelling [and include] any documents used with respect to the . . . rental of a dwelling." 24 C.F.R. § 100.75(b).

The Secretary alleges that there is direct evidence that Respondents have violated all three quoted sections of the Act.[11] Respondents assert that there is no direct evidence, and that any indirect evidence in this case does not prove liability. Respondents also contend that, independent of any occupancy restriction, they would have evicted the Smerlings because of misconduct. As to the Smerlings as well as the Hoags, Respondents maintain that there is adequate business necessity to support the occupancy standard they adopted.

I find that, although there is direct evidence of unlawful discrimination against the Smerlings, Respondents' mixed motive defense insulates them from liability. Respondents in fact decided to evict the Smerlings for legitimate reasons, but they cited their past policy, which was unlawful, as the stated reason for the eviction. However, they relied solely on that same policy to evict the Hoags. Accordingly, Respondents' eviction of the Hoags was unlawfully discriminatory.

1. Respondents had mixed motives in evicting the Smerlings.

In a disparate treatment case where the aggrieved party shows by direct evidence that an illegitimate criterion was a substantial or motivating factor for the actions of a respondent, and the respondent presents evidence of a legitimate, nondiscriminatory reason for its actions, the framework for examining the evidence is established by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).[12] Under the *Price Waterhouse*

[11]The Secretary also asserts for the first time in his post-hearing brief that Respondents violated 42 U.S.C. §§ 3604(a), (b), and (c), by requiring prospective tenants to state the number and ages of children on the lease application. Because this issue was not tried by the express or implied consent of the parties, it is not ripe for decision.

[12]*Price Waterhouse* was a Title VII sex discrimination case involving an employment action taken for a mixture of legitimate and illegitimate considerations. The propriety of applying Title VII precedents to Title

framework a plaintiff in a discrimination suit must first show that an illegal consideration, such as race or gender, "played a motivating part" in a defendant's decision. *Id.* at 244.[13] The plaintiff must "satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in [the defendant's] decision...."
Id. at 247 n.12. That showing must be based on direct evidence.[14] The burden then shifts to the defendant who "may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [the forbidden factor] to play such a role." *Id.* at 244-45 (footnote omitted). The defendant must show by a preponderance of the evidence "that its legitimate reason, standing alone, would have induced it to make the same decision." *Id.* at 252.

VIII cases has been established both by administrative and judicial decision. *See, e.g., Secretary of HUD v. Blackwell*, Fair Housing-Fair Lending (P-H) ¶ 25,001, 25,005 (HUDALJ Dec. 21, 1989), *aff'd*, 908 F.2d 864 (11th Cir. 1990). For an analysis of the application of Title VII precedents to Title VIII "mixed-motive" cases, see R. Schwemm, Housing Discrimination, § 10.3 (1990).

[13]While a plurality of the Court seems to require a showing that the prohibited consideration was a "motivating" factor in the employer's decision, Justice O'Connor's concurrence would require that the prohibited consideration be shown to have been a "substantial" factor in the decision. Whether there is a difference between the two terms is questionable, especially in light of the plurality's quotation from *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977), that a plaintiff must show that the prohibited consideration was a "substantial" or "motivating factor." *See also, Price Waterhouse*, 490 U.S. at 250 n. 13. For an extensive analysis of the implications of *Price Waterhouse* on disparate treatment cases, see Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII,* 56 Brooklyn L. Rev. 1107 (1991).

[14]If only indirect, or circumstantial evidence of discrimination is introduced by the plaintiff, then the factfinder can infer discriminatory intent from the plaintiff's proof under the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and the *Price Waterhouse* analysis does not apply. *See, e.g., Holland v. Jefferson Nat'l Life Ins. Co.,* 883 F.2d 1307, 1313 n. 2 (7th Cir. 1989)(when plaintiff has not presented direct evidence to prove that the decision was based on impermissible factors and, instead, seeks to show that defendant's articulated justifications are pretextual, the *Price Waterhouse* analysis does not apply); and *Lynch v. Belden and Co., Inc.*, 882 F.2d 262, 268-69 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1134 (1990).

Applying the *Price Waterhouse* analysis to the eviction of the Smerlings first requires that the Secretary prove that familial status played a motivating part in Respondents' decision to evict them. Respondents then may avoid liability only if they are able to prove that, absent any discriminatory motive, they would have evicted the Smerlings because of their misconduct. An examination of the record establishes that although the Secretary has proved by direct evidence that Respondents' decision to evict the Smerlings was motivated by consideration of their familial status, Respondents have presented objective evidence, and proved by a preponderance of the evidence that they would have taken the same action even in the absence of any consideration of familial status.[15]

a. The Secretary has shown that familial status played a motivating part in Respondents' decision.

The eviction letter and the policy to which it refers are direct evidence that familial status played a motivating part in Respondents' decision to evict the Smerlings. The letter specifically states that the policy has *always* been to limit the number of *children* in two-bedroom apartments, and other evidence of record is consistent with the statement in the letter.

The policy was conceived by the prior owners of the Westwood, but Respondents ratified that policy when they authorized Ms. Fuchs, who drafted it in writing, to substitute their names for those of the prior owners on the written form. Mr. Denton explicitly told her to apply the policy, and she did. The sole exception made to the application of the policy was for the Hoags. The Smerlings, who moved in after the Hoags did, and who stated on the application that only one child would be living with them, were given a copy of the written policy.

At some time after February 1989, Mr. Denton communicated a new policy to Ms. Fuchs' successor as resident manager. That policy restricts the number of *people* allowed per apartment. However, there is no evidence that this new policy had ever been reduced to writing, that it had ever been communicated to any existing tenants, that it was intended to supersede the then existing policy, that it was to be applied retroactively, or that it was applied in fact.[16] There is no evidence that any group of

[15]The familial status or other provisions of the Act do not prevent Respondents from evicting tenants such as the Smerlings for their or their children's misconduct. The legislative history of the 1988 amendments confirms that the Act is not intended to deprive housing providers of their rights to select and maintain qualified tenants. *See Secretary of HUD v. Downs*, Nos. 02-89-0322-1, 02-89-0323-1, op. at 16 n.23 (HUDALJ Sept. 20, 1991).

[16]There was testimony that Ms. Morris rented a two-bedroom apartment to a single parent with two children. *See supra* p. 5, ¶ 18. However, since this lease was executed after the complaints in this case were filed, it bears no weight on the conclusions reached as to the policy in effect prior to the filing of the complaints.

applicants has been denied an apartment because of this "policy." To the contrary, the record demonstrates that within a month of the eviction of the Smerlings, Mr. Denton specifically approved the lease of a two-bedroom apartment to four college-age women. Moreover, because Mr. Denton unhesitatingly testified that, in drafting the eviction letter, he did not use the terms "children" and "people" interchangeably, I conclude that the eviction letter can only mean that he intended to enforce the original policy that restricted the number of "children," and not any later policy purporting to restrict occupancy to a stated number of "people."

b. Respondents would have evicted the Smerlings even in the absence of any discriminatory motive.

Respondents have leveled a litany of legitimate reasons for evicting the Smerlings, and have proved by a preponderance of the evidence that even had they not taken familial status into account, they would have come to the same decision regarding the eviction.

Taking advantage of his working relationship with Respondents, Mr. Smerling used his master key to gain entry to the boiler room, bypassed the computer controls to raise the boiler temperature, and then installed a thermostat in his apartment that permitted the heat to be raised above the maximum for other tenants.[17] He violated Respondents' written policy that both limited the number of vehicles any tenant could park in the lot, and prohibited the storage of unused and inoperable vehicles.[18] He allowed his children to breach security by use of the master key, and he otherwise failed to control their behavior.[19] Mrs. Smerling provided day care services in the apartment, and also failed to supervise the behavior of her children.[20] In addition to urinating publicly in the

[17]Mr. Smerling's justification for his actions was not credible. He testified that another tenant needed a new thermostat, that the only one he could find was from his private stock, and that it permitted up to 90, rather than 70 degrees. He claimed that in order to assure that the other tenant could not exceed the maximum heat allowed, he replaced the 70 degree thermostat in his own apartment with the 90 degree thermostat, and installed the 70 degree unit in the other tenant's apartment. However, if he had had no intention to raise the heat in his own apartment, he would not have taken the trouble to bypass the boiler computer controls to raise the temperature 95 degrees. S. Ex. 16.

[18]Mr. Smerling's testimony at the hearing that the manager of the Westwood had made an exception to the policy for him was contradicted by his testimony in his deposition that he was unaware of any such policy.

[19]Mr. Smerling gave contradictory testimony regarding his receipt of complaints about his children's behavior, first denying that he received any, and then admitting to the receipt of "one or two." His "shock" at being evicted was as credible as that of the policeman in "Casablanca" who discovered that gambling was taking place at "Rick's."

[20]Mrs. Smerling's minimization of her children's misbehavior and her denial of providing day care services in her apartment are not credible. Her demeanor was more casual than forthright, and she exhibited none of the parental indignation one would expect in the face of a purportedly unjust accusation against a child. Her accusation that Mr. Denton swore at her was contradicted by Mrs. Denton's candid

hallways and outside the apartment building, their boisterous behavior drew a series of complaints from other tenants. Finally, the Smerlings, who had been evicted on at least two previous occasions for nonpayment of rent, were behind in their rent.

Still, Mr. Denton was hesitant to evict the Smerlings because Mr. Smerling was doing maintenance work at the Westwood. However, the fire in the basement was the denouement. To Respondents, all evidence pointed to Mickey Smerling as the cause.[21] At that point, Mr. Denton decided that the Smerlings had to go. However, because of his working relationship with Mr. Smerling, he wanted to avoid informing him that misbehavior was the basis for the eviction. Accordingly, he called the Waukesha Housing Authority to find out how he could get rid of the Smerlings on the basis of his policy restricting the number of children in a two-bedroom apartment, without contravening the familial status provisions of the new housing law.

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and credible testimony that he never swore, and by Mr. Denton's demeanor throughout the hearing. Moreover, Mrs. Smerling gave conflicting accounts to Ms. Morris as to whether she was providing day care services or baby-sitting.

[21]During their testimony, neither of the Smerlings denied that their son started the fire.

The Authority told him to be consistent in the application of his policy. However, either the Authority gave Mr. Denton bad substantive advice, or he misinterpreted the advice that was given. In any event, Mr. Denton was under the impression, which he acted upon, that he could evict the Smerlings for having more than one child in their apartment, but that if he did, he would have to evict any other family with more than one child in a two-bedroom apartment. The occupancy policy, then, became the stated rationale for the eviction, but misconduct was its basis in fact.

2. Respondents evicted the Hoags solely for discriminatory reasons.

Motivated by his determination to apply with consistency the Westwood policy limiting the number of children in a two-bedroom apartment, Mr. Denton could not pass over the Hoags. They became the paschal lambs in his scheme to get rid of the Smerlings. The eviction letter, the one-child policy, and Mr. Denton's statement to Mrs. Hoag, that she was being evicted because of the number of children in her family, are direct evidence of unlawful discrimination. There is no evidence that any factor changed or intervened, from the time the Hoag's tenancy began to the time of the hearing, that purports to justify Respondents' decision to renege on their lease with the Hoags, except for their newly formed intention to remove all families having more than one child in a two-bedroom apartment.

The only evidence offered by Respondents to show that, absent the unlawful considerations, they would have evicted the Hoags in any event, is the testimony of architect Charles Aldrian. Based on his inspection of the premises, the plans and drawings, and his analysis of the capacity of the water heating system, Mr. Aldrian is of the opinion that the three person per two-bedroom occupancy standard for the Westwood is reasonable. This evidence falls far short of meeting Respondents' burden of proof.

In the first place, the evidence constitutes nothing more than a *post hoc* rationalization for the eviction decision. Respondents did not seek any expert advice at the time they decided to evict the Hoags. Neither the size of the bedrooms, nor the capacity of the water heater diminished during the Hoag's tenancy. And if either had been a genuine concern at the time the Hoags applied for an apartment, no exception to the occupancy policy would have been made for them.

Respondents have failed to demonstrate that, had they considered Mr. Aldrian's opinion at the time they decided to evict the Hoags, they would have reached the same decision in the absence of familial status considerations. The smaller of the bedrooms is larger than the minimum provided by the Wisconsin Administrative Code. Mr. Aldrian's testimony about the size of the one hundred square foot bedroom ignores any furniture configuration other than the one he normally uses in his conceptual designs. Moreover, his opinion on a reasonable occupancy standard was based on an aesthetic evaluation of

the entire Westwood environment, and not solely on the square footage of the second bedroom.[22]

[22]Mr. Aldrian's testimony assumed a single bed, a dresser and a chair. He did not consider a design, for example, that included bunk beds, or one that contemplated a double bed and no chair. The question put to him, and his response are as follows: "Q. In your opinion as an architect, sir, and based on your actual view of the *apartment complex* and its *facilities*, in your opinion, is a three person occupancy standard reasonable for these two bedroom units? A. Yes, I would think so." Tr. 142 (emphasis added).

Mr. Aldrian's opinion on the adequacy of the water heating system presumes maximum occupancy of the apartment building. However, that opinion does little to satisfy Respondents' burden of proof. Mr. Aldrian testified that for a three-hour peak period, 64 occupants (4 persons in each of 16 apartments) would require at least 1,000 gallons of hot water. The existing system at 1701 Elder Street provides only 830 gallons of hot water, or 170 gallons less than the minimum required. However, even assuming, *arguendo*, the reasonableness of an occupancy restriction based solely on the capacity of the water heating system, Respondents had no rational basis for applying such a restriction retroactively to the Hoags. The maximum number of occupants of the building during the Hoag's tenancy was 51.[23] With each occupant using Mr. Aldrian's assumption of 15.6 gallons per person, the total actual maximum demand during the Hoag's tenancy would have been 795.6 gallons of hot water, 34.4 gallons less than the output of the system. Under the circumstances, there was no necessity whatsoever that the Hoags be evicted.

Based on the record, I conclude that the Hoags were evicted because of their familial status, in violation of 42 U.S.C. §§ 3604(a) and (b), and that the eviction notice and Mr. Denton's statement to Mrs. Hoag, that the reason for their eviction was the building's policy limiting the number of children, constituted violations of 42 U.S.C. § 3604(c).

Relief

Section 812(g)(3) of the Act provides that where an administrative law judge finds that a respondent has engaged in a discriminatory practice, 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 other equitable relief." 42 U.S.C. § 3612(g)(3). That section also provides that to "vindicate the public interest," a civil penalty may be assessed. The Secretary, on behalf of the Hoags, seeks a total of $28,000 to compensate them for emotional injury, economic loss, inconvenience and loss of housing opportunity. He also prays for injunctive relief and for a civil penalty to be assessed against Respondents.

1. <u>The Hoags are entitled to compensatory relief.</u>

The Hoags are entitled to an award of $210 as compensation for the following out-of-pocket expenses incurred as a result of having to move from the Westwood: $22 for trailer rental, $15 for gasoline, $90 for meals, $33 for telephone reconnection, and $50 for reimbursed expenses incurred by relatives who assisted in the move.

[23]Three families with two children (the Hoags, the Smerlings and the Wilkins) plus 13 other units with a maximum of three persons equals a total of 51 occupants.

The Hoags are also entitled to an award of damages in the amount of $1500 each for the inconvenience of having to move from the Westwood. They were comfortable in their apartment at the Westwood, had no intention of moving, and had the security of knowing that their tenancy received the explicit approbation of management. Their peace was shattered by the sudden, unexpected arrival of an eviction notice that, aside from any emotional upset, forced them to face the inconvenience and aggravation of finding a new home that was suitable for their needs, and moving to the new location.[24]

Finally the Hoags are entitled to an award of damages for emotional distress. Although "courts do not demand precise proof to support a reasonable award of damages [for emotional distress]," *Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241, 1245 (8th Cir. 1983), such damages must be supported by the record or inferred from the circumstances of the discrimination, *see Seaton v. Sky Realty Co., Inc.*, 491 F.2d 634, 636 (7th Cir. 1974). The Hoags had never been evicted before. Respondents certainly considered them to be such good tenants that they made a deliberate exception to their occupancy policy for them. Their testimonial demeanor evinced their bewilderment, pain and humiliation over their reversal of favor. Understandably, Vernon Hoag did not feel well about being evicted. He became the butt of jokes by his friends at work who asked what he did wrong to bring about the eviction. Diane Hoag was very upset about the eviction, and she and her children wept upon receiving the eviction notice.[25] She felt stigmatized by the eviction and worried that evidence of it would appear in their credit history. The Hoags were constrained to cope with the added pressure of finding adequate housing in the Westwood school district because their daughter required special educational services that were provided by the school she had been attending. Moreover, the Hoags were distressed by their apprehension that, regardless of where they moved, a similar eviction could, like a sword of Damocles, hang suspended over their heads by a slender thread. Accordingly, having weighed these factors in the calculation of the damages incurred, I conclude that Vernon and Diane Hoag should each be awarded $5,000 for emotional distress, humiliation and embarrassment.

2. A civil penalty is appropriate.

The Secretary has also asked that the maximum civil penalty be assessed against Respondents. Because Respondents have not been adjudged previously to have committed discrimination, the maximum penalty that could be assessed is $10,000. 42 U.S.C. § 3612(g)(3)(A). However, assessment of a civil penalty is not automatic in every

[24]The Secretary has also sought an award for "lost housing opportunity," but it is not clear from the brief whether damages are sought for economic loss, loss of civil rights or any other loss not included in the damage claim for inconvenience or emotional distress. Under the circumstances, I am constrained not to award any separate damages for this claim.

[25]Although their children were not named as complainants, and accordingly, cannot be compensated for their emotional distress, Mr. and Mrs. Hoag may be compensated for the anxiety they experienced as a result of their children's distress.

case. *See* H.Rep. No. 711, 100th Cong., 2d Sess. at 37 (1988). In addition to any history of prior violations, the other elements that must be considered in determining the amount of a penalty are the nature and circumstances of the violation, the degree of culpability, the financial circumstances of the Respondents, the goal of deterrence, and other matters as justice may require. *Id*.

Respondents' original goal was to rid themselves of the Smerlings. Two complicating factors intervened. One was Mr. Denton's reluctance to face Mr. Smerling with the unpleasant truth that the misconduct of his family, and particularly the atrocious behavior of his son, was the reason that their further presence could not be tolerated. The second complication was the passage of the new law prohibiting discrimination against families with children. Unfortunately for the Hoags, eviction of all families with more than one child in a two-bedroom apartment became the misguided means to the original ends, and the foolish consistency that precipitated their innocent pain and suffering.

The eviction notices were dated little more than a month after the effective date of Fair Housing Amendments Act. Mr. Denton became aware of that legislation and appropriately sought advice as to its ramifications for his dilemma. However, his actions did not go far enough, especially in view of his 25 years of experience in the rental housing business. It is difficult to rationalize Mr. Denton's sophistication that was evidenced by his awareness of the new Act, with his unsophisticated confusion that the office he called for advice was a local one, and not one affiliated with the United States Department of Housing and Urban Development. It is difficult to rationalize his understanding that he was within his rights to evict these families, in the face of his testimony that failed to articulate reasons that were advanced for the advice he was given. And finally, it is difficult to understand why, in view of the remedies afforded victims of discrimination by the new Act, he did not seek advice of counsel before taking such precipitous action.[26] Having observed the demeanor of both Mr. and Mrs. Denton, I could certainly not conclude that they acted out of any unscrupulous or iniquitous motivation. There were other children at the Westwood whose families were not subject to any eviction. Respondents cooperated fully with HUD in its investigation, and there was no other evidence adverse to their character or reputation. However, lack of venality cannot excuse the willingness to act on the most meager of verbal assurances.

[26]At the hearing and on brief, Respondents refer to two memoranda, written by the General Counsel of HUD, that concern the reasonableness of occupancy restrictions enforced after the effective date of the Fair Housing Act. Respondents argue that assessment of a civil penalty is particularly unjust in light of purported inconsistencies in HUD's position as reflected by the two memoranda. However, Respondents' reliance on these memoranda in this case is misplaced. They were written almost a year after Respondents' actions and, therefore, could not have been relied upon by them at the time they decided to evict the Hoags. They were not issued for public guidance or published for notice and comment rulemaking. Their context compels the conclusion that they were drafted only as internal guidelines for the exercise of prosecutorial discretion.

Mr. Denton was not unfamiliar with local, state, and federal housing regulations. Mrs. Denton was active in the management of their apartment business. Even if they did not originate it, they adopted and enforced the unlawful occupancy policy. Having made no further inquiry before taking their unlawful action against the innocent Hoags, they did not act reasonably, and they are culpable for their nonfeasance as well as their misfeasance.

While the goal of deterrence might be satisfied in part by a change in Respondent's policy and by appropriate injunctive relief, that goal would not be furthered if no civil penalty were to be assessed. These Respondents are not blameless, and apartment owners in general must know that if they take action to dispossess a family of its hearth and home, they must take that action only after the most careful deliberation of the lawfulness of that action.

Finally, in the absence of any evidence to the contrary, I cannot conclude that Respondents' financial condition affects any ability to pay such a penalty as is assessed. Accordingly, I conclude that a civil penalty of $2,000 should be assessed against Respondents.

3. Injunctive relief is warranted.

Once a determination of discrimination has been made, injunctive relief may be ordered to remove the lingering effects of prior discrimination and to insure that Respondents do not violate the Act in the future. *Secretary of HUD v. Blackwell*, Fair Housing-Fair Lending (P-H) ¶ 25,001, 25,014 (HUDALJ Dec.21,1989), (quoting *Marable v. Walker*, 704 F.2d 1219, 1221 (11th Cir. 1983)), *aff'd*, 908 F.2d 864, 876 (11th Cir. 1990). The relief, however, is to be molded to the specific facts of a particular situation. The provisions of the Order set forth below fulfill all of these requirements.

ORDER

Having concluded that Respondents have discriminated against Vernon and Diane Hoag, in violation of 42 U.S.C. §§ 3604(a), (b), and (c), it is hereby,

ORDERED that:

1. Respondents Robert L. and Mary Jane Denton are permanently enjoined from discriminating against Complainants Vernon and Diane Hoag, or any other person, with respect to housing because of familial status, and from retaliating against or otherwise harassing the Hoags for their participation in this case or for any matter related thereto. Prohibited actions include, but are not limited to, those enumerated in 24 C.F.R. Part 100.

2. Respondents, their agents, and employees are permanently enjoined from employing any policies or practices that discriminate against families with children,

including the policy that families with more than one child cannot rent a two-bedroom apartment.

3. Respondents, their agents and employees are permanently enjoined from using, making, printing, or publishing, or causing to be used, made, printed, or published, any notice, statement, lease provision, rule, regulation, advertisement, or other document that indicates a discriminatory preference or limitation based on familial status.

4. Consistent with 24 C.F.R. Part 109, Respondents shall display the HUD fair housing logo and slogan in all advertising and documents routinely provided to the public. Consistent with 24 C.F.R. Part 110, Respondents shall display the HUD fair housing poster in a prominent place in the Westwood Apartments' principal office and any other rental offices where Respondents conduct business.

5. Respondents shall institute internal recordkeeping procedures, with respect to the operation of the Westwood Apartments and any other real property owned, managed, or acquired by them, that are adequate to comply with the requirements set forth in this Order. These procedures shall include keeping all records described in this Order. Respondents shall permit representatives of HUD to inspect and copy all pertinent records at any and all reasonable times and upon reasonable notice. Such representatives of HUD shall endeavor to minimize any inconvenience to Respondents occasioned by the inspection of such records.

6. On the last day of every six-month period beginning January 31, 1992 (or two times per year), and continuing for three years from the date this Order becomes final, Respondents shall submit reports containing the following information to HUD's Chicago Regional Office of Fair Housing and Equal Opportunity, 626 West Jackson Boulevard, Chicago, Illinois 60606-6765:

a. a log of all persons who applied for occupancy at the Westwood Apartments during the six-month period preceding the report, indicating the name and address of each applicant, the number of persons to reside in the unit, the number of bedrooms in the unit for which the applicant applied, whether the applicant was rejected or accepted, the date on which the applicant was notified of acceptance or rejection, and, if rejected, the reason for such rejection. All applications described in the log shall be maintained at the offices of the Westwood Apartments.

b. a list of vacancies at the Westwood Apartments during the reporting period, including: the address of the unit, the number of bedrooms in the unit, the date Respondents, their agents or employees were notified that the tenant would or did move out, the actual date the tenant moved out, the date the unit was rented again or committed to a new rental, and the date the new tenant moved in.

c. a list of all people who inquired, in writing, in person, or by telephone, about the rental of an apartment, including their names and addresses, the date of their inquiry, and the disposition of their inquiry.

d. a list of all tenants upon whom Respondents, their agents or employees served a termination of tenancy notice, including the tenant's name, apartment number and address, date of such service, and a statement of each reason for the termination notice, whether the tenant terminated the tenancy, and the date of such termination.

e. a description of any changes in rules, regulations, leases, or other documents provided to or signed by current or new tenants or applicants (regardless of whether the change was formal or informal, written or unwritten) made during the reporting period, and a statement of when the change was made, how and when tenants and applicants were notified of the change, whether the change or notice thereof was made in writing and, if so, a copy of the change and/or notice.

7. Within ten (10) days of the date on which this Order becomes final, Respondents shall pay actual damages to the Hoags as follows: $210 for out-of-pocket expenses, $3,000.00 for inconvenience, and $10,000 for emotional distress.

8. Within ten (10) days of the date this Order becomes final, Robert L. and/or Mary Jane Denton shall pay a civil penalty of $2,000 to the Secretary of HUD.

9. Within ten (10) days of the date this Order becomes final, Respondents shall inform all their agents and employees of the terms of this Order and educate them as to such terms and the requirements of the Fair Housing Act. All new employees shall be so informed no later than the evening of their first day of employment.

10. Respondents shall submit a report to the Chief Docket Clerk, Office of Administrative Law Judges, within fifteen (15) days of the date this Order becomes final detailing the steps taken to comply with this Order.

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

/s/

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Alan W. Heifetz
Chief Administrative Law Judge