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: February 7, 1992

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Before: ALAN W. HEIFETZ
Chief Administrative Law Judge

INITIAL DECISION ON REMAND

Statement of the Case

On November 12, 1991, I issued an Initial Decision and Order finding that Robert L. and Mary Jane Denton ("Respondents") violated the Fair Housing Act as amended, 42 U.S.C. §§ 3601, *et seq*. ("the Act"), by discriminating against Diane J. and Vernon Hoag. The Decision concludes that Mr. and Mrs. Hoag 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 to enforce a policy limiting the number of children per apartment, constituted violations of 42 U.S.C. § 3604(c). The Order awards compensatory relief to the Hoags, imposes injunctive relief and assesses a $2,000 civil penalty against Respondents. Those aspects of the Decision and Order are not at issue in this remanded proceeding.

However, applying the evidentiary framework established by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), I found that Respondents had mixed motives in evicting Deborah and Michael Smerling. Specifically, I concluded that familial status played a motivating part in Respondents' decision to evict the Smerlings, but that they would have evicted the Smerlings even in the absence of any discriminatory motive. Accordingly, I did not find that Respondents were liable for any discriminatory practice against the Smerlings.

On December 11, 1991, counsel for the Secretary of Housing and Urban Development ("HUD" or "the Charging Party") filed a Motion for Partial Reconsideration of that portion of the Initial Decision involving the Smerlings. The Charging Party also filed a Motion for Remand of the Initial Decision to allow the administrative law judge the opportunity to consider fully the Motion for Reconsideration and to provide Respondents the opportunity to oppose the Motion for Reconsideration. With the motion for remand, Counsel enclosed a letter addressed to the Secretary from the NAACP Legal Defense and Educational Fund, Inc. ("LDF"), on behalf of itself and the National Fair Housing Alliance requesting that their views be considered as *amici*, with no direct interest in the case. On December 12, 1991, the Secretary issued an Order remanding the matter, making no determination on the merits of the Initial Decision, the motion for reconsideration or the *amicus* letter.

Pursuant to 24 CFR § 104.450(a) (1991), the Charging Party moves for reconsideration of those portions of the Initial Decision and Order that applied a mixed motive analysis and held that Respondents did not violate 42 U.S.C. § 3604(c) with respect to Deborah and Michael Smerling. HUD seeks $1,150 as compensation for the Smerlings and an additional civil penalty of $500 for this independent violation of the Act.

LDF contends that the "mixed motive" analysis of *Price Waterhouse*, a Title VII employment case, is inapplicable to a Title VIII housing case. It also points out that the result in *Price Waterhouse* was overturned by Congress, in the Civil Rights Act of 1991 ("CRA 1991").

Respondents filed a brief opposing the Motion for Reconsideration, arguing that the Initial Decision was well reasoned and correct as to the Smerlings, and that the Charging Party failed to prove any damage claim for any violation of 42 U.S.C. § 3604(c).[1]

The following findings of fact are limited to those pertaining to the Smerlings, and are restated for convenience. Some have been modified or augmented where necessary for clarity.

[1]At the outset, Respondents argue that this tribunal is without jurisdiction to entertain a motion for reconsideration. This issue need not be addressed however, because the Secretary has remanded the Initial Decision for further consideration. *See* 24 C.F.R. § 104.930.

Findings of Fact[2]

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. 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. 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.

4. 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.

5. 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.

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[2]The following reference abbreviations are used in this decision: "I.D." for "Initial Decision and Order, issued November 12, 1991," "S. Ex." for "Secretary's Exhibit," "R. Ex." for "Respondents' Exhibit," and "Tr." for "Transcript."

[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

6. 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.

7. 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 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.

8. Deborah and Michael Smerling ("Complainants") 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 in this matter in July of 1991, 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.

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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.

[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.

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

[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.

10. 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 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.

11. Complainants received eviction notices dated April 27, 1989, signed by Robert Denton. S. Ex. 13; Tr. 35. The notices terminated Complainants' tenancies as of May 31, 1989. S. Ex. 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. 14. A similar letter was sent to Mr. and Mrs. Hoag and to a Mr. and Mrs. Wilkins. Tr. 12, 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.

12. 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.

13. 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.[7] Tr. 112.

[7]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. Roxanne Morris, the

14. 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.

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resident manager who replaced Ms. Fuchs. Tr. 112.

15. Mr. Smerling testified that he was "shocked" and "dumbfounded" when he received Respondents' eviction letter. Tr. 36. Mr. Smerling thought that he was being evicted because Respondents held his son Mickey responsible for the fire in the basement. Tr. 50.

16. Mrs. Smerling testified that she did not "feel very good" about being evicted because she "wasn't expecting it." Tr. 56. Mrs. Smerling believed that Respondents evicted them because Mr. Denton thought her family "caused trouble" at the Westwood. Tr. 56-57.

17. Roxanne Morris, the present resident manager, delivered the eviction notice to Mrs. Smerling, who appeared confused when she received it. Tr. 109.

18. Respondents were motivated, in part, 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 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.

19. Respondents were also motivated to evict the Smerlings because they had two children. Tr. 125-26; S.Ex. 14, 16 at unnumbered 4. The eviction of the Smerlings, like the evictions of the Hoags and the Wilkins, was intended to enforce Respondents' policy of one child per each two-bedroom unit. Tr. 99, 122, 125-26, 136; S. Ex. 16 at unnumbered 1.

20. 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 advice on how best to accomplish his goal. 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. 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.

21. 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:

> 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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> * * *
>
> 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.

22. Prior to residing at the Westwood, the Smerlings were also 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.

Discussion

In the Initial Decision, I found that 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. I.D. at 11. Indeed, on brief, the Charging Party argued for such a finding. Secretary's Post-Hearing Memorandum of Law (Sept. 13, 1991) at 16-18. However, I also concluded, applying the *Price Waterhouse* evidentiary framework, that Respondents had proved by a preponderance of the evidence that they would have evicted the Smerlings even in the absence of any consideration of familial status, and that Respondents, therefore, cannot be held liable for familial status discrimination. I.D. at 11.

The Charging Party, in its memorandum in support of reconsideration, and LDF, in its letter, argue that the Initial Decision *did not* find that familial status played a part in the eviction of the Smerlings, and that, therefore, there was no mixed motive in the case, hence no predicate for a *Price Waterhouse* analysis. To support its argument, the Charging Party cites the finding in paragraph 25 on page 6 of the Initial Decision, that Respondents were motivated to evict the Smerlings for misconduct, and the conclusion on page 13, that while the occupancy policy was the stated rationale for the eviction, "misconduct was its basis in fact." LDF argues that while "there is no doubt that the eviction of the

other families was solely because of their familial status...," it was not an actual motive for the eviction of the Smerlings. LDF letter at 8.

1. Respondents had mixed motives in evicting the Smerlings.

As LDF notes, in the usual fair housing case a legitimate reason for an action is articulated as a pretext for discrimination. In the instant case, an unlawful reason was articulated in the eviction letter, but the permissible reason for the eviction was not stated in the letter. LDF argues that the unlawful reason was merely a pretext for the lawful reason. On the contrary, the Initial Decision made no such finding of pretext, nor was such an interpretation ever urged by the parties. Indeed, it would be anomalous to find that the familial status rationale was the actual motivation for the eviction only of the other families with children, but that it was merely pretext when asserted in an identical form letter sent to the Smerlings. In any event, the facts here clearly show that familial status was a reason, albeit not the only one, for the eviction.[8] As noted in the Initial Decision and in paragraph 21 above, Respondents wrote to HUD explaining their rationale for the evictions and stated the following:

> Mr. & Mrs. Smerling complain they were evicted for having two children. This claim is incidental in comparison to the many and large reasons for their eviction. There is no cause here for complaint and we ask that this complaint of Mr. & Mrs. Smerling be dismissed.

This letter admits that familial status was, at least, an *incidental* cause for the Smerlings' eviction, but a cause nevertheless. The Initial Decision concludes, without equivocation, that "the eviction letter can only mean that [Respondents] intended to enforce the original policy that restricted the number of `children'..." I.D. at 12.

One of the most difficult problems posed by a case involving mixed motives is to determine the extent to which any particular motive was a cause of a respondent's action. Delving into an individual's mental processes to determine causation in terms of the degree and the timing of multiple motivations is an exercise in metaphysical abstraction. However, *Price Waterhouse* does not

[8]The statement of facts in paragraph 18 of this decision on remand amends paragraph 25 of the Initial Decision to state more clearly that misconduct was a partial motivation for the eviction of the Smerlings. As amended, that paragraph reflects the Charging Party's understanding that the Initial Decision did, in fact, find that the eviction "was motivated in part by the Smerlings' familial status." Secretary's Memorandum in Support of Motion for Reconsideration (Dec. 11, 1991) at 13 n.8.

require a determination of the relative weight an unlawful motive had in a respondent's decision, nor does it require a determination whether the unlawful motive preceded or followed the lawful motive. All it requires is a finding, as I have made in this case, that it is more likely than not that at the time Respondents decided to evict the Smerlings, familial status played a part in that decision, and that they would have evicted the Smerlings even if they had not allowed familial status to play a role.

The Charging Party focuses on that portion of the Initial Decision that states that "[T]he occupancy policy, then, became the stated rationale for the eviction, but misconduct was its basis in fact." I.D. at 13. From that statement in the Initial Decision, the Charging Party concludes that misconduct must then be the *only* motive. However, that conclusion does not follow from the language in the Initial Decision. To state that misconduct was the *basis* for the eviction is only to state that it was the *principle component* of the decision to evict. That formulation does not preclude the presence of other subordinate considerations in the calculus of Respondents' reasons for taking the action at issue.

2. The Price Waterhouse analysis is applicable to the Fair Housing Act.

LDF contends that the analytical framework of *Price Waterhouse* is not applicable to the Act for three reasons. First, LDF argues that before *Price Waterhouse*, courts consistently held that the Fair Housing Act is violated if an illegal factor played a role in a defendant's treatment of a plaintiff.[9] Second, LDF insists that the different remedial schemes of Titles VII and VIII make the *Price Waterhouse* reasoning inapplicable to the Act. And finally, LDF asserts that the Civil Rights Act of 1991 in effect overrules *Price Waterhouse*.

None of these arguments has merit. Cases before *Price Waterhouse* never addressed the meaning of the statutory language contained in both Titles VII and VIII proscribing conduct taken "because of" familial status or other impermissible factors;[10] rather they merely adopted language from opinions construing language

[9]LDF variously describes these court holdings as finding violations where the illegal factor "played a role", "played a significant role," or was "only one of the factors considered." The Charging Party does not "adopt" my prior determination that *Price Waterhouse* applies to Title VIII, but merely notes two cases, also cited by LDF, in which courts held that the impermissible factor need only be shown to have played "any role" or "some part" in the decision. *See* Secretary's Memorandum in Support of Motion for Reconsideration at 8 n.5.

[10]One of the objectives of Title VIII is to preserve a certain amount of freedom for housing providers. That objective is clearly manifested in several statutory exemptions. *See, e.g.*, 42 U.S.C. § 3604(f)(9) (housing providers not required to make housing available to a tenant who "would constitute a direct threat to the health or safety" of others or cause "substantial physical damage" to property); *see also* legislative

in the Civil Rights Act of 1866. Second, the nature of a remedy has no relevance to a standard of causation. Finally, the Civil Rights Act of 1991 amended only Title VII, not Title VIII. To *construe* it as amending Title VIII by implication is to usurp the prerogative of Congress.

Case authority predating *Price Waterhouse* provides no basis for concluding that the rationale of *Price Waterhouse* should not apply to Title VIII cases. LDF cites *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344 (7th Cir. 1970), for the proposition that whenever an unlawful factor plays a role in a defendant's treatment of a plaintiff, a violation of the Act has been established. In that case, the Seventh Circuit held that:

> race is an impermissible factor in an apartment rental decision and that it cannot be brushed aside because it was neither the *sole* reason for discrimination nor the total factor of discrimination. We find no acceptable place in the law for partial racial discrimination.

Id. at 349-50 (emphasis in original). Although the complaint in *Adler* was brought under both the Civil Rights Act of 1866 (42 U.S.C. § 1982) and Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act),[11] the court's holding is based solely on an analysis of the statutory language of § 1982. It relied upon *Jones v. Alfred H. Mayer*, 392 U.S. 409 (1968), a case also interpreting the language of § 1982, in concluding that "partial racial discrimination" is unacceptable. *Adler*, 436 F.2d at 350. In its discussion, the court never addressed any provision of the Fair Housing Act.

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history at H.R. Rep. No. 711, 100th Cong., 2d Sess. 30-31 (1988); 134 Cong. Rec. H4681, H4683, H4687 (daily ed. June 23, 1988). None of the pre-*Price Waterhouse* cases addresses this objective. The *Price Waterhouse* court construed its analytical framework on an interpretation of the "because of" language in Title VII and the conclusion that the statute was intended to preserve employers' freedom of choice. *See* 490 U.S. 240-45.

[11]Section 1982 of 42 U.S.C. provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." Title VIII prohibits the denial of housing and associated rights "because of" impermissible factors, such as race or familial status. 42 U.S.C. §§ 3604(a), (b), (d), and (f).

The other cases cited by LDF all rely on the § 1982 analysis in *Adler* or on a similar rationale expressed by other courts, and accordingly are equally unhelpful in construing the specific provisions of the Fair Housing Act. As examples, the following cases involve racial discrimination and cite directly to *Adler* for the proposition that race need only be shown to be one of several factors in order to find liability for discrimination under the Act: *Payne v. Bracher*, 582 F.2d 17 (5th Cir. 1978) (race not to be considered in any way);[12] *Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975) (race played some part); *Williams v. Matthews Co.*, 499 F.2d 819 (8th Cir.), *cert. denied*, 419 U.S. 1021 (1974) (race is an impermissible factor that cannot be brushed aside because it is not the sole reason or total factor); and *Stevens v. Dobs, Inc.*, 483 F.2d 82 (4th Cir. 1973) (race was an important element). The following cases rely on precedents that cite *Adler*: *Jordan v. Dellway Villa of Tenn., Ltd.*, 661 F.2d 588 (6th Cir. 1981), *cert. denied*, 455 U.S. 1008 (1982) (race played a part); *Green v. Century 21*, 740 F.2d 460 (6th Cir. 1981) (race was an effective reason); and *United States v. Mitchell*, 580 F.2d 789 (5th Cir. 1978) (race was considered and played some role). Finally, *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032 (2d Cir. 1979) (race may not be one of the motivating factors), relies on *Adler* as well as derivative cases.

None of the cases cited by LDF address the causation issue in *Price Waterhouse*, namely, the proper interpretation of the "because of" language in the statute. Both Title VII and Title VIII proscribe conduct which is taken "because of" listed prohibited factors. Under *Price Waterhouse* a prohibited factor need not be shown to be the *sole* cause of discrimination.[13] 490 U.S. 228, 241 (1989). However, it is clear that the "because of" language in the statute permits a defendant to avoid liability by showing that the same decision would have been made in the absence of discrimination. *Id*. at 252, 253. As a matter of fact, the 7th Circuit, where *Adler* was decided, has gone so far as to state in a case brought pursuant to § 1982 and the Fair Housing Act that *Price Waterhouse requires* a showing of but-for causation in a housing discrimination case. *See Bachman v. St. Monica's Congregation*, 902 F.2d 1259, 1262-63 (7th Cir. 1990). *See also Aloqaila v. Nat'l Housing Corp.*, 743 F. Supp. 1264, 1268-70 & n.1 (N.D. Ohio 1990); *Favors v. MAQ Management Corp.*, 753 F. Supp. 941, 947 (N.D. Ga. 1990); *Miko v. Comm'n on Human Rights & Opportunities*, 220 Conn. 192, 596 A. 396 (1991).

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[12] *Payne* also rejected the "discrimination-as-sole-reason" standard, citing *United States v. Pelzer Realty Co., Inc.*, 484 F.2d 438 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). However, the *Pelzer* holding, that race need only be shown to be "one significant factor," was *ipse dixit*. *Id*. at 443. *Marable v. H. Walker & Assocs.*, 644 F.2d 390 (5th Cir. 1981), also cited by LDF, similarly relies upon *Pelzer* and derivative cases.

[13] *Price Waterhouse* is not inconsistent with *Adler* on this point.

LDF's second argument is that the *Price Waterhouse* reasoning is inapplicable to the Fair Housing Act because Title VIII has a remedial scheme different than Title VII. That argument is not persuasive. LDF draws a distinction between the award of equitable and economic relief on the one hand, and compensation for humiliation, embarrassment and emotional distress on the other. While conceding that a complainant in a mixed motive case, where the respondent would have taken the same action in the absence of discrimination, could not obtain specific performance or economic damages, LDF argues that such a complainant *should* be able to receive compensation for any loss of dignity. However, it is a fundamental principle of law that damages cannot be awarded in the absence of a finding of liability. LDF's argument is one for the legislature to consider; it does not address the rationale of *Price Waterhouse*, or the applicability of that rationale to the Fair Housing Act. As the *Price Waterhouse* Court noted, remedial provisions should not drive the interpretation of substantive provisions. 490 U.S. at 244 n.10.[14]

Finally, LDF asserts that the Civil Rights Act of 1991 overrules *Price Waterhouse* and renders the law under Title VII irrelevant to Title VIII. However, Section 107(m) of the Civil Rights Act of 1991, cited by LDF, amends only Title VII, not Title VIII.[15] While Congress has overruled the specific result in *Price Waterhouse*, the Civil Rights Act of 1991 did not address the *Price Waterhouse* Court's *analysis* for determining liability in a mixed motive case where the language of a statute proscribes conduct "because of" certain unlawful factors. Under the circumstances, I conclude that the causation analysis formulated in *Price Waterhouse* remains apt for Fair Housing Act cases.

3. Respondents violated 42 U.S.C. § 3604(c) by sending the eviction letter to the Smerlings.

Although the Initial Decision found that the eviction notice sent to the Hoags constituted a violation of 42 U.S.C. § 3604(c), no such specific finding was made

[14]The *Price Waterhouse* analytical framework has been applied to the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, *et seq.*, notwithstanding that its remedies differ from those in Title VII. *See Visser v. Packer Engineering Assoc., Inc.*, 924 F.2d 655, 658 (7th Cir. 1991); *Beshears v. Asbill*, 930 F.2d 1348, 1353-54 (8th Cir. 1991); *Burns v. Gadsden State Community College*, 908 F.2d 1512, 1517-18 (11th Cir. 1990)(*per curiam*); *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568-69 (2d Cir. 1989).

[15]Section 107(m) states that "[e]xcept as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

with respect to the same notice that had been sent to the Smerlings. The Charging Party seeks such a finding, and prays for an award of damages to the Smerlings and the assessment of a civil penalty as a result of the violation. LDF urges reconsideration of the record to determine whether the Smerlings suffered humiliation, embarrassment or emotional distress as a result of being told that familial status caused their eviction. Respondents argue that the record is devoid of any evidence of damage, and that no additional civil penalty is warranted.

Having reconsidered the record, the findings and conclusions of the Initial Decision, and the pleadings on remand, I conclude that Respondents violated section 3604(c) by sending the eviction letter to the Smerlings, but that there has been no showing that the Smerlings were damaged as a result of the violation, or that any additional civil penalty should be assessed against Respondents for the violation.

Section 3604(c) states that it is 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.

On its face, the statute makes it unlawful to make *any* statement with respect to the rental of a dwelling that indicates a limitation based on familial status. It does not provide any specific exemption or designate the persons covered, but rather, applies to anyone making, printing, or publishing an illegal statement. *See, e.g., United States v. L & H Land Corp., Inc*, 407 F. Supp. 576, 580 (S.D. Fla. 1976); *United States v. Hunter* 459 F.2d 205, 213-214 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972); and *Mayer v. Ridley*, 465 F.2d 630, 650 (D.C. Cir. 1972). A violation may be proved without any demonstration that a respondent intended to make an unlawful statement, *Saunders v. General Services Corp.*, 659 F.Supp. 1042, 1058 (E.D. Va. 1986), or that the unlawful statement influenced a respondent's actions, *Stewart v. Furton*, 774 F.2d 706, 709 (6th Cir. 1985).

The eviction letter sent to the Smerlings recited Respondents' policy of limiting the number of children in two bedroom apartments and stated, "We are aware that you have two children, and must by our past policy ask you to move." The letter clearly violates
§ 3604(c). However, that does not end the inquiry.

Although the eviction letter violates the statute, the Smerlings may not be compensated in the absence of proof that they were humiliated, embarrassed or

suffered any emotional distress as a result of the statement that their *familial status* was a cause of their eviction. The record is devoid of any such evidence.[16] Mr. Smerling *testified* that he was "shocked" and "dumbfounded" when he received the eviction letter. However, the record does not demonstrate that he reacted to the stated *reason* for the eviction, rather than to the mere fact that he was being evicted, regardless of the reason. Moreover, the testimony itself is not persuasive. The Smerlings were not unaccustomed to the eviction process, and the Initial Decision noted several reasons why neither Mr. or Mrs. Smerling's testimony was credible. I.D. at 12-13 nn.17-21.

[16]The Charging Party argues that "Respondents' statements made the Smerlings feel like undesirable or second class tenants by reason of their familial status alone," and that "Respondents intentionally deceived the Smerlings as to the reasons for their eviction," and were "thereby deprived of the contemporaneous opportunity to defend themselves against" allegations of misconduct. Secretary's Memorandum in Support of Motion for Reconsideration at 13. While the enthusiasm of counsel is laudatory, it does not supplant the need for citation to record evidence to support these conclusions. On this record, such citation is impossible.

As a consequence of violations for which Respondents were found liable, the Initial Decision included an Order granting injunctive relief and assessing a civil penalty against Respondents. Under the peculiar circumstances of this case, imposition of an additional civil penalty for the violation found in this Decision on Remand is not justified. While the Charging Party argues for an additional penalty in order to place apartment owners on notice that they will be held accountable for unlawful statements, the civil penalty already assessed will convey that message. Giving effect to the other elements that must be considered in determining the amount of any civil penalty, such as the nature and circumstances of the violation and other matters as justice may require, I cannot conclude that an additional penalty would be appropriate.

Accordingly, it is

ORDERED, that the Charging Party's request for further relief is *denied*, and that this Decision and Order on Remand 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

Dated: February 7, 1992