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 Sharon Bartley, Charging Party, v. Margaret Medige and Jack Coyne, Respondents.	HUDALJ 02-93-0173-1 Dated: January 24, 1995

William R. Hites, Esquire
For the Respondent

Janet B. Dreifuss, Esquire
For the Secretary

Before: Thomas C. Heinz
Administrative Law Judge

INITIAL DECISION ON APPLICATION FOR ATTORNEYS' FEES

On September 9, 1994, I issued an Initial Decision dismissing a Charge of Discrimination against Respondents on the ground that the Charging Party had failed to prove by a preponderance of the evidence that Respondents had violated the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* ("the Act"). On November 7, 1994, Respondents filed an Application for Attorneys' Fees and costs in the amount of $13,578.43 pursuant to 5 U.S.C. § 504; 28 U.S.C. § 2412; 42 U.S.C. § 3612, and 24 C.F.R. § 104.940.[1] The

[1]Section 3612(p) of 42 U.S.C. provides:

> Attorney's Fees. -- In any administrative proceeding brought under this section, or any court proceeding arising therefrom, or any civil action under section 812, the administrative law judge or the court, as the case may be, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The

Charging Party filed a response to Respondents' Application on November 30, 1994. The Application will be denied.

Respondents' Application rests on 28 U.S.C. § 2412, commonly referred to as the "Equal Access to Justice Act," ("EAJA"). Subsection 2412(d) of the EAJA provides, in pertinent part:

> (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

The term "substantially justified" means "'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Thus, the "substantial justification standard applied under the EAJA treads a middle ground between an automatic award of fees to the prevailing party and one made only when the government has taken a patently frivolous stand." *Losco v. Bowen*, 638 F.Supp. 1262, 1265 (S.D.N.Y. 1986).

To meet its burden of substantial justification, the government must show a reasonable basis in truth for the facts alleged, a reasonably sound legal theory, and a reasonable connection between the facts alleged and the theory propounded. *Citizens Council of Delaware County v. Brinegar*, 741 F.2d 584, 593 (3rd Cir. 1984). The Charging Party has satisfied that burden in the instant case.

> United States shall be liable for such fees and costs to the extent provided by section 504 of title 5, United States Code, or by section 2412 of title 28, United States Code.

The Initial Decision adopted facts sufficient to make out a prima facie case, as well as much of the rest of the Charging Party's factual case. I rejected only the following four material factual allegations urged by the Charging Party: 1. Respondent Medige promised Complainant she could have the apartment if she wanted it; 2. Complainant did not receive the same kind of tour of the apartment as the successful tenants; 3. Respondent Coyne asked the successful tenants to perform maintenance tasks; and 4. Respondents rejected Complainant's offer to rent because of her race. These crucial factual allegations failed not because testimony presented on behalf of the Charging Party was facially unbelievable, but rather because Respondents' contrary testimony was completely credible and corroborated by other witnesses and documents. These conclusions were based in significant part on the demeanor of the witnesses. No witness for either side appeared to have testified in bad faith. In short, there was a reasonable, though mistaken, basis in fact for the Charging Party's case.[2]

There was nothing novel or unreasonable about the theory of the Charging Party's case, namely, that Respondents, motivated by secret racial animus, treated Complainant differently than they treated the successful applicants for the apartment. The Initial Decision specifically finds that it was understandable and reasonable for Complainant to believe that she had been treated unfairly because of two sets of uncontested facts: Complainant was not the first person to view the apartment as she had been promised, and Respondent Coyne refused to take Complainant's proffered deposit check even though he told her he had previously taken one from the couple who were eventually chosen as the successful applicants. It is theoretically possible that these two sets of facts could have been caused by hidden racial animus on the part of Respondents. Moreover, Complainant's subjective belief that she was treated unfairly was largely grounded on objective facts that Respondents did not contest. The record therefore does not support Respondents' contention that there was no evidence to sustain the Charge of Discrimination other than Complainant's "subjective feelings." In sum, there was a reasonably sound connection between the facts alleged and the theory propounded by the Charging Party in this case.

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[2]It should be noted that the Charging Party relied in important part upon a reported prehearing statement by Mrs. Brown, one of the successful tenants, to the effect that Respondent Coyne asked the Browns if they would perform various maintenance tasks on the property. Mrs. Brown's hearing testimony was inconsistent with her reported prehearing statement. At hearing she corroborated Respondent Coyne's testimony that her husband *volunteered* to do the maintenance, but she conceded that she may have made the reported statement to the investigator. Inasmuch as Mr. Brown participated in the conversation at issue, it would have been better practice for the investigator to have interviewed him personally before the hearing rather than rely on his wife's recitation of events, particularly as it turned out that her recitation was contaminated with undisclosed hearsay. But the record will not support a conclusion that this case would not have been prosecuted if the investigator had interviewed Mr. Brown.

Respondents' defense against the charge of racial discrimination rested mostly upon subjective justifications for their choice of the successful applicants. Subjective justifications offered to rebut a prima facie case of racial discrimination must be examined very closely, because they can easily camouflage racial bias. *See Frazier v. Rominger,* 27 F.2d 828, 822-23 (2d Cir. 1994); *Soules v. U.S. Dep't of Hous. & Urban Dev.,*967 F.2d 817, 823 (2d Cir. 1992). The Charging Party proved a prima facie case of discrimination. It was therefore reasonable for the Charging Party to submit Respondents' subjective justifications for their conduct to an independent fact-finder for a credibility determination.

Respondents complain that by trial time the Charging Party either knew or should have known that they are not the sort of people who would commit racial discrimination. While from a statistical or sociological perspective it indeed may be very unlikely that people with Respondents' background and character would engage in racial discrimination, racial animus can be found in every walk of life. Furthermore, the law does not permit a person to be found either innocent or guilty of an alleged offense based on statistical probabilities or character evidence alone. *See* Rule 404, Federal Rules of Evidence.

I sympathize with Respondents' understandable desire to recoup expenses incurred in connection with this proceeding, but the Charging Party has demonstrated that the position of the United States in this case was "substantially justified" within the meaning of the EAJA.[3] Accordingly, Respondents' application for fees and costs must be denied. It is so ORDERED.

/s/

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THOMAS C. HEINZ
Administrative Law Judge

Dated: January 24, 1995.

[3]This conclusion obviates evaluation of the Charging Party's arguments concerning public policy, a rule of moderation, and the requirement that fee applicants submit contemporaneous time records.