

Respondent.

¹The following reference abbreviations are used in this decision: "J. Ex." for Joint Exhibit; "Sec. Ex." for Secretary's Exhibit; "Res. Ex." for Respondents' Exhibit; and "Tr." for transcript.

Charge of Discrimination filed on behalf of the Complainant by the Secretary of the Department ("Secretary" or "the Government") on April 4, 1991. On May 10, 1991, Complainant John Cummings filed a motion to intervene which was granted on May 28, 1991. A hearing was held in Boston, Massachusetts on July 9, 1991. Post-hearing briefs were filed by the Secretary and the Respondent, respectively, on August 23, 1991 and September 20, 1991.²

The Secretary alleges that Respondent refused to grant Complainant John Cummings' requests for a reserved parking space at its facility, Doggett Circle Apartments, and thereby discriminated in the terms, conditions, or privileges of Complainant's rental because of his handicap in violation of 42 U.S.C. Sec. 3604(f)(2) and 24 C.F.R. Sec. 100.202(b). The Secretary also alleges that Respondent refused to make reasonable accommodations in rules, policies, practices, or services in order to afford Complainant an equal opportunity to use and enjoy his apartment, in violation of 42 U.S.C. Sec. 3604(f)(3)(b) and 24 C.F.R. Sec. 100.204. The Secretary and the Complainant seek \$10,000 as compensation for pain and injury, "at least" \$10,000 for emotional distress and embarrassment, \$1,500 for lost equal housing opportunity, inconvenience, and loss of civil rights; and injunctive and other equitable relief. In addition, the Secretary seeks a civil penalty in the amount of \$10,000.

Respondent admits that it refused Mr. Cummings' requests for a reserved parking space. It contends that granting his requests would require the granting of similar requests by other handicapped persons, thereby, depriving the other non-handicapped Doggett Circle tenants of parking spaces. Accordingly, it contends that the Complainant cannot reasonably be accommodated. Respondent further contends that Complainant has failed to prove any damages by competent testimony, that a civil penalty is not warranted, and that it would be against public policy to impose such a penalty against Respondent, a tax-supported entity.

Findings of Fact

Respondent, Dedham Housing Authority ("Dedham" or "Authority"), is a "public body politic and corporate," established under Chapter 121B of the Massachusetts General Laws for the purpose of, *inter alia*, providing housing for families or elderly persons of low income. Tr. pp. 165-166. It is supported by both state and federal taxes. Tr. pp. 176-177. Its policies are determined by a five-person Board of Commissioners, one of whom is appointed by the Governor, and four of whom are elected. Tr. p. 200. The Authority owns and manages 627 units of housing in the town of Dedham, Massachusetts. These units are located in six projects, one of which is Doggett Circle.

Doggett Circle is an 80-unit apartment complex in Dedham, Massachusetts. Tr.

²Respondent's post-hearing brief was inadvertently sent to the wrong address. The envelope was returned to Respondent's attorney on September 20, 1991. Respondent has moved for leave to file its brief out of time. There being no opposition nor demonstration of prejudice resulting from acceptance of this late filing, Respondent's motion is granted.

p. 166. It is a state-aided development for elderly, handicapped and disabled tenants. Tr. p. 177. In the summer of 1990 the development had 34 parking spaces, three of which were designated for use by tenants with handicap license plates. Tr. pp. 49, 105. As of the date of the hearing, six of Doggett Circle's tenants had handicap plates, one of whom is Mr. Cummings. Tr. pp. 168, 228.

Mr. Cummings has lived at Doggett Circle since approximately January 1, 1986. Tr. p. 166. Pursuant to Chapter 90, Section 2 of the Massachusetts General Laws and 540 C.M.R. Sec. 17, he was issued a handicap license plate in the fall of 1988. J. Ex. 16; Tr. pp. 39-40, 99.

An applicant for the issuance of a handicap license plate must submit a medical certification that the applicant "has a diagnosed disease or disorder which substantially impairs or interferes with his mobility and which is expected to do so in the foreseeable future." J. Ex. 16. Mr. Cummings has been diagnosed as having chronic heart disease and severe peripheral vascular disease that limits his ambulatory ability. J. Ex. 8. His ambulatory range is 5 yards without rest and 10 yards with intermittent rest. He experiences leg and chest pain when he walks more than 15 to 20 feet, and feels "fuzzyheaded" when he walks more than 30 feet. Tr. p. 92. He suffered heart attacks in both 1984 and 1986. Tr. p. 146. Mr. Cummings lives in a second story apartment. He attempted to obtain a first-floor apartment when he moved into Doggett Circle, but none was available. Tr. pp. 96, 98.

In the fall of 1989, there was only one designated handicap parking space at Doggett Circle. Tr. p. 99. Mr. Cummings complained to the Massachusetts Office of Handicapped Affairs because, despite his having the handicap license plates, there was often no place for him to park. Tr. pp. 23-24, 102. James Gleich, the Executive Director of the Office, visited Doggett Circle and told Catherine Luna, the Executive Director of Dedham, that appropriately marked handicap parking spaces, each 12 feet wide,³ were required in order to comply with the State Building Code. Tr. pp. 26, 190. Dedham did not comply with his admonition until after Mr. Gleich wrote Ms. Luna on January 4, 1990, attaching a copy of the relevant design standards and threatening to file a formal complaint with the Architectural Access Board if the matter remained unresolved.⁴ J. Ex. 2; Tr. pp. 26-29. In the Spring of 1990, Dedham increased the size of the existing handicap parking space and added two additional handicap spaces in order to comply with State requirements. Tr. p. 29.

Despite the additional spaces, Mr. Cummings continued to have difficulty finding a

³Regular parking spaces are 8 feet wide. Handicapped spaces must be 12 feet wide to accommodate wheelchairs. J. Ex. 6. However, spaces may be configured so as to share the additional 4 feet. Tr. p. 190.

⁴Ms. Luna testified that the work was delayed by strong "hurricane-type storms" which caused flooding in the parking lot and prevented implementing the changes until Spring. Tr. pp. 191-193.

parking space near his apartment because other tenants, also with handicap license plates, occupied the three available spaces for lengthy periods. Tr. p. 109. There were five or six other tenants with handicap licence plates at this time. J. Ex. 6. When no spaces were available close to his apartment, he had to park illegally on a service road ("fire lane") adjacent to the parking lot. The fire lane was close to his apartment, but parking there subjected him to the risk that his car would be towed. Tr. pp. 114, 186. In addition, automobiles parked in the fire lane were subject to ticketing. J. Ex. 20 (Answer to Interrogatory 3); Tr. p. 229.

At the direction of Mr. Gleich, Phyllis Mitchell of the Office of Handicapped Affairs wrote to Ms. Luna on May 22, 1990, requesting that one of the handicapped spaces be reserved for Mr. Cummings. Attached to the letter was a copy of HUD regulations requiring a landlord to provide reasonable accommodations for tenants with handicaps. Examples of reasonable accommodation follow the text of the regulation. Example 2 states that the assignment of parking spaces close to the apartments of mobility-impaired tenants is a required accommodation if reasonable under the circumstances. 24 C.F.R. Sec. 100.204 (Example (2)); J. Ex. 3, Tr. pp. 33-34. On June 7, 1990, Mr. Edward C. Webby, counsel for Dedham, wrote to Mr. Cummings denying Ms. Mitchell's request. The letter further states: "I must also advise you that any illegal parking in that complex will result in towing." J. Ex. 4.

Following receipt of Mr. Webby's letter, Mr. Cummings informed Respondent that he would be willing to accept a reserved regular space close to his own apartment. Res. Answer, para. 9; Tr. pp. 67, 167. On July 3, 1990, Ms. Luna wrote to Ms. Ellen Hansen of HUD's Office of Fair Housing and Equal Opportunity, in response to a complaint of discrimination filed by Mr. Cummings. In the letter she stated the reasons for denying Mr. Cummings request for an assigned space. First, she claimed that Ms. Mitchell had agreed with Dedham's determination that it would not be reasonable to provide assigned parking at Doggett Circle. Second, she averred that Dedham could not implement a request to increase the number of handicap spaces from 3 to 7 in order to accommodate all of the individuals with handicap plates. She noted that widening spaces from 8 to 12 feet would decrease by four the number of spaces, which were already in short supply. Finally, she opined that the majority of tenants at Doggett, who were elderly, also suffered from mobility-limiting disabilities.⁵ J. Ex. 6.

In the summer of 1990, 31⁶ of Doggett Circle's tenants owned automobiles. J. Ex. 6; Tr. p. 211. Six or seven of these individuals, including Mr. Cummings, had

⁵Ms. Luna's testimony admits that her real concern was not that the parking lot would consist solely of assigned handicap spaces, but rather, that she would have to justify refusing spaces for non-handicapped individuals, unhappy with the special provision made for Mr. Cummings. Tr. p. 227.

⁶Ms. Luna testified at the hearing that she guessed at this figure. Tr. p. 184. However, because there is no evidence that the number is incorrect, and because Ms. Luna included the figure in Dedham's official response to the HUD investigation, I have accepted it as fact.

handicap license plates. J. Ex. 6. The number of cars varies with the turnover of approximately 2 to 5 units per month. Tr. p. 198. Two to three months prior to the hearing, the number of tenants who owned automobiles had increased to 36. J. Ex. 13; Tr. p. 211. In addition to the 34 spaces available at Doggett Circle, Dedham had obtained permission from a medical facility across the street to permit overnight parking in 10 spaces belonging to that facility. Thus, an additional 10 parking spaces became available to Doggett tenants after 6:00 p.m. Tr. p. 239. The cost to Respondent of a sign designating a reserved parking space is approximately \$50. Tr. p. 226.

The distance from the farthest parking space to Mr. Cummings' apartment is approximately 420 feet; the nearest is approximately 240 feet away. J. Exs. 1, 17; Tr. p. 56. The handicap spaces are from 270 to 290 feet from his apartment building.⁷

At approximately 2:30 a.m. on July 28, 1990, Mr. Cummings returned from his part-time job as a dispatcher with Interstate Towing, a company located in Dedham.⁸ The only vacant space was located 180 feet farther from the space closest to his apartment. J. Ex. 1. While getting out of his car he experienced acute back pain. J. Ex. 13. He felt a tightness in his legs and chest, and became dizzy. He thought he was having a heart attack and was going to die. J. Ex. 20 (Answer to Interrogatory 3); Tr. p. 122. He reached his apartment and, in the morning, called for an ambulance. He was taken to the emergency room at Norwood Hospital, released later that day, and returned home by ambulance.⁹ He was unable to leave his apartment until August 1, 1990 because of pain and medications. J. Ex. 20 (Answers to Interrogatories) 8, 9; Tr. p. 125.

⁷The parties have introduced a plat map. J. Ex. 1. Based upon the measurements of the parking lot made by Mr. Phillip Davis reflected on Joint Exhibit 17, I compute the scale of the plat to be approximately .5 inch = 10 feet. J. Exs. 1, 17. In making these distance calculations I have followed the foot paths indicated on the plat map as well as Joint Exhibit 17. Mr. Cummings' apartment is on the second floor of what is marked as Building 6. Tr. p. 94. The closest parking space is located in the Northeast corner of the parking lot. The designated handicap spaces are also located in the Northeast corner of the lot, but they are several spaces to the West of the closest space. Hence, the handicap spaces are not those closest to Mr. Cummings' apartment. The farthest space is in the Southwest corner, a distance of 180 feet from the closest space.

⁸Mr. Cummings worked 20 hours per week in the evening. His hours varied. That employment terminated on January 1, 1991. Tr. pp. 127, 160-162.

⁹Respondent points to inconsistencies between Mr. Cummings' testimony and his revelations to the treating physician as recorded in his medical records. Mr. Cummings testified that the onset of this incident occurred after he left his car and that during the course of his walk, he fell. Tr. pp. 120-121. He also claims to have reported the fall to the treating physician. Tr. p. 151. His medical records reveal that he told the treating physician that the onset of the incident occurred either while, or after he was getting out of his car. Accordingly, as to the onset of the incident, his medical records are not inconsistent with his testimony. However, they make no mention of a fall, which is essential medical information. J. Ex. 10. Accordingly, I do not credit Mr. Cummings' testimony that he fell.

During the day Mr. Cummings regularly parks in one of three spaces which are at least 90 feet farther from his apartment than the nearest parking space. J. Ex. 17; Tr. pp. 58, 105-107, 133. He is presently unable to park in the handicapped spaces because they are occupied. J. Ex. 20 (Answer to Interrogatories 3), Tr. p. 109. At night he must park either in the fire lane or in the farthest parking space, an additional 180 feet from the closest space.

He left his apartment approximately twice a week to go to his part-time job at Interstate. Tr. p. 160. He attended monthly meetings of the Knights of Columbus and Alcoholics Anonymous, and he occasionally visited family members. Since he was denied a parking space, he has continued to limit himself to roughly two excursions a week; but he quit the Knights of Columbus, and discontinued his visits to his family because of his fear that he would have no place to park upon his return. Tr. p. 137. Because of this fear, he loses sleep. He is also embarrassed when he is observed stopping to rest. J. Ex. 20 (Answer to Interrogatories 4). The greater the distance he walks, the more pain and emotional distress he experiences.¹⁰ J. Ex. 20 (Answer to Interrogatories 3).

In an attempt to obtain a parking space Mr. Cummings has made numerous calls both to Respondent and to the State Office of Handicapped Affairs. Tr. pp. 103-105, 112, 136.

Governing Legal Framework

Section 804(f)(2) of the Fair Housing Act provides that it shall be unlawful:

¹⁰Respondent has attacked Mr. Cummings' credibility based upon 1) his testimony and response to interrogatories concerning his purported fall on July 28, 1990, and the contents of contemporaneous medical records, and 2) his prior criminal record. Res. Post-hearing Brief, pp. 14-15.

Mr. Cummings admits to having received approximately fifteen misdemeanor convictions for writing bad checks. Each of the checks was in an amount less than \$100 and the last conviction was in 1986. Tr. pp. 145, 154. Mr. Cummings attributes his convictions to past domestic difficulties and alcoholism. Mr. Cummings made restitution for the amount of the bad checks. Tr. p. 157. There is no evidence of subsequent criminal activity by Mr. Cummings.

Because of the inconsistency between his testimony and his medical records concerning the purported fall, his past criminal record, and his obvious self-interest in testifying as he did, Mr. Cummings' testimony must be weighed with considerable skepticism. Having observed his demeanor, scrutinized his testimony and compared it to other evidence in the record, I have concluded that Mr. Cummings' testimony is credible. First, his appearance and direct responses to questions he did not manifest false testimony. Second, he testified against his own interest when he stated that he left his apartment "roughly" the same number of times both before and after he was denied the parking space. Tr. p. 160. Third, I credit his candid statement that having to admit he is an alcoholic was "hard." Tr. p. 154. Fourth, his testimony is corroborated by, other witnesses and medical records. J. Ex. 10; Tr. pp. 42, 77. Accordingly, with the exception of his claim that he fell, I have credited Mr. Cummings' testimony. However, while I have not found that Mr. Cummings fell, I have concluded that he actually believes that he did fall and that he believes he revealed it to his treating physician. Tr. p. 157.

To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling because of a handicap.

42 U.S.C. Sec. 3604(f)(2); *See also*, 24 C.F.R. Sec. 100.202(b).

Because handicapped persons have special needs, Congress recognized that more than a mere prohibition against disparate treatment was necessary in order that handicapped persons receive equal housing opportunities. H.R. Rep. No. 711, 100th Cong., 2nd Sess. 25, *reprinted in* 1988 U.S. Code Cong. and Admin. News, 2186. Accordingly, Congress included an affirmative obligation in the following language defining handicap discrimination:

[A] refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such persons equal opportunity to use and enjoy a dwelling.

42 U.S.C. Sec. 3604(f)(3)(B); *See also*, 24 C.F.R. Sec. 100.204.

Discrimination resulting from a failure to accommodate handicaps when it is reasonable to do so is also referred to as "surmountable barrier" discrimination. *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981). Unlike other forms of discrimination proscribed by the Act, this type of discrimination is often the result of "benign neglect" rather than intentional discrimination. *Alexander v. Choate*, 469 U.S. 287, 295 (1985).

The Act defines handicap in the same way it is defined in Section 504 of the Rehabilitation Act of 1973, as amended. 29 U.S.C. Sec. 701, *et. seq.* "Handicap" means with respect to a person:

- (1) a physical or mental impairment which substantially limits one or more of such person's major life activities;
- (2) a record of having such an impairment; or,
- (3) being regarded as having such an impairment.

42 U.S.C. Sec. 3602(h); 24 C.F.R. Sec. 100.201(d).

A Respondent must also know of, or reasonably be expected to know of, the existence of the handicap in order to be held liable for discrimination. *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1381 (3rd Cir. 1991).

Congress intended that the Act be interpreted in a manner consistent with Section 504 of the Rehabilitation Act; H.R. No. 711 at 25, *reprinted in 1988 U.S. Code and Admin. News*, 2173. Cases interpreting Section 504 hold that an accommodation which permits tenants to experience the "full benefit" of tenancy must be made unless the accommodation imposes an "undue financial or administrative burden" on a Respondent or requires a "fundamental alteration" in the nature of its program. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Majors v. Housing Authority of Cty. of DeKalb, Ga.*, 652 F.2d 454 (5th Cir. 1981). In this regard, there is no requirement that changes be "substantial," but modest modifications may be necessary. *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1384 (3rd Cir. 1991), *citing Alexander v. Choate*, 469 U.S. 287, 301, n. 20. However, a refusal to take modest, affirmative steps to accommodate persons, might well violate Section 504. *Nathanson, supra* at 1385 *citing American Public Transportation Ass'n v. Lewis*, 655 F.2d 1272, 1278 (D.C. Cir. 1981).

In order to prove that Respondent has discriminated against Mr. Cummings by failing to accommodate his handicap, the Secretary must demonstrate the following: 1) That Complainant suffers from a handicap as defined in 42 U.S.C. Sec. 3602(h); 2) that the Respondent knows of the Complainant's handicap or should reasonably be expected to know of it; 3) that accommodation of the handicap "may be necessary" to afford Complainant an equal opportunity to use and enjoy the dwelling; and 4) that Respondent refused to make such accommodation. Once the Secretary has made this demonstration, Respondent may yet prevail if it can demonstrate that an accommodation of Complainant's handicap imposes an "undue financial or administrative burden" on Respondent or requires a "fundamental alteration" in the nature of its program; i.e, that the accommodation is "not reasonable."

Discussion

Respondent does not dispute that Mr. Cummings is handicapped within the meaning of 42 U.S.C. Sec. 3602(h), and the record supports this conclusion. He was issued handicap license plates based on a medical determination that he suffers from chronic heart disease and severe peripheral vascular disease that limits his ambulatory ability. J. Ex. 8. In addition, the record contains un rebutted evidence that he can walk only short distances without rest and longer distances only with intermittent rest. He experiences leg and chest pain when he walks more than 15 to 20 feet and feels "fuzzyheaded" when he walks more than 30 feet. Tr. p. 92. Accordingly, the record establishes that he has a physical impairment which limits walking, a major life activity; that there is a record of his having this impairment; and that he is regarded by Respondent as having this impairment.

Respondent was aware that Mr. Cummings suffered from a handicap which limits his ability to walk. Ms. Mitchell's May 22, 1990, letter to Ms. Luna refers to Mr. Cummings as a person with a disability who possesses handicap license plates. J.Ex. 3. After consulting with Ms. Luna, Mr. Webby wrote directly to Mr. Cummings denying his request for a designated handicap parking space. J.Ex. 4. Ms. Luna's letter to Ms.

Hansen of July 3, 1990, acknowledges that Mr. Cummings is one of seven tenants at Doggett Circle with handicap license plates. J. Ex. 6. On August 9, 1990, the Dedham Board at an executive session rejected a HUD settlement offer that would have limited the use of handicap spaces to Dedham residents by removing the handicap signs and posting "Reserved" signs. J. Ex. 12. Finally, Ms. Luna knew at the time she denied Ms. Mitchell's request that Mr. Cummings had difficulty walking and that he could not walk very far. Tr. pp. 223-224.

The record demonstrates that accommodating Mr. Cummings' handicap is necessary to afford him an equal opportunity to use and enjoy his apartment. Not only does his physical pain vary directly with the distance he must walk, but his mobility is further limited by his fear of leaving his apartment without a nearby parking space. Finally, the thought of walking long distances results in mental distress because he worries about the possibility of another, perhaps fatal, heart attack. Tr. p. 122.

The record also establishes that Respondent has refused to make two requested accommodations. First, Respondent refused to permit Mr. Cummings to have an assigned handicap parking space. J. Ex. 4. Second, Respondent refused to assign Mr. Cummings a regular reserved parking space close to his apartment. J. Ex. 6.

For the reasons discussed below, Respondent has also failed to demonstrate that the proposed accommodation of Mr. Cummings imposes an "undue financial or administrative burden" on Respondent or requires a "fundamental alteration" in the nature of its program.

Regulations interpreting the Rehabilitation Act identify three factors which should be considered in determining whether a proposed accommodation would subject an employer receiving Federal assistance to undue hardship. These factors are:

- 1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; 2) the type of the recipient's operation including the composition and structure of the recipient's workforce; and 3) the nature and cost of the accommodation.

45 C.F.R. Sec. 84.12(c).

Appendix A to these regulations sets forth illustrations of how these factors should be applied:

The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with

impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job.

Appendix A - Analysis of Final Regulations, 45 C.F.R., p. 366 (1990). See also, *Nelson v. Thornburgh*, 567 F. Supp. 369 (E.D. Pa. 1983). Although ostensibly applicable only to employers and employees in programs receiving Federal assistance, these factors provide a useful guide for determining the appropriate factors applicable to housing providers and recipients. Applying these guidelines to housing providers and recipients these factors are: 1) the overall size of the housing provider, including the number of residents, number and type of facilities involved, and the size of its budget; 2) the type of facilities involved, including the composition and structure of the residences; and 3) the nature and cost of the accommodation needed. Each of these factors as applied to the facts of this case is discussed below.

Respondent is a large, quasi-public entity with 627 units in six projects catering to moderate income families and elderly, including handicapped individuals. Some of the units were developed either by the Federal or state government. Respondent receives Federal or state rental subsidies for other units. The project at issue is an apartment complex consisting of 80 units. It was developed in 1969 with state aid for occupancy by the elderly. Respondent's budget is sufficient to operate an entity of this size, including the employment of 10 full-time and 3 part-time employees. From the summer of 1990 to the present, between five and seven of the residents had handicap license plates.

Doggett Circle has parking spaces on its own premises sufficient to accommodate 34 out of 80 units, and has turnover of approximately 2 to 5 units per month. Three spaces have been set aside for handicap parking. Ten additional parking spaces become available across the street after 6:00 p.m. every evening. In the summer of 1990 the number of parking spaces in the Doggett Circle parking lot exceeded the number of residents with cars (31). Two to three months prior to the hearing the number of residents with cars increased from 31 to 36. However, even with this increase the availability at night of the 10 additional parking spaces obviated any shortage at the only time the Doggett Circle parking lot was full. Accordingly, Respondent has failed to demonstrate that there was a shortage of parking, either in the summer of 1990, when it denied Mr. Cummings' requests, or two to three months prior to the hearing when it surveyed the number of Doggett Circle tenants who owned cars.

The record does not reflect any costs associated with marking a particular parking space other than the \$50 cost of installing a sign, nor has Respondent made a claim that this cost is burdensome. Respondent has identified no administrative burden that would result from assigning Mr. Cummings a parking space other than its assertion, discussed below, that granting his request, would set a "damaging precedent." Res. Post-hearing Brief, p. 8.

The accommodation sought by Mr. Cummings involves either assigning him a reserved handicap parking space and/or removing one parking space from the pool of 31

non-handicap spaces now used by all tenants on a "first come, first served" basis. Respondents claim their present "first come, first served" parking policy is necessary to maintain an equitable parking situation in the face of a parking shortage. Recision of this policy, it is claimed, will open a "floodgate of demands, litigation, and expense." Respondent's argument rests on two premises: First, that there was, and is, a parking shortage at Doggett Circle, and second, that accommodation of Mr. Cummings' request will eliminate or compromise its "first come, first served" policy, thereby improperly affecting the rights of innocent tenants.¹¹

Respondent has failed to demonstrate that there was a parking shortage in the summer of 1990 and that there is presently a parking shortage at Doggett Circle. It has also failed to demonstrate how assigning Mr. Cummings his own handicap or non-handicap parking space would eliminate or compromise its "first come, first served" rule. Assigning a parking space to Mr. Cummings merely involves elevating Mr. Cummings' individualized needs as a handicapped person over the desires of other tenants who do not need the accommodation. See, *Majors v. Housing Authority of Cty. of DeKalb, Ga., supra*, at 458.¹² Accommodation does not require abrogation of the "first come, first served" rule, or even modification of the rules for those who do not demonstrate similar physical limitations. Like the plaintiff in *Majors*, Mr. Cummings is a member of a "narrow group"¹³ for whom a limited exception to the "first come, first served" parking rule could be made without eliminating the application of the rule to those who do not fall within that narrow exception.

¹¹Respondent relies on *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), for the proposition that there is no obligation to accommodate a handicap if to do so would adversely affect the rights of others. Post-hearing Brief, pp. 5-7. *Hardison* involved religious, not handicap accommodation, the effect of the accommodation on a negotiated seniority system, and the expenditure of funds in the form of premium pay. These factors differ significantly from those present in the instant case. As discussed above, even the one conceivable similarity - - the possible adverse effect the accommodation might have on others - - is not established by sufficient evidence. Accordingly, Respondent's reliance on *Hardison* is misplaced.

¹²*Majors* involved a public housing authority with a "no pet" rule. The individual seeking accommodation had a mental handicap, requiring her to have a dog. The Authority refused her request claiming that the no pet rule was reasonable because of the high density of its housing. The Court of Appeals held that the Authority had violated Section 504 by failing to make a reasonable accommodation or the handicap. The Court stated: "Even if the 'no pet' rule is itself eminently reasonable, nothing in the record rebuts the reasonable inference that the Authority could easily make a limited exception for that narrow group of persons who are handicapped and whose handicap requires . . . the companionship of a dog." *Id.* at 458. As in the instant case, making the accommodation did not require the Authority to abandon its "no pet" rule, rather the Court merely required the accommodating party to prefer the individualized needs of the handicapped person over the desires of other tenants who did not need the accommodation.

¹³At most, five or six other tenants own cars with handicap license plates. None have been shown to require a similar accommodation. One other handicapped individual, now deceased, had unsuccessfully requested his own space. Tr. pp. 196, 212, 224.

In view of Respondent's ability to afford the accommodation, the lack of significant expense in accommodating Mr. Cummings, and the lack of a demonstrated impact upon its existing parking policy, accommodation is required. Accordingly, Respondents violated 42 U.S.C. Secs. 3604(f)(2); 3604(f)(3)(b); and 24 C.F.R. Secs. 100.202(b) and 100.204 by refusing to assign a parking space as close as possible to the apartment rented by John Cummings.

Remedies

Because Respondent violated 42 U.S.C. Secs. 3604(f)(2) and 3604(f)(3)(b), Complainant is entitled to appropriate relief under the Act. 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. Sec. 3612 (g)(3).

The Act further provides that the "order may, to vindicate the public interest, assess a civil penalty against the Respondents." 42 U.S.C. Sec. 3612 (g)(3). The maximum amount of such civil penalty is dependent upon whether Respondents have been adjudged to have committed prior discriminatory housing practices.

The Secretary and the Complainant seek \$10,000 as compensation for pain and injury; "at least" \$10,000 for emotional distress and embarrassment; \$1,500 for lost equal housing opportunity, inconvenience, and loss of civil rights; and injunctive and other equitable relief. In addition, the Secretary seeks a civil penalty in the amount of \$10,000.

Economic Loss

Complainant acknowledges that he has suffered no monetary loss as a result of Respondent's failure to accommodate his handicap. J. Ex. 20 (Answers to Interrogatories, 13).

Injury and Pain

Respondent correctly states that the Secretary has failed to establish a causal link between Respondent's refusal to accommodate Mr. Cummings' handicap and any physical injury he experienced. Res. Post-hearing Brief, pp. 8-9. I have not found that he fell, and there has been no expert medical testimony which establishes that the distance walked on July 28, 1990 caused his visit to the hospital. Expert testimony is necessary to prove the cause of Complainant's physical condition, a wholly scientific matter that is far removed from the usual and ordinary experience of the average man. See, e.g., *Loudermill v. Dow Chemical Co.*, 863 F.2d 566 (8th Cir. 1988); *Charleston National Bank v. Hennessey*, 404 F.2d 539 (5th Cir. 1968); *U.S. v. Wier*, 281 F.2d 850 (5th Cir. 1960).

However, proof of causation is not necessary to establish that Mr. Cummings

experiences incremental pain the longer he walks. He credibly testified that he experiences leg and chest pain when he walks more than 15 to 20 feet, and that he experiences more discomfort and pain the longer he walks. Because the fire lane is approximately the same distance from his apartment as the closest parking space, he would experience no incremental pain if he had the use of an assigned parking space as requested. Tr. p. 117.

The record reflects that on those occasions when he did not park illegally in the fire lane, he was forced to walk approximately 180 feet farther than necessary had he been assigned the nearest parking space. He states that he parked in the fire lane when the lot was full and the lot was full 9 out of 10 times. Tr. p. 128. Since the distance from the fire lane to his apartment is approximately the same distance from his apartment as the nearest parking space, he is only entitled to compensation for those occasions on which he found a legal, but more distant space, in the parking lot. Since all but the most distant spaces were taken, he would have walked an extra 180 feet four times a week for a period equivalent to 8 weeks out of the 78 weeks which separate June 7, 1990, the date his request was initially denied, from the date of this decision. I have concluded that \$200 per week as compensation for the additional physical pain he experienced is reasonable.¹⁴ Accordingly, Mr. Cummings is entitled to an award of \$1,600 as compensation for the physical pain he experienced.¹⁵

¹⁴Mr. Cummings stated that he went out "roughly" twice a week both before and after he left his job. Tr. pp. 147, 160. I believe it to be highly unlikely that he could travel to and from a part-time job, participate in the Knights of Columbus, attend Alcoholics Anonymous meetings and visit his family, all without leaving his apartment more than twice a week. Accordingly, I have concluded that Mr. Cummings was confused by the questions as to whether his excursions included traveling to and from work. However, since there is no basis upon which to determine precisely how often he left his apartment, I have based the award on the most conservative figure justified by the record, a frequency of twice a week.

¹⁵Because of the increased availability of parking during the day, Mr. Cummings was able to park in one of three parking spaces on the same side of the lot as the handicap parking spaces. These three spaces were approximately 90 to 110 feet farther from his apartment than the closest space. It is not possible from the record to determine the frequency Mr. Cummings walked from these three spaces. Accordingly, no damages have been awarded for the extra distance he had to walk when he parked in any of these three spaces during the day.

Emotional Distress, Lost Housing Opportunity, Inconvenience, and Loss of Civil Rights

It is well established that the amount of compensatory damages which may be awarded in a Civil Rights Act case is not limited to out-of-pocket losses, but includes damages for the emotional distress caused by the discrimination. See, e.g., *Parker v. Shonfeld*, 409 F. Supp. 876, 879 (N.D. Ca. 1976). Such damages can be inferred from the circumstances of the case, as well as proved by testimony. See *Marable v. Walker*, 704 F.2d 1219, 1220 (11th Cir. 1983); *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977).

Because of the difficulty of evaluating emotional injuries resulting from deprivations of civil rights, courts do not demand precise proof to support a reasonable award of damages for such injuries. *Secretary of HUD v. Blackwell*, Fair Housing-Fair Lending (P-H) 25,011; *Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241, 1245 (8th Cir. 1983).

In *Marable, supra*, where the defendant challenged the plaintiff's claim for compensatory damages on the basis that it was based solely on mental injuries and that there was no evidence of "pecuniary loss, psychiatric disturbance, effect on social activity, or physical symptoms," the court stated:

It strikes us that these arguments may go more to the amount, rather than the fact, of damage. That the amount of damages is incapable of exact measurement does not bar recovery for the harm suffered. The plaintiff need not prove a specific loss to recover general, compensatory damages, as opposed to actual or special damages.

704 F.2d at 1220-21.

Respondent's failure to accommodate his handicap causes Mr. Cummings continuous emotional distress and anxiety. Suffering from chronic heart disease and having endured two heart attacks, he reasonably believes that he risks death every time he leaves his apartment to walk a significant distance. This risk is even greater at night because fewer people are available to give help if he has an attack. His pain that occurs everytime he leaves his apartment is accompanied by embarrassment when others see him stop frequently to rest. J. Ex. 20 (Interrogatory 4). Fearing a recurrence of these attacks as well as physical pain, he loses sleep and is justifiably more reluctant to leave his apartment, particularly at night. By parking in the fire lane, he reduces the amount of pain and his fear of imminent death. However, by doing so, he risks a ticket and the towing of his vehicle, and endangers the safety of other tenants by impeding the access of fire-fighting equipment. Based upon the above considerations, Mr. Cummings is entitled to an award of \$10,000 to compensate him for emotional distress.

Mr. Cummings did not, nor was he required, to relocate from his present

apartment. Moreover, the Secretary has not proffered any evidence that would justify an award of damages for lost housing opportunity.

Mr. Cummings was inconvenienced by Respondent's repeated refusal to accommodate his handicap. He had to make so many calls to the State Office of Handicapped Affairs that he became, as he described it, "a pest." Tr. p. 104. He also had to battle to void seven tickets. J. Ex. 11; Tr. p. 130. I conclude that Mr. Cummings is entitled to \$500 for inconvenience.

Although the Secretary seeks an award for loss of civil rights he has made no specific, discrete claim for such damages, nor does he point to specific evidence to justify such an award. Accordingly, no damages have been awarded for loss of civil rights.

Injunctive Relief

An administrative law judge may order injunctive relief, *inter alia*, to insure that the Act is not violated in the future. *Secretary of HUD v. Properties Unlimited, supra* at 25,155 n. 25; *Secretary of HUD v. Blackwell*, 908 F.2d 864, 875, quoting *Marable*, 704 F.2d at 1221. In this case, injunctive and associated equitable relief is appropriate and necessary to afford Mr. Cummings an equal opportunity to use his enjoy his dwelling and to prevent future discrimination. The injunctive relief set forth in the attached Order serves this purpose.

Civil Penalties

The Act authorizes an administrative law judge to impose a maximum civil penalty in the amount of \$10,000 against a respondent who, as this one, has not been adjudged to have committed a prior discriminatory housing practice. 42 U.S.C. Sec. 3612(g)(3)(A). In addressing the factors to be considered when assessing a civil penalty under 42 U.S.C. Sec. 3612 (g)(3), the House Report on the Fair Housing Amendments Act of 1988 states:

The Committee intends that these civil penalties are maximum, not minimum, penalties, and are not automatic in every case. When determining the amount of a penalty against a Respondent, the ALJ should consider the nature and circumstances of the violation, the degree of culpability, any history of prior violations, the financial circumstances of that Respondent and the goal of deterrence, and other matters as justice may require.

H. Rep. No. 100-711, 100th Cong., 2d Sess. 37 (1988). While the nature and circumstances of Respondent's discrimination are serious, and while Respondent knowingly committed these violations, considerations of public policy militate against assessment of an award of civil penalties in the instant case.

Nature and Circumstances of the Violation and Degree of Culpability

The record demonstrates that Respondent's failure to accommodate Mr. Cummings' handicap was made with the knowledge of Mr. Cummings' physical limitations, with a callous disregard for those limitations, and in the face of clear guidance to the contrary from the Office of Handicapped Affairs. Respondent's decision cannot be justified by the necessity of maintaining its "first come, first served" policy, since this policy would not have been significantly affected by granting the request. Accordingly, under these circumstances I find that Respondent knowingly made an unlawful decision which had a serious detrimental effect on Mr. Cummings.

Respondent had at least two opportunities to reconsider the probity and legality of its actions. Despite these opportunities it persisted in the face of what should have appeared to be clear guidance to the contrary. The first opportunity occurred when the Massachusetts Office of Handicapped Affairs notified Respondent of HUD's Fair Housing Act Regulations. The regulations contain an example of failure to accommodate a mobility-impaired individual by reserving a parking space near his apartment. 24 C.F.R. Sec. 100.204(b)(Example 2). The example describes the same situation presented to Respondent with one exception. As Respondent points out, the example does not deal with the problem posed by a shortage of available parking. However, at the time Respondent initially denied the space to Mr. Cummings there was no shortage of parking at Doggett Circle, even if the spaces in the medical facility across the street are not counted. Thus, the example is apposite. Ms. Luna testified that she read the regulations and the example. Tr. p. 227. She also knew of Mr. Cummings' mobility limitations. Tr. p. 224. Unlike situations where the law is ambiguous or there is little precedent, clear guidance existed here¹⁶ and this guidance was known to Respondent.¹⁷ Despite having this knowledge, Respondent not only denied Complainant's request, but demonstrated a callous lack of concern for those limitations by informing him in the same letter that his car would be towed if he continued to park in the fire lane.

Respondent's Financial Circumstances and Deterrence

Respondent contends that, because it is a public housing authority which receives

¹⁶Cf. *Secretary v. HUD v. Murphy*, Fair Housing-Fair Lending (PH), para. 25,002, p. 25,017 (July 13, 1990). In that case "Respondents were confronted with the difficult task of interpreting a new, complex statute and regulations that set forth those requirements. Thus, under the circumstances, Respondent's actions were not entirely without reason, and constituted a good faith attempt to comply with the spirit and intent of the regulations. *Id.* at 25,059.

¹⁷Ms. Luna also had received formal training in the reasonable accommodations requirements under Section 504 of the Rehabilitation Act of 1973. Tr. pp. 197, 225.

federal funding, sound public policy requires that it be exempt from the assessment of any civil penalty. It contends that any penalty will merely "show up in the form of diminished facilities and services." The authority would merely be required to eliminate certain items such as "maintenance, repairs, or improvements from its budget." Accordingly, Respondent's innocent tenants rather than Respondent would be penalized. Res. Brief, p. 13. Additionally, Respondent points out that the imposition of a civil penalty will merely result in Respondent seeking additional funds from the Federal Government to replace the assessment. *Id.* at 14.

The Secretary notes that there is no exemption for public housing authorities in 24 U.S.C. Sec. 3612(g)(3), the statute which authorizes civil penalties, nor is there a mention of such an exemption in the legislative history of the Act. Sec. Brief, p. 21, *citing* H.R. Rep. No. 711 at 37, *reprinted in* 1988 U.S. Code and Admin. News 2198. The Secretary also cites *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981)¹⁸ for the proposition that where a statute has not specifically authorized punitive damages and civil penalties against public housing authorities, such awards are not appropriate. HUD contends that the Act, unlike the statute in *Newport*, specifically authorizes civil penalties. Accordingly, the Secretary contends that no grounds exist for exempting public housing authorities from the assessment of civil penalties.

The Secretary correctly reads the Act to authorize the assessment of civil penalties against a public housing authority, and to make such an award discretionary. The statute does not distinguish among potential respondents against whom civil penalties may be assessed. Title 42 U.S.C. Sec. 3612(g)(3) states, "If the administrative law judge finds that a respondent has engaged . . . in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate . . . Such order may, to vindicate the public interest, assess a civil penalty against the respondent."

Despite the seriousness of Respondent's acts and its clear culpability, I am compelled to conclude that civil penalties are not warranted because of the potentially adverse effect such an award would have on innocent tenants by directly affecting Respondent's budget and because there is considerable doubt as to whether an award of punitive damages against a public entity has any deterrent effect on the discriminating officials themselves. The Supreme Court in *City of Newport, supra*, 453 U.S. at 268, considered three factors in determining whether punitive damages would deter future

¹⁸In *City of Newport*, the Supreme Court held that under 42 U.S.C. Sec. 1983, punitive damages could not be awarded against municipalities because, in enacting the Civil Rights Act, Congress was codifying certain portions of the common law as it existed in 1871, the year of the Act's passage. Because the common law did not allow recovery for punitive damages from municipalities, 42 U.S.C. Sec. 1983 could not be read to change the common law. According to the Court, Congress would have specifically declared its departure from the common law if that was its intent; absent such a declaration, public policy is determinative on the issue of imposing punitive damages.

wrongful acts by public officials. First, if the municipality is indemnified from liability and only need recover from its indemnitor, the deterrent effect of punitive damages will be marginal at best. Conversely, if the municipality is not indemnified, an award simply diminishes the public fisc. Second, an award of punitive damages is no more likely than an award of actual damages to deter a discriminating official, because the fear of losing a reelection bid will apply in either case. Finally, the Court stated that a more effective means of deterring a public official from discriminating would be to hold the discriminating official *personally* liable. However, in the instant case Dedham's enabling statute holds agents of a public housing authority not liable for any "wrongful act . . . which the [Authority] would be liable under applicable rules of law." Mass. Gen. Laws Ann. ch. 121B, Sec. 13 (West 1986). In short, a municipal tortfeasor will remain unaffected by any award on monetary damages. Accordingly, public policy considerations preclude the award of a civil penalty in the instant case.

ORDER

Having concluded that Respondent violated 42 U.S.C. Secs. 3604(f)(2) and (3), it is hereby **ORDERED** that:

1. The Dedham Housing Authority, its agents, employees, successors, and assigns as well as any other person in active concert or participation with it in the ownership, management and/or operation of any and all housing for rental, including but not limited to the Doggett Circle development is hereby permanently enjoined from:

A. Discriminating because of handicap against any person in any aspect of the provisions of housing by refusing to make reasonable accommodations in rules, practices and services when such accommodation may be necessary to afford a handicapped person equal opportunity to use and enjoy dwelling, including public and common use areas.

B. Unlawfully coercing, intimidating and interfering with an individual in the exercise or enjoyment of rights granted or protected by the Fair Housing Act, including but not limited to retaliating against any person because that person has made a complaint, testified, assisted, or participated in any manner in a proceeding under that Act.

2. Within ten (10) days of the date on which this ORDER becomes final, Respondent shall assign a parking space in the Doggett Circle parking spot for the sole use of Mr. John Cummings. This parking space shall be that closest to his apartment or shall, at the option of Mr. Cummings, be one of the existing handicapped parking spaces. In the event Mr. Cummings moves to another apartment within Respondent's control, Respondent shall reassign him the handicapped or nonhandicapped parking space closest to that subsequent apartment for his sole use. Respondent shall place a sign, no smaller than the handicapped parking signs now in place at the development, with the statement "Reserved - Violators Will Be Towed" on the curb immediately adjacent to the parking space assigned to Mr. Cummings. Respondent shall take all reasonable steps

to insure that any vehicle other than that belonging to Mr. Cummings which is parked in the assigned space is promptly removed.

3. Within forty-five (45) days of the date on which this ORDER becomes final, Respondent shall pay actual damages to the Complainant as follows: \$1,600 for physical pain; \$10,000 for emotional distress; and \$500 for inconvenience.

4. Within forty-five (45) days of the date on which this ORDER becomes final, Respondent shall provide a notice to all tenants with known handicaps, their right to request a reasonable accommodation to rules, policies, practices, or services, when such accommodations may be necessary to afford them an equal opportunity to use and enjoy their dwelling units, including the public and common use areas.

5. Respondent shall establish uniform and objective policies and procedures to be used in reviewing and acting upon all requests for handicap accommodation in housing, to be used in all housing currently owned and/or operated by Respondent, as well as any other housing acquired, owned, or controlled by Respondent in the future. Respondent shall submit a copy of these policies and procedures to the Secretary for review and approval. Such policies and procedures shall include the following:

A. Procedures to ensure the confidentiality of information regarding an individual's handicap(s) and/or physical, mental, psychological, and/or psychiatric condition(s);

B. a requirement that Respondent make determinations whether to grant or deny requests for accommodation within thirty (30) days of receipt of the request, unless it is impracticable to do so;

C. a requirement that Respondent provide written notice to the applicant for accommodation, within thirty (30) days of receipt, unless it is impracticable to do so, stating that the request is granted or denied and explaining the reasons for any denial;

D. a requirement that Respondent complete action to provide the accommodation within sixty (60) days of receipt of the request in cases where the accommodation request is approved, unless it is impracticable to do so.

Nothing herein shall preclude Respondent from imposing a reasonable screening process for making determinations on requests for reasonable handicap accommodation, provided that deference shall be given by Respondent to the individual's assessment and/or, where voluntarily provided by the individual, the assessment of medical and health professionals as well as medical evidence as to the abilities of the individual and whether it may be necessary for the individual to have an accommodation to rules, policies, practices, or services, in order to be afforded equal opportunity to use and enjoy the dwelling, including public use areas. Any screening process shall also be designed to guarantee the confidentiality of records and the privacy of the individual requesting the

accommodation.

6. Within forty-five (45) days of the date on which this ORDER becomes final, Respondent shall instruct all employees, agents, independent contractors and/or other persons who deal with the rental or management of any housing currently owned, managed and/or controlled by Respondent, of the terms of this ORDER and the Fair Housing Act and implementing regulations. To these ends, Respondent shall do the following:

A. Respondent shall provide each employee, agent, independent contractor, and/or other persons who deal with the rental or management of any housing owned, managed, and/or controlled by Respondent with a copy of this ORDER and the Fair Housing Act and implementing regulations.

B. Respondent shall obtain from each such employee, agent, independent contractor and/or other person who deals with the rental or management of housing owned, managed and/or controlled or hereafter acquired, a signed statement by which the employee, agent, independent contractor or other person who deals with the rental or management of the property affirms that he or she has read the materials provided, understands his or her legal responsibilities under this ORDER and the Fair Housing Act and will comply with both.

C. Respondent shall submit these statements in accordance with the reporting provisions set forth in Paragraph 8 of this ORDER.

D. Respondent shall maintain for inspection and borrowing by tenants at its rental offices, copies of the Fair Housing Act and implementing regulations.

7. For the three-month period beginning on the date this ORDER becomes final, and for each consecutive three-month period thereafter, for a period of three years, Respondent shall submit to the office listed below, reports containing the following information:

A. A copy of all written information submitted by individuals requesting an accommodation of their handicap;

B. a summary of all oral requests for accommodation by individuals claiming handicaps, including all information submitted in support of their request; and,

C. a copy of any and all information indicating action taken by Respondent in response to requests for accommodations by individuals claiming handicaps, including written notices provided to applicants stating whether such requests were granted or denied and the reason for the action taken, information stating whether the accommodations were completed, and information indicating the timeliness of Respondent's response to requests and completion of accommodations.

8. The reports required under Paragraph 7 shall be sent to the Director, Compliance Division, Office of Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, 10 Causeway Street, Boston, MA 02222-1092.

This **ORDER** is entered pursuant to 42 U.S.C. Sec. 3612(g)(3) and 24 C.F.R. Sec. 104.910.

/s/

William C. Cregar
Administrative Law Judge

Dated: November 15, 1991

