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 Jerome Bradford and Victoria Bradford, Charging Party, v. Pheasant Ridge Associates Limited, Margaret Mead, Cynthia Ruel, Fred J. Creek, Sheldon H. Ginsburg, Shell Development Corp., and American National Bank and Trust Company of Chicago, Respondents.	HUDALJ 05-94-0845-8 HUDALJ 05-95-0155-8 Decided: October 25, 1996

Donald S. Rothschild, Esquire
For the Respondents

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Douglas J. Finer, Esquire
For the Secretary and the Complainants

Before: ROBERT A. ANDRETTA
Administrative Law Judge

INITIAL DECISION

Jurisdiction and Procedure

This matter arose as a result of complaints filed on May 3, 1994, by Jerome Bradford (S 1) and on November 8, 1994, by his sister, Victoria Bradford (S 3).[1] Both

complaints were later amended. (S 2,4). They were filed with the United States Department of Housing and Urban Development ("HUD"), and they both allege violations of the Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.*, as amended by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 120 Stat. 1626 (1988) ("Fair Housing Act" or "Act") on the basis of handicap. On January 26, 1996, following an investigation of the complaints filed by Jerome Bradford and Victoria Bradford ("Complainants" or "complaining parties"), and a determination that reasonable cause existed to believe that discriminatory housing practices had taken place, the Secretary issued a Determination of Reasonable Cause and Charge of Discrimination for both cases, and they have remained consolidated.

The Secretary alleged that the Respondents, Pheasant Ridge Associates, Ltd., Margaret Mead, Cynthia Ruel, Fred J. Creek, Sheldon H. Ginsburg, Shell Development Corp., and American National Bank and Trust Company of Chicago, engaged in discriminatory practices on the basis of handicap in violation of that section of the Act that is codified at 42 U.S.C. § 3604(f)(1)(A), and that is incorporated into HUD's regulations found at 24 CFR 100.202(a)(1989).[2] These consolidated cases were adjudicated in accordance with § 3612(b) of the Act and HUD's regulations that are codified at 24 CFR Part 104, and by which jurisdiction was obtained, in a hearing that was conducted in Chicago, Illinois, on April 30 - May 2, 1996. The parties were ordered to submit Post-Hearing Briefs by June 24, 1996, which date was extended twice, on motions of the Secretary, to August 26, 1996. Both briefs were received on a timely basis, and this case therefore became ripe for decision on this last-named date.

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[1] The transcript of the hearing is cited as T, plus a page number; *e.g.*, (T 17). The Secretary's exhibits are identified with a capital S and an exhibit number; *e.g.*, (S 1). The Respondents' exhibits are identified with a capital R and an exhibit number; *e.g.*, (R 3).

[2] The term "handicap" is defined for purposes of the Fair Housing Act at 42 U.S.C. § 3602(h); *see also* 24 CFR 100.201.

In his Post-Hearing Brief, the Secretary states that Respondents American National Bank and Trust Company of Chicago and Fred J. Creek were named in the Charge for purposes of relief only. He further states that no relief is being requested against them and, therefore, he requests that they be dismissed from these proceedings. This "request" is treated as a Motion To Dismiss Parties. Respondents' attorney had not responded to the Motion by September 10, 1996, and was asked by phone whether he intended to do so. He declined. Accordingly, the Motion is **GRANTED**, and from this point onward in this Initial Decision, "Respondents" refers only to Pheasant Ridge Associates, Ltd., Margaret Mead, Cynthia Ruel, Sheldon Ginsburg, and Shell Development Corp.

Findings of Fact

1. Pheasant Ridge Apartments, the property that is the subject of these proceedings, is a 152-unit rental complex at 9208 Hunter Drive, Orland Hills, Illinois. Its management holds a Housing Assistance Payments contract for project-based rental assistance payments from HUD pursuant to Section 8 of the U.S. Housing Act of 1937, as amended. 42 U.S.C. § 1437f. (Answer, p. 3). Nonetheless, Pheasant Ridge is a for-profit entity. (T 488).

2. Pheasant Ridge Apartments is intended to house low income, elderly, and handicapped, including mentally disabled, tenants. (T 33; Answer, p.3). Under the HUD contract, a tenant must be classifiable as being of low income. Therefore, 100 percent of the persons who live there receive housing rent subsidies. (T 486).

3. Respondent Pheasant Ridge Associates, Limited, is an Illinois partnership and, at all times relevant to this proceeding, it was the beneficial owner of the subject property. (Answer, p.4). Respondent Sheldon H. Ginsburg was, at all times relevant, an agent of Respondent Shell Development, which, at all times relevant, had an ownership interest in the subject property. (Id.). At all times relevant, and since October 1, 1983, Respondent Margaret Mead was the property manager at Pheasant Ridge Apartments and an employee of Pheasant Ridge Associates. (T 680). Her responsibility was the operation of the property, which included "submitting the voucher and obtaining the subsidy from HUD, inspections of the property, inspection of the units, applicant criteria, updating that with the HUD regulations, attending seminars to keep [herself] apprised of the regulations and the laws." (T 681). With respect to tenant screening and selection, her responsibility was to review rejected applications when the applicants requested an appeal of a rejection. (T 682). On applications that have been appealed, Mead made the final decisions whether to accept or reject the applicants. (T 685). Respondent Cynthia Ruel was, at all times relevant, and for the past ten years, the assistant manager and secretary at Pheasant Ridge Apartments. (T 484-85). She screens the applicants and determines whether they should be accepted or rejected. (T 499-500). She also takes care of the tenants' "everyday

business" and answers the phone in the office. Margaret Mead is her supervisor. (Id.).

4. When it is taking applications, Pheasant Ridge management advertises in newspapers. Prospective tenants who call and request an application are actually mailed a "pre-application." The pre-applications of prospective tenants are reviewed to determine if they are income eligible. If they meet the income standards, they are placed on a waiting list which is maintained by Pheasant Ridge management. (T 491-92). When a vacancy occurs, Pheasant Ridge management calls the next person on the waiting list to come in for an interview. (T 493).

5. When applicants come in for their interviews, they fill out an application and "verification papers." (T 497). They are shown an apartment if one is available at the time. (T 498). As part of the verification process, management checks landlord references, criminal and civil records, income, and credit. They also conduct home visits. (T 497-99). Applicants who do not have current landlords are required by management to provide notarized statements from their relatives or other persons with whom they live. (T 501-2).

6. The application form used by Respondents at the time that Complainants applied included requests for information about handicaps. (R 4, pp. 7,9 and R 5, pp. 15, 18, at questions B.1 and B. 16)

7. Cynthia Ruel screened and interviewed siblings Jerome Bradford and Victoria Bradford. (T 507, 538-547). She made the initial decisions to reject them as tenants. (T 528, 575). Margaret Mead concurred in the rejections of Jerome Bradford's and Victoria Bradford's applications. (T 739).

Jerome Bradford

8. Complainant Jerome Bradford has mental disorders, learning disabilities, including hyperactivity, and borderline mental retardation. (T 366-70). One of his learning disabilities is dyslexia, which causes him problems with reading and math, and limits him to jobs which require only manual labor. Jerome suffered brain damage at birth from lack of oxygen, and he has been seen by neurological doctors as well as psychiatrists as needed since then. Jerome has hyperactivity and dyslexia, has suffered emotional problems, and has below normal intelligence. (T 271-73). Jerome considers his mental disabilities to be personal matters, and he is reluctant to discuss them. (T 404-05). He receives social security benefits because of his mental disabilities. (T 366).

9. On March 5, 1993, Jerome Bradford (hereinafter sometimes simply referred to as Jerome) pre-applied for an apartment at Pheasant Ridge Apartments. (R 4, p. 12; T 375).

He was added to the waiting list for one-bedroom apartments. (T 504). On April 5, 1994, Jerome updated his application, and he was shown an apartment. (R 4, pp. 39-59; T 376-77). In response to the requests for information concerning handicaps on Jerome's application form, he stated that he was mentally handicapped, had borderline mental retardation, had a learning disability, and, because of his mental disabilities, that he was unable to remain gainfully employed. The application also indicates that he has dyslexia and that he was receiving social security benefits. (S 14; T 88-92).

10. On April 12, 1994, Cynthia Ruel contacted Jerome's then current landlord, Ray Loomis, by telephone to conduct part of the applicant screening process by requesting a landlord's reference. (T 519-20). Loomis reported that Jerome had removed a window, replaced it with another one, and blamed it on his "twin brother." He also reported that he was surprised by the incident with the windows. (T 311). Loomis told Ruel that Jerome had been late a couple of times with his rent, but that he still paid it within the month, and he was never delinquent. (T 316). Loomis further told her that Jerome had been seen in the basement, and that the person who saw him there had said that Jerome had no apparent reason to be there. (T 317). Finally, Loomis told Ruel that another tenant, Mrs. Ronsani, had complained once that "it sounded like Jerome Bradford was doing something with the pipes." (T 317).

11. On the landlord reference form for Complainant Jerome Bradford, Respondent Ruel wrote, "Rent was late a lot until family took over payment," but she circled that his rent payment habits were "On Time" and that his housekeeping habits were "Good." She wrote, "At first there were a lot of complaints from other tenants that he would bang on pipes & wall at all hours but after he talked to him and family there has been none." She also wrote, "June 90 he broke out all windows landlord put in because he didn't like them said (imaginary) brother did it." (T 59-64, 521-23; S 6).

12. Ruel also obtained a public records report on Jerome from the Accurate Research Company. This report indicates that, on June 7, 1990, Jerome had been arrested for battery and property damage, but that the case had been dismissed. There was no indication that he had been convicted, nor was there any indication of criminal activity by him since the June, 1990, charge. There was no indication that Loomis had been the victim of the battery or that his property was that which had been damaged as noted in the charge. (T 69-72, 160; S 9).

13. Respondents' Applicant Intake Screening notes, that are signed by Respondents Ruel and Mead, indicate that Jerome Bradford broke out Mr. Loomis's windows and assaulted him. (T 64-5; S 7).

14. On April 13, 1994, Jerome was notified that his application had been rejected,

and that the reason for rejection was, "Unfavorable present and/or past rental references." (T 68; S 8). When Jerome received notice of the rejection, he called Cynthia Ruel about it, and was told that he would have to speak with Margaret Mead. He spoke with Mead, and she told him he would have to make an appointment to speak with her. On April 20, 1994, Jerome and his mother attended an appeal meeting, where Margaret Mead told him that he had been rejected because a criminal background check performed by Accurate Research Company had revealed that he had battered his landlord and had done damage to the landlord's building. (T 698). Jerome denied the charges, and was told by Mead that he could bring back proof that he did not commit those acts against his landlord. (T 339-45, 381-86, 701-03).

15. Complainant Jerome Bradford obtained a copy of the Accurate Research report concerning the incident in June 1990. The report did not indicate who the victim was or to whom the property belonged, but it stated specifically that the charges had been dismissed. (S 9). Jerome subsequently obtained a copy of the actual charges, which indicated that the complaining party was Janet Martinez, a former girl friend of Jerome. (T 341-45, 380-86).

16. Jerome attempted to give copies of the charges to Respondent Ruel, and he attempted to explain them to her, but she refused to accept the documents. (T 346-48, 530-33). Jerome also attempted to bring a copy of the charges to Respondent Mead, but there was no one in the office. He made several other attempts to deliver the documents to Pheasant Ridge management, to no avail. (T 347-48).

17. On May 3, 1994, Jerome filed a verified complaint with HUD alleging that the owners and managers of Pheasant Ridge Apartments violated the Act by discriminating against him on the basis of his mental handicaps. (S 1). His complaint was subsequently amended on May 18, 1995, to include all Respondents. (S 2).

Victoria Bradford

18. Complainant Victoria Bradford (hereinafter sometimes simply referred to as Victoria) is Jerome Bradford's sister. She is also mentally handicapped. She suffers from schizo-effective disorder and borderline mental retardation, and she has a history of seizure disorder. She attended special education classes because of learning disabilities and mental retardation. At the time of the hearing, she was seeing a psychiatrist and a neurologist. (T 267-70, 413-415; S. 23).

19. Victoria's mother, Phyllis Bradford-Smith, testified that Victoria suffered brain damage as a child. She described Victoria as being mentally slow and that she has ongoing problems that require psychiatric care. Victoria suffers from short periods of

over anxiousness, which is symptomatic of her mental disability. (T 135; S 22).

20. On March 6, 1993, Victoria pre-applied for an apartment at Pheasant Ridge Apartments, and was put on a waiting list. (T 539, 542; R 5, p. 23). On July 14, 1994, Victoria was called in for an interview with Cynthia Ruel and to fill out an application. (T 542-53). Victoria's mother attended the interview with her. After the interview, Victoria and her mother were shown an apartment on the third floor of one of Respondents' buildings. The apartment overlooked the office, the swimming pool, and some green space. (T 543-45). In response to the requests for information concerning handicaps on Respondents' application form, Victoria wrote that she is mentally disabled,

and described her disability as including borderline mental retardation, epilepsy, schizo-affective disorder, mental illness, and anxiety disorder. (T 94-7; R 5, pp. 15, 16, 18, 19).

21. Victoria's rental application indicates that, at the time of the application, she lived with her mother. In addition, she listed her prior landlords as the Gary [Indiana] Housing Authority, Cynthia Powers, and Thresholds A.M.I.S.S. (T 98-101; R 5, p. 25). Victoria also provided a notarized statement from her mother which indicates that she had been living with her mother since November of 1986. (R 1).

22. Respondents' record of telephone calls indicates that Victoria called the Pheasant Ridge management office nine times between July 20 and August 10, 1994, to determine the status of her pending application or to attempt to set a time for a required home visit; as follows:

> a. On July 20, 1994, Victoria called the office during normal working hours to ask the purpose of the home visit and to request that it be conducted on Friday, July 22, 1994. (S 21).
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> b. On July 22, 1994, she called Respondents' answering service at 1:04 am to leave a message for Respondents requesting that the home visit be conducted between 11:00 am and 1:00 pm. (S 21).
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> c. On July 22, 1994, she called Respondents at 2:00 pm to inquire when the home visit inspector would be arriving because she had other things to do. (S 21).
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> d. On July 28, 1994, she called Respondents during normal working hours to inquire about the status of her application. Margaret Mead told her that they would contact her when they completed her application. (S 21).
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> e. On July 28, 1994, Victoria called Respondents at 6:54 pm to see if she could get the apartment the next day. She told the answering

service operator that she needed the information because it affected her work schedule. (S 21).

f. On July 28, 1994, she called Respondents at 7:21 pm and told the answering service operator that she needed to speak with the respondents to learn whether she had been accepted as a tenant. (S 21).

g. On July 29, 1994, she called Respondents to learn if Cynthia Ruel had gotten back a report. Respondent Mead recorded in a narrative that she informed Victoria that she "didn't appreciate her harassing calls every day, numerous times a day ... and that we don't have to give a day to day, blow by blow update on our progress of aps." (R 5, p. 97).

h. On August 9, 1994, she called during normal working hours to inquire about her application. (R 5, pp. 100-102).

i. On August 10, 1994, she called during office hours to inquire again about her application. (R 5, pp. 100-102).

23. During one of the phone conversations, Respondent Ruel told Victoria that she was having trouble verifying her previous landlord. (T 631). Victoria did not know the phone number for her previous landlord, Cynthia Powers, when she filled out the application. (T 422-24, 616-17). During the conversation with Ruel, she provided Ruel with Powers's facsimile number. (T 449). However, Respondents did not contact Cynthia Powers, nor did they ever attempt to do so. (T 616-17).

24. While living in an apartment managed by Cynthia Powers, Victoria was receiving Section 8 housing assistance through the Gary (Indiana) Housing Authority. (T 657). When Victoria was vacating that apartment, Powers told her to feel free to use her as a reference. (T 661-62). Powers testified at the hearing that, if she had been asked to provide a reference for Victoria, she would have stated that Victoria was a good tenant, that management had enjoyed her tenancy, that Victoria paid her rent on time, and that she would rent to her again. (T 660).

25. On August 16, 1994, Respondents notified Victoria Bradford that she had been rejected as a tenant because of her disruptive follow-up behavior and because of unverified and inconsistent information contained in her application concerning her prior landlords. (T 73; S 10). Respondents stated to HUD's investigator that Victoria's application was not rejected so much because they could not verify where she previously lived, but primarily because she called them too many times. (T 101-107, 113; S 16).

26. In a letter dated August 28, 1994, Victoria notified Respondents that she was requesting an appeal meeting. (T 576-77; R 5, p. 3). On September 1, 1994, Margaret Mead responded by letter to Victoria's letter. She wrote that, after reviewing Victoria's application file, she concurred with Respondent Ruel's decision to reject the application. Nonetheless, Respondent Mead included in her letter an invitation for Victoria to call to arrange a meeting with her. (T 5, p. 5). Victoria did not make an appointment to meet with Mead because Mead had already told her that she concurred with the rejection. (T 430).

27. On November 8, 1994, Victoria Bradford filed a verified complaint with HUD alleging that the owners and managers of Pheasant Ridge Apartments violated the Act by discriminating against her based on her mental handicap. (S 3). She amended her complaint on May 10, 1995, to include all the Respondents. (S 4).

Applicable Law

Congress enacted the Fair Housing Act, which is Title VIII of the Civil Rights Act, to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers [which] operate invidiously to discriminate on the basis of impermissible characteristics." *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir.), *cert. denied*, 422 U.S. 1042 (1974). The Act was designed to prohibit "all forms of discrimination, [even] simple-minded." *United States v. Parma*, 494 F. Supp. 1049, 1053 (N.D. Ohio), *aff'd in relevant part*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 465 U.S. 926 (1982).

On September 13, 1988, Congress amended the Act by adding new Section 804 to prohibit, *inter alia*, discrimination "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. § 3604(f)(2); 24 CFR 100.202(b). Section 804 further states that discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford [a disabled person] equal opportunity to use and enjoy a dwelling ..." 42 U.S.C. § 3604(f)(3)(B); 24 CFR 100.204.

By adding this section, Congress recognized that discrimination against disabled people includes not only outright invidious discrimination, but also the failure by a landlord to take affirmative steps to ensure that disabled people enjoy the use of, or have access to, the facility to the same extent as non-disabled individuals. H.R. Rep. No. 711, 100th Cong. 2nd Sess. 25, *reprinted in* 1988 U.S. Code Cong. Admin. News 2186 ("H.R. No. 711").

The Act defines a handicap as being "(1) a physical or mental impairment which substantially limits one or more of such handicapped person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such impairment ..." 42 U.S.C. § 3602(h); 24 CFR 100.201. Under HUD regulations that implement the Act, "handicap" includes "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 24 CFR 100.210(a)(2).[3] Major life activities are defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 24 CFR 100.210(b).

The Act also provides that "[n]othing in this subsection [prohibiting handicap discrimination] requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 42 U.S.C. § 3604(f)(9). However, the House of Representatives also made clear that, "generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion." H. Rep. No. 100 at 711, 1988. The House report explains the provision authorizing denial of housing to physically violent persons as prohibiting denial of dwellings based on "generalized assumptions, subjective fears, and speculation" concerning threats to health or safety posed by handicapped persons. The report states that a landlord may only reject a handicapped applicant consistent with this provision if such action is based upon "objective evidence that is sufficiently recent to be credible, and not from unsubstantiated inferences, that the applicant will pose a direct threat to the health or safety of others." (Id.).

The legal framework to be applied to cases alleging violations of the Fair Housing Act is dependent on whether the evidence offered to prove the violation is direct or indirect. Direct evidence of discrimination presented by the complainant, if it constitutes a preponderance of the evidence, is sufficient to support a finding of discrimination. *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir. 1990); *HUD v. Jerrard*, Fair Housing - Fair Lending (P-H) para. 25,005, at 25,087 (HUDALJ Sept. 28, 1990). If the evidence of discrimination is indirect, the analytical framework to be applied is that which was developed as the three-part test for employment discrimination cases brought under Title VII of the Civil Rights Act, as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See, e.g., Politt v. Bramel*, 669 F. Supp. 172, 175 (S.D. Ohio 1989). *See also*, R. Schwemm, *Housing Discrimination Law*, at 323, 405-10 & n. 137 (1983). That burden of proof test is as follows:

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[3] Dyslexia is a learning disability to be regarded as a handicap. *Wynne v. Tufts University School of Medicine*, 932 F.2d 19 (1st Cir. 1991).

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

Politt, supra, at 175, *citing McDonnell Douglas, supra,* at 802, 804.

However, pretext alone does not necessarily prove discrimination. The complaining party still has the burden of demonstrating that an asserted reason, even though demonstrably pretextual, shows an intent to discriminate. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742; 125 L.Ed. 2d 407 (1993). In this case, because there is no evidence of direct discrimination, any proof of discrimination must be accomplished by the application of the described analysis.

Discussion

The *Prima Facie* Cases

To establish a *prima facie* case in this matter, the Secretary must prove by a preponderance of the evidence that: (1) the complaining party is a member of a protected class; (2) the complaining party applied for and was qualified to rent the subject property; (3) the complaining party was rejected as a tenant; and (4) after the rejection, the property remained available. *Davis v. Mansards*, 595 F. Supp. 334, 345 (N.D. Ind. 1984); *Phillip v. Hunter Trails Community Association*, 685 F.2d 184, 190 (7th Cir. 1982).

Jerome Bradford is a member of a class -- persons with handicaps -- whose members are afforded protection under the Act. He is mentally disabled, has borderline mental retardation, and suffers with dyslexia, which causes him problems with reading and math, and which limits to manual labor the types of jobs that he can perform. (T 366, 370).[4] These handicaps were known to Respondents Ruel and Mead because he informed them on his application to become a Pheasant Ridge tenant. (R 4, pp. 7,9). Jerome has been medically followed throughout life by neurological doctors and psychiatrists, he has learning disabilities, and he is of below normal intelligence. (T 271-73). Jerome receives

[4] Although Jerome denied in his deposition that he is mentally retarded, he stated that his mental handicaps are personal, and that he does not like to discuss them. (T 404, 405). Given Jerome's mental conditions, this discrepancy in his testimony is considered inconsequential.

Social Security benefits because of his mental disabilities. (T 366). These handicaps were not contested at the hearing.[5]

[5] After failing to contest the veracity of Jerome's claims of disabilities in the hearing, Respondents attempted to do so in their post-hearing brief.

Jerome Bradford applied and was qualified for housing at Pheasant Ridge Apartments. He pre-applied on March 5, 1993. He was then invited to complete an application, and did so on April 5, 1994. Everyone residing at Pheasant Ridge is low-income qualified. (T 486). Respondents place persons on a waiting list after they establish that the applicant qualifies. (T 491-92). By placing Jerome on the waiting list, Respondents determined that he qualified to rent an apartment at Pheasant Ridge. In fact, Jerome also qualified for a preference on the waiting list because he was paying over fifty percent of his gross income in rent and utilities at the time. (T 505).

Respondents rejected Jerome's application to become a Pheasant Ridge tenant on April 13, 1994. (S 8). The rejection was later affirmed as a result of his "appeal" meeting with Respondent Mead.

Respondents' procedure, when they reject an applicant, is to process the application of the next person on the waiting list. Since Jerome was rejected for the housing, it remained available until someone else was selected from the waiting list. (T 493-97). Thus, having met the elements necessary, the *prima facie* case is made with regard to Jerome Bradford's complaint.

In like manner, Victoria Bradford has also established a *prima facie* case of housing discrimination. She, too, is a member of a protected class, persons with handicaps, which is afforded protection under the Act.

Victoria has multiple mental disability, and she has attended special education classes because of her learning disabilities and mental retardation. As of the time of the hearing, she was under psychiatric care and was also being seen by a neurologist. (T 267-70, 413-14; S 23). Victoria suffered brain damage as a child, and she is apparently mentally slow. In addition to her basic neurological damage, she has ongoing problems that require psychiatric care; *e.g.*, she suffers from short periods of over anxiousness, which is symptomatic of her mental disability. (T 135; S 22). When she applied for a dwelling at Pheasant Ridge Apartments, Victoria informed the respondents that she is mentally disabled, has borderline mental retardation, epilepsy, schizo-affective disorder, mental illness, and anxiety disorder. (T 94-7; S 15). At the hearing, Respondents did not contest the veracity of Victoria's handicaps.

Victoria Bradford applied for housing at Pheasant Ridge on March 6, 1993. Her application was updated on July 14, 1994. Since she was placed on the waiting list, she is shown to have been found income-qualified, by the managerial Respondents, for tenancy at Pheasant Ridge. (T 486, 491-92).

Respondents rejected Victoria's application on August 16, 1994. (S 10). At the time Victoria was being considered for an apartment at Respondents' property, she was the only person being considered for the apartment that she was shown. (T 630, 636). After the rejection, the apartment remained available until the next person was selected from the waiting list. (T 493-97).

Respondents' Reasons for Rejecting Jerome

Respondents' proffered reasons for rejecting Jerome Bradford's application are pretextual. When they notified him of his rejection, they gave as their reasons, "Unfavorable present and/or past rental references." (S 8). They claimed that Ray Loomis, Jerome's then current landlord, informed them that Jerome had broken out Mr. Loomis's windows and had assaulted him. (T 56, 64-5; S 5, 7).

In a meeting held by HUD investigator James Webster on May 3, 1995, with Respondents Ruel and Mead, and in the presence of their attorney, Respondents advised Webster that they would stand by their statements regarding Jerome's rejection previously submitted to HUD; *i.e.*, that Loomis informed them that Jerome had assaulted him and broken out windows that he was installing. (T 101-107, 113; S 16).

On April 12, 1994, Respondent Ruel spoke with Jerome's landlord, Ray Loomis, to obtain a landlord reference. On the reference form that she filled out, she wrote that Jerome's "[r]ent was late a lot until family took over payment" and that he presently had no balance due, his rent payment habits were on time, and his housekeeping habits were good. (S 6). Ruel further indicated that, for instances of disturbance, "[a]t first there were a lot of complaints from other tenants that he would bang on pipes & wall at all hours but after he [Loomis] talked to him and family there had been none." For instances of damage, she noted, "June 90 he broke out all windows landlord put in because he didn't like them and then said (imaginary) brother did it." Finally, on the reference form, she wrote "yes" in the category of violence. (S 6). On the Applicant Intake Screening form, Ruel summarized the April 12, 1994, conversation with Loomis and added in commentary that Jerome had also assaulted Ray Loomis. (S 7).

However, the violent and destructive actions attributed by Respondents to Jerome did not occur as alleged by Respondents, and more significantly, Loomis did not report such actions to Respondents. Loomis testified that Jerome never assaulted him, and that he never told Respondents or anyone else that Jerome had assaulted him. (T 308-12). He further testified that Jerome never broke out windows and that he never told Respondents, or anyone else, that Jerome had done so. (T 308-12). As to the window incident, Loomis testified that he had "told the woman taking the reference" that Jerome had removed one window and had replaced it with another, and that his doing so had caused only

"negligible" damage. (T 310-11, 328). He stated on the stand that, by relaying to Respondents the window incident, he was only attempting to illustrate for them how Jerome was sometimes "a little peculiar." (T 318, 321-22).

Ray Loomis's testimony concerning Jerome's tenancy was consistent and credible.[6] He consistently maintained to HUD investigator Webster, and in his testimony, that he never told anyone that Jerome assaulted him or broke out any of his windows. (T 308-309). In addition, there is no evidence of inaccuracies in Loomis's landlord report to the Respondents. On the contrary, that the contemporaneous record of the telephone reference made by Respondents omits any reference to an assault is further indication of the accuracy of Loomis's testimony regarding that conversation. In contrast, Respondents' testimony was inconsistent, and it lacked complete credibility.

In their explanation of the rejection, Respondents maintained that it was also based upon information in a public records report regarding Jerome that they obtained from Accurate Research on April 8, 1994. (T 74-77; S 11). The report indicates that Jerome was arrested on June 7, 1990, for battery and property damage, but that the charges were dismissed. Respondent Ruel testified that she connected the criminal record report with what Loomis had told her, and concluded that the criminal damage to property and assault were against Loomis. As a result, she rejected Jerome's application. (T 525-28). However, there is no indication that Loomis or his property, or the person or property of any tenant of Loomis's, had been the subject of the battery or property damage. (T 69-72, 160; S 9). Thus, Respondent Ruel turned a statement by Loomis about Jerome's replacing a window into an assault on Loomis and damage to property by "breaking out windows." Moreover, Respondents maintained this position, without further investigation, in spite of Jerome's denials and offers of proof. The asserted reason is pretextual.

[6] Respondents offered the testimony of Robert Ciannetti, Ray Loomis's maintenance man, to refute Loomis's testimony that Jerome was a good tenant. However, his testimony is irrelevant to the reasons given by Respondents for Jerome's rejection for tenancy, because Respondents took the landlord reference solely from Loomis over the telephone. They had no awareness at that time of Ciannetti and his views regarding Jerome. Even if Ciannetti's testimony were relevant, it is tainted by unreliability and a lack of credibility because of animosity that existed between him and Jerome. (T 408-11).

In one of Jerome's futile attempts to explain the error concerning Respondents' belief that he had assaulted his landlord, Jerome came to the office on April 22, 1994, to show them the actual arrest report which indicated that he had done minor damage to his girl friend's car and had broken her finger in an altercation in June, 1990. However, Ruel testified that this did not change her decision because it still indicated a violent prospective tenant. This reasoning is pretextual because the incident on which the decision is based happened over four years prior to the application. *See, HUD v. Burns Trust,* Fair Housing - Fair Lending (P-H) para. 25,073, at 25, 679 (HUDALJ 09-92-1993-1, June 17, 1994). In that case, the administrative law judge held that Respondents' reasons were pretextual because the most recent minor incident of misconduct occurred at least a year before the Complainant was evicted.

I also find the reason pretextual because of the Respondents' inconsistent statements about the alleged violence and destruction of property and how it affected the application. Respondent Mead testified that an arrest without a conviction would not have been a basis for rejecting Jerome's application. She stated that Jerome could have been arrested for anything, but without a conviction, the arrest meant nothing. (T 78-9, 84-7, 708; S 12, 13). Respondent Ruel testified that, when she received the report from Accurate Research, she did not believe that Jerome had been convicted of any crimes.
(T 518-19). It was the Respondents' policy to reject people for arrest records only when there was a history of many arrests. (T 599). Respondent Ruel testified at another point that Jerome was not rejected for his arrest record. According to Ruel, if Jerome had a favorable landlord reference, he would have gotten the apartment in spite of the arrest record. (T 599-600). Thus, there was much in the two Respondents' testimony that was inconsistent with earlier statements to the investigator and, indeed, with earlier statements on the stand.

At the hearing, Respondents proffered other reasons to justify rejecting Jerome's application. Because they are *post facto*, and also because they are not sufficient reasons, Respondents' additional proffered reasons are also rejected as pretextual. These reasons are drawn from a landlord reference taken over the telephone which related events that at one time were problems with Jerome's tenancy, but were either resolved long before the reference was taken or were not significant problems. For example, Ruel also testified that she had rejected Jerome's application because he still had a bad landlord reference concerning complaints from other tenants about noise, his "skulking" in the basement, and his denying Loomis access to his unit. (T 528-34, 611-14, 618-25). However, Loomis had made clear that the complaints of noise were old and resolved, the so-called skulking was never shown to be more than a further indication of the bad feelings between Jerome and Ciannetti, the maintenance man, and Loomis's request for access to Jerome's apartment had been made without an appointment or, at least, prior notification. Furthermore, while Ruel testified that these things had been significant to her at the time of her rejection

decision, she had not included them on the form when she obtained the landlord reference and she did not include them in any of her extensive narratives.

Another *post facto* reason for Jerome's rejection proffered during testimony by Mead was that Jerome had not cooperated with the home visit. (T 704). However, whether Jerome cooperated in his home visit is irrelevant to the original reasons proffered as to why he was rejected as a tenant. In fact, Respondent Mead later contradicted herself by stating that Jerome was not rejected based on his home visit and that his lack of cooperation with the home visit was irrelevant. (T 748-49, 761).

None of these additional reasons for the rejection were noted on the landlord reference form or on the Applicant Intake Screening form. Thus, some were based on facts too old to be relevant, some were not credible, and all of them were outside those facts which comprised Respondents' original statements which they stated they wished to stand on when interviewed by the HUD investigator.

There was apparently nothing Jerome could have done or said to overturn his rejection at the appeal stage once the two managers had determined to reject him and had chosen to base their decision on the erroneous perception of Jerome as a violent tenant who would also damage property. Respondent Mead testified that she did not see any reason to overturn Ruel's rejection even though it turned out not to be his landlord that had been battered or had his property damaged, but instead, turned out to be an incident unrelated to Jerome's tenancy that had occurred over four years earlier, and in spite of the fact that there was no conviction. (T 707). According to Mead, in this part of her testimony, what mattered was that he had battered someone and damaged someone's property. She also emphasized again in that testimony, Jerome's supposed lack of cooperation with the home visit. Mead's stated reasons for upholding Jerome's rejection and denying his appeal are not credible and are inconsistent with her earlier testimony that an arrest without other criminal history or without conviction means nothing to the decision-making process and that Jerome's so-called failure to cooperate with the home visit was irrelevant. (T 708). These inconsistencies in the Respondents' reasons for the rejection, and their tenacious refusal to reconsider their decision in the face of Jerome's explanations and proffered proof of error, are evidence that they were committed to keeping Jerome out of the apartment complex even though he had never done anything to merit such exclusion.

In denying Jerome an apartment because of purported threats to safety and the property of Pheasant Ridge Apartments, Respondents are effectively attempting to avail themselves of the exception to the protections for the handicapped that are found in the Act at 42 U.S.C. § 3604(f)(9) and referred to earlier. The exception permits a housing provider to refuse to rent to any individual whose tenancy would constitute a direct physical threat to the health, safety or property of others. However, Respondents' reliance

on this section of the Act is misplaced, because their denial was based upon information that does not meet what Congress intended in passing this exception. The evidence Respondents relied upon, the landlord reference and the arrest record, were not "objective evidence that is sufficiently recent to be credible." It was, instead, "unsubstantiated inference," which Congress explicitly rejected, and it was four years old. This view is bolstered by Federal Courts that have concluded that to preserve the "broad and inclusive" coverage and "generous construction" of the protections guaranteed by the Act, the Act's exceptions must be interpreted narrowly. *City of Edmunds v. Oxford House, Inc.*, 115 S. Ct. 1776, 1780 (1995), *citing Trafficante v. Metropolitan Life Ins. Co.*, 93 S. Ct. 364, 366-67, 368 (1972). Moreover, Respondents overreached even further by not giving due consideration to the explanation and information supplied to them by Jerome to rebut their already unsubstantiated inference. Thus, I conclude, that the reasons proffered by the Respondents for refusing to rent an apartment to Jerome Bradford are pretextual within the meaning of the *McDonald Douglas* analysis and discriminatory within the meaning of the *St. Mary's* case.

Respondents' Reasons For Rejecting Victoria

Respondents' asserted reasons for denying Victoria Bradford's application also fail to pass the three-part test. When they notified her of her rejection, Respondents wrote as their reasons, "Unverifiable and/or inconsistent information and unsatisfactory interview and disruptive follow up by applicant." (T 73; R 5, p.1; S 10). This short written statement was described by the Respondents to mean that Victoria was rejected because she telephoned the Respondents too many times during the application process and tried to show the apartment to a friend without permission to visit. Respondents also complained that they could not verify where she previously lived, and that there was conflicting information between what Victoria put on her application and what her mother's landlord statement said regarding when she lived with her mother. (T 567-75).

Respondents contend that they rejected Victoria because of disruptive behavior: most importantly, approximately 20 "inappropriate" phone calls to their office while the application was pending, but also Victoria's unscheduled visit to show the apartment to a friend. (T 570-71). I find that the phone calls and the visit to show the apartment to a friend were manifestations of Victoria's anxiousness to have the apartment and are symptomatic of her handicap in so far as it includes anxiety disorder. Respondents had experience with mental disabilities and were specifically put on notice by Victoria in her application that she suffers from anxiety disorder. Any layman in the position of the managing Respondents should be able to understand and cope with such minor behavioral incidents. Thus, the Respondents cannot claim that the phone calls and the visit to Pheasant Ridge were legitimate, nondiscriminatory reasons for Victoria's rejection. It is therefore unnecessary to explore why the claim of "disruptive follow-up" is a pretexual and

discriminatory reason.

Nonetheless, I do find these reasons to be pretextual. Since Respondents documented nine calls and wrote extensive narratives concerning Victoria's application process, it is apparent that Respondents' testimony that there were 20 such calls is not credible. In addition, Respondents' written record of nine calls is more consistent with Victoria's testimony that she called between 10 and 15 times. Ruel defined "inappropriate" as meaning calls to ask about something she had already answered; a call that repeats prior learned information. (T 572). Ruel found the calls "irritating." (T 572). According to her own notes, all of the nine calls documented concerned the status of Victoria's application. Ruel stated at the hearing that none of the calls contained threatening or abusive language. (T 572). By then, she had conceded that the calls were appropriate to the application process. (T 570-71).

Respondents also stated that Victoria had created a disturbance by visiting Pheasant Ridge to show a friend what she believed would become her apartment, and asking another tenant about gaining access to the apartment. However, at the hearing, Shirley Kloss, the tenant who had reported Victoria's visit to the Respondents, testified that Victoria had caused no disturbance, but had only "talked loudly." (T 795).

Respondents' reasons regarding the application and interview information also fail the three-part test. Respondents' procedure is to check with applicants' prior landlords if they have the information needed to do so, but in cases where they do not have the information, they permit applicants to move in on the basis of a notarized statement from the relatives or other persons with whom the applicants then currently reside. (T 116-21, 501-02, 549, 586). In Victoria's case, she had provided a notarized statement from her mother, with whom she had lived since 1986. (R 5, p.83). But she also provided the name of her preceding landlord, Cynthia Powers. (T 422-24, 449). She did not have Powers's phone number at the time she filled out her application, but she provided the appropriate telephone and facsimile numbers later, after Respondents told her that they were having trouble verifying the prior landlord. (T 422-24, 448-49, 631).

Respondent Ruel testified at the hearing that she did not have a phone number for Cynthia Powers. (T 616). However, this contradicts her deposition testimony, in which she stated that Victoria gave her the telephone and fax numbers for Powers. (T 616). She further stated, at the taking of her deposition, that she never called Powers because of "conflicting information" regarding who Victoria's landlord was. (T 616-17). Obviously, this would have easily been explained, especially since Victoria's mother attended the meetings with Victoria. Nonetheless, Ruel admitted in the deposition that she never asked Victoria to clarify the "conflicting information" contained in the application. (T 631). She never asked Victoria's mother to clarify it, and she never called Cynthia Powers. Clearly, she had no intention to clarify this minor inconsistency in Victoria's

application. Thus, Respondents became committed to Victoria's exclusion, as they had been to her brother's, and this refusal to reconsider the application in spite of clarifications of the alleged problems indicates an intent to exclude the applicant for discriminatory reasons.

Respondents' Other Arguments

Respondents argue that their rentals to other disabled individuals, including mentally disabled tenants, demonstrates that their reasons for rejecting the two Bradfords were not discriminatory. However, evidence that Respondents rented to members of the same protected class as the complainants is not dispositive of discrimination. *David v. Mansards*, 579 F. Supp. 334 (N.D. Ind., 1984). Even if Respondents rented to a high percentage of individuals from the same protected class, it would not be dispositive of a claim of discrimination. *Asbury v. Brougham*, Fair Housing - Fair Lending (P-H) para. 15,635 at 16,266 (10th Cir., January 30, 1989). In further response to Respondents' theory, Respondents were not charged with failure to rent to an entire class of individuals; people with mental disabilities. They were only charged with failure to rent to Jerome and Victoria, individually, on the basis of their handicaps.

Respondents also argue that neither Jerome Bradford nor Victoria Bradford requested any special accommodations; that they did not request Respondents to process their applications in a different manner from those of other persons. (T 30-31, 577). In their post-hearing brief, they even say that the complaining parties failed to provide a doctor's opinion stating their illnesses and the special accommodations that they would require. (T 37, 41). Thus, Respondents imply that they had no duty under the Act to accommodate special needs of the two Bradfords. However, the minor problems that the two complaining parties had with the application process did not require any special accommodation of a nature that necessitated or warranted specific or special requests. All that was needed was quite ordinary courtesy and patience, and, perhaps, a small amount of assistance; *i.e.*, substantially the same treatment that any applicant should have been able to expect from an apartment rental office.

Respondent Mead testified that she considers a tenant who does not cause her problems to be the "perfect" tenant. According to Mead, two other mentally handicapped tenants of Pheasant Ridge, described to be very quiet, are both the "perfect" type of tenant that she prefers. (T 746-48). Within the definition, she sensed that Jerome and Victoria would not be "perfect" tenants. (T 747-48, 754). From this part of the testimony, it is reasonably inferred that Jerome and Victoria were not wanted as tenants, not because they fell into a class of unwanted tenants, but because they appeared to be candidates who would be less than "perfect" as tenants of Pheasant Ridge.

Respondents' apartment complex is intended to house low income, elderly and

handicapped, including mentally disabled, tenants, and it does so. (Answer, p. 3; T 33). However, it is clear that some handicapped individuals are "irritating" to Respondents. At the least, Jerome and Victoria, because of real or imagined manifestations of their handicaps, presented difficulties, however so minor, which Respondents decided they did not wish to deal with when they had a large waiting list of easier, more nearly "perfect" people from which to choose.

Even if the complaining parties in the instant case needed more accommodation than ordinary courtesy, patience and assistance, Respondents needed no request for accommodations from them.[7] It is general, laymen's knowledge that the mentally handicapped "have a reduced capacity to cope with and function in the everyday world." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985). Respondents Ruel and Mead were indisputably aware that the two Bradfords suffered from retardation and other mental disabilities. Thus, Respondents knew, or should have known, for example, that Victoria's difficulties completing the application and her "inappropriate" phone calls were manifestations of her disabilities.[8]

Conclusion of Liability

By refusing to rent apartments to Jerome Bradford and Victoria Bradford because of their handicaps of mental disabilities, Respondents have violated provisions of the Fair Housing Act that are codified at 42 U.S.C. § 3604(f)(1)(A) and, it follows, the HUD regulations that are found at 24 CFR 100.60(a). The Respondents Cynthia Ruel's and Margaret Mead's liability is established by reason of their direct actions as authorized management agents of the owners of Pheasant Ridge Apartments. The Respondent owners' liability is vicarious, and is reached by the logic of the laws of agency.

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[7] Respondents argued that this case was one of reasonable accommodation and that they are not liable under that theory. However, because I find that the respondents are liable under the *McDonald Douglas - St. Mary's* analysis, I need not consider exhaustively reasonable accommodation issues.

[8] It is emphasized again that these applicants did not need any "special" accommodation; just ordinary courtesy, tolerance, and assistance with the application process. With there being a continuous waiting list of over a year for Pheasant Ridge apartments, Respondents were free to choose tenants who they believed not to be irritating and to subject applicants to long waits with little or no communication. Most people, even those without mental disabilities, would become anxious under the circumstances described in this case.

The general rule in Fair Housing cases is that a principal is legally responsible for the acts, conduct, and statements of its agents that are done within the scope of the agent's apparent authority. *Cabrera v. Jakabovitz*, 24 F.3d 372, 385-89 (2nd Cir., 1993), *cert. denied*, 115 S.Ct. 205 (1994); *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1096-98 (7th Cir., 1992); *cert. denied*, 113 S.Ct. 2961 (1993). An employer is liable for the unlawful discrimination of its employees under the doctrine of *respondeat superior*. *Id.* An owner "is responsible as a matter of law for his employee's unlawful discriminatory conduct, even if he was unaware of, or did not explicitly ratify, that conduct." *HUD v. Properties Unlimited*, Fair Housing - Fair Lending (P-H), ¶ 25,009 at 25,154 (HUDALJ 02-89-0308-1, August 5, 1991). The duty not to discriminate is nondelegable. *United States v. Mitchell*, 335 F.Supp. 1004, 1007 (N.D. Ga. 1971), *aff'd. sub. nom., United States v. Bob Lawrence Realty*, 474 F.2d 115 (5th Cir., 1973), *cert. denied*, 414 U.S. 826 (1973) (a principal is liable even though it neither instructed its agent to discriminate nor ratified that discrimination later).

Accordingly, Respondents Pheasant Ridge Associates Limited, Margaret Mead, Cynthia Ruel, Sheldon Ginsburg, and Shell Development Corporation are jointly and severally liable for the discriminatory treatment of Jerome Bradford and Victoria Bradford that is described in this case.

Remedies

Section 812(g)(3) of the Act provides that where an administrative law judge finds that a respondent has engaged in discriminatory practices, 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 equitable relief." 42 U.S.C. § 3613(g)(3); 24 CFR 104.910(b). That section further states that the "order may, to vindicate the public interest, assess a civil penalty against the respondent." The maximum amount of a civil money penalty is dependent upon whether the respondent has been adjudged to have committed prior discriminatory practices. Where the respondent has not been adjudged to have committed any prior discriminatory practices, any civil money penalty assessed against the respondent cannot exceed $10,000. *See also* 24 CFR 104.910(b)(3) (1990). Otherwise, the maximum allowable civil money penalty is $25,000.

Expenses incurred in finding alternative housing and the difference in cost between the rent of a dwelling made unavailable by unlawful discrimination, and the cost of more expensive alternative housing, may be recovered if the evidence shows that the expenses and the choice of alternative housing were reasonable. *Hamilton v. Svatik*, 79 F.2d 383, 388-89 (7th Cir., 1985) ($500 for additional rent and transportation expenses); *Young v. Parkland Village, Inc.*, 460 F. Supp. 67, 71 (D. Md., 1978) ($88 in rent differential); *Brown v. Ballas*, 331 F. Supp. 1033 (N.D. Tex., 1971) ($750 for lost work and expenses in finding

alternative housing).

The complaining parties are also entitled to compensation for the time and money spent prosecuting their complaints and attending depositions and the hearing.[9] This forum has frequently ordered such compensation. *See, e.g., Blackwell, supra*, at 25,011 (lost wages for time to consult with attorneys and to attend hearing); *Properties Unlimited, supra*, at 25,150 (costs for missing four days' work, including two days for hearing and two days for travel); *HUD v. TEMS Ass'n*, Fair Housing - Fair Lending (P-H) para. 25,311 (litigation expenses incurred in separate but related litigation in another forum); *HUD v. Pfaff*, 2 Fair Housing - Fair Lending (P-H), para. 25,785 (lost wages to attend hearing).

The Secretary claims that the complaining parties suffered emotional distress as a result of Respondents' actions. In addition to actual damages, a Complainant is entitled to recover for this category of damage. *See, e.g., Blackwell, supra,* at 25,001; *Parker v. Shonfeld*, 409 F. Supp. 876, 879 (N.D. Ca. 1976). Because these abstract injuries are not subject to being quantified, courts have ruled that precise proof of the actual dollar value of the injury is not required. *Block v. R.H. Macy & Co.*, 712 F.2d 1241, 1245 (8th Cir. 1983); *Steele v. Title Realty Co.*, 478 F. 2d 380, 384 (10 Cir. 1973).

The administrative law judge assigned to decide a case of housing discrimination is accorded wide discretion in setting damages for emotional distress. R. Schwemm, *Housing Discrimination Law*, 260-62 (1983). Because of the difficulty of evaluating the emotional injuries which result from deprivations of civil rights, courts do not demand precise proof to support a reasonable award of damages. *See Marble v. Walker*, 704 F.2d 1219, 1220 (11th Cir., 1983) (plaintiff need not prove a specific loss to recover general, compensatory damages even though plaintiff's claim was based solely on mental injuries and there was no evidence of pecuniary loss, psychiatric disturbance, effect on social activity, or physical symptoms). *See also*, Heifetz and Heinz, *Separating the Objective, the Subjective, and the Speculative: Assessing Compensatory Damages in Fair Housing Adjudications*, 26 J. Marshall L. Rev., 17 (1992).

[9] The award of litigation expenses is not contrary to the "American Rule" because the complaining parties have not intervened and, therefore, they are not parties to the case. Their expenses are not being reimbursed by HUD, and HUD, which is a party to the case, is not requesting compensation for litigation expenses. *See*, Secretary's Post-Hearing Brief, p. 39, n. 28. *See also*, 28 U.S.C.A. § 1920, where costs associated with litigation have been awarded to prevailing complaining parties in civil rights and employment discrimination cases.

Furthermore, as with other types of injury cases, housing discriminators must take their victims as they find them, and damages must be awarded based upon the injuries suffered by the victim rather than calculating what would be due to some average or ordinary individual. *See, e.g., HUD v. Nelson Mobile Home Park*, Fair Housing - Fair Lending (P-H), ¶ 25,063, 25,612 (HUDALJ 04-91-0040-1, Dec. 2, 1993)(complaining party with pre-existing mental condition awarded $30,000); *HUD v. Jerrard*, 2 Fair Housing - Fair Lending (P-H), ¶ 25,005 (HUDALJ 04-88-0612-1, Sept. 28, 1990)(complaining party with pre-existing mental condition awarded $15,000).

Respondents' discriminatory conduct caused the two Bradfords to suffer losses and injuries, including economic losses, emotional distress, loss of housing opportunity, and inconvenience, for which they are entitled to compensation. The secretary requests $20,049 to compensate Jerome and $30,148 to compensate Victoria.

Jerome's Damages

Jerome Bradford was rejected for housing at Pheasant Ridge on April 13, 1994. (T 68; S 8). At that time, and at least through the date of the hearing, April 30, 1996, he lived at 5023 West Columbus Drive, Oak Lawn, Illinois. (T 338). At that address, he was paying $325 per month in rent at the time of his rejection. (T 303, 438-49). At that rate, he was left with very little money for his other needs. T 348-49). By the time of the hearing, his rent had been increased to $345 per month; it had been raised in April, 1995. At Pheasant Ridge, he would have been required to pay rent based on a portion of his earned income. There, the average monthly rent that tenants must pay is $60, and Jerome's rent would have been approximately that amount. (T 727). From April, 1994, to April, 1995, when his rent was increased, the monthly rent differential was approximately $325 - 60 or $265. Thus, for the 12-month period, it was $3,180. After the rent increase and until the hearing in April, 1996, the monthly rent differential was approximately $345 - 60, or $285. Thus, for the second twelve-month period, it was $3,420. The total rent differential is $6,600.

After his rejection for an apartment at Pheasant Ridge, Jerome continued until January 1996, to look for an apartment that would meet his financial needs. (T 399, 407). He spent about 24 hours per week in this futile search. (T 348-53). During this period, his average pay was $6.09 per hour. (T 362-64). Nine months of searching, at 24 hours per week, is compensated by applying his hourly wage to the time spent, which yields $4,092. However, the secretary demanded only $1,900 to compensate Jerome for his efforts.

Jerome was required to use public transport every time he looked at an apartment. This cost him $3.60, round trip, each time. (T 353). From the time of his rejection until January, 1996, he took approximately three such trips per week. (T 351). This yields an

additional $970.

To prepare the case, Jerome met with HUD attorneys and investigators 15 times, with each meeting lasting approximately an hour. (T 359). This, times his hourly wage, yields $91. To attend the meetings, Jerome spent about an hour and a half each way on public transport, and this yields $259. The costs of the transportation was $3.60 per round trip, which yields $54. (T 353). Jerome also spent about four hours being deposed at Respondents' attorney's office. (T 357). Jerome's time is again taken against his hourly wage, and the round trip distance of 14 miles is taken against the reasonable allowance of $.30 per mile, which yields $24. His loss for attending the hearing for three days is calculated in like manner to be $146. Thus, the total due Jerome to compensate him for the time spent prosecuting the case is $579, and the total economic loss is $10,049. This last named amount will be ordered paid by the respondents to Jerome Bradford at the end of this Initial Decision.

As a result of his rejection by Pheasant Ridge, Jerome felt disappointed and discriminated against on the basis of his mental disabilities. (T 348). Jerome knew that he had a right to that housing and that Respondents deprived him of that right because of their stereotypes and generalized preconceptions about him. Respondents saw him as a mentally handicapped person, and bolstered their adverse view of him by their own unfounded speculations about threats to safety and property. They were totally remiss in not pursuing the truth of these issues, but simply went on to the next person on the waiting list because that action would hold out hope of finding a less bothersome tenant. There was no evident concern on their part about whether Jerome would be able to secure the type of housing that he needed and that Pheasant Ridge provides. It is not hard to imagine the frustration, even anguish, that being treated in this manner would cause.

In an attempt to prove that he was worthy of tenancy at Pheasant Ridge, Jerome set out to disprove the reasons given for his rejection, as he was invited by Respondents to do. (T 342-48). For example, he went to the state records office and got a copy of his arrest record to show that the incident was old and did not involve his current landlord. However, these efforts were futile from the beginning. Respondents would not accept the document. It is clear from Respondents' testimony that there was nothing Jerome could have done or said at that time that would have changed Respondents' minds about accepting him. This experience no doubt compounded Jerome's exasperation, pain and suffering.

The sense of discrimination that Jerome felt was greater and more painful than his embarrassment about his mental disabilities allowed him to say. It is a common lesson learned from discrimination cases that the nature of discrimination can so affect a person that at a later encounter the person cannot articulate the pain that such discrimination causes. Individuals seek redress not only because the law has been violated, but because they have been personally offended. Pain, anger, and hurt underlie the individual's move

to take legal action. Jerome is embarrassed by his disabilities and does not like to discuss them, and yet he has had to do so throughout this ordeal. Similarly, he was reticent to discuss the effect that Respondents' actions had upon him. But it could be seen and heard in Jerome's manner and voice, and, indeed, in the very reticence that kept him from stating a full description of his feelings.

Jerome was also frustrated in his attempt to find more suitable housing. At his pay level, he needed subsidized housing, and he feels it is essential to live in an area that is safe and not crime-ridden. (T 407). Because of Respondents' discrimination, Jerome felt trapped in his then current housing. There, he had to pay far more rent than he could afford. In addition, the maintenance man at his residence created a hostile environment for him by subjecting him to threats and exaggerated adverse stories told to the landlord. (T 411). This employee stated that he knew that Jerome "marches to a different drummer." (T 671). Thus, Jerome suffered further by having to remain in an intimidating environment where he did not feel safe and which he could not afford without sacrificing nearly everything else he would want to do with his modest earnings. This situation was extremely frustrating and depressing, and must be considered along with the other intangible effects on Jerome that are described above. Nonetheless, the secretary has asked for compensation for emotional distress in the amount of only $10,000, and that amount will be awarded in the Order that follows later.

Victoria's Damages

Victoria Bradford's economic losses are calculated in the same way as her brother's. To prepare her case against Pheasant Ridge, Victoria traveled into Chicago five times, by train, with the cost of doing so $3.50 round trip. On each occasion, she had to take an entire eight-hour day off work. (T 480-81). She works at a McDonald's restaurant earning $5.10 per hour. (T 435). She also lost three full days of wages to attend the hearing and another for the taking of her deposition at Respondents' attorney's office. (T 482). Thus, she lost $367 in wages.

Victoria traveled in her mother's car, approximately 26 miles round trip, for the deposition. Transportation for the hearing was by train at $3.50 round trip. Thus, Victoria's total transportation cost for the hearing and hearing preparation was $33, for a total direct economic loss of $403, which will later be ordered paid to her.[10]

[10] The Secretary, after going through this listing, only asks for $147.80 in economic losses. I take this to be a minor arithmetic error and award the whole amount described.

Victoria sought the housing at Pheasant Ridge because she wanted to again be on her own and because she and her mother were not getting along. (T 443, 446). She had lived in group homes for the mentally ill and with her mother, but she felt prepared to live on her own again, as she had done before, when working. (T 425-26). She liked the apartment she had been shown on the day of her interview. It was clean, quiet, and close to stores, and it had a balcony on which she intended to keep flowers. Pheasant Ridge is also near the Orland school system offices where she hoped to get a better job than the one at McDonald's. (T 426).

All her hopes for a new and better life were dashed by the rejection at Pheasant Ridge. Prior to that, Victoria's anxiety disorder had been under control. She felt confident and ready to be on her own. This disorder got worse after the rejection. (T 463-65). She had problems with her nerves from the stress she felt. Her rejection triggered off a period of anxiety and tremors for her. It effected her sleep, and distracted her from her job, where she was transferred from the cash registers to the cleaning crew. Victoria thought about her rejection frequently. It became a major burden on her mind. She visited her doctor to seek help for the anxiety and tremors, and he prescribed Ativan (lorazepam) to help calm her down. (T 426-28).

The rejection also caused Victoria a great deal of inconvenience. She works at the McDonald's in Moraine Valley Community College in Palos Hills, Illinois. (T 435). This McDonald's is approximately six or seven miles from Pheasant Ridge Apartments. (T 475). At the time of the rejection, Victoria was living with her mother in Crestwood, Illinois, from which it took approximately an hour and a half on public transport to get to McDonald's. (T 440-41). After the rejection, Victoria moved into a Thresholds group home for the independently disabled in the Hyde Park area of Chicago. From there, it took two and a half hours each way to go to McDonald's and back. (T 438-40). She then moved to another Thresholds home which provided better housing, but was still two and a half hours from McDonald's. At the time of the hearing, she was living at a third Thresholds home with a like travel time to McDonald's.

Thus, Victoria was subjected to the stress and inner pains of having been discriminated against, in the same manner as her brother, and she was subjected to extraordinary inconvenience getting to and from her job. But she also suffered special damage as a result of her pre-existing mental conditions; her anxiety condition was exacerbated. The Secretary argues that an appropriate amount of compensation for Victoria's emotional distress and inconvenience is $30,000. I do not disagree.

Various awards of damages for emotional distress have been made by this forum in housing discrimination cases, and these can be compared to the instant case for some guidance. In *Blackwell*, $40,000 was awarded to a black couple for the embarrassment,

humiliation, and emotional distress of having been denied a house because of their race. This was a clear case of open and blatant racial discrimination perpetrated by a real estate agent who knew, or should have known, that he was acting illegally. In *Murphy, supra*, awards of $150, $400, $800, $1,000, and $5,000 were made for emotional distress and loss of civil rights, with the award of $150 being made to a party who "... suffered the threshold level of cognizable and compensable emotional distress." (at 25,057). In *HUD v. Guglielmi and Happy Acres Mobile Home Park*, Fair Housing - Fair Lending (P-H), ¶ 25,070 at 25,079, I awarded $2,500 to the Complainant where I found that the Respondents had "... contributed significantly to [Complainant's] actual and perceived loss of civil rights, feelings of embarrassment and humiliation, and general emotional distress" for the better part of a year, and in *HUD v. Baumgardner*, Fair Housing - Fair Lending (P-H), ¶ 25,094 at 25,101, I awarded $500 to a young man who had been discriminated against on the basis of sex "because men are messy tenants". He did not appear to be a man of vulnerable constitution, but he said that he was angry, hurt, and frustrated by the denial of the house he wanted and that it was a source of anger and distress for a few months.

This case is most nearly like *Blackwell* because the discriminating parties knew, or at least should have known, that what they were doing was wrong. Moreover, with regard to Victoria, Respondents discriminated against a person with a pre-existing condition that was much exacerbated by their discriminatory conduct. Thus, a total amount of $30,403 will be ordered paid to Victoria by the respondents to compensate her for the damage they caused her.

Civil Penalty

The maximum penalty that may be imposed upon a respondent who has not been adjudged to have committed any prior discriminatory housing practices is $10,000. Otherwise, it is $25,000. *See* 42 U.S.C. §3612(g)(3); 24 CFR 104.910(b)(3). In the instant case, the Secretary has asked for the imposition of a civil penalty of $10,000 for each of the Respondents' two acts of discrimination in violation of 42 U.S.C. § 3604(a).

In addressing the factors to be considered when assessing a request for imposition of a civil penalty, 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 respondent, the ALJ should consider the nature and circumstances of the violation, the degree of culpability, and any history of prior violations, the

> financial circumstances of that respondent and the goal of deterrence, and other matters as justice may require.

Respondents' refusal to rent to the two Bradfords was absolute; without any willingness to discuss their qualifications. It was a frustrating and hurtful way for the complaining parties to be treated. Respondents refused the housing contrary to their purpose of providing housing to the handicapped. The two managerial employees had worked for many years at Pheasant Ridge and therefore knew, or should have known, that their action was unlawful. They selfishly put their own convenience ahead of the very real needs of these two prospective tenants as well as the contractual obligations of the apartment complex. They also dissembled in their explanations to the investigator and this forum.

Respondents' financial circumstances suggest that only the imposition of a large civil penalty for the violation they committed could have a significant impact on their overall financial status. Pheasant Ridge, alone, is a large land holding, and the nature of some of the respondents indicates the availability of large sums of money. Only if the penalty for their actions makes a significant dent in their resources can it be believed that the imposition of a penalty will reenforce the significance of the Act's prohibition against discrimination. Furthermore, only a large penalty will provide a message to others that discriminatory practices will not be tolerated under the Act.

Thus, the only factor mandated by Congress for consideration when imposing a civil penalty that militates against imposition of the maximum penalty of $25,000, is that the respondents have not been previously judged in violation of the Act. Consideration of all the others points the way to a major penalty. Accordingly, a civil penalty of $10,000 for each of the two cases of discrimination will be imposed in the Order at the end of this initial decision.

Injunctive Relief

Section 812(g)(3) of the Fair Housing Act also authorizes the administrative law judge to order injunctive or other equitable relief to make the complainant whole and to protect the public interest in fair housing. "Injunctive relief should be structured to achieve the twin goals of insuring that the Act is not violated in the future and removing any lingering effects of past discrimination." *Marable v. Walker*, 704 F.2d 1219, 1221 (11th Cir. 1983).

The purposes of injunctive relief in housing discrimination cases include the elimination of the effects of past discrimination, the prevention of future discrimination, and the positioning of the aggrieved persons as close as possible to the situation they would

have been in but for the discrimination. *See, Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1036 (8th Cir. 1979), *cert. denied*, 445 U.S. 905 (1980). Once a judge has determined that discrimination has occurred, he has "the power as well as the duty to use any available remedy to make good the wrong done'." *Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1975).

While the Secretary has stated the above in his brief, he has not stated with any particularity the specific injunctive relief for which he prays on behalf of the complaining parties. The relief sought in the Charge of Discrimination is also of a very general nature. Thus, it is up to this forum to fashion appropriate injunctive relief.

It is appropriate to ensure that the Respondents cease certain activities and undertake certain other actions so long as they continue to rent housing. Therefore, a number of specific provisions of injunctive relief are set forth in the Order issued below. This is also a case where it is not too disruptive to fashion injunctive relief for the purpose of "making the complainant whole." Injunctive relief designed to achieve this goal will be included in the Order.

Order

Having concluded that Respondents violated the Fair Housing Act by discriminating against Jerome Bradford and Victoria Bradford on the basis of their handicapped status, it is hereby

ORDERED that,

1. Respondents are permanently enjoined from discriminating against the two Bradfords, or any member of their families, and from retaliating against or otherwise harassing them or any member of their family. Prohibited actions include, but are not limited to, all those enumerated in the regulations codified at 24 CFR Part 100(1989).

2. Respondents shall institute record-keeping of the operation of all of their rental properties, owned or otherwise controlled by the Respondents within the jurisdiction of HUD's Chicago Office, which are adequate to comply with the requirements set forth in this Order, including keeping all records described in paragraph 3 of this Order. Respondents shall permit representatives of HUD to inspect and copy all pertinent records at reasonable times after reasonable notice.

3. On the last day of every third month beginning December 31, 1996, and continuing for three years, Respondents shall submit reports containing the following information regarding the previous three months, for all properties owned or otherwise

controlled by the Respondents within the jurisdiction of HUD's Chicago Office, to HUD's Director, Fair Housing Enforcement Center, U.S. Department of Housing and Urban Development, 77 W. Jackson Blvd., Chicago, Illinois 60606, provided that the Director may modify this paragraph of this Order as deemed necessary to make its requirements less, but not more, burdensome:

a. a duplicate of every written application, and written description of every oral application, for all persons who applied for occupancy of all Respondents' properties effected by this Order, including a statement of the person's handicap status, whether the person was accepted or rejected, the date of such action, and, if rejected, the reason for the rejection;

b. a list of vacancies at all Respondents' properties effected by this Order including each departed tenant's handicap status, the date of termination notification, the date moved out, the date the unit was next committed to rental, the handicap status of the new tenant, and the date that the new tenant moved in;

c. current occupancy statistics indicating which of the Respondents' properties are occupied by handicapped individuals;

d. sample copies of advertisements published or posted during the reporting period, including dates and what, if any, media was used, or a statement that no advertising was conducted;

e. a list of all persons who inquired in any manner about renting one of Respondents' units, including their names, addresses, handicap status, and the dates and dispositions of their inquiries; and

f. a description of any rules, regulations, leases, occupancy standards, or other documents, or changes thereto, provided to or signed by any tenants or applicants.

4. Respondents shall inform all their agents and employees of the terms of this Order and shall educate them as to these terms and the requirements of the Fair Housing act.

5. Within 30 days of the date this Initial Decision and Order is issued, the respondents shall pay damages in the amount of $20,049 to Jerome Bradford and $30,403 to Victoria Bradford to compensate them for their losses that resulted from Respondents' discriminatory activity.

6. Within 30 days of the date this Initial Decision and Order is issued, the respondents shall pay civil penalties totaling $20,000 to the Secretary, United States Department of Housing and Urban Development.

7. No sooner than 30 days after the date this Initial Decision and Order is issued, Respondents shall make the next two one-bedroom apartments available at Pheasant Ridge, or at another of Respondents' locations, at the option of the complaining parties, available to Jerome Bradford and Victoria Bradford to rent.

8. Within 30 days of the date that this Initial Decision and Order is issued, the respondents shall submit a report to HUD's Director, Fair Housing Center, at the Chicago Office that sets forth the steps they have taken to comply with the other provisions of this Order.

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

/s/

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ROBERT A. ANDRETTA
Administrative Law Judge