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 Dionne Staples,

Charging Party,

v.

Michael P. Kelly and John T. Kelly

Respondents.

HUDALJ 05-90-0879-1
Decided: August 26, 1992

Robert G. Kelly, Esquire
For the Respondent

Michael **J.** Mooney, Esquire
For the Complainant

Konrad **J.** Rayford, Esquire
For the Secretary

Before:
THOMAS C. HEINZ
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This proceeding arises out of a complaint filed by Dionne Staples ("Complainant") alleging that Michael P. Kelly and John T. Kelly ("Respondents") violated the Fair Housing Act, 42 U.S.C. Sec. 3601 *et seq.* (sometimes "the Act"), by refusing to negotiate the rental of a dwelling; discriminating in the terms, conditions, or privileges of rental of a dwelling; and malting statements concerning the rental of a dwelling that indicated a preference, limitation, or discrimination based on the familial status of Complainant. The Department of Housing and Urban Development ("HUD," "the Secretary," or "the Government") investigated the complaint, and after deciding that there was reasonable cause to believe that

discriminatory acts had taken place, issued a Charge of Discrimination against the

Respondents on March 2, 1992.1 The Charge alleged violations of sections 804(a), (b), and (d) of the Act (42 U.S.C. Secs.(a), (b), and (d)), as well as sections 100.60, 100.65, 100.70, and 100.75 of the regulations promulgated thereunder (24 C.F.R. Secs. 100.60, 100.65, 100.70, and 100.75).

After Answers were filed to the Charge and Complainant was granted permission to intervene, an oral hearing was held on May 27, 28, and 29, 1992 in Cincinnati, Ohio, at the close of which the parties were ordered to file proposed findings of fact, conclusions of law, and briefs in support thereof. The last brief was received July 23, 1992. On August 1, 1992, Respondents filed a Reply Memorandum and Request For Acceptance. The request will be granted.

Findings of Fact

1. Complainant Dionne Staples is an African-American, single mother of twin daughters who were five years old in March 1990. Tr.280.2 She works full-time as an

accounts-payable clerk for John Morrell & Co., where she earned approximately $16,000 per year (or $8.17 per hour) in March 1990. Tr.290. In late 1989 and early 1990, Complainant and her children were living with her parents in the Pleasant Ridge-Silverton area of Cincinnati, Ohio, in very cramped quarters where all five people slept in the same room. Tr.299, 307. These unsatisfactory living conditions created considerable tension in the family and prompted Complainant's parents to ask that she find another place to live. Complainant searched for better accommodations for several months, but she had great difficulty finding a suitable apartment because of her low income. Tr.298.

2. In early March 1990 a sign was posted in front of a 31-unit apartment complex at 6300 Montgomery Road in Cincinnati that said, "apartment available, two bedroom, one and a half baths," and gave a telephone number, 321-0077. Tr.281, 413. Complainant called that telephone number on March 5, 1990, and spoke with an unidentified man who answered the telephone. She testified that after some preliminary discussion about the apartment:

> He then asked me who would be occupying the apartment. I told him myself and my two daughters. And he said, oh, well, we have a problem. And I said, a problem, he said, yes. He said, you have one to[o] many children. And I said, one to[o] many children? He said, yes, we only allow one child per bedroom. And I said, oh. There was a short pause and I said okay, thank you, good-bye.

Tr.282. *See also* SX.3.

'James Kelly was also named as a Respondent in the Charge, but he was later removed from the case pursuant to a stipulation between the parties. Order, May 21, 1992.

2The following reference abbreviations are used in this decision: "Tr." for "Transcript"; "SX." for "Secretary's exhibit"; and "RX." for "Respondents' exhibit."

3. As a person without an automobile, Complainant was particularly interested in the apartment at 6300 Montgomery Road because she considered the location ideal: it is near her parents and friends in an area of the city where she grew up; a direct bus to her job stops in front of the complex; a drug store is a block away; it is close to a library and to a school for her daughters; a grocery store is within one or two blocks; the complex is in "a nice residential area with children and sidewalks"; and there are parks nearby. SX.3; Tr.303, 304. Furthermore, she had been told by an acquaintance that the rent for a twobedroom unit was $375 per month, an amount she felt she could afford, particularly since her parents were willing to co-sign a lease. SX.3.

4. After completing her telephone inquiry regarding the apartment at 6300 Montgomery Road, Complainant made no further attempt to rent an apartment there. Rather, she continued to search elsewhere. Approximately a month and a half later, she and her daughters moved into an apartment that rents for $425 per month in a complex called "Kenwood Towers," located in a secluded, wooded area with no sidewalks and no play area. The complex does not have convenient public transportation or shopping, but tenants do have the use of a pool and barbecue pits. Tr.304-05, 332.

5. Complainant must leave for work before her children go to school. If she had rented an apartment at 6300 Montgomery Road, her parents could have picked up the children in the morning before she left for work on the bus at 7:25 a.m. Now she leaves her home at 7:00 a.m., drives 3.5 miles to her parents' home in an automobile borrowed from her parents, leaves her daughters in her parents' care, and drives another 3.5 miles from her parents' home to a shopping area where she parks the car and at 7:35 a.m. catches the same bus to work she would catch ff she lived at 6300 Montgomery Road. In other words, Complainant's commute to and from work is 25 minutes longer each way and more complicated than it would have been if she had become a tenant at 6300 Montgomery Road. Tr.307-09.

6. Complainant is able to borrow her parents' car only five days a week. Therefore, if she needs to go somewhere on the weekend, she must call someone to ask for a ride because she does not have access to convenient public transportation. Tr.310.

7. Six to eight months after moving into Kenwood Towers, Complainant, concluding that the apartment was unsatisfactory, began looking for another residence. Tr.301. Until the date of the hearing, she continued to go through the newspaper and make

telephone calls seeking an apartment closer to her parents and friends, but had been unable to find one within her budget. Tr.301.

8. The apartment at 6300 Montgomery Road that Complainant sought to rent was rented on March 17, 1990, to a couple without children. Answer of Respondent Michael P. Kelly, p.2.

9. Respondents Michael P. Kelly and John T. Kelly are brothers who, together with Kathie Kelly, the wife of their brother James, own the apartment complex at 6300 Montgomery Road. Respondents and their brother James purchased the complex in 1978,

but James transferred his interest to his wife in December of 1989. Tr.459, 578; SX16. Profits and expenses are divided equally among the owners. Tr.488, 528, 579, 610. When an apartment becomes available for rent, responsibility for finding a new tenant is assumed on an ad hoc basis by one of the Kelly brothers. In the words of Respondent Michael P. Kelly, they "take turns." Tr.460, 461, 578; SX.15. Kathie Kelly does not participate in the rental of the apartments, except for taking telephone calls at her home when it is James Kelly's turn to rent an apartment. Tr.579-580.

10. Respondent John Kelly has been a federal administrative law judge in Cincinnati since 1978. Tr.592.

11. Respondent Michael Kelly has been a real estate broker since 1983. He is the sole owner of Michael P. Kelly Realty company, with offices at 3330 Erie Ave., Cincinnati, Ohio. Tr.459, 474. In March 1990, six people worked at Michael P. Kelly Realty, two of whom were women. Tr.519, 553. The telephone number Complainant called on March 5, 1990, to inquire about the apartment is the telephone number of Michael P. Kelly Realty company. Tr.462. Everyone at Michael P. Kelly Realty was authorized to answer telephone inquiries about vacant apartments at 6300 Montgomery Road. Tr.559.

12. In March 1990 it was Res ondent Michael KeHys "turn" to find a tenant for an apartment at 6300 Montgomery Road. Tr.461.

13. Tmmediately after Complainant's telephone conversation of March 5, 1990, regarding the apartment for rent at 6300 Montgomery Road, she called H.O.M.E., Inc., a nonprofit fair housing organization in Cincinnati. Tr.312. Prompted by Complainant's contact, H.O.M.E. conducted an investigation using several testers who posed as prospective renters of the apartment. Two of them, Kathleen Lester and Adonica Jones, testified.

14. On March 7, 1990, pursuant to an appointment, Ms. Lester went to 6300

Montgomery Road to meet Michael KeRy. After they discussed the apartmen@ Respondent
Michael Kelly asked Ms. Lester if she lived alone, to which she replied:

> And I said, no, I had two elementary school children.
>
> Q. What happened at this point?
>
> Before then, Mr. Kelly had maintained eye contact with me. When I told him I had two children, he very abruptly folded his arms and his eyes went towards the ceiling and he didn't say anything, but his expression on his face changed.
>
> I believe he was not pleased with the fact that I said I had two children.

Tr.63. *See also* SX.5.

15. On March 12, 1990, Adonica Jones, a tester for H.O.M.E., telephoned Michael
P. Kelly Realty to inquire about the two-bedroom apartment for rent and spoke with an unidentified woman who asked if Ms. Jones was married and had children, explaining that "she had to know because the owner only allowed one child in the apartment." Tr.34. *See also* SX.4.

16. Under the City of Cincinnati Buflding Code, an apartment occupied by three persons must have a total living area of at least 350 square feet. A bedroom for one person may have a floor area as small as 70 square feet, but a room occupied on a regular basis by two persons for sleeping purposes must have a minimum of 100 square feet of floor space. SX.20; Tr.95, 396, 398, 405, 412.

17. The two-bedroom unit at 6300 Montgomery Road sought by Complainant, apartment number 10, has a total living area of approximately 503 square feet. The floor space measures approximately 145 square feet in the larger bedroom and about 94 square feet in the smaller bedroom. SX.19. Complainant and her two daughters could have lived in apartment 10 without violating the City of Cincinnati Building Code.

18. At the time of IILJD's investigation of this case, two of the 31 rental units at 6300 Montgomery Road were occupied by families with two children. In one of these, the children arrived after the tenancy began. The lease for the other family was signed by Respondent John Kelly in June of 1989, approximately three

months after the Fair Housing' Amendments Act became effective. - Six apartments had tenants with one child, and the remainder had no children. SX.22; Tr.97-9. Respondent John Kelly testified that he rented an apartment to an unidentified third family with two children in 1983. Tr.480, 582.

19. Complainant filed her complaint with HUD on May 17, 1990. Copies of the complaint and cover letters were sent on May 18, 1990, to Michael Kelly at 2147 St. James Ave., Cincinnati, Ohio; John Kelly at 2147 St. James Ave., Cincinnati, Ohio; and Michael P. Kelly Realty Co., 3330 Erie Ave., Cincinnati, Ohio. Respondent Michael Kelly signed a return receipt card evidencing receipt of the material sent to Michael P. Kelly Realty Co. on May 24, 1990. Shortly thereafter, Respondent Michael Kelly mailed a copy of the complaint to Respondent John Kelly. Neither Respondent has ever lived or worked at
[3] 2147 St. James Ave. Tr.7 -10, 591. That address was mistakenly entered on the complaint by an employee of H.O.M.E. who also mistakenly included race as a basis for the complaint. Tr.430, 432.

20. On June 5, 1990, HUD received a written response to the complaint from Respondent Michael Kelly in which he mistakenly identified his brother James (rather than

[3] The return receipt card for the material addressed to John Kelly was returned to the Government with a signature that is difficult to decipher but that could reasonably be interpreted by someone unfamiliar with John Kelly's handwriting as the signature of John Kelly. *See* exhibit 3 in the Secretary's Memorandum in Opposition to Respondents' Motion to Dismiss, dated May 20,1992. After receiving the return receipt card, the Government appears to have continued to prosecute the case on the basis of such an interpretation until shortly before the case went to trial.

James' wife) as the third owner of 6300 Montgomery Road. SX.15. The response was written with the assistance of Respondent John Kelly and notarized by another Kelly, Robert. See Finding of Fact 9, *supra.* Tr.473, 474.

21. Both Respondents attended a conciliation meeting with HUD officials on July 19, 1990. RX.5, Tr.83, 460, 597.

22. On July 27, 1990, HUD sent an amended complaint to Michael and Jack Kelly at 3330 Erie Avenue, the address of Michael P. Kelly Realty.' The amended complaint removed race as a basis for the action. Tr.473, 474.

23. On August 8, 1990, HUD received from Respondent John Kelly a written response to the amended complaint of July 27, 1990, in which he states, *inter alia,* that he was not named in the original complaint, but that he is named in the amended complaint, thereby acknowledging that he had received actual notice of Complainant's allegations

that she had been a victim of housing discrimination in connection with an apartment at 6300 Montgomery Road. SX.17.

24. HUD made offers to conciliate the complaint to either Respondent Michael Kelly or Respondent John Kelly on May 24, 1990, July 19, 1990, July 27, 1990, August 2, 1990, and September 19, 1990. Tr.561, 598, 642; RX.5, p.3; SX.16.

25. On November 5, 1990, HUD prepared for Complainant's signature a second amended complaint naming James Kelly as a respondent. The complaint was sent via certified mail to an incorrect address and the return receipt card was not returned. The Government later dropped James Kelly as a respondent from this case.

26. The Secretary failed to complete the investigation of Complainant's allegations of housing discrimination by August 25, 1990 -- that is, within 100 days of the filing date of the complaint -- and failed to notify Respondents of the reasons why the investigation could not be completed within 100 days, as required by 24 C.F.R. Sec. 103.225. Secretary's Motion of May 20, 1992, p.S.

27. The Secretary failed to make a reasonable cause determination within 100 days of the filing of the complaint as required by 24 C.F.R. Sec. 103.400, and failed to notify Respondents of the reason for the delay, as required by 24 C.F.R. Sec. 103.400(c)(2). Secretary's Motion of May 20, 1992, p.5.

28. On March 2, 1992, almost exactly two years after the events occurred that form the basis of this case, the Secretary issued the Reasonable Cause Determination and Charge of Discrimination.

4HUD's investigator sometimes referred to Respondent John Kefly as "Jack Keffy." *See, e.g.,* SX.17, 18.

Subsidiary Findings and Discussion

The Congress passed the Fair Housing Act to "[ensure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics." *United States v. Parma,* 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *revd on othergrounds,* 661 F.2d 562 (6th Cir. 1981), *cell. denied,* 465 U.S. 926 (1982). *See also United States v. City of Black JacA;* 508 F.2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975); *cf. Giiggs v. Duke Power Co.,* 401 U.S. 424 (1971). The Act was designed to prohibit "all forms of discrimination [even the] simple-minded." *Williams*

v. Matthews Co., 499 F.2d 819, 826 (8th Cir. 1974).

On September 13, 1988, the Act was amended to prohibit, *inter alia,* housing practices that discriminate on the basis of familial status.' 42 U.S.C. Secs. 3601-19. "Familial status," as relevant to this case, is defined by the Act as "one or more individuals (who have not attained the age of eighteen years) being domiciled with ... (1) a parent or another person having legal custody of such individual or individuals..... *Id.* at Sec. 3602(k); 24 C.F.R. Sec. 100.20. Complainant and her daughters fall within this definition.

The Act makes it unlawful for anyone to:

> refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of
>
> ... familial status ....

42 U.S.C. Sec. 3604(a). Furthermore, the Act prohibits a housing provider from:

> discriminat[ing] against any person in the terms, conditions, or privileges of sale or rental of a dwelling ... because of familial status ...

42 U.S.C. Sec. 3604(b).

Finally, it is unlawful to:

> make ... any ... statement ... with respect to the ... rental of a dwelling that indicates any preference, limitation, or discrimi-

[5] *In amending the Act, Congress recognized that "families with children are refused housing despite their ability to pay for it." H.R. Rep. No. 711, 100th Cong., 2d Sess., at 19 (1988). Congress cited a survey finding that 25 percent of all rental units exclude children and that 50 percent of all rental units have policies restricting families with children in some way. Itt, citing Marans, Measuring Restrictive Rental Practices Affecting Ftvnilies Mth Children: A National Survey,* Office of Policy Planning and Research, HUD (1980). The survey found also that almost 20 percent of families with children were forced to live in undesirable housing due to restrictive housing policies. Id. Congress therefore intended the 1988 amendments to remedy these problems for families with children.

> nation based on ... familial status ... or an intention to make any such preference, limitation, or discrimination.

Id. at Sec. 3604(c). This provision applies to all written or oral statements made by a person engaged in the rental of a dwelling. 24 C.F.R. Sec. 100.75(b), (c)(1) and (2).

The record in the instant case contains both direct and indirect evidence of housing' g discrimination. Complainant credibly testified that when she inquired about a twobedroom apartment at 6300 Montgomery Road to be occupied by her and her two children, she was told that she had "one child too many." That is direct evidence of discrimination, inasmuch as the apartment could be lawfully occupied by three persons.

Respondent Michael Kelly testified that he does not remember speaking with Complainant on March 5, 1990,' but in a letter to HUD dated August 7, 1990, he seemed to admit that he or one of his agents may have made a mistake:

> If HOME, the recognized expert in discrimination matters, can make an honest mistake regarding a race discrimination charge, cannot other individuals, like me, make an honest mistake regarding space requirements for renters?

Respondent Michael KeHys testimony at hearing contrasted sharply with his August 7, 1990, letter to HUD. At hearing he contended that he has not had a "policy" regarding the number of children who may occupy a two-bedroom apartment at 6300 Montgomery Road. Tr.538. His protests to the contrary notwithstanding, the evidence clearly demonstrates that Respondent Michael Kelly has followed a "policy." He testified to the effect that he had adopted a course of action that he called, "one child per bedroom." Tr. 538. On the face of it, such a policy would permit a single parent and two children to occupy a two-bedroom apartment at 6300 Montgomery Road, assuming that one of the children shared the larger bedroom -with the parent. However, that was not Respondent Michael Kelly's assumption in 1990. In his letter to HUD of August 7, 1990, he wrote:

> In my twelve years of renting apartments at 6300, I have yet to experience, and certainly have never expected, an adult to occupy the smaller bedroom and to give the larger bedroom with the ½ bath to a child or children. Nor have I seen, nor do I expect, an adult to share the larger bedroom with a child ff such can be avoided, as here, by putting the child or children in the smaller bedroom. Further, neither the complainant, nor any other person has ever represented to me that he/she would sleep two children in the larger bedroom and one adult in the smaller bedroom, or an adult and one child in the larger bedroom and one child in the smaller bedroom.

""Fr.460

> Thus, regardless that in hindsight someone can argue that two children, or an adult and one child, can *theoretically* [emphasis in original] be placed in the smaller

bedroom. *[sic]* This situation would then put me in possible violation of the City Health Code because I should have known, based on common sense and my rental experience, that both children would be placed in the smaller bedroom.

SX. 16. In other words, he clearly assumed that if he were to permit an adult and two children to occupy a two-bedroom apartment, the two children would sleep in the smaller bedroom, and he did not want that to happen. This evidence shows that Respondent Michael Kelly's policy for a two-bedroom apartment was not in fact "one child per bedroom@" but rather, "one child per apartment." His agent at Michael P. Kelly Realty told Ms. Jones, a H.O.M.E. tester, when she called to inquire about a two-bedroom apartment, "the owner only allowed one child in the apartment." Tr.34-35. Furthermore, the fact that the occupancy policy was cast in terms of *children* rather than in terms of *people* in itself indicates an intent to discriminate against children. Tr.539, 540.

Ms. Jones provided direct evidence of discrimination against Ms. Jones, but neither Ms. Jones nor H.O.M.E. is a party to this case. TTherefore Ms. Jones' evidence only indirectly shows discrimination against Complainant. Her evidence strongly implies that Complainant's experience was not an aberration and that there was a policy at 6300 Montgomery Road to exclude tenants with two children from occupying a two-bedroom apartment.

TTheevidence supplied by Ms. Lester, the other tester witness, is also indirect. Ms. Lester's observation of Respondent Michael Kelly's body language gave her the impression that he was not pleased when she told him that she had two children. Standing alone, that evidence proves very little. However, viewed in the light of the entire record, Ms. Lester's impression lends some support to the argument that Respondent Michael Kelly had a policy against renting to tenants with two children.

At the time of the investigation, there were only two tenants with two children out of the 31 rental units in the complex at 6300 Montgomery Road, and in one of those cases, the children arrived after the tenancy began. However, the Government did not prove what proportion of the apartments have two bedrooms. Without that proportion in evidence, the demographics of 6300 Montgomery Road have no probative value for the Government's case.

In any event, even if Respondents did not have a uniform policy of excluding tenants with two children, they are liable for their unlawful discrimination against Complainant. Evidence that a landlord has rented to members of a protected class in the past does not foreclose a claim of intentional discrimination. *SeeAsbury v. Brougham,* 866 F.2d 1276, 1281 (10th Cir. 1989).

Respondents miss the mark with their argument that they relied upon advice from H.O.M.E. *See* Tr.185, 613; SX.15. ne record does not show that anyone at H.O.M.E. gave Respondents incorrect advice upon which Respondent Michael Kelly relied when he

established the policy leading to the discrimination suffered by Complainant.'

Respondents also miss the mark with their argument that the "one child per bedroom" policy was formulated in order to comply with the occupancy standards in the Cincinnati Building Code. The occupancy standards provide no refuge from liability, because the Code permits a parent and two children to occupy the two-bedroom apartment sought by Complainant at 6300 Montgomery Road. Tr.396-97, 412; SX.19, 20. In a closely related argument, Respondents also seem to contend that the "one child per bedroom" policy was formulated out of fear that two-children families would violate the Building Code, thereby exposing Respondents to sanctions by the City. But the testimony of City officials called on Respondents' behalf to explain the Building Code and its enforcement revealed no realistic basis for Respondents to fear that they would be prosecuted if tenants failed to configure their sleeping arrangements in accordance with the Code. In any event, the possibility that a potential tenant may violate a city occupancy standard in the future does not give the landlord permission to discriminate against that tenant in violation of the Fair Housing Act. Moreover, Respondents' arguments implicitly acknowledge that two children families have been turned away; that is, the arguments admit discrimination against tenants with two children.

In short, a preponderance of the evidence shows that Respondent Michael Kelly, or agents under his direction and control, intentionally engaged in conduct that made a twobedroom apartment unavailable to Complainant and her two daughters because of their familial status. Section 3604(a) of 42 U.S.C. proscribes any conduct that makes housing unavailable, as well as all practices that have the effect of denying dwellings on prohibited grounds, and that in any way impede, delay, or discourage a prospective buyer or renter. *United States v. Youiitan Construction Co.,* 370 F.Supp. 643, 648 (N.D.Cal. 1973), modified on other grounds, 509 F.2d 623 (9th Cir. 1975); *Zuch v. Hussey,* 394 F.Supp. 1028, 1047 (E.D.Mich. 1975). Section 3604(a) may be violated without an outright refusal to deal or negotiate and without proof of specific intent.

T'he statement made by Respondent Michael Kelly or one of his male agents to Complainant that she "had one child too many," as well as the statement made by one of Respondent Michael KeHys female agents to Ms. Jones that she had to know whether Ms. Jones had any children "because the owner only allowed one child in the apartment" violated 42 U.S.C. Sec. 3604(c). These statements and conduct also violate 42 U.S.C. Sec. 3604(b) prohibiting "discrimination against any person in the terms, conditions, or privileges of ... rental of a dwelling ... because of familial status

7 Even if Respondents had proved they relied on bad advice, they would still be liable. H.O.M.E. is a private organization. The actions of a private organization cannot estop the Government's enforcement of the Fair Housing Act.

As for Respondent John Kelly, his liability rests on his status as co-owner of the property and partner of Respondent Michael Kelly. Tr.488, 610. Respondent John Kelly had no contact with Complainant until after she filed her complaint, and, aside from the admissions implicit in the arguments posed in defense, there is no proof that he participated in the formulation of the so-called "one child per bedroom" policy. SX.17. Complainant and the testers from H.O.M.E. dealt only with Respondent Michael Kelly and people working at Michael P. Kelly Realty. The record does not demonstrate that any of the people who answered the telephone at Michael P. Kelly Realty did so under the direction and control of Respondent John Kelly. Nevertheless, when Respondent Michael Kelly took his "turn" to rent apartment number 10, he acted as the agent for Respondent John Kelly. See Restatement (Second) Agency § 14A; Ohio Rev. Code Ann. § 1775.06 (Anderson 1985). As a joint owner who shares equally in the profits and expenses generated by the property, Respondent John Kelly could not delegate his duty to prevent housing discrimination to his brother or to his brother's agents.' In other words, Respondent John Kelly's liability in this case is vicarious.'

Respondents focus most of their defense on the conduct of HUD's investigator and counsel for the Government rather than the merits of their case. They deliver a broadside. attack demanding dismissal of the charges and alleging, *inter alia,* incompetence, deliberate misrepresentation, duplicity, dishonesty, and deliberate deception of the Court by the Govern m ent. Respondents' Brief, pp. 7, 17, 19, 22, 23, 24; Respondents' Reply Memorandum. NVhfle HUD's investigation and presentation of the case were far from perfect, the Government's errors were not so prejudicial to the Respondents that the Charge of Discrimination must be dismissed.

HUD committed several procedural errors during the conduct of the investigation leading to issuance of the Charge of Discrimination on March 2, 1992. The Complainant filed her complaint with HUD on May 17, 1990. 'ne statute and the regulations require that the complaint be forwarded to the person allegedly responsible within 10 days. Although Respondent Michael Kelly received a copy of the original complaint on May 24, 1990, and mailed a copy to Respondent John Kelly shortly thereafter, Respondent John Kelly testified he did not know that he was a named party in the case until he received a copy of the amended complaint of July 27, 1990. Tr. 599, 628. The amended complaint, like the original complaint, was mailed to the business address of Respondent Michael Kelly but not to Respondent John Kelly's home or business address. Nevertheless, both

8Hamilton v. Svatik, 779 F.2d 383, 388 (7th Cir. 1985); *Green v. Century 21,* 740 F.2d 460, 465 (6th Cir. 1984); *Marr v. Rife,* 503 F.2d 735, 741 (6th Cir. 1974); *Saunders v. General Servs. Corp.,* 659 F.Supp. 1042, 1059 (E.D.Va. 1987); *Davis v. Mansards,* 597 F.Supp. 334, 344 (N.D. Ind. 1984); *United States v. Youtitan Construction Co.,* 370 F.Supp. 643, 649 (N.D.Cal. 1973), *modified on other grounds,* 509 F.2d 623 (9th Cir. 1975), *ceit. denied,* 421 U.S. 1002 (1975). Respondent Michael Kelly is likewise liable for the acts of the unidentified persons working at Michael P. Kelly Realty who answered the telephone on his behalf. They were his agents.

9 In fact, there is some suggestion in the record that Respondent John Kelly may have been

aware that the two-bedroom apartments at 6300 Montgomery Road must be made available to a parent with two children. In June of 1989 he signed the lease for the only documented instance in the record where a family with two children successfully applied for an apartment. SX.22(e).

Respondents received *actual* notice of the complaint filed by the Complainant and had ample opportunity to respond to it before the Secretary issued a reasonable cause determination. Nothing more is required to satisfy due process requirements." To be sure, the Government was sloppy in discharging its duty to notify Respondents of the allegations in the complaint, but that is merely an embarrassing, not a fatally defective, error.

Citing Baumgardner v. H-UD, 960 F.2d 572 (6th Cir. 1992), Respondents also argue that they were not afforded a reasonable opportunity to conciliate the complaint, and that the case must therefore be dismissed. That argument has no merit. Section 3610(b)(1) of 42 U.S.C. requires HUD "to the extent feasible to engage in conciliation with respect to the Complaint." According to the court in *Baumgardner:*

> While a respondent is certainly not entitled to a successful conciliation, he is entitled to an objectively reasonable effort by the agency to bring about a settlement of the charge.

960 F.2d at 579. The *Baumgardner* court concluded that EIUD's conciliation efforts satisfied the requirements of 42 U.S.C. Sec. 3610(b)(1), even though HUD had only one telephone call contact and one unsuccessful meeting with the respondent to discuss conciliation. In the instant case, Respondents were offered, either singly or together, an opportunity to settle the case on at least five occasions before HUD made the reasonable cause determination. Tr.561, 598, 642. Although the *Baumgardner* decision does not explain how to determine whether an "objectively reasonable effort" to conciliate has been made, in light of the court's conclusion that two conciliation efforts by HUD were sufficient, I find that HLTD's multiple contacts with Respondents in this case sufficed to satisfy HUD's statutory duty to try to conciliate the complaint before issuing the formal CChargeof Discrimination."

The statute also requires HUD to complete its investigation of the complaint and make a reasonable cause determination within 100 days of the filing of the complaint. HUD did not do so. Nor did HUD notify the Respondents of the reasons the investigation and the reasonable cause determination were not completed by that deadline. When in *Baumgardner* it was shown that HUD had committed similar errors, the court applied a substantial prejudice test and concluded that the respondent had not been substantially

10 Federal Rules of Civil Procedure service requirements do not apply to this administrative proceeding.

11 It is also unclear from the *Baumgardner* decision how one may create a record sufficient to determine whether the Government made an "objectively reasonable effort" to conciliate without running afoul of Rule 408 of the Federal Rules of Evidence and 42 U.S.C. Sec. 3610(d)(1). With a few exceptions not applicable here, Rule 408 prohibits introducing into evidence the content of settlement negotiations or the conduct of the parties during settlement negotiations. Similarly, 42 U.S.C. Sec. 3610(d)(1) provides: "Nothing said or done in the course of conciliation under

this title may be made public or used as evidence in a subsequent proceeding under this title without the written consent of the persons concerned."

prejudiced on the merits of the discrimination complaint but had been prejudiced on the issue of damages. I reach the same conclusion here.

When Respondents were invited to explain how they were prejudiced by the Government's errors and delays, the only concrete response came from Respondent John Kelly. He maintained that he would have retained a lawyer sooner if the Determination of Probable Cause had been issued sooner. Tr.655. However, there is nothing in the record to suggest that the presentation of Respondent John Kelly's case would have been stronger, or that the case could have been settled without trial, if counsel had been retained earlier. In short, Respondents did not demonstrate how they suffered any substantial prejudice in the preparation or presentation of their defense as a result of HUD's failure to follow its own rules and regulations." Nevertheless, Respondents have been substantially prejudiced by the Government's conduct when it comes to the issue of damages.

Damages

Complainant requests on her own behalf economic damages of $10,432.73 and intangible damages of $15,000.00, totaling $25,532.73 sic. Intervenor's Brief at 29. The Government requests on Complainant's behalf an award of economic damages totaling $8,279.40 and intangible damages totaling $10,000.00. Secretary's Brief at 37, 39. She will be awarded economic damages of $6,930.76 and intangible damages of $3,500.00.

Economic Damages

Under Section 812(g)(3) of the Act (42 U.S.C. Sec. 3612(g)(3)), Complainant is entitled to compensation for her out-of-pocket expenses resulting from Respondents' discrimination. But for that discrimination, Complainant could have rented the apartment at 6300 Montgomery Road sometime in March 1990. After she was turned away at 6300 Montgomery Road, she spent approximately 30 hours over six weeks' time searching for a comparable apartment before she found one at Kenwood Towers at a monthly rent of $425, $50 more per month than the rent would have been at 6300 Montgomery Road. [13] 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,* 779 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*

12 1 have carefully considered all of Respondents' allegations of misconduct by the Govern m ent's investigator and counsel and have found no substantial prejudice to Respondents' cause except as to damages, as discussed in the text. Furthermore, none of the liability findings in this decision depend on the credibility of HUD's investigator.

13Because Complainant was able to afford a $450 per month apartment, she was presumably economically qualified to rent one for $375 per month.

F.Supp. 1033 (N.D. Tex. 1971) (up to $750 for lost work and expenses in finding alternative housing).

Complainant moved into the Kenwood Towers apartment during the latter part of Aprfl 1990. She continued to live there through the date of the hearing in late May 1992. Although the Kenwood Towers apartment is more expensive and has some arguably better features, I am satisfied that Complainant made a reasonable attempt to find an apartment comparable to one at 6300 Montgomery Road, and that the Kenwood Towers apartment was as close as she could get. She is therefore entitled to compensation for her increased alternative housing costs.

Complainant's unrebutted testimony indicates that she has been looking for an affordable apartment closer to her parents and her friends for more than a year and a half. Tr.364 As of the date of the trial, she had not been successful. She requests compensation for her more expensive alternative housing and associated transportation costs for a period of 27 months, the approximate period between March 5, 1990, when she suffered the discrimination, and the end of May 1992, when the trial began. In addition to the increased costs of alternative housing, victims of housing discrimination may also recover any increased transportation costs attributable to living in alternative housing, provided they show that they have attempted to ' ' ' e their damages. 14 Damages accrue from the date the victim would have moved into the denied housing until the date of the hearing, or until the first date the complainant is no longer obligated to remain in the alternative housing and is free to occupy the denied housing, or the first date the complainant is able to occupy comparable housing at a comparable cost." Under these rules, the record supports Complainant's claim for damages from the date she would have moved into 6300 Montgomery Road until the date of the hearing. But Complainant did not move into Kenwood Towers until late Aprfl 1990, and she cannot recover damages for higher rent she did not pay. She therefore will receive damages for increased alternative housing costs and associated transportation costs for the 25-month period from Aprfl 1990 to May 1992, even though much of this period is attributable to the Government's delay in bringing the case to trial.

Complainant paid $50 per month more for her apartment at Kenwood Towers than she would have paid if she had rented the apartment at 6300 Montgomery Road. She

will receive an award of $1,250 for her higher alternative housing costs over a period of 25 months.

As a consequence of living at Kenwood Towers rather than at 6300 Montgomery Road, complainant has been required to drive a total of 14 miles per day to and from the bus she rides to work, which she would not otherwise have had to do. Over the period of

14 *See Smith v. Anchor Building. Corp.,* 536 F. 2d 231, 234 n.4 (8th Cir. 1986); *Young v. Parkland Village, 460* F. Supp. 67, 71 (D. Md. 1978).

15 *See Miller v. Apts. and Homes of NJ.,* 646 F. 2d 101, 112 (3rd Cir. 1981); *Parkland Village,* 460 F. Supp at 71; *United States v. Keck,* 1990 U.S. Dist. LEMS 19309 (W.D. Wash. Nov. 15, 1990).

25 months, assuming the Federal mileage reimbursement rate of $.24 per mile, her increased **commute** transportation costs total $1,680.00 (70 nffles/week x 4 weeks/month x 25 months x $.24 = $1,680.00). She will be awarded an additional $120.00 for misceraneous travel expenses for 25 months.

Complainant's commute time has been 50 minutes longer each day than it would have been at 6300 Montgomery Road. Although she requests compensation for her additional commute time at the rate of $10.00 per hour and for the loss of leisure time at the rate of $20.00 per hour, her hourly wage of $8.17 per hour is the only objective evidence of the value of her time in the record, and she did not introduce any evidence to show that her leisure time should be valued more highly. For her additional commute time over 25 months, Complainant will be awarded $3,402.81 (.833 hours x 5 days/week x 4 weeks/month x 25 months x $8.17 = $3,402.81).

Complainants who are unlawfully dissuaded from renting housing should receive compensation for the time and energy spent looking for alternative housing and prosecuting their cases." Complainant spent approximately 30 hours over a six-week period looking for an apartment after her unsuccessful attempt to rent at 6300 Montgomery Road, and a total of 28.5 hours from March 1990 until the close of the hearing pursuing her claim against Respondents. Tr.200, 300, 313, 314. She will receive an award of $477.95 for that time (58.5 x $8.17 = $477.95).

Complainant's request for future damages of $1,733.33 must be denied because her future damages are speculative and cannot be determined with reasonable

specificity.

When Congress authorized administrative adjudication in 1988, it intended to provide a "speedy, fair, and inexpensive" procedure for resolving housing discrimination complaints." Toward that end, the Act contains numerous time limitations. For example, HUD is required to complete its investigation and issue a reasonable cause determination within 100 days of the filing of the complaint; an administrative hearing must begin no later than 120 days after the issuance of a charge of discrimination; the decision of the administrative law judge is to be issued within 60 days after the end of the hearing; and the Secretary's discretionary review must be completed not later than 30 days after issuance of

16 *See, e.g., HUD v. Blackwell* 2 Fair Housing-Fair Lending (P-H) 1 25,001 (HUDALJ Dec. 21, 1989), *aff4* 908 F.2d 864 (llth Cir. 1990) (lost wages for time to consult with attorneys and to attend hearing on temporary restrainin2 order and hearing before ALJ); *HUD v. Propeities Unlimited,* 2 Fair Housing-Fair Lending (P-H) 1 25,009 at 25,1-50 (HUDALJ Aug. 5, 1991) (complainant awarded costs for missing 4 days of work, including 2 days for hearing and 2 days for travel to and from hearing); *HUD v. Murphy,* 2 Fair Housing-Fair Lending (P-H) at 25,054 (complainant entitled to lost wages, babysitting fees, and travel expenses incurred to attend hearing). *But see Hodge v. Seiler,* 558 F.2d 284, 287 (5th Cir. 1977) (upheld trial court decision not to award airfare to and from trial but would not rule out such an award if appropriately made within broad discretion of trial judge, citing strong policies that lie behind remedial civil rights legislation, and the need to ensure that those who defend their rights are not financially penalized).

17 134 Cong. Rec. H4608 (remarks of Rep. Edwards, the bill's chief sponsor in the House, describing the new administrative procedure).

the decision. 18 Taken together, these time limitations indicate that Congress expected that a housing discrimination complaint brought before an administrative law judge would reach completion within less than a year after the filing of the complaint with HUD.

However, almost exactly two years elapsed from the date Complainant telephoned H.O.M.E. to complain that she was a victim of housing discrimination until the date HUD issued its Reasonable Cause Determination and Charge of Discrimination. By the time this decision becomes final, at least two and one-half years will have passed. There is no justification in the record for this delay, particularly the 17-month period between October 2, 1990, when HUD's investigator completed his investigation, and March 2, 1992, when the Reasonable Cause Determination and Charge of Discrimination was issued. Secretary's Motion of May 20, 1992, p.4. Clearly, in the instant case the parties have not been afforded the speedy resolution of the complaint required by the Act.

As a result of HUD's unexplained delay in bringing this case to trial, Respondents will suffer substantial prejudice, because they will be ordered to pay significantly higher damages than would have been ordered if this case had come to trial within a year. Complainant's demonstrated out-of-pocket damages for increased housing and transportation costs are nearly double what they would have been if the case had been tried within the period contemplated by the Congress." However, a search of the Act, its legislative history, and the cases has revealed no authority for reducing the actual damages of a housing discrimination victim below the proven amount because HUD has, without explanation, delayed presenting the case for adjudication.

Intangible Damages

Actual damages in housing discrimination cases are not limited to out-of-pocket losses, but may also include damages for intangible 'injuries such as embarrassment, humiliation, and emotional distress caused by the discrimination." Damages for emotional distress can be inferred from the circumstances, as well as established by testimony, even in the absence of evidence of economic or financial loss or medical evidence of mental or

[18] 42 U.S.C. Secs. 3610, 3612. Most of the time limitations provide exceptions when it is "impracticable" to abide by them.

[19] If the accrual period for Complainant's damages were 12 months rather than 25 months, her economic damages would total $3,571.03, calculated as follows: higher alternative housing costs, M; higher co-mute costs, $806.40; miscellaneous transportation costs, $53.33; commute time, $1,633.35; and time searching for alternative housing and pursuing claim, $477.95.

2OSee, e.g., HUD v. Blackwell, Fair Housing-Fair Lending (P-H), 1 25,001 at 25,011 (HUDAIJ Dec. 21,1989), *affd,* 908 F.2d 864 (Eth Cir. 1990); *See also Smith v. Anchor Bldg. Corp.,* 536 F.2d 231 (8th Cir. 1976); *Steele v. 7-itle Realty Co.,* 478 F.2d 380, 384 (10th Cir. 1973).

emotional impairment." The amount of the award is intended to compensate the complainant for the damage inflicted by the discrimination. As in all civil cases, the damage award should make the victim whole."

Housing discriminators must take their victims as they find them; that is, damages are measured based on the injuries actually suffered by the victim, not on the injuries that would have been suffered by a reasonable or by an ordinary person." Put otherwise, the susceptibility of the victim to injury is a factor that must be taken into consideration." Complainant testified to the effect that as an African-American, she has become sensitized to discrimination because she has experienced discrimination based on her race. Tr.29193. When asked to compare past experiences of racial discrimination with the discrimination she suffered in this case, she said, "this stands out much more in my mind because it affected innocent children that had no cause to be discriminated against." Tr.296.

As a young single woman with relatively low income who is responsible for raising two children, Complainant is precisely the kind of vulnerable person the Act was designed to protect.)When she was turned away from 6300 Montgomery Road, she was forced to continue living for several weeks in stressful, crowded conditions with her parents, sleeping

2'See, e.g., Seaton v. Sky Really, 491 F.2d 634, 636 (7th Cir. 1974); *Smith v. Anchor Building Corp.,* 536 F.2d 231, 236 (8th Cir. 1976) (damages for emotional distress may be awarded, even though any award for out-ofpocket damages is limited); *Johnson v. Hale,* 940 F.2d 1192 (9th Cir. 1991); *HUD cc rel HeTron v. Blackwell, 908* F.2d 864, 874 (llth Cir. 1990).

"'2See, eg., HUD v. Blackwell, 2 Fair Housing-Fair Lending (P-H) 1 25,001, 25,013 (HUDAIJ Dec. 21, 1989), *ajrd,* 908 F.2d 864, 872-73 (llth Cir. 1990) (amount of damages awarded should compensate for the injury suffered so as to make the injured party whole, and should not provide the injured party with a windfall). *See also Rogers v. Loether,* 467 F.2d 1110, 1122 (7th Cir. 1972), *ajtd sub nom., Curtis v. Loether,* 415 U.S. 189 (1974) ("The payment of compensatory damages in a housing discrimination case, however, is not a return to plaintiff of something which defendant illegally obtained or retained; it is a payment in money for those losses - tangible and intangible - which plaintiff has suffered by reason of a breach of duty by defendant.')

23See, e.g., HUD v. Properties Unlimited, 2 Fair Housing-Fair Lending (P-H) 1 25,009, 25,152 (HUDAL-J Aug. 5, 1991) (damage award gave consideration to fact that complainant was eight and one-half months pregnant at time of discriminatory act); *HUD v. Jerrard,* 2 Fair Housing-Fair Lending (P-H) 1 25,005,25,091 (HUDAU Sept. 28, 1990) (complainant's "pre-enisting emotional problem" taken into consideration in determining damages for emotional distress).

24See Baumgardner v. HLTD, 960 F.2d 572, 581 (6th Cir. 1992), where the court affirmed an award by an AIJ of $500 for emotional distress, noting that complainant "did not appear to the ALJ to be 'a man of vulnerable constitution who could be easily driven to distress.' He felt hurt and angry, but 'it was kind of easy to get over." However, the *Baumgaidner* court rejected, without explanation, a claim that the complainant's emotional distress award should be augmented because he had previously experienced racial discrimination. 960 F.2d at 581. Because the court affirmed the emotional distress award based on an assessment of the compl-tinant's vulnerability, I have not interpreted the decision to reject the principle that the susceptibility of a housing discrimination victim to injury must be considered. *See also Steele v. 7-itle Really,* 478 F.2d 380 (10th Cir. 1973) (previous discrimination relevant to determining amount of compensation for emotional distress); *DaWs v. Mansards,* 597 F. Supp. 334,347-48 (N.D. Ind. 1984) (wife-tester, "deeply affected" and "decimated emotionally," was awarded $5,000, while husband-tester,

who was "much less profoundly affected" and displayed a "degree of cynicism," was awarded $2,500); *Hanisons v. Otto G. Heinzeroth Mtg. Co.,* 430 F.Supp. 893, 897 (N.D. Ohio 1977).

continue living for several weeks in stressful, crowded conditions with her parents, sleeping five people to a room. While looking for alternative housing, she continued to worry that she might run into another landlord who would treat her the same way. Tr.297. Although her distress subsided over the months following her telephone call to Michael P. Kelly Realty, she said at hearing that she continued to feel the effects of the discrimination. Tr.298.

Complainant was particularly troubled by the location of Kenwood Towers and the absence of recreational facilities for her children:

> It comes to mind a lot because where I Eve is not accessible to transportation. When I'm stuck in a house where there's nowhere for my children to play, to have to, you know, I feel bad about that. There's times where I need things and I can't just get up and walk to a store.

Tr.298. She felt that not having transportation on the weekends had a "very adverse effect" on her life. Tr.310. "I mean, it's just depressing to sit at home all the time on the weekend, but I don't have a choice." Tr.311. There have been occasions when she has been unable to get supplies, including medicine, for her daughters because she has been without transportation and there are no 24-hour convenience stores near Kenwood Towers as there are near 6300 Montgomery Road. Tr.311-12. Complainant should be compensated for her "lost housing opportunity," that is, the deprivation of those features of 6300 Montgomery Road that are of particular and uncommon value to her but are not reflected in the rental market values of 6300 Montgomery Road and Kenwood Towers."

Although Complainant's intangible injuries are substantial, they are not extreme. More offended than humiliated or depressed by the discrimination she experienced, she apparently has not felt the need for professional care or medication to cope with her distress. Her testimony was straightforward, self-possessed, and presented with little emotional display, leaving the impression that she is a resourceful and resilient person who will not suffer any long-term emotional scars from this episode. Considering the record as a whole, I conclude that an award of $3,500.00 will adequately compensate Complainant for her emotional distress and loss of housing opportunity.

Civil Penalties

To vindicate the public interest, the Act authorizes an administrative law judge to impose civil penalties upon respondents who violate the Act. 42 U.S.C. Sec. 3612(g)(3); 24

Z5HUD v. Wagner, 2 Fair Housing-Fair Lending (P-H) 1 25,032 (HUDAIJ June 22, 1992) ($350 awarded for deprivation of features of denied housing particularly valued by complainant); *HUD v. Holiday Manor Estates Club,* 2 Fair Housing-Fair Lending (P-H) 1 25,016, 25,232 (14UDALJ Nov. 26, 1991), *reconsd on other grounds* 1 25,025 (Feb. 21, 1992), *affd on other grounds* T 25,027 (HUD Office of the Sec'y Mar. 23, 1992) ($500 awarded for lost housing opportunity because complainant was denied home located near her parents that would have allowed her to escape abusive husband).

C.F.R. Sec. 104.910(g)(3). The Government requests imposition of civil penalties in the amount of $10,000 against Respondents. The legislative history of the 1988 Fair Housing Amendments Act includes these comments about civil penalties:

The Committee intends that these civil penalties are m
not ' ' 4 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.

H. Rep. No. 711, 100th Cong., 2d Sess. at 37 (1988). Respondents have no history of housing discrimination violations. In fact, they testified that they made anonymous telephone calls to H.O.M.E. before the Act was amended in 1988 in an attempt to determine occupancy standards for 6300 Montgomery Road. Although Respondents may be faulted for their failure to ask the right questions from authoritative sources, their attempt to conform their rental business with the requirements of the law manifests good intentions. Consistent with those demonstrated good intentions, Complainant appears to have been treated politely and without malice when she called Michael P. Kelly Realty to inquire about an apartment. Nevertheless, Respondents and other similarly situated housing providers need to be deterred from engaging in discriminatory treatment of families with children. They must come to understand that landlords cannot delegate their duty to prevent housing discrimination, and that they may be guilty of unlawful discrimination even ff they do not exclude all children from their rental properties. If an apartment may be rented to two adults and one child, then that same apartment must be made available to one adult and two children.

Only the goal of deterrence argues for imposition of a civil penalty in this case. Under ordinary circumstances, the civil penalty imposed for that single purpose would be less than $3,000. However, the circumstances are extraordinary in this case, in that HUD has failed by a very wide margin to observe the time limitations in the Act and the

regulations, more than doubling the accrual period of Complainant's damages. In consequence, Respondents will be ordered to pay economic damages more than $3,000 higher than they would have been if HUD had presented the case for adjudication within the period contemplated by the Act. In the *Baumgardner* case, the Sixth Circuit Court of Appeals reduced a $4,000 civil penalty that had been imposed by an administrative law judge to $1,500 because HUD had failed to properly observe its own rules and regulations. T'he court held that such deficiencies, while not a denial of due process, "do have an

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adverse effect with regard to ascertaining fair and reasonable damages.... In light 'f the 0 *Baumgardner ruling,* I decline to impose a civil penalty in this case.

Injunctive Relief

An administrative law judge may order injunctive or other equitable relief to make a complainant whole and protect the public interest in fair housing." 42 U.S.C. Sec. 3612(g)(3). The purposes of injunctive relief include: eliminating the effects of past discrimination, preventing future discrimination, and positioning 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 or she 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. 1985) - (citations omitted). The injunctive provisions of the following Order serve all of these purposes.

Order

It is hereby **ORDERED** that:

1. Respondents are permanently enjoined from discriminating against Complainant, any member of her family, and any tenant or prospective tenant, with respect to hous' 9 because of familial status, and from retaliating against or otherwise harassing Complainant or any member of her family. Prohibited actions include, but are not limited to, all those enumerated in the regulations codified at 24 C.F.R. Part 100 (1991).

26The *Baumgaidner* decision appears to confuse civil penalties with punitive damages. For example, at the begin of the discussion regarding damages, the decision states: 'Title 42 U.S.C. Sec. 3613 authorizes 'actual and punitive' damages as well as injunctive reliel" 960 F.2d at 580. However, this section does not apply to administrative proceedings; rather, it authorizes United States district courts and

State courts to award actual and punitive damages to plaintiffs in civil actions. Cf. 42 U.S.C. Sec. 3612. Further, a subsection of the discussion is entitled, "Civil Penalty-Punitive Damages," and concludes:

> We entertain a clear conviction in this case, based upon all the circumstances in the record, that an award in excess of the allowed compensatory damages of $1-500 for a civil penalty would be excessive, unjust, and improper. We, therefore, adjust the civil penalty damage award to $1500. Total damages, therefore, are determined to be $3000.

960 F.2d at 583. In other words, the text of the decision combines the civil penalty with the compensatory award and speaks of both as "damages." However, the order of the court does not change the payee of the civil penalty (i.e., HUD); it only changes the size of the penalty imposed by the AIJ. Therefore, reading the order of the court together with the decision shows that the court indeed separated the civil penalty from the compensatory damage award, and that the court did not intend respondent to pay complainant $3,000 in damages.

27„ 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." *HT-7D v. Blackwell,* 908 F.2d 864, 875 (llth Cir. 1990) (quoting *Marable v. Walker,* 704 F.2d 1219, 1221 (llth Cir. 1983)).

2. Respondents and their agents and employees shall cease employing any policies or practices that discriminate against families with children, including any policy that prohibits or discourages people with children 18 years or younger from living in any residential rental real estate owned or operated by Respondents. Specifically, Respondents and their agents and employees shall cease telling prospective tenants that no more than one child may live in a two-bedroom apartment at 6300 Montgomery Road, Cincinnati, Ohio.

3. Consistent with 24 C.F.R. Part 109, Respondents shall display the HUD fair housing logo and slogan in all advertising and documents routinely provided to the public. Consistent with 24 C.F.R. Part 110, Respondents shall display the HUD fair housing poster in a prominent place in a common area at 6300 Montgomery Road, Cincinnati, Ohio, and in any rental office where Respondents, either singly or together, conduct a housing rental business.

4. Respondents shall institute internal record keeping procedures with respect to the operation of 6300 Montgomery Road and any other real properties owned or managed or acquired by Respondents adequate to comply with the requirements set forth in this Order. Respondents will permit representatives of HUD to inspect and copy all pertinent records at any and all reasonable times and upon reasonable notice. Such representatives of HUD shall endeavor to e any convenience to Respondents from the inspection of such records.

5. On the last day of each sixth month period beginning February, 1993, and continuing for three years from the date this Order becomes final, Respondents shall submit reports containing the following information to HUD's Chicago Regional Office of Fair Housing and Equal Opportunity, 626 West Jackson Boulevard, Chicago, Illinois 606066765:

a. A log of all persons who applied for occupancy at 6300 Montgomery Road during the six-month period preceding the report, indicating the name and address of each applicant, the number of persons to reside in the unit, the number of bedrooms in the unit for which the applicant applied, whether the applicant was rejected or accepted, the date on which the applicant was notified of acceptance or rejection, and if rejected, the reason for such rejection.

b. A list of vacancies during the reporting period at 6300 Montgomery Road, including: the address of the unit, the number of bedrooms in the unit, the date Respondents were notified that the tenant would or did move out, the date the tenant moved out, the date the unit was rented again or committed to a new rental, and the date the new tenant moved in.

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

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

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

6. Within ten days of the date on which this Order becomes final, Respondents shall pay actual damages to Complainant Dionne Staples of $10,430.76.

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

8. Respondents shall submit a written report to this tribunal within 15 days of the date this Order becomes final detailing the steps taken to comply with this Order.

9. Respondents' Request for Acceptance of their Reply Memorandum of August 1, 1992, is granted.

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

/s/

THOMAS C. HEINZ
Administrative Law Judge

Dated: August 26, 1992.