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 Frank Ricciotti, III, Charging Party v. Lee Morgan, Respondent.	HUDALJ 08-89-0077-1 Decision Issued: July 25, 1991

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For the Respondent

Kathleen M. Pennington, Esq.
For the Secretary

Before: William C. Cregar
Administrative Law Judge

INITIAL DECISION AND ORDER

This matter arose as a result of a complaint of discrimination based upon familial status in violation of the Fair Housing Act of 1968, 42 U.S.C. Sec. 3601, et seq ("Fair Housing Act" or "Act") and was processed in accordance with the Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619 (1988) and 24 C.F.R. Parts 103 and 104. The complaint was filed with the Department of Housing and Urban Development ("the Department" or "HUD") on June 8, 1989, Sec. Ex. 4. A determination of Reasonable Cause was made and a Charge of Discrimination filed on behalf of the Complainant by the Secretary of the Department ("Secretary" or "the Government") on December 5, 1990. A hearing was held in Glenwood Springs, Colorado, on March 6,

1991. Post-hearing briefs were filed by the parties on May 7, 1991. Reply briefs were filed on May 31, 1991.

The Government alleges that Frank Ricciotti, III and his family were discriminated against by Respondent Lee Morgan's enforcement of a rule prohibiting families with children from purchasing mobile homes within his mobile home park. The enforcement of this rule is alleged to have prevented him and his family from consummating the purchases of two mobile homes on successive occasions in June and July of 1989. The Government requests approximately $2,700 in out of pocket expenses, $7,500 for lost housing opportunity, $2,500 for inconvenience, $12,500 as damages for emotional distress, and a maximum civil penalty in the amount of $10,000. In addition, the Government requests injunctive and associated relief.

While not denying that he initially enforced an illegal rule prohibiting the purchase of mobile homes in his park by families with children, Respondent asserts that the discriminatory rule was not the direct cause of the Complainant's failure to purchase a mobile home on the first occasion. He also asserts that upon learning that the rule was illegal he immediately ceased its enforcement and was ready, willing and able to permit the sale of the mobile home on the second occasion. That Complainant did not purchase the home was, according to Respondent, his own decision and did not result from any acts on Respondent's part. Respondent also takes issue with the amount of damages claimed by the Government.

Respondent asserts that neither the Commerce Clause, nor the Thirteenth Amendment of the United States Constitution permit the application of the Fair Housing Amendments Act to his park.[1] He also claims that this case should be dismissed by reason of HUD's purported failure to comply with the mandatory conciliation provisions found in 42 U.S.C. Sec. 3610(b)(1).

Findings of Fact

Respondent, Lee Morgan, is the former owner of a mobile home park located in Glenwood Springs, Colorado. The park occupies 7.19 acres and has 45 mobile home spaces. Sec. Ex. 14, Tr. pp. 167-168. Respondent purchased the park on June 30, 1980, and sold it on May 1, 1990. Tr. pp. 31, 136, 141-143. All of the homes in the park are owned by individual owners who lease mobile home spaces.

[1] I have not addressed Respondent's contention that the Fair Housing Amendments Act is unconstitutional, since an administrative proceeding is not an appropriate forum for considering and deciding that type of constitutional argument. *Califano v. Sanders*, 430 U.S. 99, 109 (1977). However, I note that the United States District Court for the Middle District of Florida recently held that the prohibition of "familial discrimination" was a proper exercise of legislative authority under the Commerce Clause. *Seniors Civil Liberties Ass'n, Inc. v. Kemp*, 761 F. Supp. 1528, 1545-1547 (M.D. Fla. 1991).

Tenants had adhered to a set of park rules under the former owner. However, because of tenant dissatisfaction with these rules, Respondent permitted them to draft their own rules soon after he purchased the park. Tr. pp. 143-144.

Rules 3 and 19 are germane to the issues in this case. Rule 3 provides:

> It is management's intention to make the mobile home park entirely an adult park. That is, no children will be allowed in the park. Excepted from this rule are those tenants who own mobile home (sic) in the park as of the date hereof. These individual (sic) shall be allowed to have children. Any new tenants as of this date shall be subject to this rule and in the event that said tenants shall have a child born to them, they shall be required to remove or sell their mobile home within a reasonable time, not to exceed six months, after the birth of said child. All visiting children must stay in tenant's yard.

Rule 19 provides:

> In the event a tenant wishes to sell his mobile home, the prospect (sic) tenants must meet all the requirements of the rules and regulation (sic) of the park and have managements (sic) approval. The approval by management shall not be unreasonably withheld.

Sec. Ex. 7.

In accordance with Rule 19, prospective tenants were required to meet with Mr. Morgan before they could buy a home. He required that they read and sign the rules and regulations. Tr. pp. 163, 175. Except for requiring tenants to relocate within six months after the birth of a child, Mr. Morgan enforced Rule 3. Tr. pp. 138-139, 144-145, 169. No Fair Housing posters were displayed on the premises during the time Mr. Morgan owned the park. Sec. Ex. 14.

The Sarno Home

In the Spring and Summer of 1989, the Ricciottis lived in an apartment on Blake Street in Glenwood Springs. They paid $450 rent per month, approximately $100 per month for gas and electricity, and $15 per month for trash pickup. Tr. pp. 29, 102-103. Two considerations prompted their decision to seek a new home. First, Mr. Ricciotti's parents had expressed a willingness to give them $10,000 towards the purchase. Second, their apartment had been tested and found to have had a high level of radon gas. Tr. pp. 29-30, 103.

Michael and Rauna Sarno owned a mobile home at Space 13 in the park. Sometime in the Spring of 1989, as a result of Mr. Sarno's having accepted a job in

California, the Sarnos put their home up for sale. He placed a "for sale" sign on the road and advertised in the paper for a week or so. His initial asking price was $31,000. Sec. Ex 11, pp. 7, 10. Four or five people looked at the home, but all had children. Mr. Sarno told them that the rule precluding children prevented his selling to them. The Sarnos received no offers. *Id*. pp. 7-8; Sec. Ex. 12, p. 6. Accordingly, Mr. Sarno reduced his asking price to $29,500. Sec. Exs . 1, Tr. pp. 51-52.

During this period, Rauna Sarno and Debra Ricciotti worked together at the Hotel Denver. Mrs. Ricciotti learned about the availability of the home from Mrs. Sarno and, as a result, on or about June 1, 1989, the Ricciottis viewed the home. Tr. p. 30; Sec. Ex. 11, p. 8. Sec. Ex. 12, p. 6. The Ricciottis "loved" the home and the park, and were "really excited". Tr. pp. 30, 39, 104, 111.

The home was a 16 x 74 foot, 1987 "Titan" single-wide with three bedrooms, two bathrooms, kitchen/dining area and living room. Sec. Ex. 1. Outside was a swing set, sandbox, and fenced yard. Tr. pp. 30, 104; Sec. Ex. 11, p. 6; Sec. Ex. 12, p. 9. The lot rent was $175.00 per month. It was within walking distance from Mrs. Ricciotti's job.

On or about June 1, 1991, the Ricciottis sought and obtained approval for a loan. Combined with the $10,000 from his parents, Mr. Ricciotti had sufficient funds to make an offer on the Sarno home. Tr. pp. 99-100. On or about June 2, 1989, he offered $28,500, $1,000 less than the Sarno's asking price. Tr. p. 32.[2] Mr. Sarno stated that "they wanted to think about it." Tr. p. 33.

The Sarnos were aware of the rule prohibiting children. On the other hand, they needed to sell their home as soon as possible in order to move to California. Their efforts had been unsuccessful, but now they had a ready, willing, and able buyer. They only needed Mr. Morgan's permission to sell. Attempting to change Mr. Morgan's mind, Mr. Sarno met with him at least twice and told him he wished to sell to a family with a child.[3] Mr. Morgan continued to insist on the enforcement of Rule 3. He told Mr. Sarno

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[2]Neither Mr. or Mrs. Sarno nor Mr. Ricciotti was absolutely certain of the amount of the original offer. Tr. p. 23; Sec. 11, p. 11; Sec. Ex. 12, p. 7. The asking price of $29,500 was handwritten by Mr. Sarno on the copy of the "listing" which he gave to the Ricciottis during their visit. Sec. Ex. 1. Mr. Sarno's response to this offer was that "they wanted to think about it." Tr. p. 33. If the offer had been for the full amount of the asking price, there is no apparent reason for the Sarnos not to have immediately accepted the offer subject to Mr. Morgan's approval. On June 4, 1989, Mr. Ricciotti offered the "full price" after learning that someone else had made an offer on the home. Tr. p. 33. Accordingly, the original offer by Mr. Ricciotti must have been for some amount less than the asking price of $29,500. These circumstances have caused me to conclude that Mr. Ricciotti's recollection is correct.

[3]Mr. Sarno does not state when these conversations with Mr. Morgan occurred. Because Mr. Sarno recalls mentioning that he had a buyer with a child, I have concluded that the conversations occurred after the initial offer by the Ricciottis. Sec. Ex. p. 9.

that it would be a long time before he saw his money and that he would "tie this thing up in the courts if he had to," or words to that effect. On one of these occasions, Mr. Sarno observed Respondent refusing to accept the application of a woman with a teenage child. Sec. Ex. 11, p. 9.

The evening he made the offer, Mr. Ricciotti called Mr. Morgan who agreed to meet with him. Shortly after their phone conversation, Mr. Morgan again phoned Mr. Ricciotti and asked whether they had any pets or children. Receiving an affirmative response, he asked the age of the child. Upon being informed that the child was three, Mr. Morgan said, "Well, this is an all adult park and we do not allow children here." or words to that effect. Tr. pp. 35, 165-166. Mr. Ricciotti ended the conversation by stating that his attorney would be in contact with him. Tr. p. 35.

On or about June 5, 1989, Mr. Ricciotti again called Mr. Morgan. He mentioned the Fair Housing Law and stated that he still planned on living in the park. Mr. Morgan replied that as long as he owned the park Mr. Ricciotti would never live there and "if you know so much about the goddam law, why don't you buy the court". Tr. p. 36.

The Sarnos sold their home to William and Betty Geib, a couple having no children under eighteen. The Geib's offer followed the initial offer by the Ricciottis. Sec. Ex. 11, p. 10. They originally offered some amount less than the full asking price of $29,500, but more than the $28,500 initially offered by the Ricciottis.[4] After learning from Mr. Sarno of the Geib's offer, Mr. Ricciotti offered Mr. Sarno his full asking price. Tr. p. 33. Mr. Sarno again contacted Mr. Morgan who by this time had learned of the Geib's offer. Respondent told Mr. Sarno that he could not sell to the Ricciottis and should sell to the Geib's. Sec. 11, p. 11. The Sarnos did not accept Mr. Ricciottis' second offer and, instead, sold to the Geibs for $29,500.[5] The Sarnos rejected the Ricciottis because they didn't have the time to spend disputing the issue of children with Mr. Morgan and the Geibs had no children under eighteen.[6] Sec. Ex. 11, p. 11; Sec. Ex. 12, p. 8. The Geibs signed the park rules on June 22, 1989, and moved in on July 1, 1989. R. Ex. 7; Tr. p. 173. The rental fee for the space was $175.00 per month.

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[4]The testimony of Mr. Sarno is imprecise and conflicts with that of Mr. Ricciotti on the number and timing of offers made by the Ricciottis and the amount of those offers. Mr. Sarno did not testify at the hearing. However, his telephonic deposition was placed in evidence. Since, the record reflects no reason to believe Mr. Sarno has an interest in the outcome of this case, his testimony reflects a poor recollection of the exact the amount and timing of offers rather than bias. Accordingly, I have generally credited Mr. Sarno's testimony except where it conflicts with that of others as to these specific details.

[5]There is no evidence that a contract of sale had been entered into between the Sarnos and the Geibs or that the Sarnos were in some way restricted from rejecting the latest Geibs' offer and accept that of the Ricciottis.

[6]Mr. Sarno states that he made the decision to sell to the Geibs ". . .rather than stay around and fight and have a chance of losing everything. . . ." Sec. Ex. 11, p. 11.

The Krigbaum Home

After his initial conversation with Mr. Morgan, Mr. Ricciotti contacted his father-in-law, Bradley Coover, an attorney. By letter dated June 6, 1989, Mr. Coover informed Respondent that his refusal to consider the Ricciottis' application violated the Fair Housing Act. Sec. Ex. 9, Tr. pp. 37, 145. On June 8, 1989, Mr. Ricciotti signed a HUD complaint form alleging discrimination based on familial status. Sec. Ex. 4; Tr. pp. 37-38, 58.

Following his receipt of Mr. Coover's letter, Mr. Morgan called the Ricciottis. He reached Mrs. Ricciotti and explained to her that he wished to retract his pervious statements. Tr. pp. 40-41, 69-70, 106, 116, 146, 166, 169. Mrs. Ricciotti, not certain how to respond, stated that her husband would call him back. Tr. p. 106. When Mr. Ricciotti called Respondent he asked whether by "retracting" his statement, Mr. Morgan meant that the Ricciotti family could live in the park. Mr. Morgan replied that he "guessed that's what it means." He also requested Mr. Ricciotti to withdraw his discrimination complaint, which Mr. Ricciotti agreed to do. Tr. pp. 41, 70, 72, 82, 93-94, 147. Mr. Ricciotti stated that he would continue to look for another home in the park and would contact him if he found one he wanted to buy. Tr. p. 41.

Marilyn Krigbaum (now Marilyn Shettle) owned a 1,456 square foot, 1982 double-wide mobile home at Space 18. It had three bedrooms, two bathrooms, a kitchen, a laundry room, a dining room and a living room. Amenities included built in china cabinets, storm windows, walk-in closet, draperies, dishwasher and washer and dryer. Sec. Exs. 5, 13, p. 5; Tr. pp. 41-42, 108. The lot rent was $175 at the time it was put up for sale in March 1989. She had rejected an offer from a family with children under eighteen because Mr. Morgan had told her to do so. Sec. Ex. 13, pp. 6-7.

Ms. Krigbaum's asking price was $38,500. The Ricciottis looked at the home on or about July 1, 1989. On or about July 6, 1989, having obtained approval for a $25,500 loan, they offered $35,500. Ms. Krigbaum accepted the offer. Sec. Ex. 13, p. 8; Tr. pp. 42-43, 108. Mr. Coover drafted a sales contract. Sec. Ex. 6; Tr. pp. 43, 62. The Ricciottis began preparations for moving, notified their landlord, and wrote cards notifying friends of the move. Tr. pp. 46, 110, 122-125.

Toward the latter part of June 1989, Mr. Morgan decided to raise the lot rent from $175 to $225 for incoming tenants. Existing tenants were unaffected.[7] With the exception of his secretary, who was also a tenant, Respondent did not notify park tenants

[7]Under Colorado law a sixty day notice was required prior to the imposition of a rental increase for existing tenants. *Colorado Mobile Home Park Landlord-Tenant Act*, 16 A Colo. Rev. Stat. Secs. 31-12-201.5, *et. Seq.* (1982 Replacement Vol. and 1988 Cum. Supp.) R. Ex. 8. Since the notice was required, and since the park's policies were being investigated by HUD, Respondent decided not to raise the rent of existing tenants. Tr. p. 179.

of his decision not to enforce Rule 3, or to increase the rent for new tenants. Tr. p. 170. The rent increase became effective on July 3, 1989, and has applied to new tenants. R. Exs. 5, 6; Tr. p. 144.

The Ricciottis arranged to meet with Mr. Morgan on the 7th or 8th of July to read and sign the park rules. Mr. Morgan did not mention the rent increase at the time the meeting was arranged.

The meeting was actually held on or about July 10th. Respondent handed a copy of the rules to the Ricciottis. Mr. Ricciotti first learned of the rent increase when he reached the third page. He also noticed that Rule 3 was in place, and he placed and "x" next to it. Sec. Ex. 7, Tr. pp. 43-44.[8] Mr. Ricciotti asked about the rent increase. Mr. Morgan stated that it was new and applied to all persons moving into the park. Tr. pp. 43, 67, 109, 117, 151-152. At this point the Ricciottis decided to discuss the matter at home and decide what to do. The Ricciottis terminated the meeting without discussing the rent increase any further. They asked no questions regarding the effect of Rule 3. They were "shocked" by the rent increase and felt that it was directly related to their pursuit of the fair housing complaint. They found Mr. Morgan's attitude to be "cold," and they believed that he wanted nothing to do with them. Tr. pp. 44-47, 67-69, 84. They subsequently decided not to purchase the Krigbaum home.

Ms. Krigbaum's home was sold to Erik and Judy Westra who signed the park rules on August 14, 1989, and moved in on September 1, 1989. The Westras have no children under eighteen years of age. Sec. Ex. 13, pp. 11; R. Ex. 4A; Tr. pp. 172-173. As indicated by the copy of the rules signed by the Westras, Rule 3 was excised from the park rules by the time of this sale. R. Ex. 4. Three homes in the park were purchased between the time the Westras moved in and Mr. Morgan's sale of the park. None of the purchasers had children under eighteen years of age. R. Ex. 7; Tr. pp. 171, 179. All,

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[8]The parties dispute whether Secretary's Exhibit 7 (a copy of Rule 3 with a handwritten "x" placed next to it) or Respondent's Exhibit 10 (a copy of Rule 3 with four handwritten "x's" placed over the text of Rule 3) is the document given by Mr. Morgan to the Ricciottis.

Mr. Morgan was uncertain, if not inconsistent, as to when he actually made the "x's". He initially remembers having drawn them in the Ricciottis' presence. He stated that "*If I remember right*, I took the pen and I drew (sic) x's across number 3. . . ." In his narrative this act immediately follows his description of what took place at the meeting and gives the clear impression, although he does not say so, that he drew the "x's" in their presence. Tr. p. 150. On the other hand, he later testified that he made the "x's" prior to the meeting. Tr. p. 177. He stated: *I believe*, that was done before they (the Ricciottis) got there."

Mr. Ricciotti testified that he was "positive" that he made a small "x" next to Rule 3 and underlined the rental increase on the copy that was given him. Sec. Ex. 7, Tr. pp. 64, 181-182. Mrs. Ricciotti corroborates his statement that Secretary's Exhibit 7 is a copy of what was actually handed them. Having heard and observed both witnesses I have credited Mr. Ricciottis' testimony as being the more consistent and precisely recollected.

including the Westras, paid the increased lot rent of $225. R. Exs. 4A, 5; Tr. pp. 153, 158.

The Ricciottis reinstated the Fair Housing Complaint with HUD. On October 25, 1989, they moved into a townhouse in Glenwood Springs. They paid rent until December 27, 1989, when they obtained title. The cost of the home was $60,000 financed with a $54,600 mortgage for 30 years at 9 and 1/2 per cent interest. Their monthly expenses are: a $550 mortgage payment, $120 for utilities, $15 for trash pickup, and a $41 home owner's association fee. Tr. pp. 48-49, 112.

Discussion

Conciliation as a Jurisdictional Requirement

Respondent asserts that the evidence taken during an *in camera* hearing[9] reveals a failure to meet the mandatory conciliation requirement, set forth at 42 U.S.C. Sec. 3610(b)(1), and that this requirement is mandatory, hence jurisdictional.[10]

A similar argument has been advanced in cases where the Secretary has failed to complete an investigation within 100 days of the filing of the complaint and has not given Respondent the notice required by the statute setting forth the reasons that it is impracticable to complete the investigation within the 100 days. 42 U.S.C. Sec. 3610(a)(1)(B)(iv). The 100 day investigation requirement is not jurisdictional because there is no stated consequence for a failure to comply with its terms. *U.S. v. Hakki*, Fair Housing-Fair Lending (P-H) para. 15676 at 16,473 (E.D. Pa.). *See also*, *Fort Worth National Corp. v. FSLIC*, 469 F. 2d 47, 58 (5th Cir. 1972). The conciliation section of the statute contains a requirement analogous to the 100 day investigation requirement. Like that provision, it is mandatory but specifies no consequences for a failure to meet its provisions. Accordingly, it is not jurisdictional, and, therefore, it is unnecessary to address the adequacy of the conciliation attempts in this case.

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[9] I permitted Respondent to adduce testimony in support of his Motion to Dismiss. Because nothing said or done during the course of conciliation may be made public or used as evidence in a subsequent proceeding, the testimony was taken before a court reporter in a separate proceeding *in camera*. 42 U.S.C. 3610(d)(1); 24 C.F.R. Sec. 103.330(a).

[10] Section 3610(b)(1) of Title 42 provides:

> During the period beginning with the filing of such complaint and ending with the filing of a charge or a dismissal by the Secretary, the Secretary shall, to the extent feasible, engage in conciliation with respect to such complaint.

Governing Legal Framework

Respondent has been charged with having violated 42 U.S.C. Sec. 3604(a),(b), (c) and (d).[11] Among other things, these sections prohibit certain actions by housing providers taken "because of. . . familial status".

The Government contends that direct evidence of discrimination establishes that the Act was violated. In the alternative, the Secretary contends that discrimination is demonstrated by the application of the three-part burden of proof test of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See also Pollit v. Bramel*, 669 F. Supp. 172, 175 (S.D. Ohio 1987); *Secretary of HUD v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990).

[11]Title 42 U.S.C. Section 3604(a) makes it unlawful "(t)o 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. . . ."

Section 3604(b) makes it unlawful "(t)o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of. . . familial status. . . ."

Section 3604(c) makes it unlawful "(t)o make, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates a preference, limitation, or discrimination based on . . .familial status. . . ."

Section 3604(d) makes it unlawful "(t)o represent to any person because of . . . familial status. . .that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."

Where direct evidence of discrimination is presented, such evidence, if established by a preponderance of evidence, is sufficient to support a finding of discrimination. *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir.), *cert. denied*, 111 S. Ct. 515 (1990). *Secretary of HUD v. Jerrard*, Fair Housing-Fair Lending (P-H) para. 25,005 at 25,087 (HUDALJ Sept. 28, 1990).

If direct evidence is not presented, discrimination can also be established using the three-part analysis of *McDonnell Douglas*. This analysis is designed to assure that a plaintiff may satisfy his burden of proof despite the unavailability of direct evidence of discrimination. The analysis can be summarized as follows:

> 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, nondiscriminatory 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 mere pretext. *Pollitt,* 669 F.Supp. at 175 (quoting *McDonnell Douglas*, 411 U.S. at 802, 804).

Specifically, in the circumstances of this case, a prima facie case would be demonstrated by proof that: 1) Complainant is a member of a protected class, i.e., a member of a family with a person under eighteen years of age; 2) Complainant applied for and was qualified to purchase a mobile home and rent a space within the park; 3) Complainant was denied the housing; and 4) housing in the park was purchased and the space rented to persons not in the protected class. If a prima facie case is established, the burden of production shifts to Respondent to articulate a legitimate, non-discriminatory reason for denying the housing. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1978). If the articulation of a legitimate, non-discriminatory reason raises a genuine issue of fact, the burden again shifts to the Secretary to demonstrate that the articulated reason is merely pretextual.

The Sarno Purchase

Direct evidence of the existence of a discriminatory policy is established by enforcement of Rule 3, which on its face, discriminates against families with children after March 12, 1989, the effective date of the Fair Housing Amendments Act. Respondent admits that on or about June 2, 1989, he enforced Rule 3 and refused to allow the

Ricciottis to lease the mobile home space on which the Sarno home was located. Tr. p. 166. He asked Mr. Ricciotti if he had any children and, receiving an affirmative response, admits to having stated "Well, this is an adults court, and I can't permit children in the court." Tr. pp. 165-166.

Other direct evidence of enforcement of Rule 3 is provided by Mr. Morgan's insistence on enforcement of Rule 3 in his conversations with Mr. Sarno regarding the Ricciotti's offer; Mr. Sarno's testimony that he turned away four or five potential buyers with children, his observation of Mr. Morgan's refusal to rent to a woman with a child under eighteen, and Ms. Krigbaum's rejection of an offer of a family with children under eighteen.

While admitting the existence of a discriminatory policy, Respondent contends that the Government has failed to show that the Ricciottis could have purchased the Sarno home. He bases his contention on Mr. Ricciotti's initial offer which was $1,000 less than Mr. Sarno's asking price. Since, Mr. Geib met the full price prior to Mr. Ricciotti's second offer, according to Respondent, the home would have been sold to the Geibs no matter what Mr. Morgan did. Thus, he contends that while there may be evidence of a discriminatory policy, the Government has failed to demonstrate that Respondent's admittedly discriminatory policy affected the Ricciottis and resulted in damage to them.

Contrary to Respondent's contention, the record establishes that the Sarnos were prevented from selling to the Ricciottis by Respondent's enforcement of the discriminatory policy. The Sarnos clearly wanted to sell to the Ricciottis.[12] The Ricciottis had an approved loan and had made an offer on the property. Although the initial offer was $1,000 less than Mr. Sarno's asking price, there is no evidence that this was a final offer. When Mr. Sarno obtained an offer from the Geibs, Mr. Ricciotti bid the full asking price of $29,500. The only hurdle was Mr. Morgan's enforcement of the discriminatory policy. The Sarno's sale to the Geibs for the full asking price after receiving a similar second offer from the Ricciottis directly resulted from Respondent's enforcement of the discriminatory policy.[13]

Since the record establishes by preponderant direct evidence that there was a discriminatory policy in place and that this discriminatory policy resulted in the sale of the

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[12]The wives worked together and knew each other. In her deposition Mrs. Sarno repeatedly refers to Mrs. Ricciotti as "Debra" rather than to her as "Mrs. Ricciotti". The depositions of both Mr. and Mrs. Sarno reveal their desire to sell to the Ricciottis. Sec. Ex. 11, pp. 9-10; Sec. Ex. 12, p. 7. It was the Sarno's anxiety to move, combined with their knowledge that the Ricciottis were unacceptable to Respondent because they had a child, which caused them to contact the Geibs. Mrs. Sarno recalls that their discussions with the Geibs occurred only after Mr. Sarno reported that the Ricciottis were unacceptable because they had a small boy. Sec. Ex. 12, p. 7.

[13]The record establishes that the Geibs would also have been precluded from purchasing the property if they had children under eighteen years of age.

sale of the Sarno home to the Geibs rather than the Ricciottis, it is not necessary to apply the *McDonnell Douglas* analysis to the events resulting in the purchase of the Sarno home.

The Krigbaum Purchase

Upon receiving the letter from Mr. Coover, Respondent called Mrs. Ricciotti and, subsequently, Mr. Ricciotti. He stated on both occasions that he was retracting the rule prohibiting families with children and that they could live in the park. Despite his retraction of Rule 3 as applied to the Ricciottis, he did not notify other tenants of the change[14], and did not immediately cause the rules to be reissued.[15] Thus, the discriminatory policy, established by direct evidence, continued in force even after Mr. Coover's letter was received.

While the policy of discriminating against families with children continued, it was not applied to the Ricciottis, as they were specifically told by Mr. Morgan that the policy was "retracted" and that they could live in the park. Accordingly, there is no direct evidence that the policy of discrimination was applied to the Ricciottis.

The Secretary has not established, prima facie, that the Ricciottis' failure to purchase the Krigbaum home was the result of discrimination based upon their familial status. Thus, although the record establishes 1) that Complainant is a member of a protected class, i.e., a member of a family with a person under eighteen years of age; 2) that Complainant applied for and was qualified to purchase a mobile home and rent a space within the park, that is, he had successfully arranged financing and made an offer on the property; and 3) that housing in the park was purchased and the space rented to the Geibs, persons without children under the age of 18, and therefore, not in the protected class, the Secretary has not established, the remaining element which is that Complainant was denied the housing.

Because Mr. Morgan gave no overt indication at the meeting that he would decline to permit the Ricciottis to reside in the park or that he had changed his position since informing the Ricciottis of his decision to retract his prior policy, the question presented is whether he did so tacitly by his handing them a copy the park rules containing Rule 3 and the rent increase.

To "deny" or "otherwise make available" includes "any conduct" which makes housing unavailable and includes "all practices which have the effect of denying dwellings on prohibited grounds," and which in any way impedes, delays, or discourages" a

[14]Ms. Krigbaum told inquirers with children under eighteen that it was an "adult" park. In addition, Mr. Morgan never informed her that Rule 3 had been revoked. Sec. Ex. 13, pp. 11-12.

[15]Sometime after the events surrounding the Ricciottis' agreement to purchase the Krigbaum home, Respondent had his secretary retype a copy of the rules eliminating Rule 3 . R. Ex. 4; Tr. p. 157.

prospective buyer. 42 U.S.C. Sec. 3604(a); 24 C.F.R. Sec. 100.50(b)(3); *United States v. Youritan Construction Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973), modified on other grounds, 509 F. 2d. 623 (9th Cir. 1975); *Zauch v. Hussey*, 394 F. Supp. 1028, 1047 (E.D. Mich 1975). Despite this broad construction, the peculiar facts presented by this case do not establish that Mr. Morgan denied or otherwise made the Krigbaum home unavailable.

A weeks days prior to the meeting Mr. Morgan had retracted his policy. In the words of his counsel, he "ate crow". Tr. p. 70. This action sprang from self interest. He sought the elimination of the discrimination complaint. Moreover, he initiated the retraction call to the Ricciottis and, thereby, took a self-effacing action.

The argument that Mr. Morgan's act of handing the Ricciottis a copy of the rental agreement, containing Rule 3 and setting forth the rent increase, in a deliberate attempt to discourage them does not make sense. Moreover, the Ricciottis should have known that it did not make sense. First, Mr. Morgan knew they had a child. He also knew that they had filed a discrimination complaint with HUD, by which it was made a matter of record that he knew they had a child. He could not, logically, permit them to sign the agreement and, subsequently, enforce Rule 3 against them, claiming that he did not know they had a child. Second, the record establishes that Mr. Morgan did not seek to do battle with Mr. Ricciotti on this issue. Because Mr. Morgan was aware that Mr. Ricciotti had filed a discrimination complaint with HUD and that he had an attorney who would pursue the matter, he was concerned about the discrimination complaint and had requested Mr. Ricciotti to withdraw it. Any overt or tacit attempt to discriminate would have thwarted his efforts to avoid a discrimination action. As the bringing of this action makes clear, it is reasonably foreseeable that the inclusion of Rule 3 would cause precisely the reaction which Mr. Morgan sought to avoid.[16] Accordingly, handing the Ricciottis a copy of park rules containing Rule 3 could only have been inadvertent. Under these particular circumstances, the Ricciottis could not reasonably[17] have treated this act as "discouraging" or "impeding" their purchase of the home.

As for the rent increase, the record establishes that it was in line with rents being charged by other parks and was consistently applied to all new tenants after July 1989. The Ricciottis made an offer on the Krigbaum home sometime after July 4, 1989. This was after the effective date of the rent increase. Accordingly, the record does not

[16]For this reason, I am also persuaded that Mr. Morgan's "cold" appearance in his dealings with the Ricciottis was "businesslike" rather than part of an intentional effort on his part to discourage the Ricciottis.

[17]The Ricciotti's behavior must be evaluated by an objective standard of reasonableness, i.e., whether an ordinary, reasonable person in the same or similar circumstances would have reacted the same way. This standard looks to the natural and forseeable consequence of the act, rather than the Complainant's personal reaction to that act. *See, e.g., NLRB v. Corning Glass Works*, 293 F. 2d 784 (1st Cir. 1961).

establish that, despite its proximity in time to the Ricciotti's attempt to purchase the Krigbaum home, the rental increase was specifically directed at the Ricciottis or was intended to discourage their purchase.

Of course, one can "deny" housing by leaving no reasonable alternative to the prospective tenant except rejection of the terms which have been offered. The Secretary has not demonstrated that Mr. Ricciotti was required to sign the document "as is", nor that he could not pay the increased rent. Tr. p. 46. In view of Respondent's definitive retraction, Mr. Ricciotti's questioning Mr. Morgan about the inclusion of Rule 3 would not have been a "waste of time", or a "meaningless gesture". *Pinchback*, supra, 1449, 1452. A question or two by Mr. Ricciotti would have revealed either that the rental agreement was to be signed without change, or, as is more likely, that Rule 3 remained by mistake and would be excised. Because the questions were not asked nor subsequently answered, and the record is insufficient to satisfy this demonstration, the Secretary's burden to prove that Respondent's actions constituted a discouragement or an impediment to the purchase of the Krigbaum home has not been satisfied.

Familial Status as a Motivating Factor

The record establishes that Respondent's discrimination based on complainant's familial status caused them to lose the Sarno home. Respondent had a written policy which he consistently enforced. As stated above, it was this policy rather than the initial lower offer made by the Ricciottis which resulted in the loss of opportunity to purchase the Sarno home. However, the Secretary has not demonstrated by a preponderance of evidence that discrimination based on the familial status of the Ricciottis was a factor in their decision not to purchase the Krigbaum home.

Conclusions of Law

The record establishes that Respondent was the owner of a "dwelling designed or intended for occupancy by, or occupied by, five or more families." 42 U.S.C. Sec. 3603(c)(3).[18] Accordingly, the Act applies to him.[19]

[18]Mobile homes are "dwellings" within the meaning of the Fair Housing Amendments Act. *HUD v. Murphy*, Fair Housing Fair Lending (P-H), para 25,002 (HUDALJ July 13, 1990); *Stewart v. Furton*, 774 F. 2d. 706 (6th Cir. 1985); *U.S. v. Warwick Mobil Home Estates*, 537 F. 2d 1148 (4th Cir. 1976), *later appeal*, 558 F. 2d 194 (4th Cir. 1977). A "dwelling" also includes "any vacant land which is offered for sale or lease for the construction or location thereon. . . of any building, structure, or portion thereof" that is occupied or intended for occupancy as a residence by one or more families, including single individuals. 42 U.S.C. Sec. 3602(b),(c); 24 C.F.R. Sec. 100.20.

[19]Because Respondent owned the park, he cannot escape responsibility for the enforcement of Rule 3 either because it was created by the tenants, or that it was the tenants who desired its continued enforcement. *Furton, supra,* 709; *Cf. United States v. Yonkers Bd. of Educ.*, 837 F. 2d 1181, 1223-1226 (2d Cir. 1987), *cert. den.*, 486 U.S. 1055; *Gautraux v. Chicago Housing Auth.*, 296 F. Supp. 907 (N.D. Ill. 1969)

The record establishes that Respondent violated Title 42 U.S.C. Sections 3604(a), (b), (c) and (d) and 24 C.F.R. Sections 100.50(b), 100.60(a),(b)(1),(2), 100.75(a),(c)(1),(2), and 100.80(b)(2),(3).

Section 3604(a) makes it illegal to "otherwise make unavailable or deny" a dwelling "because of . . .familial status. . . ." Respondent's enforcement of the adults only policy set forth in Rule 3 of park rules, denied the Ricciottis the opportunity to purchase the Sarno home and, thereby, caused that dwelling to become "unavailable" in violation of this section of the statute. *See also*, 24 C.F.R. Secs. 100.50(b)(1), 100.60(b)(1),(2).

Section 3604(b) makes it unlawful to discriminate against persons in the "terms, conditions, or privileges" of the "sale or rental of a dwelling" because of . . .familial status. . . ." A preponderance of evidence establishes that the rental increase, which was applied to all new tenants, was not motivated by unlawful discrimination. However, the enforcement of Rule 3 against the Ricciottis, thereby preventing their purchase of the Sarno home, and the continued application of Rule 3 to all tenants and potential purchasers even after Respondent's June retraction as to the Ricciottis, discriminated against potential sellers and purchasers. *See also*, 24 C.F.R. Sec. 100.50(b)(2).

Section 3604(c) makes it unlawful to make, print, or publish notices statements or advertisements with respect to the sale or rental of a dwelling which indicate a "preference, limitation, or discrimination based on . . . familial status. . . ." This section was violated (1) by Respondent's various statements to Mr. Sarno that he would refuse to permit the Ricciottis to purchase his home, and that he would "tie this thing up in the courts if he had to;" (2) his statement to Mr. Ricciotti that "this is an all adult park and we do not allow children here," or words to that effect; (3) his statements to Ms. Krigbaum she could not sell to families with children; (4) his statement to a woman with a teenage son that she could not live in the park, and (5) his publishing copies of the park rules containing Rule 3, after March 12, 1989, the effective date of the Fair Housing Amendments Act. *See also*, 24 C.F.R. Secs. 100.50(b)(4), 100.75(a),(c)(1),(2).

Section 3604(d) makes it unlawful "to represent to any person because of . . . familial status. . . that any dwelling is not available for . . .sale. . .when such dwelling is in fact so available." HUD regulations provide that a representation that covenants which purport to restrict the sale of dwellings because of familial status, or the enforcement of a covenant which precludes the sale of a dwelling because of familial status, are violative of this section. 24 C.F.R. Sec. 100.80(b), (2),(3). Since Rule 3 was established by the mobile home community, it was a "covenant" within the meaning of this regulation. Accordingly, the enforcement of Rule 3 against the Ricciottis in order to prevent their purchase from the Sarnos and the continued enforcement of Rule 3 after that time violated this section of the statute. *See also*, 24 C.F.R. Sec. 100.50(b)(5).

Remedies

Because Respondent violated 42 U.S.C. Secs. 3604(a), (b), (c) and (d), Complainants are entitled to appropriate relief under the Act. The Act provides that where an administrative law judge finds that a Respondent has engaged in a discriminatory practice, the judge shall issue an order "for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief. 42 U.S.C. Sec. 3612 (g)(3).

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

The Secretary, on behalf of Complainant, asks for: 1) damages totalling $562.28 and alternative living expenses in the amount of $104.39 per month from January 1990 until such time as this decision becomes final, to compensate Complainant for economic loss; 2) $7,500 for lost housing opportunity; 3) $2,500 for inconvenience; 4) $12,500 for emotional distress; 5) injunctive and equitable relief requiring, *inter alia*, that Respondent cease to employ any policies or practices that discriminate against Complainant or anyone else because of familial status; and, 4) the imposition of the maximum civil penalty of $10,000.00.

Economic Loss

Complainant and Mrs. Ricciotti[20] are entitled to any wages lost as a result of Respondent's actions. *See HUD v. Blackwell*, Fair Housing-Fair Lending (P-H) para. 25,001 at 25,010 (HUDALJ 04-89-0520-1, Decided Dec. 21, 1989). In addition, he is entitled to out-of-pocket expenses. Complainant missed 16 hours from his job at a rate of $11.75 per hour and 5 hours at a rate of $10.00 per hour. Debra Ricciotti lost 13 hours at a rate of $7.50 per hour as a result of this case. The family also expended $90.00 for telephone calls and $10.00 for facsimiles related to this case.

But for Respondent's discrimination, Complainant would have purchased the Sarno home. Their monthly expenditures would have been $175.00 for lot rent, approximately $150.00 for utilities, and $19.83 for property taxes. Their payment on a $19,500.00 loan would have been $279.78 at 12% for 10 years. Their total monthly payment would have been $624.61 per month.

[20]Complainant is entitled to compensation for the damages inflicted on other members of his family to the extent that he is damaged by the harm caused the other family members. *Davis v. Mansards*, 597 F. Supp. 334, 348 (N.D. Ind. 1984). However, other family members are not entitled to compensation for damages on their own behalf unless they are "aggrieved persons". 24 C.F.R. Sec. 104.910(b)(1). The Charge names only one "aggrieved person", Mr. Ricciotti. Since Mrs. Ricciotti's loss of income was also a loss to Mr. Ricciotti, her lost wages are compensable.

Compensation is appropriate for the costs of alternative housing to compensate victims who have unlawfully been denied housing even though the alternative housing is more expensive, hence, worth more.[21] The Secretary seeks compensation for the difference between the amount Complainant's monthly expenditures would have been for the Sarno home, and the amount he has had to expend for his townhouse. However, compensation based upon this difference is not justified. Had the Ricciottis purchased the Krigbaum home, as they could have done, they would not have purchased the even more expensive townhouse. Complainant has a duty to mitigate his damages and is not entitled to build up those damages by declining to accept an available home in the park. *See, e.g., Young v. Parkland Village, Inc.*, 460 F. Supp. 67, 71 (D. Md. 1978). Accordingly, the price which would have been paid for the Krigbaum home constitutes a ceiling on the amount of compensation to be awarded for alternative housing. The difference between the price which would have been paid for the Krigbaum and Sarno homes constitutes the appropriate amount which can be awarded for alternative housing under the facts of this case.

The record reflects that, with the exception of different loan payments, monthly expenditures for the Sarno and Krigbaum homes would have been the same, that is, $175.00 for lot rent,[22] $150 for utilities and $19.83 for property taxes. Sec. Ex. 5. However, the monthly payment on the loan for the Krigbaum home would have been $365.85, based on loan of $25,500 at 12% for 10 years.[23] The difference between what would have been paid for the Krigbaum home ($365.85) and for the Sarno home ($279.78) amounts to $86.07 per month. This difference begins with a July 1989, payment, since the Sarno purchase would have been made in that month.[24] There would have been 24 payments covering the period from July 1989 to July 1991. The difference in monthly payments is 24 x $86.07 or $2,065.68. The remaining principal balance owed on the Krigbaum home would have been $22,509.99 as of July 1991.[25] The remaining

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[21]The additional worth is not a windfall, rather it results from a "forced reallocation of [Complainant's] monetary resources." *Miller v. Apartments and Homes of N.J.*, 646 F. 2d 101, 112 (3rd Cir. 1981). Respondent has forced Complainant to divert resources for the new home which he could have used for other purposes.

[22]Had the Ricciottis purchased the Sarno home, they would have been existing tenants to whom the additional $50.00 increase would be inapplicable.

[23]The agreed price was $35,500. Tr. pp. 42-43. This amount, less the $10,000 advanced by Mrs. Ricciotti's parents, results in a loan amount of $25,500. The interest rate was 12 percent amortized over ten years. Tr. pp. 45, 100.

[24]Although the Krigbaum home could not have been purchased until July 1989, the Krigbaum home, or any substitute housing, became the alternative to the Sarno home at the moment the Ricciottis were prevented from purchasing it. Therefore any differential must be calculated from the time alternative housing became necessary, not when it became available.

[25]Based on 24 payments at an interest rate of 12% for 10 years, compounded monthly.

principal balance on the Sarno home would have been $17,213.18.[26] The difference between the respective principal balances remaining on the Krigbaum and Sarno homes is $5,296.81. Combining the differences in monthly payments with the differences in the remaining principal balances, Complainant is entitled to an award of $7,362.49 for the cost of alternative housing as of the date of this decision.

Lost Housing Opportunity

The Secretary seeks $7,500 in damages for the opportunity which was lost because the Ricciottis were deprived of their opportunity to purchase the Sarno home. The Secretary describes the Sarno home as ideally suited to the Ricciotti's needs. The Ricciottis "loved" the home, it was a good size, had a fenced yard geared for children with a swing set and sandbox, was close to Mrs. Ricciotti's workplace, and was "small, quiet, tidy and clean, and right next to a park." Tr. pp. 31, 104.

[26]Based on 24 payments on a ten year note with a principal of $19,500 beginning in July 1989 at 12 percent, compounded monthly.

Because Respondent did not deny the Ricciottis the opportunity to purchase the Krigbaum home, they were not ultimately deprived of the opportunity to live in the mobile home park itself. Thus, any opportunity which was lost does not include the features of the park itself, such as proximity to Ms. Ricciotti's workplace and its proximity to a park. In addition, the record indicates that the Ricciottis were at least as excited about the Krigbaum home. About the Krigbaum home, Mr. Ricciotti states:

> It was a double-wide, very spacious place. Once again, it was just perfect for our family. More room than the Sarnos, had a bigger lot, and nice amenities, but -- it was loaded.

Tr. p. 42.

Since Respondent did not prevent the sale to the Ricciottis of the Krigbaum home, a home at least as ideally suited to their needs as the Sarno home, there was no lost opportunity, merely a delay which would have ended with the purchase of the Krigbaum home. This delay began with the loss of the Sarno home and ended with their decision not to purchase the Krigbaum home. This delay is included as part of the inconvenience the Ricciottis suffered, which is discussed below.

Inconvenience

From the time Mr. Ricciotti made his initial offer on the Sarno home, he suffered inconvenience. The inconvenience included the time and effort spent discussing the denial of the Sarno home with Mr. Morgan, the efforts to obtain a loan on the Krigbaum home, the resulting contacts with Mr. Coover and HUD, and the preparation for the hearing in this case. However, Mr. Ricciotti is not entitled to compensation for inconvenience resulting from the decision not to purchase the Krigbaum home. The effort expended on locating a new home following that decision resulted from the Ricciotti's decision not to purchase the Krigbaum home, hence, it is not compensable.

During the period between the loss of the Sarno opportunity and the decision not to purchase the Krigbaum home, a period of approximately one month, the Ricciottis were precluded from living in the mobile home park in the home of their choice. This inconvenience also affected Mr. Ricciotti's quality of life.

Based on the above considerations, compensation for inconvenience in the amount of $1,500 is reasonable under the circumstances of this case.

Emotional Distress

It is well established that the amount of compensatory damages which may be awarded in a Civil Rights Act case is not limited to out-of-pocket losses, but includes damages for the emotional distress caused by the discrimination. *See, e.g.*, *Parker v. Shonfeld*, 409 F. Supp. 876, 879 (N.D. Ca. 1976). Such damages can be inferred from

the circumstances of the case, as well as proved by testimony. *See Marable v. Walker*, 704 F.2d 1219, 1220 (11th Cir. 1983); *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977).

As stated in *Blackwell, supra*, "[b]ecause of the difficulty of evaluating emotional injuries which result from deprivations of civil rights, courts do not demand precise proof to support a reasonable award of damages for such injuries." Fair Housing-Fair Lending (P-H) 25,011, *quoting Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241, 1245 (8th Cir. 1983).

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

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

704 F.2d at 1220-21.

Key factors in determining the amount of compensation for emotional distress are the complainant's reaction to the discriminatory conduct, and the egregiousness of Respondent's behavior. Schwemm, *Housing Discrimination: Law and Litigation*, para 25.3(2)(c), 25-22.

Mr. Ricciotti suffered emotional distress resulting from Respondent's conduct. Being denied an opportunity to purchase the Sarno home, one he and his wife considered ideal for their needs, was "upsetting" and "disappointing". Tr. pp. 37, 40, 110. He was embarrassed, feeling that Respondent's action was a "put down". Tr. p. 50. He embarked on an "emotional roller coaster", first looking forward to his new home, then painfully contemplating its loss, merely because he had a child. During the Spring and Summer of 1989, the vacancy rate in Glenwood Springs was extremely low. Tr. pp. 78-79, 107, 114. In addition, the family had limited means. The record establishes that Mr. Ricciotti suffered stress and depression from the worry of not being able to find a satisfactory, affordable home, and the fear for himself and his family of having to continue to live in a home with a high level of radon gas. In addition, his stress and depression were compounded by the stress and depression suffered by the other members of his family.[27] Respondent first became aware that the Fair Housing Act precludes

[27]Mrs. Ricciotti suffered headaches beginning in July 1989 which she attributes to the stress caused by

discrimination based on family status during his June 5, 1989, telephone conversation with Mr. Ricciotti. However, after receiving Mr. Coover's letter confirming this fact, he informed the Ricciottis of the cancellation of his policy. Accordingly, the record establishes that, at least as to the Ricciottis,[28] his conduct was not egregious. Based on the above considerations, I conclude that Complainant is entitled to an award of $5,000 as compensation for the emotional distress he suffered.

Injunctive Relief

Despite the fact that Respondent no longer owns the park, injunctive relief is appropriate. The specific provisions of this relief as adopted by this decision are set forth in the Order below and include an order that Respondent be enjoined from discriminating against Complainant and his family or anyone else with respect to housing which he owns or may own in the future because of familial status.

Civil Penalties

In addressing the factors to be considered when assessing a request for imposition of a civil penalty under 42 U.S.C. Sec. 3612 (g)(3), the House Report on the Fair Housing Amendments Act of 1988 states:

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

H. Rep. No. 100-711, 100th Cong., 2d Sess. 37 (1988). Based upon a consideration of these factors, it is appropriate in this case, in order to vindicate the public interest, to impose the maximum civil penalty of $10,000.00.

Respondent's actions were serious and egregious. His actions were serious because they prevented the sales of mobile homes to families with children under 18 at

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their difficulties in finding a home. There is no credible evidence of the actual cause of the headaches, and the record reflects that she was also changing jobs at this time. While Mr. Ricciotti could be compensated to the extent her sufferings affected him, since Mrs. Ricciotti is not a named "aggrieved person", she cannot be compensated for her own damages in this proceeding.

[28]By not taking immediate steps to inform existing tenants of the cancellation of Rule 3, Respondent permitted the *de facto* continuation of the discriminatory policy. Respondent's actions are egregious to the extent that he knowingly did nothing to prevent families from being discriminated against.

least until he was aware that Rule 3 was illegal. He was unaware of the illegality of Rule 3 until this was pointed out to him by Mr. Coover. His actions became egregious when, after learning of its illegality, he took no immediate steps to comply with the law, except to inform the Ricciottis that he would retract the policy.[29] Respondent knew Mr. Ricciotti had filed a complaint and his chief concern was with that complaint, rather than cancellation of the illegal policy. As far as the other tenants in the park knew, the policy was still in force. They would continue to comply with Rule 3 and Mr. Morgan must have known that they would.

[29]The record does establish that any particular sales were prevented after he learned that Rule 3 was illegal.

There is no history of prior violations. Consideration of this factor is built into the statutory scheme set forth in section 812(g)(3). Thus there is a limit of $10,000 where there is no history of prior violations.

Respondent did not testify that payment of a $10,000 civil penalty would be beyond his means, nor did he introduce any documentary evidence which would support this conclusion. Because evidence regarding financial circumstances is peculiarly within Respondent's sphere of knowledge, he has the burden to produce such evidence. *Campbell v. United States*, 365 U.S. 85, 96 (1961); *Jerrard, supra,* 25,092; *Blackwell, supra,* 25,015.

Imposition of the maximum civil penalty under the circumstances of this case also serves the goal of deterrence. It is necessary to ensure that Respondent and others learn that "adult" communities are not permitted under the Fair Housing Amendments Act. In addition, in the event housing providers are able to prove that they were, in fact, unaware of the law for a period of time after March 12, 1989, once having learned of the law's requirements, they must take all reasonable steps to eliminate rules which discriminate against families with children. Under these circumstances the award of the maximum civil penalty will act to deter others by demonstrating that actions such as this are not only unlawful but costly. See *Jerrard, supra*, 25092.

ORDER

1. Respondent and his agents and employees are hereby enjoined from discriminating against any persons with respect to housing because of familial status. Prohibited actions include, but are not limited to:

a. refusing or failing to sell or rent or refusing to negotiate for the sale or rental of a dwelling to any person because of familial status;

b. otherwise making unavailable or denying, a dwelling to any person because of familial status;

c. discriminating 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 therewith, because of familial status;

d. making, printing, or publishing, or causing to be made, printed or published, any notice, statement, or advertisement, with respect to the sale or rental of dwelling that indicates any preference, limitation, or discrimination based of familial status.

2. Within forty-five days of the date on which this Order becomes final, Respondent shall pay actual damages to the Complainant as follows: $335.50 for lost wages; $100 for telephone calls and facsimile transmissions; $7,362.49 for the cost of alternative housing, $1,500 for inconvenience; and $5,000 for emotional distress.

3. Within forty-five days of the date on which the Order becomes final, Respondent shall pay a civil penalty of $10,000 to the Secretary of the United States Department of Housing and Urban Development.

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

/s/

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WILLIAM C. CREGAR
Administrative Law Judge

Dated: July 25, 1991