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 Diane Tamberelli and Housing Opportunities Made Equal, Inc., Charging Party, v. Properties Unlimited, Eugene Jason, Marian Buckley, Lisa Jason and Debbie Dalton, Respondents.	HUDALJ 02-89-0308-1 HUDA LJ 02-89-0309-1 Decided: August 5, 1991

Kathleen Pennington, Esquire
For the Secretary

David Gerald Jay, Esquire
For Respondents Eugene Jason and Lisa Jason

Marian Buckley and Debbie Dalton, *pro se*
Respondents

Before: THOMAS C. HEINZ
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This proceeding arises out of complaints filed by Diane Tamberelli ("Complainant Tamberelli") and Housing Opportunities Made Equal, Inc., ("Complainant HOME" or "HOME") alleging that the Respondents, Eugene Jason doing business as Properties Unlimited, Lisa Jason, Marian Buckley, and Debbie Dalton, violated the Fair Housing Act,

42 U.S.C. Sec. 3601 *et seq.,* (sometimes "the Act") by refusing to rent apartments to Complainant Tamberelli and to a representative of Complainant HOME, Helen Bateman, because of their familial status. The Department of Housing and Urban Development ("HUD," or "the Government") investigated the complaints, and after deciding that there was reasonable cause to believe that discriminatory acts had taken place, issued a charge against the Respondents on January 4, 1991. The charge alleged violations of sections 804 (a), (c), and (d) of the Act (42 U.S.C. Secs. 3604 (a), (b), and (d)). An oral hearing was held in Buffalo, New York, on April 24 and 25, 1991, at the close of which the parties were ordered to file proposed findings of fact, conclusions of law, and briefs in support thereof no later than June 10, 1991. Tr.II, 99.[1]

On June 10, 1991, the Government filed 50 pages of proposed findings of fact, conclusions of law, and brief in support thereof plus 25 pages of attachments. Respondents Marian Buckley and Debbie Dalton, who appeared at the hearing *pro se,* have not filed proposed findings of fact, conclusions of law, or briefs.[2] On June 19, 1991, counsel for the other two Respondents, Eugene Jason and Lisa Jason, filed a "Motion to File Proposed Findings Out of Time," together with five pages of proposed findings of fact and conclusions of law, but no supporting brief. The Government opposes the motion. Counsel for Respondents Eugene and Lisa Jason asserts that these materials were filed untimely because he was engaged in a homicide trial from May 6, 1991, through June 12, 1991. Counsel's preoccupation with a homicide case might have justified an extension of time in which to file proposed findings, conclusions, and a brief if a timely request for an extension had been received before June 10, 1991, the filing deadline. But there is no excuse for filing a request for an extension nine days after the deadline and seven days after the jury verdict in the homicide trial. It should not have taken more than five minutes to draft a written request and even less time to direct a secretary to request an extension by telephone. In order to protect the integrity of the adjudicatory process under the Fair Housing Act, the "Motion to File Proposed Findings Out of Time" will be denied.

Findings of Fact

1. In early June of 1989, Complainant Tamberelli was eight and one-half months pregnant. Tr. 7, 13.

2. Established in 1963, Complainant HOME is a non-profit membership organization dedicated to obtaining equal housing opportunities for all persons. Tr. 78, 80, 95. HOME's activities include: referring individuals to available housing; educating potential victims of housing discrimination and housing providers; publishing and distributing brochures for tenants and housing providers; publishing newsletters for HOME's members; broadcasting public service announcements concerning fair housing

[1]The following reference abbreviations are used in this decision: "Tr." for "Transcript, volume I"; "Tr.II" for "Transcript, volume II"; "Sx." for "Secretary's exhibit"; "Rx." for "Respondents' exhibit"; and "Answer" for the Answer filed on behalf of Respondents Eugene Jason and Lisa Jason.

[2]In response to the Government's brief, on July 29, 1991, Respondent Buckley submitted a letter the contents of which cannot be considered for the reasons set out in footnote 24.

issues; and appearing on public affairs programs to discuss housing discrimination. Tr. 78-79, 95, 98-99, 102, 115-16; Sx. 31, 32. Complainant HOME also provides free counseling to people who believe they have been subjected to unlawful discrimination. Tr. 79-80.

3. In June of 1989, Helen Bateman was a HOME member and a volunteer tester. Tr. 136-37, 143. HOME trains testers to act as housing seekers interested in the same housing as HOME clients. Tr. 85-87. A tester adopts a profile similar to a HOME client but is never informed of the client's specific allegations. Tr. 85-87. If testing results indicate that unlawful discrimination appears to have occurred, HOME acts as an advocate for the client by endeavoring to resolve the complaint informally, and if necessary, by pursuing appropriate legal action. Tr. 80, 88.

4. Respondent Eugene Jason is an individual doing business as "Properties Unlimited." ("Properties") Tr.II 9, 80, 86; Answer, para. 3.[3] He owns and operates approximately 500 rental units in the Buffalo, New York area, including Creekside Village Apartments of Tonawanda, which consists of 48 one-bedroom apartments and 32 two-bedroom units. Tr.II 86; Answer, para. 3, 7.

5. Respondent Marian Buckley ("Respondent Buckley") was property manager for Properties from 1979 until August of 1989. Tr. 217; Tr.II 40. She was responsible for reviewing rental applications, selecting tenants, collecting rents, maintaining the properties, and resolving tenant complaints. Tr. 217; Tr.II 70; Answer, para. 4.

6. Respondent Lisa Jason (now Herdman), stepdaughter of Respondent Eugene Jason, has worked as a rental agent for Properties. Tr.II 8-9. During the period covered by this case, she was responsible for answering the telephone, showing apartments, and accepting applications from prospective tenants. Answer, para. 5.

7. Respondent Debbie Dalton (now Dennis) was a rental agent for Properties from May of 1988 until July of 1990. Tr.II 65. Her duties included answering telephone calls, showing apartments, and accepting applications from prospective tenants. Tr.II 66, Answer, para. 6.

8. Respondent Eugene Jason gave Respondents Buckley, Lisa Jason, and Debbie Dalton authority to sign leases on his behalf. Tr. 217; Tr.II 19, 88.

9. In early June 1989, Properties would not rent one-bedroom units to an adult and a child or to a pregnant woman. Tr. 11, 48, 60, 63, 140-41, 189, 196; Tr.II 17, 76, 77; Sx.

[3]Although "Properties Unlimited" has been named as a separate respondent by the Government, inasmuch as that term is merely the name under which Respondent Eugene Jason conducts business, "Properties Unlimited" is not a legal entity separate from Respondent Eugene Jason and hence cannot be deemed a separate respondent.

1; Sx. 2; Properties routinely leased one-bedroom units to two adults. Tr. 34, 48, 180, 219-25.

10. In June 1989, the rental application used by Properties asked applicants to state the number of adults and children who would reside in a unit, as well as each child's age. Sx. 5.

11. In early June 1989, Complainant Tamberelli lived in a single room in a house at 141 Argonne Drive in Kenmore, New York, and paid $50 rent per week. Tr. 75; Sx. 2; Sx. 5. She and her landlord agreed she should move before her child was born. Tr. 34, 54. She was ready to move as soon as she found a suitable apartment. Tr. 75.

12. In early June 1989, Complainant Tamberelli telephoned Properties and made an appointment to see an apartment that had been advertised. The apartment is located at 85 Paradise Lane, Number 9, Tonawanda, New York, in Creekside Village ("the apartment"). Tr. 10; Sx. 2; Sx. 7. It has one bedroom and measures about 800 square feet. Monthly rent was $409, including utilities. Tr. 9, 10, 256; Tr.II 89; Sx. 5; Sx. 7. At that time, it was vacant. Tr.II 30.

13. On or about June 5, 1989, Complainant Tamberelli met Respondent Lisa Jason at the apartment. Tr. 9, 59, 188; Tr.II 9-10, 11, 14; Sx. 1; Sx. 2; Answer, para 8. Complainant Tamberelli's father, Russell, drove her to the meeting. Tr. 9, 59. She was very interested in the apartment because it fit all of her needs. Tr. 9, 59, 60, 201. She expressed her interest to Respondent Lisa Jason, who told her that she was not sure if the apartment was available, and that she should telephone the next day to inquire about completing an application. Tr. 9, 10, 59-60; Tr.II 12, Sx. 1; Sx. 2.

14. On or about June 6, 1989, Complainant Tamberelli telephoned Properties and spoke to Respondent Lisa Jason. Tr. 11, 60, 188; Tr.II 15; Sx. 1. Respondent Lisa Jason told her that because she was pregnant, Respondent Buckley would not allow her to rent the apartment but she could rent a two-bedroom unit. Tr. 11, 60, 188-89; Tr.II 16-17, 39; Sx. 1; Sx. 2; Answer, para. 8. Respondent Lisa Jason stated that Respondent Buckley said that Complainant Tamberelli could not share a bedroom with her child. Tr. 11, 60, 61; Sx. 1; Sx. 2. Complainant Tamberelli told Respondent Lisa Jason that she believed that it was illegal to deny her the apartment and that she would call her back about it. Tr. 11.

15. On or about June 6, 1989, Complainant Tamberelli contacted her father for assistance with the problem, and he in turn contacted an attorney. Tr. 11, 12, 61, 62. After discussing the matter with the attorney, Mr. Tamberelli contacted Respondent Buckley by telephone later that day and explained his understanding of the provisions of the Fair Housing Act prohibiting discrimination on the basis of familial status. Tr. 63. During that conversation, Respondent Buckley stated that written company policy did not permit renting a one-bedroom apartment to a single parent and child. Tr. 63. Mr. Tamberelli testified that Respondent Buckley promised to send him a copy of the written policy, but that he never received it. Tr. 63-64.

16. On or about June 8, 1989, Mr. Tamberelli contacted Complainant HOME. Tr. 13, 64, 89; Sx. 1. HOME then performed a secret test of Properties' rental policy and procedure.

17. On June 14, 1989, Complainant HOME requested that Ms. Bateman perform a test of Properties' rental policies and procedures. Tr. 318. She was advised to pretend she was a single mother of a child less than a year old and ask to see a one-bedroom unit. Tr. 91, 138.

18. On June 16, 1989, pursuant to an appointment, Ms. Bateman met Respondent Debbie Dalton, viewed two one-bedroom units, and expressed interest in the larger of the two. Tr. 140; Dalton Answer, para.17, 18. Upon hearing that Ms. Bateman had a daughter, Respondent Dalton said, "Well, that could be a problem. We normally don't rent one-bedroom apartments to anyone with children." Tr. 140; Tr.II 76; Dalton Answer, para. 19. After some discussion of the issue, Respondent Dalton suggested that Ms. Bateman telephone Respondent Buckley to ask if she could rent a one-bedroom unit. Tr. 141; Dalton Answer, para. 19.

19. Later the same day, Ms. Bateman telephoned Respondent Buckley requesting to rent a one-bedroom apartment for herself and her eleven-month-old daughter. Tr. 142. Respondent Buckley denied the request, explaining that she could rent a two-bedroom apartment but that Properties' policy prohibited renting a one-bedroom unit to a single parent and child. Tr. 142. Respondent Buckley refused Ms. Bateman's request to reconsider the policy. Tr. 142-43.

20. On June 26, 1989, Complainants Tamberelli and HOME filed complaints (later amended) with HUD. Tr. 19, 20, 21-22, 41, 92; Sx. 2; Sx. 3; Sx. 11. HOME requested that HUD seek a temporary restraining order to keep the apartment available for Complainant Tamberelli. Tr. 92, 116-17.

21. On or about June 26, 1989, Mary Haith, an investigator for HUD, received the complaints from Complainants Tamberelli and HOME and telephoned Respondent Buckley in an effort to preserve the availability of the apartment for Complainant Tamberelli. Tr. 195, 206, 208; Tr.II 93. After Ms. Haith told Respondent Buckley about Complainant Tamberelli's complaint, Respondent Buckley said that the apartment was still available but that she would not rent it to Complainant Tamberelli; only a two-bedroom unit could be rented. Tr. 196; Tr.II 42. Ms. Haith then told Respondent Buckley that she would contact HUD's Washington, D.C., office in an attempt to get a temporary restraining order. Tr. 179; Tr.II 43.

22. After consultations with HUD in Washington, D.C., Ms. Haith again telephoned Respondent Buckley, who said she would contact the Properties attorney and Respondent Eugene Jason. Tr. 198; Tr.II 43, 44. Thereafter, Respondent Buckley told

Ms. Haith that she would agree to rent the apartment to Ms. Tamberelli under protest. Tr. 198-99.

23. On or about June 29, 1989, Ms. Haith notified Mr. Tamberelli that Respondent Buckley had agreed to rent the apartment to Complainant Tamberelli. Tr. 22-23, 42, 65, 199. Ms. Haith told him that Complainant Tamberelli should meet with Respondent Buckley the next day to complete a lease application. Tr. 23, 24.

24. On or about June 30, 1989, Complainant Tamberelli and her father were met at the apartment by Respondent Debbie Dalton rather than Respondent Buckley. Tr. 23-24, 65; Tr.II 66, 71. Complainant Tamberelli provided the information necessary to complete the application and credit check, and payment for the credit check. Tr. 24-25, 26, 66; Tr.II 67; Sx. 5; Sx. 6. The apartment was ready for occupancy at this time. Tr.II 47.

25. On July 3, 1989, Complainant Tamberelli's son, Matthew, was born. Tr. 7, 29, 42.

26. On July 5, 1989, Complainant Tamberelli left the hospital but could not return to her room on Argonne Drive. Tr. 31-32, 44, 51. She went to her father's apartment because she had no place else to go. Tr. 32, 69. She had hoped to move into the apartment upon leaving the hospital and was willing and able to move into the apartment before entering the hospital. Tr. 44, 56.

27. On or about July 5, 1989, Renter's Reference, the company that performed credit inquiries on rental applicants for Properties, completed a credit check on Complainant Tamberelli. Tr.II 49-50; Sx. 5. Renter's Reference informed Respondent Buckley that Complainant Tamberelli's son was born on July 3, 1989. Tr.II 50-51; Sx. 5.

28. On July 6, 1989, Respondent Buckley reneged on her agreement to rent Complainant Tamberelli the apartment and told Ms. Haith that Complainant Tamberelli could not rent it. Tr. 27-28, 67, 200; Sx. 5. Respondent Buckley told Ms. Haith she would only approve a two-bedroom apartment for Complainant Tamberelli. Tr. 218, Tr.II 52, 59; Sx. 5. Ms. Haith then telephoned Complainant Tamberelli to report Respondent Buckley's change of mind. Tr. 200.

29. Sometime between July 7 and July 11, 1989, Respondent Buckley again changed her mind and agreed to rent the apartment to Complainant Tamberelli. Tr. 29, 46, 56, 67, 200, 208, 218; Tr.II 53; Sx. 5. Respondent Buckley and Mr. Tamberelli arranged a meeting on July 12, 1989, to sign the lease. Tr. 218; Sx. 5.

30. On July 12, 1989, Complainant Tamberelli and her father met with Respondent Buckley in the Properties office, and Complainant Tamberelli signed a one-year lease. Tr. 30, 67-68, 218; Tr.II 53; Sx. 7. Respondent Buckley signed the lease on behalf of Respondent Eugene Jason, noting on the face of the lease agreement that it was signed "under duress." Tr. 30, 217-18; Tr.II 53; Sx. 7.

31. Complainant Tamberelli moved into the apartment on July 15, 1989. Tr. 29. She renewed the lease in June of 1990, but was later transferred by her employer to Florida, where she currently lives. Tr. 43; Tr.II 33.

Subsidiary Findings and Discussion

The Congress passed the Fair Housing Act to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers [that] operate invidiously to discriminate on the basis of impermissible characteristics." *United States v. City of Black Jack,* 508 F.2d 1179 (8th Cir.), *cert. denied,* 422 U.S. 1042 (1974). The Act was designed to prohibit "all forms of discrimination [even the] simple-minded." *United States v. Parma,* 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *rev'd on other grounds*, 661 F.2d 562 (6th Cir.), *cert. denied*, 465 U.S. 926 (1982). Under the Act, any "aggrieved person" has standing to file a complaint. An aggrieved person is "any person who claims to have been injured by a discriminatory housing practice; or [who] believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. Sec. 3601(i); 24 C.F.R. Sec. 100.20. The sole requirement for standing under the Act is that a complainant allege "a distinct and palpable injury" caused by a respondent. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982), *quoting Warth v. Seldin,* 422 U.S. 490, 501 (1975). This requirement applies to individuals and organizations alike. *Spann v. Colonial Village, Inc.,* 899 F.2d 24, 27 (D.C. Cir. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 508 (1990). Both Complainants in the instant case alleged the requisite injury.[4]

On September 13, 1988, the Act was amended to prohibit, *inter alia,* housing practices that discriminate on the basis of familial status.[5] 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; .... The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant ....

[4]Charge of Discrimination, p. 5.

[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. *Id.* (citing Marans, *Measuring Restrictive Rental Practices Affecting Families with 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 intended the 1988 amendments to remedy these problems for families with children.

42 U.S.C. Sec. 3602(k); 24 C.F.R. Sec. 100.20. Complainant Tamberelli falls within this definition both as a pregnant woman and as the mother of infant Matthew.

The pertinent 1988 amendments to the Act made it unlawful:

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

42 U.S.C. Sec. 3604(a). The apartment at issue in this case is a "dwelling" within the meaning of the Act. 42 U.S.C. Sec. 3602(b); 24 C.F.R. Sec. 100.20.

Section 804(d) of the Act also makes it unlawful:

> to represent to any person because of ... familial status ... that any dwelling is not available for ... rental when such dwelling is in fact so available.

42 U.S.C. Sec. 3604(d).[6] In contrast to section 804(a) of the Act (42 U.S.C. Sec. 3604(a), this section applies to *any person*, not just those people who fall within the protected class, that is, those people who satisfy the "familial status" definition. In other words, section 804(d) grants "an enforceable right to truthful information concerning the availability of housing" to *all* persons, including bona fide offerors to rent as well as testers with no intent to rent. *Havens,* 455 U.S. at 373; *Village of Bellwood v. Dwivedi,* 895 F.2d 1521, 1526 (7th Cir. 1990).

In addition, the Act prohibits a housing provider from:

> mak[ing] ... any ... statement ... with respect to the ... rental of a dwelling that indicates any preference, limitation, or discrimination based on ... familial status ... or an intention to make any such preference, limitation, or discrimination.

42 U.S.C. 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).

Respondents Violated Sections 804(a) and (d) of the Act

[6]In finding a violation of section 804(d) of the Act, several courts have held that the defendant's conduct also violated section 804(a). *See, e.g.,* McDonald v. Verbe, 622 F.2d 1227, 1233 (6th Cir. 1980); *Seaton v. Sky Realty Company, Inc.,* 491 F.2d 634, 635-36 (7th Cir. 1974); *Johnson v. Jerry Pals Real Estate,* 485 F.2d 528 (7th Cir. 1973); *Davis v. Mansards,* 597 F. Supp. 334, 343 (N.D. Ind. 1984).

The record establishes that Respondents repeatedly denied housing to Complainant Tamberelli based on familial status. On June 6, 1989, both Respondent Lisa Jason and Respondent Buckley refused to lease a one-bedroom apartment to Complainant Tamberelli because she was pregnant. Respondent Buckley repeated that refusal on June 26, 1989. In addition, on July 6, 1989, with the knowledge that Complainant Tamberelli's son had been born on July 3, 1989, Respondent Buckley reneged on an earlier agreement to rent her the apartment and again refused to lease it to her. Each of these actions constitutes a violation of sections 804(a) and (d) of the Act. 42 U.S.C. Secs. 3604 (a) and (d); 24 C.F.R. Secs. 100.50(b)(1), (3), and (5); 24 C.F.R. Secs. 100.60(a), (b)(l), and (2), and 24 C.F.R. Secs. 100.80(a) and (b)(5). *See Glover v. Crestwood Lake Section 1 Holding Corp.,* 746 F. Supp. 301 (S.D.N.Y. 1990).

Further, on June 16, 1989, based solely on Ms. Bateman's purported familial status, Respondents Debbie Dalton and Buckley told Ms. Bateman that she could not lease a one-bedroom unit even though a one-bedroom unit was in fact available for rent. Accordingly, Respondents Debbie Dalton and Buckley made unlawful representations that housing was unavailable based on familial status, in violation of section 804(d), 24 C.F.R. Sec. 100.50(b), and 24 C.F.R. Secs. 100.80(a) and (b)(5). Respondent Eugene Jason is also liable for the discriminatory conduct of all of the other Respondents because they were his employees, and he cannot delegate his responsibilities under the Act.[7]

Finally, Respondents violated section 804(c) of the Act by making numerous statements regarding the rental of a dwelling that indicated a preference, limitation, or discrimination based on familial status or the intention to make such preference, limitation, or discrimination. 42 U.S.C. Sec. 3604(c); 24 C.F.R. Secs. 100.50(b)(4) and 100.75(a), (b), (c)(1) and (2).[8]

The Government also argues that the tenant application form used by Properties is discriminatory because it unlawfully requests information concerning the number and age of the applicant's children. However, the pleadings raise no issue regarding the specific content of the Properties tenant application form, and the issue was not tried by the express or implied consent of the parties. *See* 24 C.F.R. Sec. 104.440. Because the

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[7] *Hamilton 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); *Mansards,* 597 F. Supp. at 344; *United States v. Youritan Construction Co.,* 370 F. Supp 643, 649 (N.D. Cal. 1973), *modified on other grounds*, 509 F.2d 623 (1975), *cert. denied*, 421 U.S. 1002 (1975).

[8] These statements include: Respondent Lisa Jason's statements of June 6th (Tr. 11, 60, 188-89; Tr.II 16-17, 39; Sx. 1; Sx. 2; Answer, para. 8); Respondent Buckley's statements of June 6th (Tr. 63); Respondent Debbie Dalton's remarks of June 16th (Tr. 140-41; Tr.II 76: Dalton Answer, para. 19); Respondent Buckley's comments of June 16th (Tr. 142); Respondent Buckley's statements of June 26th (Tr. 196; Tr.II 42); Respondent Buckley's remarks of July 6th (Tr. 27-28, 67, 200, 218; Tr.II 52, 59; Sx. 5); and Respondent Buckley's notation on Complainant Tamberelli's lease that it was signed "under duress" (Sx. 7).

Government raises the issue for the first time in its post-hearing brief, the issue is not ripe for decision.[9]

Respondent Buckley testified that Complainant Tamberelli was offered a two-bedroom apartment but was denied a one-bedroom apartment pursuant to Properties' occupancy policy, which was formulated on the basis of many discussions with representatives of Belmont Shelter Corporation ("Belmont") concerning HUD's Section 8 occupancy guidelines; that Properties applied the same policy without discrimination to everyone whether or not they received Section 8 subsidies; that Properties never refused to rent an apartment to a tenant because there were children in the tenant's family; and that there was no economic motive for anyone at Properties to rent a two-bedroom rather than a one-bedroom apartment to Complainant Tamberelli. Tr.II 25, 35-38, 42. This is tantamount to a claim that Respondent Buckley and everyone else at Properties acted in good faith. However, the record will not support the claim.

[9]The Government's argument on this issue appears suspect, at least as to questions regarding age. For example, a landlord has the right to know who will be legally liable under a lease. If he cannot lawfully ask the age of the prospective lessors, he would not be able lawfully to protect himself from entering into unenforceable lease contracts with minors. It is questionable whether the Congress intended the 1988 amendments to the Act to cause such a result.

Through its so-called "Section 8" program, HUD provides funds to public housing agencies to assist low-income families in the form of rent subsidies called "certificates" and "housing vouchers." Tr. 148, 166. *See generally* 42 U.S.C. Sec. 1437f; 24 C.F.R. Parts 882 and 887. HUD's Section 8 program has no standards prescribing the size of the unit that a family may lease, although family size determines the amount of the subsidy. Tr. 149, 166. That is, the subsidy increases with the number of bedrooms that HUD considers appropriate for the size of a family. However, HUD does not require a family to lease a unit with the same number of bedrooms specified on the certificate or housing voucher. Tr. 149; Sx. 35. HUD Handbook 7420.7 expressly provides that a family may select a unit of a different size than that designated on the certificate or housing voucher. Tr. 149, 175; Sx. 35.

Belmont issues certificates and housing vouchers in 41 communities in Erie County, New York. Tr. 164, 166; Tr.II 35. Neither HUD nor Belmont requires a single mother with child to live in a two-bedroom unit, or prohibits them from sharing a one-bedroom unit. Tr. 151, 154, 170. HUD guidelines, as published in Handbook 7420.7 at 4-31, state, *inter alia*, that:

> The bedroom size assigned *should not require* persons of opposite sex other than husband and wife to occupy the same bedroom with the exception of infants and very young children. [emphasis added]

See also Tr. 153; Sx. 35. In addition, 24 C.F.R. Sec. 882.109(c)(2) (1990) states that:

> Persons of the opposite sex, other than husband and wife or very young children, shall not be required to occupy the same living/sleeping room.

See also Tr. 159-60.

None of HUD's Section 8 guidelines apply to tenants not receiving assistance. 24 C.F.R. Sec. 882.101. *See also* Tr. 155, 213. Belmont's Section 8 occupancy standards likewise apply only to those receiving such assistance. Tr. 167.33. Before June of 1989, Properties had leased to tenants receiving Section 8 assistance. Tr.II 43, 36, 85.
Complainant Tamberelli, however, was not receiving Section 8 assistance. Tr. 10. HUD's Section 8 guidelines therefore did not apply to Complainant Tamberelli.

Respondent Buckley never asked anyone at Belmont if Belmont required a single pregnant woman to lease a two-bedroom unit. Tr.II 60. Further, the record contains no evidence that any HUD or Belmont representative ever informed Respondent Buckley either verbally or in writing that a single pregnant woman could not lease a one-bedroom unit. Tr.II 59-60. Finally, the record contains no corroborative evidence to support Respondent Buckley's contention that Belmont personnel led her to believe that

Properties' occupancy policy comported with HUD requirements. Accordingly, that contention must be rejected.

Respondent Buckley's assertion that Properties never refused to rent to a tenant because the tenant had children is no defense. Refusing to rent a one-bedroom apartment to a parent and child is unlawfully discriminatory when the landlord will rent the same apartment to two adults. Properties routinely rented one-bedroom apartments to two adults.

Respondent Buckley likewise misses the mark with her claim that Properties' policy was applied to everyone without discrimination. While it is true that the evidence shows Respondents did not single out Complainant Tamberelli or Ms. Bateman for special handling, this evidence does not excuse Respondents; it merely tends to show that Respondents harbored no malice toward Complainant Tamberelli and Ms. Bateman as individuals. Treating everyone the same does not make the treatment lawful.

As for the argument that no one at Properties would have profited economically by persuading Complainant Tamberelli to rent a two-bedroom rather than a one-bedroom apartment, money is not the only motivator of human behavior. Unlawful discrimination may be prompted by a wide variety of motives. Regardless of what may have motivated Respondents' conduct in this case, the evidence unquestionably proves that Respondents refused to rent a dwelling to a single parent and child at a time when two adults would have been permitted to rent the same dwelling. That constitutes unlawful discrimination in violation of the Fair Housing Act.

Respondent Buckley's contentions amount to a claim that she and everyone else at Properties acted in good faith. That claim might be accorded some credence if Respondent Buckley had immediately changed Properties' policy when informed by HUD that the policy was unlawful under newly effective amendments to the Fair Housing Act; if she had taken immediate steps to make a one-bedroom apartment available to Complainant Tamberelli; if she had not reneged at one point in the process on a promise to rent the apartment to Complainant Tamberelli; and if she had not made a point of renting the apartment "under duress." Intransigence followed by a tardy and reluctant compliance with the law does not manifest good faith.[10] Respondents are fully liable for their unlawful conduct.

Remedies

Section 812(g)(3) of the Act provides that upon a finding that a respondent has violated the Act, an administrative law judge shall order "such relief as may be

[10]The record suggests that Respondents' conduct in this case may have been shaped at least in part by the erroneous advice of legal counsel not associated with the trial of the case. *See* Tr. 65; Tr.II 43. However, erroneous legal advice cannot shield a respondent from liability for conduct subject to the Act.

appropriate, which may include actual damages suffered by the aggrieved person." 42 U.S.C. Sec. 3612(g)(3). Respondents have violated the Act through conduct that has caused actual, compensable damages to the Complainants.

Complainant HOME's Damages

The Government seeks damages on behalf of HOME for three separate categories of alleged losses: economic losses as of the closing date of the hearing totalling $1,736.75, losses attributable to "frustration of purpose" in the amount of $5,000.00, and future expenses of $3,592.00. Damages will be awarded for economic losses through the date of the hearing and for HOME's future expenses incurred in connection with this case, but no separate award will be made for "frustration of purpose."

The time and money that a fair housing organization like HOME spends pursuing a legal remedy for housing discrimination diverts time and money away from the organization's other functions and goals. In other words, discrimination costs the organization the opportunity to use its resources elsewhere. These "opportunity costs" for the diversion of resources should be recouped from the parties responsible for the discrimination. *See Dwivedi,* 895 F.2d at 1526 ("These are opportunity costs of discrimination, since although the counseling is not impaired directly, there would be more of it were it not for the ... discrimination."); *Saunders v. General Servs. Corp.,* 659 F. Supp. 1042, 1060 (E.D. Va. 1987)($2,300 for "diversion of resources"); *Davis v. Mansards,* 597 F. Supp. 334, 348 (N.D. Ind. 1984)($4,280 for out-of-pocket expenses).

Complainant Tamberelli went to Complainant HOME in June of 1989 seeking HOME's assistance with her complaints of housing discrimination. HOME diverted some of its resources from its educational, counseling, and referral functions to help investigate the case and enforce the law. HOME staff spent 17 hours investigating the matter and processing the complaint, at a cost of $510.00. Tr. 107, 124-25; Sx. 33. HOME personnel also spent 19.25 hours preparing for the hearing at a cost of $597.00. Tr. 107; Sx. 33. Although the HOME representative anticipated spending 20 hours attending the hearing at a cost of $620.00, the hearing actually lasted only a day and a half at an approximate cost to HOME of $372.00. Tr. 107, 108; Tr.II 100; Sx. 33. The Government's requested damages on behalf of HOME for attending the hearing have been reduced accordingly from $620 to $372.00 (12 hours X $31.00/hour). All of these costs total $1,488.75, which Complainant HOME will be awarded in damages.

In order to help preclude unlawful housing discrimination by Properties' personnel in the future, HOME has agreed to train, test, and monitor the Properties operation for three years. Three annual fair housing training sessions will cost HOME $372.00. Tr. 108-09; Sx. 34. Four paired unannounced tests each year for three years will cost $2,448.00. Tr. 109, 110-11; Sx. 34. Monitoring Properties' tenant records once each year for three years will cost $744.00. Tr. 109, 110; Sx. 34. Properties personnel will be ordered to attend the training sessions and to provide HOME staff with access to

Properties' records, and Complainant HOME will be awarded $3,592.00 to cover the cost of these future activities.

In addition to awards for HOME's past and future expenses, the Government also seeks a separate damage award of $5,000.00 to compensate HOME for the "frustration of purpose" caused by Respondents' discriminatory conduct. The purpose of HOME is to help obtain equal housing opportunities for all persons living within the geographical area it serves. In pursuit of that goal, HOME engages in several functions: educating the general public, housing providers, and tenants; counseling individuals who believe they have been subjected to unlawful discrimination; investigating housing discrimination complaints; and pursuing legal remedies when necessary. HOME's participation in this case helped obtain an equal housing opportunity for Complainant Tamberelli. That is, by pursuing a legal remedy on behalf of Complainant Tamberelli, the purpose of HOME has been fulfilled, not frustrated. However, to the extent that HOME expended resources on this case in the process of fulfilling its purpose that could have been spent elsewhere, it will be compensated.

The record does not show that HOME has suffered any other compensable injuries at the hands of the Respondents. Although the Government contends that Respondents' conduct damaged HOME's members by preventing them from living "in a community free of unlawful discrimination," every member of the public, not just HOME's members, has the abstract civil right to live in a community free of unlawful discrimination.[11] Mere proof that HOME's members live in the same general community where Respondents committed unlawful discrimination is not enough to show a "distinct and palpable injury" sufficient to support an award for actual damages. *See Havens,* 455 U.S. at 375-77; *Warth v. Seldin,* 422 U.S. 490, 501 (1975).

The Government cites three cases in support of its argument that Complainant HOME should be awarded $5,000.00 for "frustration of purpose." In the first case, *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.,* No. 88 C 9695, (N.D. Ill. Apr. 5, 1991) (LEXIS, Genfed library, Court Files), the magistrate awarded $16,500.00 to a nonprofit fair housing organization, the "Leadership Council," to cover the cost of

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[11]The Charge of Discrimination which initiated this proceeding alleged on page 5:

> As a result of the actions of the respondents, the complainants have suffered damages including economic loss, emotional distress, and the loss of their civil rights.

However, on brief the Government made no specific claim for a damage award based on loss of civil rights. More than nominal damages have been awarded for lost civil rights by some adjudicators of Fair Housing Act cases, but it is questionable whether such awards would survive scrutiny by the Supreme Court. In *Memphis Community School District v. Stachura,* 477 U.S. 299 (1986), a case brought under 42 U.S.C. Sec. 1983 for, *inter alia,* an alleged violation of First Amendment rights, the Supreme Court specifically held that only nominal damages may be awarded for the abstract value of a lost civil right protected by the Constitution. *See generally,* R. Schwemm, *Housing Discrimination Law and Litigation,* para. 25.3(2)(b).

investigating the case, monitoring defendant's records, auditing defendant's sales practices, and conducting several training seminars. In other words, the Leadership Council was awarded $16,500.00 for the diversion of resources caused by defendants. With respect to plaintiffs' claim for compensatory damages for "frustration of purpose," the memorandum opinion states:

> [T]he court believes it can best evaluate the damages caused by frustration of purpose by the compensatory damages assessed. That is, if Leadership Council was damaged in the amount of

> $16,500, it is reasonable to believe that diversion of its resources from other purposes must have been in approximately the same amount.

This opinion awards $16,500.00 for diversion of resources, defines "frustration of purpose" in terms of diversion of resources, then awards another $16,500.00 for "frustration of purpose," thereby awarding damages for the same thing twice. This case cannot be deemed persuasive authority for the argument that separate damages should be awarded to Complainant HOME for "frustration of purpose" in addition to an award for diversion of its resources.

Better authority may be found for the Government's position in *Saunders,* 659 F. Supp. 1042, where the United States District Court for the Northern District of Virginia ordered payment of $10,000.00 to a nonprofit fair housing corporation for frustration of the corporation's mission in addition to separate damages for diversion of resources. The Court found evidence that the defendant's large-scale discriminatory advertising had caused a subtle but substantial impact on the corporation's mission of ensuring equal housing and conveying the availability of equal housing to the public. 659 F. Supp. at 1060-61. However, no analogous evidence may be found in the instant case to support a separate award for frustration of purpose as well as an award for diversion of resources.

The Government also cites *Mansards,* 597 F. Supp. 334, to support its argument. In that case the United States District Court for the Northern District of Indiana awarded $1,000.00 to the Northwest Indiana Open Housing Center, a nonprofit organization like HOME, for frustration of the Center's goals. This case also may be distinguished on the facts. The Court concluded that the lawsuit frustrated one of the Center's stated goals (enhancing cooperation between the Center and local landlords), while at the same time advancing another goal (promoting equal housing opportunities). 597 F. Supp. at 348. Unlike the record in *Mansards,* in the case at hand the evidence shows no frustration of HOME's purpose other than that manifested by the diversion of its resources, for which it will be compensated. In other words, as in a tort case, the damages awarded in this case will return HOME as much as possible to the condition it would be in if Respondents had not engaged in unlawfully discriminatory conduct. *See Curtis v. Loether,* 415 U.S. 189, 197 (1974); *Seaton v. Sky Realty Company, Inc*., 491 F.2d 634, 636 (7th Cir. 1974); *Lee v. Souther Home Sites Corporation,* 429 F.2d 290, 293 (5th Cir. 1970).

Complainant Tamberelli's Damages

The Government seeks, on behalf of Complainant Tamberelli, a total of $19,088.80 in damages: $3,088.80 for economic losses; $12,000.00 for emotional distress; and $4,000.00 for inconvenience. Complainant Tamberelli will be awarded $1,711.15 for economic losses and $2,500.00 for emotional distress and inconvenience.

Economic Losses

Complainant Tamberelli is entitled to compensation for her out-of-pocket expenses resulting from Respondents' discrimination. Among those expenses, Complainant Tamberelli claims $1,383.20 for 14 days of missed work to discuss her allegations with HOME, prepare documents related to her complaint, confer with HUD about the complaint, and meet with Properties personnel about the apartment. Tr. 36-37. This claim is clearly inflated. In contrast to Complainant Tamberelli's claim, Complainant HOME claims only 12.75 hours spent conducting the initial intake interview with Complainant Tamberelli, processing the case, drafting complaints, responding to HUD inquiries and following up on the complaint. Sx. 33. The written housing discrimination complaint is a one-page HUD form. Sx. 2. The trial of the issues raised by this complaint took an unrushed day and a half. Furthermore, Complainant Tamberelli met with Properties personnel on just three occasions before moving into the apartment: on or about June 5, 1989, when she first visited the apartment; on June 29, 1989, when she came to the apartment complex to fill out the application form; and on July 12, 1989, when she met Respondent Buckley at the Properties office to sign the lease. At least two of these meetings would have been necessary even if Respondents had not engaged in discrimination. Respondents therefore cannot be charged with whatever amount of time Complainant Tamberelli took off from work to attend two of these meetings. In short, Complainant Tamberelli's claim for 14 days of lost wages is unsupported by the evidence and obviously exaggerated. It undermines her general credibility as well. The award on this specific claim will be reduced to lost wages for three days, $296.40.

Complainant Tamberelli also claims damages for the seven days of work she says she had to miss in order to attend the hearing. She did not work from Monday, April 22, the day before the hearing began, through Tuesday, June 30, six and a half days after the hearing ended. Tr. 35. Again, the claim is excessive. The purpose of damage awards in Fair Housing Act cases is to compensate victims of discrimination for the injuries, both economic and intangible, that they have suffered. These awards are supposed to return the victims as closely as possible to the condition that they would be in if they had not been subjected to unlawful discrimination, not to provide a paid vacation from work.[12] Again, this inflated claim for out-of-pocket expenses tends to make Complainant Tamberelli's other claims less credible. The award for this particular claim will be reduced to $416.00, the wages Complainant Tamberelli lost for missing four days of work, two days for travel and two days for the hearing itself.

Complainant Tamberelli has claimed $378.00 to cover her air fare to and from Buffalo to attend the hearing. Tr. 35. That fare would have been $600.00 if she had returned to her home the day after the hearing ended rather than six days later. Tr. 40. She will be awarded $600.00 for air fare.

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[12]Complainant Tamberelli conceded that she and her son spent time visiting her father and Matthew's other grandfather while in Buffalo. Tr. 40.

At hearing, Complainant Tamberelli testified that she had "moving expenses from getting myself from Connie's house [where she rented a room] to my father's house, then from my father's house to the apartment." Tr. 35, 52-53. She said she and her father paid five men $60.00 each to "help us move all my things." Tr. 36. On brief, the Government seeks damages from Respondents for the entire $300.00 Complainant Tamberelli paid to move. Because she would have had moving expenses if Respondents had not discriminated against her, only one of the two moves is chargeable to Respondents. Accordingly, only half of those expenses, $150.00, may be recovered from Respondents.

Complainant Tamberelli rented a car for seven days while she was in Buffalo, at a cost of $129.60. Tr. 35. For the reasons set out in the above discussion regarding Complainant Tamberelli's claim for lost wages, she will be reimbursed for the cost of the rental car for four days, $78.75.[13]

The Government, on Complainant Tamberelli's behalf, has requested damages of $30.00 for telephone calls made in connection with the case, $100.00 for the rental of Complainant Tamberelli's Argonne Drive room to store some of her belongings after she left the hospital, and $40.00 for gasoline. Tr. 33, 35, 51, 52. Although subject to quibble, all appear sufficiently reasonable to be included in the award to Complainant Tamberelli for her out-of-pocket economic losses.

Emotional Distress and Inconvenience

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.[14] Damages for emotional distress may be based on inferences drawn from the circumstances of the case, as well as on testimonial proof.[15] Because emotional injuries are by nature qualitative and difficult to quantify, courts have awarded damages for emotional harm without requiring proof of the actual dollar value of the injury.[16] The amount awarded should make the victim whole. *Murphy* at 25,056; *Blackwell I* at 25,013.

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[13]Complainant Tamberelli testified the rental car cost $16.95 per day plus a $10.95 lump sum charge. Tr. 35.

[14]*See, e.g., HUD v. Blackwell,* Fair Housing-Fair Lending (P-H), para. 25,00l at 25,011 (HUDALJ Dec. 21, 1989) (hereinafter *Blackwell I*), *aff'd,* 908 F.2d 864 (llth Cir. 1990); *HUD v. Murphy,* Fair Housing-Fair Lending (P-H) para. 25,002 at 25,055 (HUDALJ July 13, 1990); *See also Smith v. Anchor Bldg. Corp.,* 536 F.2d 231 (8th Cir. 1976); *Steele v. Title Realty Co.,* 478 F.2d 380, 384 (10th Cir. 1973); *McNeil v. P N & S. Inc.,* 372 F. Supp. 658 (N.D. Ga. 1973).

[15]*HUD v. Blackwell,* 908 F.2d 864, 872 (11th Cir. 1990)(hereinafter *Blackwell II*); *Murphy* at 25,055; *See also Marable v. Walker,* 704 F.2d 1219, 1220 (11th Cir. 1983); *Gore v. Turner,* 563 F.2d 159, 164 (5th Cir. 1977).

[16]*See, e.g., Block v. R.H. Macy & Co.,* 712 F.2d 1241, 1245 (8th Cir. 1983); *Steele v. Title Realty Co.,* 478 F.2d at 384; *Blackwell I* at 25,0ll. *See also Blackwell II,* 908 F.2d at 872-73 (recovery for distress is not

barred because amount of damages is incapable of exact measure).

In determining just what amount will make a complainant whole, judges have wide discretion.[17] Past actual damage awards under the Fair Housing Act for nonmonetary injuries are not a very helpful guide, because the awards vary widely depending on the circumstances, ranging from $150 to one complainant in *Murphy* at 25,057 to a total of $60,000 to two couples in *Blackwell I* at 25,017. *See* R. Schwemm, *Housing Discrimination Law and Litigation*, para. 25.3(2)(d) and cases cited at 25-18 and 19. In any event, the central focus of the determination of an appropriate damage award for intangible injuries must be the complainant's reaction to the discrimination and the amount of compensation that the complainant feels is necessary, because the purpose of the award is to repair the damage suffered by the complainant.[18] To be sure, the conduct of the discriminator that caused that damage is relevant, and in most cases we can expect to see a rough equivalence between the egregiousness of the respondent's behavior and the seriousness of the damage inflicted by that behavior.[19] Nevertheless, the egregiousness of the behavior cannot *determine* the size of the award. If it did, then an emotionally hardened complainant who is constitutionally incapable of suffering more than minor annoyance would win an unjustifiable windfall award against a respondent whose conduct was deemed outrageous by the judge or jury. *See Blackwell I* at 25,013; *Murphy* at 25,056; *See also Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)(Title VII case).

In the instant case, the Government seeks, on behalf of Complainant Tamberelli, a total of $16,000.00 for her inconvenience and emotional distress. She and her father testified that she suffered severe emotional distress as a result of Respondents' refusal to rent her the one-bedroom apartment she wanted. Her father testified that after the first contact with Properties, she became very upset and telephoned him in tears. Tr. 11, 60, 62. He said that from then until she moved into the apartment, she was a "basket case," "nervous," and "hyper." Tr. 69. She herself described her emotional state after the baby was born as follows:

> I got stressed a lot. I couldn't sleep. I didn't eat a lot. After Matthew was born, within that time, I went from--Matthew being born, I was 169 pounds approximately, and about three or four weeks time, I was down to 123. That wasn't from exercising or anything like that. I wasn't eating a lot. My

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[17] *See* R. Schwemm, *Housing Discrimination Law and Litigation,* para. 25.3(2)(c).

[18] *Cf. Mansards,* 597 F. Supp. at 347-48 (wife awarded twice the amount awarded husband because she reacted differently to the racial discrimination encountered when they tested the defendants' apartment complex).

[19] *But see Phillips v. Hunter Trails Community Ass'n,* 685 F.2d 184, 191 (7th Cir. 1982)(defendant's egregious behavior should be reflected in the punitive award [which is analogous to a civil penalty in this forum], but not in the award for actual damages.)

> appetite was down. I didn't sleep. I was snapping at people a lot. Couldn't let people finish sentences. They'd try to explain something to me, and I'd stop them short without letting them finish what they were trying to say and just telling them,
> "You're wrong," you know, and just jumping all over them and everything. My nerves were on edge a lot. [Tr. 37-38]

She was, according to her father, "not herself." Tr. 69. These problems were short-lived, however; according to Complainant Tamberelli, all of them ceased when she finally moved into the apartment, and there is no evidence that she felt the need, at any time, for professional treatment for her emotional distress. Tr. 38, 39. In addition, all of Complainant Tamberelli's weight loss cannot be attributed to a loss of appetite caused by Respondents' conduct. Complainant Tamberelli testified that she lost 46 pounds over three or four weeks beginning with the birth of the baby, but she moved into the apartment on July 15th, 10 days after the baby was born, at which time her emotional distress purportedly ended. Since she continued to lose weight thereafter, some other cause must have been operating to diminish her appetite after July 15th. She admitted suffering from postpartum depression. Tr. 39. Furthermore, despite the contention by her father that she was "not herself," her description of her own personality and behavior during this period is wholly consistent with the personality and behavior she exhibited on the witness stand, where she repeatedly interrupted her questioners and was defensive, snappish, and sarcastic in the face of mild and polite cross-examination.

The testimony of Complainant Tamberelli was not consistent with that of her father. She said she slept on the couch while staying at her father's apartment, whereas he testified that she could not sleep on the couch and slept on the floor. Tr. 33, 70. Mr. Tamberelli also testified that his daughter "stayed with me from the 5th until the day she moved in
-- or the day before she moved into the apartment." Tr. 69. But Complainant Tamberelli testified on more than one occasion that she spent only part of that period at her father's apartment and part at the home of Matthew's other grandfather. Tr. 32, 51-52.

The credibility of Complainant Tamberelli's claims for emotional distress and inconvenience are significantly undermined by the exaggeration of her out-of-pocket expenses, the inconsistencies between her testimony and that of her father, and the similarity between the personality and behavior Complainant exhibited on the witness stand and the personality and behavior she claimed were temporarily evoked by the discrimination she had suffered. In short, I conclude that Complainant Tamberelli did not suffer as much as she claimed as a result of Respondents' behavior.

This is not to say, however, that Complainant Tamberelli suffered no compensable harm. Despite the exaggerated quality of her claims, I find that she indeed suffered some emotional distress and inconvenience. She was eight and one-half months pregnant when she found the apartment at Properties that perfectly suited her needs at

an affordable price and in a convenient location near her work and her babysitter. Tr. 9. She could not stay in her rented room after the baby was born and therefore had to find a new place to live in a necessarily short time, only to be rejected because of a "policy." Over the course of the next month or so, she was subjected to an emotional roller coaster. First she could not have the apartment, then she could, then she could not. Finally, she was permitted to sign the lease--and even then, Respondent Buckley made it clear that she and her baby were not wanted in Creekside Village Apartments. The suspense and uncertainty about her housing situation during the period from early June to July 15 must have exacerbated the normal stress experienced by a woman during late pregnancy and childbirth. Complainant Tamberelli's postpartum depression can only have been deepened by the makeshift housing conditions she and her baby endured during the 10 days between her departure from the hospital and her move into the apartment. She had to live in uncomfortable circumstances where there was not enough room for a crib for the baby and where lack of a bed caused discomfort to her back. Tr. 33.

Further, as a result of Respondents' discriminatory conduct, Complainant Tamberelli had to make several phone calls, meet several times with HOME personnel, write to HOME detailing Respondents' conduct, file a complaint, confer with HUD's attorney and investigators, move at least once unnecessarily, and travel to Buffalo for the hearing on public transportation burdened with a two-year-old child.[20] Taken together, these experiences would inconvenience and distress anyone.[21]

Complainant Tamberelli will therefore be awarded $2,500.00 for emotional distress and inconvenience.[22]

Civil Penalties

[20]As part of the argument that Complainant Tamberelli was inconvenienced by Respondents, the Government cites evidence that the apartment was in disrepair and dirty when she finally moved in. Tr. 31, 47, 48, 71-72; Tr. II 68; Rx. 12. Because there is no evidence that the condition of the apartment into which Complainant Tamberelli moved was different than that of any other newly rented apartment at Properties, this component of the argument cannot be credited. In short, there is no proof that the condition of her apartment was a result of discrimination.

[21]The Government argues that Complainant "Tamberelli is entitled to damages for the inconvenience she suffered as a result of respondents' unlawful discrimination," citing *Blackwell I* at 25,011. By using the word "suffered," this argument implicitly recognizes that there is an element of emotional distress contained in all of Complainant Tamberelli's experiences that the Government cites to support a separate damage claim for "inconvenience." I therefore have not analyzed "inconvenience" separately from "emotional distress."

[22]The Government did not claim that Respondents caused Complainant Tamberelli to suffer humiliation and embarrassment.

To vindicate the public interest, the Act also authorizes an administrative law judge to impose civil penalties upon respondents who violate the Act. 42 U.S.C. Sec. 812 (g)(3)(A);24 C.F.R. Sec. 104.910(b)(3). Determining an appropriate penalty requires consideration of five factors: (1) the nature and circumstances of the violation; (2) the goal of deterrence; (3) whether the respondent has previously been adjudged to have committed unlawful housing discrimination; (4) respondent's financial resources; and (5) the degree of respondent's culpability. *See Murphy* at 25,058; *Blackwell I* at 25,014-15; H.Rep No. 711, 100th Cong., 2d Sess. at 37 (1988).

Nature and Circumstances of the Violation

The nature and circumstances of Respondents' violations do not merit a $10,000.00 penalty against any Respondent. Respondents' unlawful discrimination apparently was not motivated by malice toward the Complainants personally, but rather was the result of a universal policy. Nevertheless, significant civil penalties should be imposed in this case. Respondents deprived Complainant Tamberelli of her chosen housing for 10 days, from July 5 to July 15, 1989, and subjected her to a month of inconvenience and distress while they vacillated on whether or not to rent to her. In addition, Respondents persisted in maintaining their policy even after they were informed by government representatives that it was unlawful.

Deterrence

Of the Respondents, only Eugene Jason and Lisa Jason are still in the housing business. Accordingly, the need to deter is greater for them than for the other two Respondents. Respondent Eugene Jason and other similarly situated housing providers need to be deterred from failing to fulfill their supervisory responsibilities under the Act.[23] Respondent Lisa Jason and other rental agents need to be deterred from committing unlawful discrimination based on familial status. Although Respondent Buckley is no longer working in the housing industry, front-line managers need to know that violating the Act will incur serious consequences, even if they leave the industry. Imposition of appropriate civil penalties in this case against Respondents Eugene Jason, Lisa Jason, and Buckley will send a message to housing providers and their employees that discrimination based on familial status is not only unlawful but potentially costly.

Respondents' Previous Records

There is no evidence that any Respondent in the instant case has previously been found to have committed an unlawful discriminatory housing practice. Consequently, the maximum civil penalty that may be assessed against any Respondent is $10,000.00, pursuant to 42 U.S.C. Sec. 812(g)(3)(A) and 24 C.F.R. Sec. 104.910(b)(3)(i)(A).

[23]The responsibility to prevent housing discrimination cannot be delegated. *See* cases cited at footnote 7.

Respondents' Financial Circumstances

Evidence regarding respondents' financial circumstances is peculiarly within their knowledge, so they have the burden of introducing such evidence into the record. If they fail to produce credible evidence militating against assessment of a civil penalty, a penalty may be imposed without consideration of their financial circumstances. *See Campbell v. United States*, 365 U.S. 85, 96 (1961); *HUD v. Jerrard*, Fair Housing-Fair Lending (P-H) para. 25,005 at 25,092; *Blackwell I* at 25,015.

The only evidence in the record directly bearing on the financial resources of the Respondents shows that Respondent Eugene Jason owns Properties, a 500-unit operation, as well as a separate roofing business. Tr.II 80. The record does not show the financial condition of those businesses. Presumably, therefore, all of the Respondents could afford any civil penalty imposed by this case.[24]

Culpability

[24]In a letter dated June 14, 1991, and received by this office on July 29, 1991, Respondent Buckley asserts, *inter alia*, that she has no income and that the imposition of any penalty would cause undue hardship. Respondent Buckley introduced no evidence at hearing, testimonial or otherwise, about her financial condition. Her assertions in the letter of June 14, 1991, are inherently unreliable because they were not submitted under oath and are unsupported by a financial statement or other corroborative document. Furthermore, her June 14, 1991, letter was prepared in response to the brief filed by the Government. I have not requested or authorized the parties to file pleadings in response to post-hearing briefs, nor do the rules of practice governing this proceeding authorize the parties to file such pleadings (24 C.F.R. Sec. 104.10 *et seq.*). For these reasons, the assertions contained in Respondent Buckley's June 14, 1991, letter regarding her financial condition cannot be considered in the determination of the appropriate civil penalty to be imposed against Respondent Buckley.

Respondent Eugene Jason's involvement in the events which are the subject of this case was almost entirely passive. He was aware of Complainant Tamberelli's complaint but, consistent with his practice of delegating responsibility for dealing with complaints to Respondent Buckley, he did not interfere in Respondent Buckley's handling of the matter. Tr.II 82. Nevertheless, despite Respondent Eugene Jason's marginal involvement in the operation of Properties, he is responsible as a matter of law for his employees' unlawfully discriminatory conduct, even if he was unaware of, or did not explicitly ratify, that conduct. He clearly failed to fulfill his responsibility to ensure that his employees knew the law and obeyed it.

Respondents Lisa Jason and Debbie Dalton assert in defense that they are not liable for any unlawful discrimination because they merely obeyed Respondent Buckley's orders. That assertion fails as a matter of law. One who acts as a conduit for the discriminatory conduct of another is equally liable for the unlawful conduct, even if the former does not act with a discriminatory animus. *Dwivedi*, 895 F.2d at 1530-31; *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1223-26 (2d Cir. 1987), *cert. denied,* 486 U.S. 1055 (1988); *Diaz v. Pan Am. World Airways*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). Nonetheless, their culpability is minimal. In 1989, Respondent Lisa Jason was 17 years old and worked part-time after school and on Saturdays. Tr.II 8-9. Respondent Debbie Dalton began working for Properties in May 1988. She was going to college but worked "pretty much full-time" until July 1990. Tr.II 65. As young, relatively inexperienced, entry-level employees who did not formulate policy, they cannot be expected to have independently acquired, in June and July of 1989, any knowledge of the newly effective amendments to the Fair Housing Act. Tr.II 16, 66, 76. Accordingly, it would be contrary to the public interest to impose any civil penalty against Respondent Debbie Dalton or more than a very nominal penalty against Respondent Lisa Jason. Because Respondent Lisa Jason is still working in the housing industry, a $25.00 civil penalty (the amount requested by the Government) will be imposed against her to serve the goal of deterrence.

Respondent Buckley was responsible for the management and operation of Properties, including formulation and administration of the policy under which the Complainants were damaged. Tr. II 85-86; Answer, page 2. She was a real-estate professional with 10 years' experience and had received training courses in the rental business. Tr. 217, Tr.II 22. She should have been fully aware of the proscriptions against discrimination based on familial status contained in the Fair Housing Act. Apart from suggestions that she may have acted in part on the basis of erroneous legal advice, the record shows Respondent Buckley is solely responsible for the vacillating treatment of Complainant Tamberelli and the refusal to cooperate with HUD. To be sure, she considered the offending policy necessary and appropriate in light of her understanding of HUD Section 8 rules and regulations. But she persisted in her unjustifiable position even after being told by HUD that her understanding was incorrect and that the Properties policy was unlawful. Clearly, Respondent Buckley is far more culpable than Respondent Eugene Jason for the discrimination that Complainants suffered.

The Government seeks a $2,000.00 civil penalty against Respondent Buckley and $8,000.00 against Respondent Eugene Jason, the owner of Properties and the employer of the other Respondents. The Government justifies the higher penalty request against Respondent Eugene Jason solely on the basis of an assumption that he can afford to pay a higher penalty, even though the record does not show that any of the Respondents would be unable to pay the maximum civil penalty that could be imposed in this case.

A civil penalty of $2,000.00 against Respondent Buckley is appropriate in light of the nature and circumstances of the offense, her degree of culpability, the goal of deterrence, her clean record, and her apparent ability to pay the penalty without hardship. Because Respondent Eugene Jason is markedly less culpable than Respondent Buckley, and also has a clean record, it would be inappropriate to impose a higher civil penalty upon him than upon her. On the other hand, it would be equally inappropriate to impose a lower civil penalty upon him than upon her, because unlike Respondent Buckley, he remains in the housing business and needs to be deterred from allowing his employees to commit further acts of unlawful discrimination. Therefore, a civil penalty of $2,000.00 will also be imposed against Respondent Eugene Jason.

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.[25] 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.

Conclusion

The preponderance of the evidence shows that Respondents discriminated against Complainants Tamberelli and HOME on the basis of familial status, in violation of sections 804(a),(c), and (d) of the Act. Complainants Tamberelli and HOME suffered actual damages for which they will receive compensatory awards. Further, to vindicate

[25]"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." *Blackwell II*, 908 F.2d at 875 (quoting *Marable*, 704 F.2d at 1221).

the public interest, injunctive relief will be ordered, as well as civil penalties against Respondents Eugene Jason, Lisa Jason, and Marian Buckley.

ORDER

It is hereby **ORDERED** that:

1. The "Motion to File Proposed Findings Out of Time" filed on behalf of Respondents Eugene Jason and Lisa Jason is denied.

2. Respondent Eugene Jason d/b/a Properties Unlimited and his agents and employees, and Respondents Marian Buckley, Lisa Jason, and Debbie Dalton are hereby permanently enjoined from discriminating with respect to housing because of race, color, religion, sex, familial status, national origin, or handicap. Prohibited actions include, but are not limited to:

a. refusing or failing to sell or rent a dwelling, or refusing to negotiate for the sale or rental of a dwelling, to any person because of race, color, religion, sex, familial status, national origin, or handicap;

b. otherwise making unavailable or denying a dwelling to any person because of race, color, religion, sex, familial status, national origin, or handicap;

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 race, color, religion, sex, familial status, national origin, or handicap;

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 a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, familial status, national origin, or handicap;

e. coercing, intimidating, threatening, or interfering with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by the Fair Housing Act.

f. retaliating against Complainants Tamberelli or HOME or anyone else for their participation in this case or for any matter related thereto.

3. Respondent Eugene Jason and his agents and employees shall cease to employ any policies or practices that discriminate against families with children, including the policy prohibiting an adult and infant child from leasing a one-bedroom unit or sharing a bedroom.

4. Respondent Eugene Jason and his agents and employees shall refrain from using any lease provisions, rules, and regulations, and other documentation or advertisements, that indicate a discriminatory preference or limitation based on familial status.

5. Consistent with 24 C.F.R. Part 109, Respondent Eugene Jason d/b/a Properties Unlimited 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, Respondent Eugene Jason d/b/a Properties Unlimited shall display the HUD fair housing poster in a prominent place in Properties Unlimited's principal office, all Properties Unlimited rental offices, and any other offices where Properties Unlimited conducts business.

6. Respondent Eugene Jason shall institute internal record-keeping procedures, with respect to the operation of Properties Unlimited and any other real property acquired by Respondent Eugene Jason that are adequate to comply with the requirements set forth in this Order. These will include keeping all records described in this Order. Respondent Eugene Jason will permit representatives of HUD to inspect and copy all pertinent records at any and all reasonable times and upon reasonable notice. Respondent Eugene Jason will also permit representatives of HOME to inspect and copy all pertinent records once each year upon reasonable notice. Representatives of HUD and HOME shall endeavor to minimize any inconvenience to Respondent Eugene Jason occasioned by the inspection of such records.

7. On the last day of every six-month period beginning September 1, 1991 (or two times per year), and continuing for three years from the date this Order becomes final, Respondent Eugene Jason d/b/a Properties Unlimited shall submit reports containing the following information to HUD's New York Regional Office of Fair Housing and Equal Opportunity, 26 Federal Plaza, New York, NY 10278-0068:

a. A log of all persons who applied for occupancy at any of the properties owned, operated, leased, managed, or otherwise controlled in whole or in part by Respondent Eugene Jason d/b/a Properties Unlimited or any successor entity 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. All applications described in the log shall be maintained at Properties Unlimited's office.

b. A list of vacancies at properties owned, operated, leased, managed, or otherwise controlled in whole or in part by Respondent Eugene Jason d/b/a Properties Unlimited, or any successor entity during the reporting period, including: the address of the unit, the number of bedrooms in the unit, the date the tenant gave notice of an intent to 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. Sample copies of advertisements published during the reporting period, specifying the dates and media used or, if applicable, a statement that no advertisements have been published during the reporting period.

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

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 and/or notice.

8. Respondent Eugene Jason d/b/a Properties Unlimited shall post at his office or any other offices associated with Properties Unlimited or any successor entity a list of all available units, specifying for each unit, its address, the number of bedrooms in the unit, the rent for the unit, and the date of availability.

9. To ensure that this Order is followed, HOME has agreed to provide fair housing training once each year for three years to staff employed by Respondent Eugene Jason in the housing rental business. HOME has also agreed to perform four paired tests each year for three years. In addition, HOME has agreed to monitor the tenanting records of Properties Unlimited once each year for three years. During the pendency of this Order, should HOME come to believe that it has or will become unable to carry out any or all of these agreements, in whole or in part, it shall so inform this tribunal, stating the reasons for its inability to so perform, and the Order may be modified as appropriate.

10. Within ninety (90) days of the date of this Order, Properties Unlimited staff shall attend a four-hour training by HOME on the Act. Within sixty (60) days of the first and second anniversary of this Order, Properties Unlimited staff shall again receive fair housing training from HOME.

11. Within ten (10) days of the date on which this Order becomes final, Respondents shall pay actual damages to Complainant Tamberelli as follows: $712.40 for lost wages; $30.00 for phone calls; $150.00 in moving expenses; $40.00 for gasoline; $100.00 rent for her Argonne Drive room; $678.75 for traveling to the hearing; and $2,500.00 for inconvenience and emotional distress.

12. Within ten (10) days of the date on which this Order becomes final, Respondents shall pay actual damages to HOME of $1,488.75 for out-of-pocket expenses and $3,592.00 to compensate HOME for future monitoring, testing, and training of the rental housing business owned by Respondent Eugene Jason.

13. Within ten (10) days of the date on which this Order becomes final, Respondent Eugene Jason shall pay a civil penalty of $2,000.00, Respondent Marian Buckley shall pay a civil penalty of $2,000.00, and Respondent Lisa Jason shall pay a civil penalty of $25.00 to the Secretary of HUD.

14. Within ten (10) days of the date this Order becomes final, Respondent Eugene Jason shall inform all Properties Unlimited agents and employees of the terms of this Order and educate them as to such terms and as to 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.

15. Respondent Eugene Jason shall submit a report to this tribunal within fifteen (15) days of the date this Order becomes final detailing the steps taken to comply with this Order.

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 (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 5, 1991