

**BEFORE THE  
MISSOURI COMMISSION ON HUMAN RIGHTS  
STATE OF MISSOURI**

<b>STATE OF MISSOURI ex rel.</b>	)	
<b>Charlene and Benjamin Burke,</b>	)	
	)	
<b>Plaintiff,</b>	)	
<b>v.</b>	)	<b>Case Number: H-11/10-03457</b>
	)	<b>11-0001 HRC</b>
<b>Tamara J. And Doyle E. McDowell,</b>	)	
	)	
<b>Respondent.</b>	)	

**NOTICE OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER, AND NOTICE OF STATUTORY RIGHT TO JUDICIAL REVIEW**

**TO:**

Vanessa Howard  
Assistant Attorney General  
P.O. Box 861  
St. Louis, Missouri 63188

Charlene Burke  
100 Garson Lane  
Farmington, Missouri 63640

Doyle E. McDowell  
4024 McDowell Road  
Farmington, Missouri 63640

Benjamin J. Burke  
100 Garson Lane  
Farmington, Missouri 63640

Tamra J. McDowell  
4024 McDowell Road  
Farmington, Missouri 63640

**YOU ARE HEREBY NOTIFIED** that the Hearing Panel of the Missouri Commission on Human Rights, on September 13, 2013, filed with the Commission a Decision and Order in the above-styled case, a copy of which is served with this Notice.

**YOU ARE HEREBY NOTIFIED** of your statutory right to judicial review pursuant to Section 213.085.2, RSMo 1994, which states:

Any person who is aggrieved by a final decision, finding, rule or order of the commission may obtain judicial review by filing a petition in the circuit court of the county of proper venue within thirty days after the mailing or delivery of the notice of the commission's final decision.

I HEREBY CERTIFY THAT THE FOREGOING Notice of Findings of Fact, Conclusions of Law and Decision and Order, and Notice of Statutory Right to Judicial Review together with a copy of

the Decision and Order, have been served by mailing a true copy this 27<sup>th</sup> day of September by certified mail to the above-named persons.



Deborah J. Sarber  
Secretary to the Commission

(SEAL)



**BEFORE THE  
MISSOURI COMMISSION ON HUMAN RIGHTS  
STATE OF MISSOURI**

STATE OF MISSOURI ex rel. )  
 CHARLENE AND BENJAMIN )  
 BURKE, )  
                                   ) Petitioners, )

v. )

TAMARA J. AND DOYLE E. )  
 MCDOWELL, )  
                                   ) Respondents. )

MCHR Case Number: H-11/10-03457  
 AHC Case Number: 11-0001 HRC

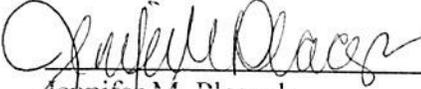
**DECISION AND ORDER**

After reviewing the record in the above-styled case the Commission Panel adopts the Hearing Examiner's Findings of Fact and Conclusions of Law and issues the following Decision and Order.

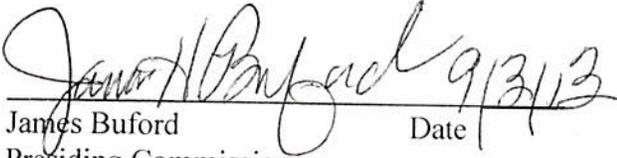
**IT IS HEREBY ORDERED:**

1. Respondent violated §213.040 RSMo. by discriminating against Complainants Charlene and Benjamin Burke because of familial status by terminating their tenancy.
2. Respondent shall pay to Complainants the sum of \$2,000 in actual damages for pain, suffering and emotional distress, \$2,000 in actual damages for violation of their civil rights and \$6,000.20 in actual damages for out-of-pocket expenses related to the Burke's moves. Respondent's shall pay the Burke's a total of \$10,000.20 in actual damages plus pre-judgment interest of 3.25%.
3. Respondent shall pay to the Missouri Commission on Human Rights (MCHR) a civil penalty of \$1,000 to vindicate the public interest.

4. Respondent shall cease and desist from further discriminatory practices that involve familial status or other prohibited factors in its rental practices and to submit a report to MCHR of the manner of their compliance within in 90 days of the date of this order.

 8-22-13  
\_\_\_\_\_  
Jennifer M. Placzek Date  
Commissioner  
Agree   
Disagree \_\_\_\_\_

 8/30/13  
\_\_\_\_\_  
Roger L. Worthington Date  
Commissioner  
Agree   
Disagree \_\_\_\_\_

 9/3/13  
\_\_\_\_\_  
James Buford Date  
Presiding Commissioner  
Agree   
Disagree \_\_\_\_\_

Before the  
Commission on Human Rights  
State of Missouri



STATE OF MISSOURI, ex rel. )  
CHARLENE and BENJAMIN BURKE, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
TAMARA J. and DOYLE E. MCDOWELL, )  
 )  
Respondents. )

No. 11-0001 HRC

**RECOMMENDED DECISION**

The Hearing Examiner recommends that the Missouri Commission on Human Rights (“the MCHR”) grant the claim of Charlene and Benjamin Burke (“the Burkes”) against Tamara J. and Doyle E. McDowell (“the McDowells”) and award the Burkes \$10,000.20 in actual damages and that the MCHR assess a civil penalty of \$1,000.00 against the McDowells.

**Procedure**

The Burkes filed a complaint of housing discrimination on the basis of familial status with the MCHR on October 5, 2010. On June 1, 2011, the MCHR found probable cause to believe that discrimination occurred. The MCHR received an affidavit of the failure of conciliation on August 5, 2011. On August 15, 2011 the MCHR approved the appointment of Sreenivasa Rao Dandamudi, Administrative Hearing Commissioner, as Hearing Examiner. On

August 16, 2011, the MCHR transmitted its record to the Hearing Examiner. On February 1, 2012, the Attorney General, on behalf of the State, filed a First Amended Complaint in the Burkes' name.

On April 3, 2012, the Hearing Examiner convened a pre-hearing conference, and on April 24, 2012, the Hearing Examiner convened a hearing on the amended complaint. Assistant Attorney General Vanessa Howard Ellis represented the MCHR at the pre-hearing conference and the hearing. The McDowells were not represented and did not attend the prehearing conference or the hearing. The transcript was filed on May 9, 2012. The last written argument was filed on July 30, 2012. On October 31, 2012, the McDowells filed a motion for rehearing. On November 15, 2012, the Hearing Examiner denied the motion.

### **Findings of Fact**

1. The Burkes are, and at all times relevant to this action were, a married couple.
2. The Burkes are, and at all times relevant to this action were, parents of two minor children who live with them.
3. The McDowells own and operate a housing complex with four dwellings<sup>1</sup> located at 100, 102, 104 and 106 Garson Lane in Farmington, Missouri, and marketed as "A. Grace Land" ("the complex").
4. The McDowells made these dwellings available for rent.<sup>2</sup>
5. The complex is within walking distance of Mineral Area College, where the Burkes were students.
6. The Burkes contacted the McDowells about renting the dwelling at 100 Garson Lane after seeing a sign in front of the complex. The sign contained only a description of the dwelling

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<sup>1</sup> As defined in § 213.010, RSMo. Statutory references are to RSMo 2000 unless otherwise indicated.

<sup>2</sup> As defined in § 213.010.

(new duplex, 2 bedroom, 2 bath) and a telephone number to contact. There was no indication that the dwelling was intended for seniors.

7. The McDowells and the Burkes entered into a one-year lease agreement for the dwelling at 100 Garson Lane effective August 1, 2009, for which the Burkes paid the McDowells a \$600.00 security deposit.

8. Under the terms of the lease, the Burkes were required to pay for their electricity, but other utilities were included with the \$600 monthly rent. Mr. Burke estimated that they paid no more than \$700 per month.

9. The lease agreement included a non-refundable pet deposit of \$20 per month for the term of the lease to cover pet-related costs including carpet cleaning.<sup>3</sup> The Burkes owned a dog at all times during their tenancy at 100 Garson Lane.

10. The McDowells were aware of the Burkes' familial status prior to entering into the lease agreement and during the Burkes' tenancy in the dwelling.

11. There was nothing in the rental application, the lease agreement, or the rules and regulations attached to the lease agreement that would have placed the Burkes on notice that the dwellings were intended to be used as "housing for older persons."<sup>4</sup>

12. There was nothing about the property itself that would have placed the Burkes on notice that the dwellings were intended to be used as "housing for older persons."

13. At the conclusion of the one-year lease agreement, the McDowells conducted an annual inspection of the dwelling. During and following this inspection, the McDowells gave no indication to the Burkes of any issues with regard to the condition of the dwelling or about them as tenants.

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<sup>3</sup> The testimony refers to a \$250 pet deposit, but the terms of the lease require either a one-time \$150 deposit or \$20 per month for the term of the lease.

<sup>4</sup> As defined in § 213.040.9.

14. After the expiration of the lease, the Burkes told the McDowells that they would continue to pay their rent months in advance as had been their practice and that because of the convenience and affordability of the complex, they planned to stay in the dwelling for at least two more years.

15. Beginning in August 2010, after the conclusion of the one-year term of the lease, the Burkes became month-to-month tenants.

16. In the summer of 2010, the McDowells advertised the complex as “senior duplexes” and were contacted by a single, older woman who was interested in living in the complex. The McDowells decided to terminate the Burkes’ month-to-month tenancy and rent the dwelling at 100 Garson Lane to this older, single woman with no children.

17. On September 7, 2010, the McDowells hand delivered a written Notice to Vacate to the Burkes. In the notice, the McDowells informed the Burkes that they had to vacate because “it has been decided to proceed with leasing only to Senior citizens, 55+ years.”

18. The Notice to Vacate provided the Burkes with only thirty days to vacate the dwelling and locate alternative housing.

19. At the time the Burkes received the notice, at least one other dwelling in the complex was available.

20. After receiving notice of the Burkes’ complaint to the MCHR, the McDowells alleged their reason for evicting the Burkes was due to the bad condition of the apartment, the Burkes’ dog, the Burkes’ unwillingness to allow the McDowells monthly unannounced access into the dwelling, and late payment of rent.

21. At no time prior to delivery of the Notice to Vacate did the McDowells address issues of late payment of rent, the condition of the apartment, the dog, or access to the dwelling in writing or orally with the Burkes.

22. After the Burkes received the Notice to Vacate, the Burkes' new potential landlord called the McDowells to confirm why the Burkes were moving, and the McDowells explained that they had decided to rent to seniors.

23. The Burkes regularly paid their rent in advance, but did have two checks returned for insufficient funds. At the time they vacated the apartment, there was only minimal damage to the dwelling (a small hole in the wall and a hole in the yard from the dog) and limited traffic area dirt to the carpets and clean appliances.

24. On October 27, 2010, the Burkes received a refund of a portion of their security deposit in the amount of \$75.00. The McDowells retained the \$525 balance of the deposit for cleaning (\$300), painting (\$130), patching holes (\$40), yard (\$15), miscellaneous (\$10), and time and travel (\$30). The \$525 is separate from the \$240 non-refundable pet deposit (\$20 per month for 12 months).

25. The only housing the Burkes were able to obtain in thirty days was their church parsonage in Park Hills, Missouri. The parsonage was an older building that needed renovations. The rent was only \$300 per month, but it did not include utilities, so that the total monthly cost was as high as \$800 per month – approximately \$100 per month more than they were paying for the Garson Lane dwelling prior to being evicted.

26. The Burkes incurred approximately \$150 in moving expenses when they moved from the Garson Lane dwelling to the parsonage.

27. The Burkes had to buy a stove and a microwave when they moved into the parsonage at a cost of \$872.73.

28. Because the parsonage was not as convenient and was farther from their school than the Garson Lane dwelling, in March 2011, the Burkes had to purchase a second vehicle at a cost of \$3,000.

29. Because Mrs. Burke had to miss classes to accomplish the move, she had to drop a class without a refund. The cost of the class was \$350, and the textbook for the class was approximately \$100.

30. Due to the increase in monthly expenses after the move, Mrs. Burke had to get a part-time job to help with the family finances.

31. After living in the parsonage for approximately one year, the Burkes were again forced to move to a home in Desloge, Missouri. The Burkes estimate they are paying \$850 per month for rent and utilities at this residence – approximately \$150 per month more than they were paying for the Garson Lane dwelling prior to being evicted.

32. In August 2010, the McDowells also refused to renew the lease of a young, single tenant who kept his dwelling in “excellent condition” because they did not want him to have a co-tenant and because the dwellings were intended for senior citizens.

33. Photos of the 100 Garson Lane dwelling do not show any features that are typically found in housing for older persons.

### **Conclusions of Law**

The MCHR has jurisdiction to hear and determine this complaint.<sup>5</sup>

The McDowells did not respond to the State’s requests for discovery and did not attend the pre-hearing conference. On that same day, the Hearing Examiner issued an order prohibiting the McDowells from presenting any evidence at the hearing unless they made themselves available for depositions. Despite an opportunity to attend, the McDowells did not attend the hearing, and no one appeared on their behalf. At the hearing, all of the Burkes’ exhibits were admitted without objection, and no evidence was offered to refute the testimony provided by the Burkes’ witnesses.

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<sup>5</sup> Sections 213.075.3 and 213.075.5.

Regulation 8 CSR 60-2.190<sup>6</sup> provides in relevant part:

- (1) Default may occur where a party has been served with Notice of Hearing and fails to appear at the scheduled hearing.
- (2) Unless notified by the party, the presiding officer shall wait no longer than thirty (30) minutes from the time set for the hearing in the Notice of Hearing to commence the hearing.
- (3) When the respondent fails to appear at the specified time and place for the hearing, the moving party shall proceed to present evidence in support of the complaint, which shall constitute the sole evidentiary basis for disposition and the respondent shall be deemed to have waived any evidentiary and other objections at the hearing.
- (4) A final order supporting the complaint may be rendered only where the contested case record demonstrates a *prima facie* case supporting that document.

Missouri courts rely on federal decisions in cases involving civil rights because of the similarities between the applicable state and federal statutes.<sup>7</sup> The provisions of the Missouri Human Rights Act (“the MHRA”) cited below are substantially similar to provisions of Title VIII of the Civil Rights Act of 1968 as modified by the Fair Housing Amendments of 1988 (“the FHA”).<sup>8</sup> Cases involving disparate treatment under Chapter 213 may be addressed using federal law.<sup>9</sup>

#### Refusal to Rent

The Burkes claim that the McDowells discriminated against them due to their familial status by refusing to renew their lease and giving them a thirty-day notice to vacate, in violation of § 213.040(1). In order to prevail on their claim of discrimination, the Burkes must establish a *prima facie* case by showing: (1) they are protected by the statute; (2) the McDowells refused to rent to them after they made a bona fide offer to rent; and (3) their familial status was a factor in

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<sup>6</sup> All references to “CSR” are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

<sup>7</sup> *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007).

<sup>8</sup> Pub. L. 90-284, 82 Stat. 73 (1968) (amended by Pub. L. 100-430, 102 Stat. 1619 (1988)).

<sup>9</sup> *Id.*

the McDowells' decision not to rent to them.<sup>10</sup> Once the Burkes have established a prima facie case, the burden shifts to the McDowells to provide a legitimate, nondiscriminatory reason for the refusal to rent.<sup>11</sup> If the McDowells articulate such a reason, the Burkes must then demonstrate the articulated reason is merely a pretext for discrimination.<sup>12</sup>

Section 213.040.1 prohibits unlawful housing practices and states in relevant part:

It shall be an unlawful housing practice:

- (1) To refuse to sell or rent after the making of a bona fide offer, to refuse to negotiate for the sale or rental of, to deny or otherwise make unavailable, a dwelling to any person because of race, color, religion, national origin, ancestry, sex, disability, or familial status[.]

Section 213.010(5) defines "Discrimination" as:

any unfair treatment based on race, color, religion, national origin, ancestry, sex, age as it relates to employment, disability, or familial status as it relates to housing[.]

Section 213.010(6) defines "Dwelling" as:

any building, structure or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure or portion thereof[.]

Section 213.010(10) defines "Familial status" as:

one or more individuals who have not attained the age of eighteen years being domiciled with: (a) a parent or other person having legal custody of such individual[.]

Section 213.010(16) defines "Rent" as including:

to lease, to sublease, to let and otherwise to grant for consideration the right to occupy premises not owned by the occupant[.]

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<sup>10</sup> *Van Den Berk v. Missouri Comm'n on Human Rights*, 26 S.W.3d 406, 412 (Mo. App., E.D. 2000) (citing the burden shifting analysis developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973)).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

### *The Burkes' Prima Facie Case*

The Burkes are a husband and wife who are parents of two children under the age of eighteen who live with them and are, therefore, members of a class protected by § 213.040.1(1). The McDowells were aware of the Burkes' familial status when the Burkes submitted their rental application.<sup>13</sup>

Initially, the Burkes entered into a one-year lease for the dwelling at 100 Garson Lane. When the term of the lease expired, the McDowells decided to let the Burkes continue to rent the dwelling as month-to-month tenants. The Burkes told the McDowells that they wanted to continue to rent the dwelling for at least two more years while they were in school. A little over one month later, the McDowells terminated the Burkes' tenancy in a Notice to Vacate letter that gave the reason for the eviction as a decision by the McDowells "to proceed with leasing only to Senior citizens, 55+ years." At the time the Burkes were evicted, there was at least one other dwelling in the complex that was unoccupied and available for rent. The Burkes have established a prima facie case of housing discrimination based on familial discrimination.

### *The McDowells' Purported Non-discriminatory Reason*

The McDowells told the Burkes orally and in writing that they were being evicted because the McDowells only wanted to rent to seniors. However, after the Burkes filed their complaint with the MCHR, the McDowells told the MCHR investigator that the eviction was actually based on the bad condition of the dwelling, the Burkes' dog, several late rent payments, and restricted access to the dwelling. Under the terms of the lease, the McDowells had the right to evict the Burkes for any of these reasons, but there is no evidence beyond their self-serving statements that they actually did so. We find they did not evict the Burkes for such

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<sup>13</sup> Arguably, the McDowells knew that familial status was a protected class because their rental application assures prospective tenants that they "do business in accordance with the federal Fair Housing Law" and lists "familial status" as a protected class.

nondiscriminatory reasons, nor did they ever warn the Burkes about any of these alleged breaches of the lease orally or in writing.

*Credibility/Pretext*

The McDowells made several statements that were admitted as exhibits at the hearing, which provide a means to evaluate their credibility when compared with the Burkes' credibility. There are inconsistencies in the McDowells' statements, which make them less credible than the Burkes.

The McDowells made conflicting statements about the reasons for evicting the Burkes. In the Notice to Vacate and in statements made to the Burkes when they were given the notice, the McDowells said they were ending the Burkes' tenancy because they wanted to rent only to seniors. However, after receiving notice of the Burkes' complaint to the MCHR, the McDowells claimed in a statement to the MCHR investigator that the decision to evict the Burkes was really because of the bad condition of the dwelling and problems with the Burkes as tenants. The McDowells never gave the Burkes any written or oral warnings during the term of the lease. Mr. McDowell did not comment on the condition of the dwelling when he conducted the annual inspection a little more than a month before the eviction, and the McDowells allowed the Burkes to continue to rent the dwelling on a month-to-month basis. In fact, when the McDowells were contacted as a reference by a potential landlord, they did not mention any of these issues, but instead told the potential landlord that they had ended the Burkes' tenancy so they could rent the property to seniors.

The Burkes' testimony during the hearing contradicts the McDowells' statements. Mr. Burke described in detail the extent to which they cleaned the dwelling when they moved out and their offer to steam clean the carpets. The Burkes took several photographs of the dwelling when they moved out that confirm their testimony and do not reflect the terrible conditions the

McDowells are now claiming existed in the dwelling and yard. The McDowells did not take any photographs to substantiate the conditions they claim they found after the Burkes moved out.

The evidence supports the Burkes' claim that the McDowells' explanation for their actions was merely pretextual. Therefore, we find that the McDowells discriminated against them due to their familial status in violation of section 213.040(1).

#### Exception to the MHRA

Section 213.040.8<sup>14</sup> provides an exception to claims of housing discrimination based on familial status that allows housing to be restricted as "housing for older persons." Section 213.040.9 defines "housing for older persons" as housing:

- (1) Provided under any state or federal program that the commission determines is specifically designed and operated to assist elderly persons, as defined in the state or federal program;
- (2) Intended for, and solely occupied by, persons sixty-two years of age or older;  
or
- (3) Intended and operated for occupancy by at least one person fifty-five years of age or older per unit. In determining whether housing qualifies as housing for older persons under this subsection, the commission shall develop regulations which require at least the following factors:
  - (a) The existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and
  - (b) That at least eighty percent of the units are occupied by at least one person fifty-five years of age or older per unit; and
  - (c) The publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons fifty-five years of age or older.

Because this section provides an exception that allows discrimination, it should be construed narrowly and should be analyzed accordingly.<sup>15</sup> The McDowells bear the burden of proof on this

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<sup>14</sup> The corresponding federal law is 42 U.S.C. § 3607(b)(2)(C)(iii) (2011).

<sup>15</sup> *Gibson v. County of Riverside*, 181 F. Supp.2d 1057, 1076 (C.D. Cal. 2002).

affirmative defense and must demonstrate that the complex met all three requirements at the time of the alleged discriminatory action.<sup>16</sup>

The MCHR investigator testified that the complex is not offered as “housing for older persons” under either a state or federal program. The McDowells’ own advertising and statements demonstrate that the dwellings are not intended for, or solely occupied by, people age 62 or older. Thus, the only provision in this exemption that the McDowells’ rented dwellings could qualify under is: “(3) intended and operated for occupancy by at least one person fifty-five years of age or older per unit.” To qualify under subsection (3), the rented dwellings must meet the three factors enumerated in this subsection.<sup>17</sup>

*Significant Facilities and Services Designed  
to Meet the Needs of Older Persons*

Prior to 1995, the United States Department of Housing and Urban Development (“HUD”) developed a non-exclusive list of factors to be used in determining whether significant facilities or services were provided to assist seniors. These factors are useful in interpreting § 213.040.9(3)(a), which is the same as the pre-1995 provision in the FHA. The factors include recreational programs, continuing education, information and counseling, health care programs, emergency health assistance, dining facilities, and transportation.<sup>18</sup>

There is no evidence that the McDowells offer any facilities or services specifically designed to meet the physical or social needs of older persons. The MCHR investigator noted the absence of any obvious physical modifications to the units, such as grab bars, that would

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<sup>16</sup> 181 F. Supp.2d at 1076.

<sup>17</sup> Prior to 1995, the FHA’s “older persons” housing exception was identical. The 1995 FHA amendments removed the first requirement and replaced it with an occupancy verification requirement. The second two requirements remain a part of the current FHA. Thus, pre-1995 FHA cases are applicable to an analysis of this exception and post-1995 FHA cases are applicable to (b) and (c). *Lippman v. Bridgcrest Estates I Unit Owners Ass’n et al.*, 991 S.W.2d 145 (Mo. App., E.D. 1988).

<sup>18</sup> *Park Place Homes Brokers v. P-K Mobile Home Park*, 773 F.Supp. 46, 50-51 (N.D. Ohio 1991).

normally be found in senior housing. There is no evidence that the McDowells offer transportation, health care assistance, or recreational programs. They have not identified any amenities they offer beyond basic tenant services that any landlord would offer to all tenants.

The McDowells have not offered any evidence that they made any attempt to offer programs or services designed to meet the needs of older persons but found that it was “impracticable,” nor have they demonstrated that “such housing is necessary to provide important housing opportunities for older persons.” In fact, based on the McDowells’ initial unsuccessful attempts to rent to seniors, it appears that there was more of a demand for housing from younger persons than from seniors.

The complex does not meet the requirements of § 213.040.9(3)(a).

*At Least One Tenant 55 or Older in Eighty Percent of the Units*

The exhibits introduced at the hearing included lease information for the four dwellings in the complex before and after the Burkes were evicted. On September 7, 2010, the date of the Notice to Vacate, 33% (one of three) of the occupied dwellings<sup>19</sup> were occupied by at least one person 55 years of age or older.<sup>20</sup> By November 1, 2010, this number had increased to 75% (three of four) of the occupied units.<sup>21</sup> Even though eventually all of the dwellings had at least one occupant 55 years of age or older, at all times relevant to this complaint, the complex did not meet the requirements of § 213.040.9(3)(b).

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<sup>19</sup> See 8 CSR 60-2.015(J)4.B. (Unoccupied units shall not disqualify this as housing for older persons, provided that these units are reserved for occupancy by persons who meet the age requirements).

<sup>20</sup> 100 Garson-the Burkes; 102 Garson-65 yr. old tenant; 104 Garson-vacant until November 1, 2010; 106 Garson- 54 yr. old tenant.

<sup>21</sup> 100 Garson-65 year old tenant; 102 Garson-65 year old tenant; 104 Garson-84 year old tenant; 106 Garson-54 year old tenant.

### *Policies and Procedures*

The policy and procedures provision requires both publication *and* adherence to policies *and* procedures.<sup>22</sup> It is not enough to actually restrict tenants if there are no written policies that are actually followed. To meet this requirement, written policies and procedures must “explicitly set out the age restrictions.”<sup>23</sup> Although the McDowells informally expressed their desire to restrict the age of their tenants, having the intention to make housing senior-only is not enough: “The intention, without published policies and procedures is insufficient to satisfy” the requirement in § 213.040.9(3)(c).<sup>24</sup>

The Missouri Court of Appeals found the factors provided by HUD in connection with a prior regulation to be useful in determining whether the requirements of this section were met.<sup>25</sup> These factors include: written rules and regulations, the manner in which housing is described to prospective residents, the nature of advertising, age verification procedures, lease provisions, and actual management practices in enforcing the rules and regulations.<sup>26</sup>

Nothing in the rental application, the rental agreement, or the policies and procedures attached to the agreement indicates that the complex was intended as housing for older persons.

Although the Burkes admit the McDowells told them they initially wanted to rent to seniors, they did not understand that meant the McDowells would refuse to rent to them before they were ready to move out. The other young tenant who was evicted at the end of his lease had no knowledge of the McDowells’ intent to rent only to seniors. There is no evidence about what any of the other tenants or prospective tenants were told.

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<sup>22</sup> *Gibson*, 181 F. Supp.2d at 1078.

<sup>23</sup> *Lippman*, 991 S.W.2d at 150.

<sup>24</sup> *Id.* at 151.

<sup>25</sup> *Id.* at 150.

<sup>26</sup> *Id.*

The advertising for the complex does not explicitly reference that the dwellings are for individuals 55 and older. The newspaper ad that appeared in March 2009 indicates only that the dwellings are “senior duplexes.” Although the McDowells stated that another ad was placed in the summer of 2010, there is no copy of that ad in the record and no evidence of the exact wording of the ad. The sign that Mrs. Burke saw outside the dwelling in the summer of 2009 did not mention seniors or an age restriction, and the sign that was apparently displayed briefly in front of the dwellings in the summer of 2010 indicates that the dwellings are for individuals 50 and older.

Although the rental application asks for “date of birth,” there is no evidence as to whether the McDowells verify this information.

There is no provision in the lease that restricts occupancy to at least one person per unit 55 years of age or older, and there are no age restrictions on overnight guests or subletting in the lease.

There are no actual rules and regulations restricting the age of occupants for the McDowells to enforce. Although the McDowells informally expressed their desire to restrict the age of their tenants, having the intention to make housing senior-only is not enough: “The intention, without published policies and procedures is insufficient to satisfy” the requirement in section 213.040.9(3)(c).<sup>27</sup>

The McDowells do not meet the requirements in § 213.040.9(3)(c).

Because the complex does not qualify as housing for older persons under § 213.040.9, it does not qualify for the exemption from the MHRA provided in § 213.040.8.

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<sup>27</sup> *Lippman*, 991 S.W.2d at 151.

### Conclusion

The Burkes have established proof of housing discrimination based upon their familial status. The evidence demonstrates that, regardless of the condition of a tenant's dwelling, the McDowells terminated their tenancy in order to rent to older persons without children. The McDowells' policy/practice is overtly discriminatory in light of the fact that the complex does not meet any of the requirements to qualify for the exemption for housing for older persons of the MHRA.

### Default

As an alternative remedy, the Burkes request a default judgment as authorized by § 213.075.9, Missouri Rule of Civil Procedure 74.05(a), and 8 CSR 60-2.190. Because we find in favor of the Burkes on the merits of their claim, there is no need to consider this remedy.

### **Damages**

Section 213.075.11 provides in relevant part:

The panel shall state its findings of fact and conclusions of law, and if, upon all the evidence at the hearing, the panel finds:

- (1) That a respondent has engaged in an unlawful discriminatory practice as defined in this chapter, the commission shall issue and cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful discriminatory practice. The order shall require the respondent to take such affirmative action, as in the panel's judgment will implement the purposes of this chapter, including, but not limited to ... payment of actual damages; and the submission of a report of the manner of compliance[.]

### Actual Damages

Section 213.075.11(1) provides for "actual damages" when a respondent has engaged in an unlawful discriminatory practice. "A damage award is designed to fulfill the remedial purposes of the civil rights laws and compensate a wronged person for the loss or injury

suffered.”<sup>28</sup> The Burkes are entitled to damages including out-of-pocket expenses related to their subsequent moves, emotional distress, pain and suffering, and deprivation of civil rights.

The Burkes’ testimony concerning the extent of the damage they suffered as a result of the McDowells’ discriminatory conduct was credible. The unrefuted evidence shows that as a result of the McDowells’ discrimination, the Burkes had considerable out-of-pocket expenses related to their subsequent moves. The Burkes testified that it was their intention to rent the dwelling at 100 Garson Lane for at least two more years. The Burkes’ testimony also established that they have suffered the type of mental anguish that a discrimination claim is designed to address.

#### *Out-of-Pocket Expenses*

The rent for the 100 Garson Lane dwelling was \$600 per month including all utilities except electricity. The complex was close enough to their school for them to walk to class, which resulted in a substantial savings on gas. From October 2010 until October 2011, the Burkes lived in their church parsonage. The Burkes incurred approximately \$150 in moving expenses and had to purchase a stove and microwave for \$872.73 in order to live in the parsonage. Although the rent on the parsonage was less than the rent on the Garson Lane dwelling, the Burkes’ monthly expenses were approximately \$100 higher due to the increased expenses for utilities. Because now they both needed a car to get to class, they had to purchase a second car for \$3,000. While she was moving her family to the parsonage, Mrs. Burke missed classes and had to drop a course with no refund for the \$350 tuition for the course or the \$100 cost of the textbook.

One year after they were forced to move from the Garson Lane dwelling, the Burkes were forced to move from the parsonage in Park Hills to Desloges. The Burkes testified that their

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<sup>28</sup> *Van Den Berk*, 26 S.W.3d at 413.

monthly expenses for housing were approximately \$150 higher in Desloges than they were at the Garson Lane residence.

When the Burkes signed the lease agreement with the McDowells, they paid a \$600 security deposit. Over the term of the lease they also paid a non-refundable pet deposit of \$20 per month (\$240) that was intended to cover pet-related cleaning. After the Burkes moved out, the McDowells only refunded \$75 of the security deposit. The itemized statement provided by the McDowells with the \$75 refund stated that the McDowells retained the \$525 balance of the deposit for cleaning (\$300), painting (\$130), patching holes (\$40), yard (\$15), miscellaneous (\$10), and time and travel (\$30). The \$525 was separate from the \$240 non-refundable pet deposit. The Burkes took several photographs of the dwelling when they moved out that confirm their testimony that damage to the dwelling, if any, did not exceed “ordinary wear and tear.” The photographs do not reflect the terrible conditions the McDowells claim they found after the Burkes moved out. The McDowells did not take any photographs to substantiate their claim or their deductions from the Burkes’ security deposit.

Section 535.300.3 provides:

3. The landlord may withhold from the security deposit only such amounts as are reasonably necessary for the following reasons:
  - (1) To remedy a tenant's default in the payment of rent due to the landlord, pursuant to the rental agreement;
  - (2) To restore the dwelling unit to its condition at the commencement of the tenancy, ordinary wear and tear excepted; or
  - (3) To compensate the landlord for actual damages sustained as a result of the tenant's failure to give adequate notice to terminate the tenancy pursuant to law or the rental agreement; provided that the landlord makes reasonable efforts to mitigate damages.

Section 535.300.5 provides:

If the landlord wrongfully withholds all or any portion of the security deposit in violation of this section, the tenant shall recover as damages not more than twice the amount wrongfully withheld.

The McDowells have withheld a portion of the Burke's security deposit in violation of § 535.300.3 in the amount of \$525. The Burkes are entitled to restitution pursuant to § 535.300.5 in the amount of \$1,050.

The Burkes are entitled to \$6,000.20 for out-of pocket expenses to compensate them for actual expenses incurred through October 2012, at which time the Burkes may have chosen to move from the Garson Lane dwelling. This includes \$3,000.00 for the difference in rent and utilities for the two years they would have stayed at the Garson Lane Dwelling, \$150.00 for moving expenses, \$872.73 for appliances, \$450 for the dropped course and book, \$1,050 for the double damages for the unreturned security deposit, and prejudgment interest in the amount of \$477.47. Because a second car can be used for numerous activities beyond those related to the change in residence, the Burkes are not entitled to restitution for the purchase of the second family car.

#### *Emotional Distress*

Actual damages in a civil rights case under the MHRA may include damages for emotional distress and humiliation.<sup>29</sup> Damages can be awarded even where a medical diagnosis is not indicated and where the claim is “for emotional distress ... that an ordinary person would feel in such circumstances.”<sup>30</sup>

The Burkes testified how shocked they were when the McDowells delivered the Notice to Vacate. The Burkes had hoped to stay in the Garson Lane dwelling until they completed their classes at Mineral Area College. Instead, twice in two years they had the stress of looking for a new home and moving their family. The Burkes testified about the impact on the family of moving out of a very new dwelling with a yard that was “ideal” for their family into a much

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<sup>29</sup> *Conway v. Missouri Commission on Human Rights*, 7 S.W.3d 571, 574-75 (Mo.App. E.D. 1999).

<sup>30</sup> *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 568 (Mo. banc 2006).

older dwelling that needed renovations, did not have a back yard, and was farther from the college. The demands of moving the family required Mrs. Burke to miss classes, drop a course, and add a part-time job to her already busy schedule. Mr. Burke testified about the effect the moves had on the children and how they could not sleep after the move to the parsonage, but instead went into their parents' room every night, causing them all to lose sleep.

The Burkes' testimony demonstrates that the McDowells' actions in evicting the Burkes from the Garson Lane dwelling caused significant emotional distress for the Burkes. They are entitled to an award of damages for emotional distress in the amount of \$2,000.<sup>31</sup>

#### *Violation of Civil Rights*

The amount of damages recoverable for a deprivation of civil rights depends on the severity of the harm suffered by the person whose rights have been affected.<sup>32</sup> In this case, the McDowells acted willfully and knowingly, violating the MHRA and the FHA and infringing on the Burkes' civil rights by evicting them from their home based solely on their familial status. The Burkes are entitled to an award of damages of \$2,000 for the violation of their civil rights.<sup>33</sup>

#### Prejudgment Interest

An award of prejudgment interest is appropriate in cases under the MHRA.<sup>34</sup> "Prejudgment interest is designed to compensate a plaintiff for the loss of the use of her money from the date the cause accrued to the date of final judgment and to promote settlement, deterring a defendant from unfairly benefitting from the inherent delays of litigation."<sup>35</sup> When

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<sup>31</sup> See *Van Den Berk* 26 S.W.3d at 414 (Van Den Berk refused to rent to the Austins because of their race. The court awarded Mr. Austin \$1,000 for emotional distress and Mrs. Austin \$5,000 for emotional distress. In addition to stress and depression, the Austins claimed the discrimination contributed to a marital separation).

<sup>32</sup> *Missouri Commission on Human Rights v. Red Dragon Restaurant*, 991 S.W.2d 161, 171 (Mo.App. W.D. 1999).

<sup>33</sup> See *Van Den Berk* (Van Den Berk refused to rent to the Austins because of their race. The court awarded Mr. and Mrs. Austin \$1,000 each for violation of civil rights).

<sup>34</sup> *Pollack v. Wetterau Food Distribution Group*, 11 S.W.3d 754, 771 (Mo.App. E.D. 1999).

<sup>35</sup> *Id.* at 771-772.

the Burkes offered to settle the complaint for twice the amount of the unreturned portion of their security deposit, the McDowells refused to negotiate because “A counter-offer would only be a sign of wrong doing on our part.”<sup>36</sup> The McDowells did not cooperate with discovery and did not participate in the pre-hearing conference or the hearing. Months after the hearing had been held and the Burkes’ brief had been filed, the McDowells contacted the Hearing Examiner to request a rehearing. The McDowells’ actions caused more than just the “inherent” delay in litigation. An award of prejudgment interest is appropriate.

Section 408.040.3<sup>37</sup> authorizes an award of prejudgment interest for tort cases equal to the applicable federal funds rate, plus three percent. The federal funds rate on May 21, 2013 is .25%. Thus, a prejudgment interest rate of 3.25% should be awarded.

#### Civil Penalty

Section 213.075.11(2) allows imposition of a civil penalty upon a finding:

- (2) That a respondent has engaged or is about to engage in a violation of section 213.040, 213.045, 213.050, or 213.070, to the extent that the alleged violation of section 213.070 relates to or involves a violation of one or more of such other sections or relates to or involves the encouraging, aiding, or abetting of a violation of such other sections, the commission may, in addition to the relief provided in subdivision (1) of this subsection\*, assess a civil penalty against the respondent, for purposes of vindicating the public interest:
  - (a) In an amount not exceeding two thousand dollars if the respondent has not been adjudged to have violated one or more of the sections enumerated in subdivision (2) of this subsection within five years of the date of the filing of the complaint[.]

Section 213.040.1 has prohibited housing discrimination on the basis of familial status since 1992. The McDowells are responsible for knowing and following the law. In fact, they

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<sup>36</sup> Pet. Ex. 1, e-mail dated December 7, 2010.

<sup>37</sup> RSMo Supp. 2012.

were on notice that familial status was a protected class because their rental application assures prospective tenants that they “do business in accordance with the federal Fair Housing Law” and lists “familial status” as a protected class. After they were contacted by the MCHR, they offered nondiscriminatory reasons for evicting the Burkes that, as demonstrated above, were merely pretextual.

The complex consists of only four dwellings, so the impact on the housing market in the area is minimal. The McDowells have no other known violations of Chapter 213. We recommend that the MCHR assess a civil penalty against the McDowells of \$1,000.

#### Cease and Desist

Even though the Burkes no longer rent a dwelling from the McDowells, a cease and desist order is appropriate to protect the interest of future renters from the same discriminatory practices, unless and until such time as the McDowells can demonstrate that the complex qualifies as housing for older persons under the requirements of § 213.040.9. The McDowells should be required to use the words “Equal Opportunity Renter” in all advertisements, applications, and rules and procedures for their rental properties and maintain records to demonstrate compliance.

#### Conclusion

Sufficient evidence exists to establish a prima facie case of housing discrimination due to familial status under the MHRA. The McDowells have failed to establish a legitimate non-discriminatory reason for evicting the Burkes, and the evidence demonstrates that the reason the McDowells offer was merely pretextual. Accordingly, the Burkes are entitled to damages in the amount of \$10,000.20.

## Summary

The Hearing Examiner recommends that the MCHR take the following actions:

- (1) find that the McDowells committed unlawful and discriminatory acts in violation of Chapter 213;
- (2) assess damages against the McDowells including out-of-pocket expenses related to the Burkes' subsequent moves, emotional distress, pain and suffering, deprivation of civil rights, and any other damages deemed reasonable by the MCHR, plus pre-judgment interest in the amount of \$10,000.20;
- (3) assess a civil penalty to be paid to the Missouri Human Rights Fund of \$1,000 for the purpose of vindicating the public interest; and
- (4) order the McDowells to cease and desist any ongoing unlawful and discriminatory practices that violate the prohibition on familial discrimination in § 213.040.1(3) and to submit a report of the manner of compliance.

Pursuant to 8 CSR 60-2.200(1), the parties may file exceptions within ten days of the date of this recommended decision.

SO ORDERED on May 28, 2013.

  
SREENIVASA RAO DANDAMUDI  
Hearing Examiner