

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-2445

YOURITAN CONSTRUCTION COMPANY,
a corporation; SHU TSUN TAN, JOAN E. CHANG TAN,
individually and d/b/a TAN CONSTRUCTION COMPANY,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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STATEMENT

Proceedings Below

This action was brought by the United States on June 16, 1971, pursuant to Title VIII of the Civil Rights Act of 1968 (fair housing law), 42 U.S.C. 3601 et seq., alleging racial discrimination in the

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On February 8, 1973, the District Court issued an opinion and order (CL. T. 323-345) QUESTIONS PRESENTED appellants had engaged in.

1. Whether the District Court's Findings that appellants engaged in discriminatory housing practices are clearly erroneous.

2. Whether the District Court correctly ruled that the evidence was sufficient to entitle the United States to injunctive relief under 42 U.S.C. 3613. we do not repeat them here. Briefly,

the District Court found that STATEMENT through the resident manager

Proceedings Below buildings, instructed rental agents to discriminate

This action was brought by the United States on June 16, 1971, pursuant to Title VIII of the Civil Rights Act of 1968 (fair housing law), 42 U.S.C. 3601 et seq., alleging racial discrimination in the rental of apartments owned and operated by defendants (hereinafter referred to as "appellants" or "Tan"). The complaint alleges that the appellants engaged in a pattern and practice of resistance to the enjoyment of the rights granted by the Fair Housing Act, and that their conduct constituted a denial of rights secured by the Act, which denial raised an issue of general public importance. 42 U.S.C. 3613. Plaintiff prayed for injunctive and affirmative relief.

Appellants denied the material allegations of the complaint and trial was held on July 17-20 and July 31 - August 3, 1972. ON SUBSTANTIAL

EVIDENCE AND WERE NOT CLEARLY ERRONEOUS

The appellants seek to undermine the District Court's general findings of fact by a blunderbuss attack on the specific elements of the complaint. This case refers to the Clerk's Transcript of the trial.

On February 8, 1973, the District Court issued an opinion and order (Cl. T. 323-345)^{*/} holding that the appellants had engaged in racially discriminatory conduct and entered injunctive and affirmative relief.

Facts

The facts in this case are comprehensively set forth in the trial judge's Findings of Fact, and we do not repeat them here. Briefly, the District Court found that appellants, through the resident manager of one of their buildings, instructed rental agents to discriminate against black persons in the rental of apartments, that these instructions were implemented by defendants' agents in a variety of methods, and that the discriminatory behavior resulted from defendants' failure, by design or by thoughtlessness, to provide adequate supervision of employees. The Court also found that racially discriminatory conduct occurred at other of appellants' buildings, that the witnesses called by the United States to prove these facts were credible, and that the evidence of discrimination was supported by statistical evidence, which showed no blacks or very few at all of Tan's buildings. (Findings of Fact 5-9, 12-13).

ARGUMENT

I. THE DISTRICT COURT'S FINDINGS OF FACT ARE BASED ON SUBSTANTIAL EVIDENCE AND WERE NOT CLEARLY ERRONEOUS

The appellants seek to undermine the District Court's general Findings of Fact by a blunderbuss attack on the specific elements of

^{*/} Cl. T. refers to the Clerk's Transcript of the trial.

the evidence which supports these Findings. In order to succeed, appellants must upset the court's findings on credibility, eliminate that evidence they contend to be inadmissible, reject the statistical corroboration of direct evidence, and ignore uncontradicted evidence. This they have failed to do. The record supports the reasonableness and fairness of the decision below, which held that appellants discriminated in apartment rentals and that injunctive relief was necessary to insure compliance with the Fair Housing Act.

A. Questions of credibility are for the trial court and are not reviewable on appeal.

Appellants contend that the District Court's findings were based on conflicting testimony, incorrect determination of credibility, and inadmissible evidence, and are therefore "clearly erroneous" within the meaning of Rule 52(a), F.R.C.P. They argue, for example, that the testimony of plaintiff's white witness Gross, who testified that no one told him he would be required to undergo a credit check (in contrast to the experiences of the black testers) is "unreliable" because it is said to have been contradicted by the testimony of several of Tan's managers. (Tan brief, p. 22.) They also attack the testimony of appellants' former employees, who testified that they received and on occasion carried out racially discriminatory instructions, as the "highly inconsistent and contradicted testimony

by three ^{*/} disgruntled former Tan employees." The District Court, however, after having the opportunity to observe the witnesses personally, made specific findings as to their credibility. These findings were explicitly based, in substantial part, on the Court's "observation of the demeanor and credibility of all the witnesses."^{**/} Such findings may not be disturbed on appeal. United States v. Reddoch, 467 F. 2d 897 (5th Cir. 1972), (per curiam), aff'g P.H. E.O.H. Rptr. Para. 13,569 (S.D. Ala. 1972); Glenn Falls Indemnity Co. v. United States, 229 F. 2d 370, 373 (9th Cir. 1955).

In Reddoch, as in this case, the proof of discrimination in rentals included the testimony of former employees that they received discriminatory instructions, the testimony of blacks and whites -- fewer than in this case -- as to their rental experiences, and a similar statistical showing. On appeal, appellants attacked the testimony as conflicting and incredible and the statistics as irrelevant.^{***/} In addressing itself to a question virtually identical to the one presented here, the Court of Appeals said:

*/ In fact, the District Court found that four former employees so testified. See Finding of Fact No. 5. Cl. T. I 326.

**/ Finding of Fact No. 7 (former employees) and Nos. 10 and 12 (testers).

***/ In Reddoch, the apartment complex was in a white section of Mobile. See page 18, below.

Credibility choices and the resolution of conflicting testimony are for the district court, subject only to the clearly erroneous rule. Rule 52(a), F.R.Civ.P.

We think that the two cases are indistinguishable and that the District Court's findings, based upon its determination of credibility, should be sustained on appeal.

B. The district judge's findings are based on admissible evidence.

Appellants contend that certain findings of the District Judge concerning disparate treatment of black and white applicants at the Americana should be set aside because they are allegedly based on inadmissible hearsay evidence. They argue that the testimony of a black and white test team (Arthur McCullen and Phillip Smith) concerning their visit to the Americana should have been stricken from the record on the alleged ground that no proper foundation was laid for the use of memoranda which the witnesses prepared immediately after visiting the complex in order to record their experiences while their recollection was still fresh.

It defies reason to suggest that the Court should rely exclusively on a man's recollection months or years after an event when he recorded his observations at the moment they occurred, and when the contemporaneously prepared documents were available to him at the time of his testimony to refresh his recollection. Accordingly,

the trial judge properly^{*/} denied appellants' motion to strike this testimony. (RT VII 48-50.)^{**/} Santa Fe Drilling Co. v. N.L.R.B., 416 F. 2d 725, 730, n. 4 (9th Cir. 1969); and see III Wigmore on Evidence §§ 758 et seq. (3rd Ed. 1940).

Appellants criticize this testimony on the ground that the witnesses allegedly failed to testify that what they had written down was true. Their criticism is factually inaccurate, for each witness testified that the documents reflected the truth to the best of his recollection.^{***/} Moreover, the documents prepared by these witnesses were used to refresh their recollection, and appellants' extensive discussion of the requirements under state law for "past recollection recorded" misses the point.

^{*/} At this time, the objection was phrased in terms of relevancy.

^{**/} RT VII refers to Volume VII of the Reporter's Transcript of the trial. Due to the fact the original seven volumes of the reporter's transcript were not paginated sequentially, the court reporter, on appellants' request, consolidated the original seven transcripts into five volumes for purposes of sequential numeration. The old number was retained on each transcript page. Since the appellee's copy reflects the old numbering system, we shall refer to that number when making reference to the reporter's transcript in our brief.

^{***/} Smith Dep., pp. 19-20; McCullen Dep. p. 20; see P.Exh. 4(b) and (c).

C. The district judge's findings correctly reflect the evidence.

Finally, since the testimony of these two witnesses as to Tan's discriminatory use of the "credit check" ruse was merely cumulative of other independent evidence^{*/} before the trial court, any error would have been harmless. Cf. Wineberg v. Park, 321 F. 2d 214, 218-219 (9th Cir. 1963).

Appellants contend that the appendix "inaccurately portrayed disparate treatment of black and white testers" (Brief, p. 18), in that it allegedly failed to take into account the fact that the black applicants were not all told that apartments were not available, and that not all of them were told that a "credit check" was necessary.

Appendix B to the District Court's findings does contain one error, in that the experiences of white checker Gross as to availability of apartments at Tan Plaza and Tan Plaza Continental were inadvertently transposed. The answer should have been No at the former complex and Yes at the latter. This error is of little consequence, however, because the United States has only claimed discriminatory misrepresentation of availability at three buildings (Tan Plaza, Tan Village and Tan Plaza International). While the record at Tan Plaza and Tan Plaza Continental

^{*/} Black persons, on at least ten separate occasions, were told that they would have to undergo a credit check as a condition of occupancy, while white persons who made virtually contemporaneous visits to the Tan buildings were told such a check was unnecessary. (Cl.T. I 348-352, Appendix B.)

C. The district judge's findings correctly reflect the evidence.

The District Court found that appellants discriminated against black applicants, among other ways, by falsely representing to them that apartments were not available and by using a "credit check" device to discourage blacks. These findings were based on the experiences of black bona fide apartment seekers and of matched white and black "testers" who visited eight of Tan's buildings. The specifics of these disparate experiences are contained in Appendix B to the District Court's Findings of Fact.^{*/} Appellants contend that the appendix "inaccurately portrayed disparate treatment of black and white testers" (Brief, p. 18), in that it allegedly failed to take into account the fact that the black applicants were not all told that apartments were not available, and that not all of them were told that a "credit check" was necessary.

*/ Appendix B to the District Court's findings does contain one minor error, in that the experiences of white checker Gross as to availability of apartments at Tan Plaza and Tan Plaza Continental were inadvertently transposed. The answer should have been No at the former complex and Yes at the latter. This error is of little consequence, however, because the United States has only claimed discriminatory misrepresentation of availability at three buildings (Tan House, Tan Village and Tan Plaza International). While the correction of the record at Tan Plaza and Tan Plaza Continental shows that Gross and his black counterpart were given similar information as to availability at these two complexes, Appendix B also discloses that the "credit check ruse" was discriminatorily applied at both of these buildings.

But the district judge did not find, nor did the United States contend, that all black prospects at Tan buildings were given false information concerning the availability of apartments or that all blacks were told of a credit check requirement (see Appendix B, Cl. T. I 348). What we did contend, and what the Court did find, was that all of the black witnesses who visited Tan buildings were subjected to discriminatory treatment in one or other of these two ways.

At page 22 of their brief, after what purports to be a detailed analysis of the portion of Appendix B which substantiates the discriminatory use of the "credit check ruse," appellants set forth some statistics which they propose to substitute for the District Court's findings and which are supposed to show that, even if every legitimate doubt is resolved in favor of the United States, 20% of the whites as compared with 46% of the blacks were subjected to a delay by reports of a credit check. Even if appellants' figures were correct -- which they manifestly are not -- this would still be a significant difference. More important, however, Tan's substitute statistics are predicated on their factual contentions, which Judge Wollenberg rejected on the basis of credibility choices, and on their contentions as to admissibility, which the District Court properly rejected.

Appellants also argue that the proof of discriminatory misrepresentation of unavailability does not support the District

Court's findings with respect thereto because, so they allege

(1) White tester Gross and black tester Johnson did not ask for the same kinds of apartments;^{*/} and

(2) Some of the apartments described as available on defendants' records were not in fact available.

The District Court heard a substantial amount of testimony bearing on these asserted defenses and the rebuttal thereto by the United States. After appraising the testimony and documentary evidence, including in particular appellants' attempted contradictions of their own records, the testimony of Mrs. Roberts as to how easily furnished apartments were changed to unfurnished ones, Mr. Tan's memorandum exhorting his agents not to leave any apartment vacant, if possible, longer than a day, and the proof that some apartments represented as unavailable to blacks had been vacant for as long as five months, the District Judge rejected appellants' assertions on the basis of the evidence summarized in the appendix^{**/} to this brief, and we urge this Court to do the same.

^{*/} Gross asked for furnished apartments and Johnson for unfurnished ones at all complexes except Tan Plaza Continental.

^{**/} Citations to the record are detailed in the appendix to this brief.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE EVIDENCE OF APPELLANTS' DISCRIMINATORY HOUSING PRACTICES ENTITLES THE UNITED STATES TO THE RELIEF GRANTED

The Fair Housing Act of 1968 was enacted to eliminate from the housing market badges and incidents of slavery which have persisted a century after the Thirteenth Amendment. United States v. Bob Lawrence Realty Co., 474 F. 2d 115, 120 (5th Cir. 1973), cert. den. ____ U.S. ____, 42 L.W. 3195 (Oct. 9, 1973); see also Jones v. Mayer Co., 392 U.S. 409 (1968); Mayers v. Ridley, 465 F. 2d 630 (D.C. Cir. 1972) (en banc). In vindicating a policy which it considered to be of the highest national priority (Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972)), Congress declared its intention to provide "within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. As the District Court held below, the language of the Act is so broad that "all practices which have the effect of denying dwellings on prohibited grounds are therefore unlawful." United States v. Parma, P.H. E.O.H. Rptr., Para. 13,616 (N.D. Ohio September 5, 1973); Zuch v. Hussey, ____ F. Supp. ____, C.A. No. 38757 (E.D. Mich. October 18, 1973), slip opinion at p. 5.

A. The evidence is sufficient to support the District Court's findings that defendants engaged in a "pattern and practice" of discrimination and denied equal housing opportunity to blacks.

The District Court found that appellants created a permissive atmosphere among their agents which in turn led to the implementation of racially discriminatory rental practices. After hearing the testimony and observing the witnesses, the district judge attributed these racially discriminatory results to the appellants and entered an order substantially along the lines of the one prescribed by the Court of Appeals for the Fifth Circuit in United States v. West Peachtree Tenth Corp., 437 F. 2d 221, 229 et seq., (1971). In the light of the extensive proof of discrimination, we think the relief granted was temperate and fully supported by findings which were in turn based on substantial evidence.

A. The evidence is sufficient to support the District Court's findings that defendants engaged in a "pattern and practice" of discrimination and denied equal housing opportunity to a "group of persons."

The court below found that discriminatory instructions were given to four employees,^{*/} that eight blacks were falsely told that no apartments were available, and that ten blacks were discouraged or otherwise deterred from renting apartments at Tan buildings through the use of a "credit check ruse."^{**/} In addition, the Court explicitly found that the rental agents carried out their superiors' discriminatory instructions,^{***/} and while the precise number of occasions on which this implementation was effected is not ascertainable;^{****/} appellants' rental statistics speak for themselves.

42 U.S.C. 3613 authorizes suit by the Attorney General where he has reasonable cause to believe that defendants have engaged in a discriminatory pattern or practice, or that there has been a denial

^{*/} See also the testimony of Ken Romines (RT II 7-8, 9-16), who is in effect a fifth such witness.

^{**/} Cl. T. I 350, App. B.

^{***/} Finding of Fact No. 6, Cl. T. I 326.

^{****/} There were at least six unidentified blacks to whom availability was misrepresented. (RT I 48-49, 110-111; RT II 163-168; P.Exh. 4(e) at pp. 7, 9-15). This evidence, like discrimination against identifiable blacks, is admissible to show a pattern or practice. United States v. Real Estate Development Corp., 347 F. Supp. 776, 783 (N.D. Miss. 1972) and cases there cited.

of equal housing opportunity to a group of persons which, in his judgment, raises an issue of general public importance. United States v. Hunter, 459 F. 2d 205 (4th Cir. 1972), cert. den. 409 U.S. 934 (1972); United States v. Bob Lawrence Realty Co., supra. To establish a "pattern or practice," it is incumbent upon the United States to show that any discriminatory conduct by the defendants was not an isolated, accidental or peculiar departure from a nondiscriminatory norm. United States v. Pelzer Realty Co., Inc., 484 F. 2d 438, 445 (5th Cir. 1973); United States v. Reddoch, supra, at 25-26; United States v. Real Estate Development Corp., supra, 347 F. Supp. at 783; United States v. Grooms, 348 F. Supp. 1130, 1133 (M.D. Fla. 1972); and see United States v. Ironworkers Local 86, 443 F. 2d 544, 552 (9th Cir. 1971) (employment).

Since courts have found a pattern and practice in cases ranging from two discriminatory incidents^{*/} to a single act of discrimination coupled with an admission of a discriminatory policy,^{**/} and since it

^{*/} United States v. Pelzer Realty Co., supra (two victims of discrimination); United States v. Mintzes, 304 F. Supp. 1305, 1313 (D. Md. 1969) (unlawful representations to three persons); United States v. West Peachtree Tenth Corp., supra, at 227 (proof of a pre-Act discriminatory policy and two post-Act incidents); United States v. Grooms, supra (two incidents).

^{**/} United States v. Alexander and Cloutier Realty Co., P.H. E.O.H. Rptr. Para. 13,583 (M.D. Ga. 1970); United States v. Reddoch, supra, Conclusion of Law No. 13; United States v. Raymond, P.H. E.O.H. Rptr. Para. 13,618 (M.D. Fla. 1973); see also United States v. Gilman, 341 F. Supp. 891 (S.D. N.Y. 1972) (two incidents of discrimination, both in one of many buildings operated by defendants; one was an implicit statement of discriminatory policy).

has been held that discriminatory instructions to employees or admissions of a discriminatory policy, standing alone, can support relief under 42 U.S.C. 3613,^{*/} it was proper for the court below to find the existence of such a discriminatory course of conduct in view of the far more extensive proof in the instant case.

Moreover, as the court below aptly observed,^{**/} the United States is entitled to relief, even short of proof of a "pattern and practice," where there has been a denial of rights secured by Title VIII to a group of persons, and where the Attorney General has determined that this denial raises an issue of general public importance. In United States v. Hunter, supra, 459 F. 2d at 218, note 17, the court said:

In contrast to the 1964 Act, a pattern or practice of resistance is not an indispensable prerequisite for relief. Relief may be based on a single (unintentional) violation of the Act when by that violation a group of persons are denied their statutory rights and the case raises an issue of general public importance. Here the rights of all non-whites looking for an apartment were abridged by the illegal advertisements published in the Courier.

^{*/} United States v. Reddoch, supra, Conclusion of Law No. 13; United States v. Real Estate Dev. Corp., 347 F. Supp. at 784-85.

^{**/} See Conclusion of Law Nos. 16 and 17; Cl. T. I 337.

Contrary to the implication in appellants' Question Presented No. 8, it is well settled that the Attorney General's determination of general public importance is conclusive and not subject to judicial review. United States v. Bob Lawrence Realty Co., supra; United States v. Northside Realty Associates, 474 F. 2d 1164 (5th Cir. 1973); and see note 6 to Conclusion of Law. No. 16 in the District Court's opinion.

In United States v. Reddoch, supra, the Court of Appeals affirmed an opinion by Judge Pittman which summarized the law as to the "second alternative" of 42 U.S.C. 3613 as follows:

"To determine whether an injunction is appropriate under the "second alternative" of 42 U.S.C. 3613, the court will apply conventional principles of equity. Injunctive relief is appropriate, in cases of this kind, where significant violations of the Act have been shown, irreparable injury being presumed from the fact of such violations, without more. United States v. Hayes International Corp., 415 F. 2d 1038 (5th Cir. 1969). Since equity looks to the future, injunctive relief is also appropriate, even in the absence of a showing of past violations, where the defendants' conduct or statements threaten future violations. Swift & Co., v. United States, 276 U.S. 311, 326 (1928); United States v. W.T. Grant & Co., 345 U.S. 629, 633 (1953). Proof of discriminatory instructions to employees constitutes a threat of future violations, and the same is true of admissions of a discriminatory policy. Injunctive relief

is therefore appropriate in this case on the basis of appellants' discriminatory rejection of blacks, standing alone, on the basis of their discriminatory instructions to Mrs. Ward and Mrs. Robbins, standing alone, and on the basis of their extrajudicial admissions of a discriminatory policy. The need for such relief is even more cogent when all of these kinds of evidence are considered together."

In the light of the foregoing passage, the almost identical facts in the present case are more than sufficient to support the relief granted under the "second alternative."

B. The district court properly used statistical evidence to support its finding of discrimination.

It is now well settled that in housing discrimination cases,*/ as well as those in cases involving other kinds of racial discrimination,**/ statistics tell much, and courts listen. The District Court found that black occupancy of Tan buildings was negligible, with the majority never having had a black tenant, and with black occupancy of all Tan buildings at the time suit was brought less than 1 1/2 percent of total occupancy. The court

*/ United States v. Reddoch, supra; United States v. Real Estate Dev. Corp., supra; Newbern v. Lake Lorelei, Inc., 308 F. Supp. 407, 417 (S.D. Ohio 1968); United States v. Housing Authority of the City of Albany, Ga., P.H. E.O.H. Rptr. Para. 13, 580 (M.D. Ga. 1973); United States v. Northside Realty, supra, slip opinion at p.3.

**/ E.g. State of Alabama v. United States, 304 F. 2d 583, 586 (5th Cir. 1972), aff'd 371 U.S. 37 (1962) (voting); United States v. Ironworkers Local No. 86, supra (employment); Penn v. Stumpf, 308 F. Supp. 1238, 1243 (N.D. Cal. 1970); Carmical v. Craven, 457 F. 2d 582 (9th Cir. 1971) (juries).

concluded that these statistics, together with the minimal control exercised by the appellants over their subordinates, raised an inference unfavorable to appellants and corroborated the other evidence against them. We believe that this temperate treatment of the statistical evidence was unexceptionable.*/

Appellants claim that the statistics are unpersuasive because the racial composition of their buildings is alleged to mirror the make-up of the surrounding population. But in Reddoch and Real Estate Development,**/ in which the courts gave weight to such statistics, there was no suggestion that the complexes in question were not in white areas, although of course there are substantial numbers of blacks in Mobile, Alabama and Columbus, Mississippi. In the present case, two of appellants' complexes are directly across the freeway from East Palo Alto, an unincorporated area of about 18,000 people, over 58% of whom are black,***/ and all

*/ Ct. Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421, 426 (8th Cir. 1970), holding that statistics no more extreme than these constitute legal proof of discrimination.

**/ In United States v. Northside Realty Associates, supra, over strenuous objections by defendants similar to those made here, the District Court gave weight to statistical evidence of no sales to blacks by a company doing its business in the virtually all-white northern part of Atlanta, Georgia.

***/ Cl. T. I. 324-325; P. Ex. 6 and 6(a).

the others are within easy driving distance.*/ According to the 1970 census, the mean income of blacks in that area is \$8,000.**/ Under these circumstances, the minuscule black occupancy of appellants' apartments fully corroborates the proof of discrimination contained in the testimony of appellants' former employees and of the blacks and whites who testified to their disparate rental experiences.***/

*/ See Def. Ex. G.

**/ Such fact is judicially noticeable. See Parham v. Southwestern Bell Telephone Co., 433 F. 2d 421, 426, note 4 (8th Cir. 1970).

***/ Appellants contend that the district judge erred in his findings on the number of black tenants at Tan buildings at the time of suit. In arguing the claimed existence of more blacks at the six buildings which never had a black before the suit (Brief, 7-8), appellants refer to a black tenant (Ralph Prather) (D. Exh. I) who applied for an apartment (later withdrawn) at Tan Manor in May 1972 -- almost one year after the suit was filed. Such evidence is of no consequence in a suit of this kind. United States v. West Peachtree Tenth Corp., 437 F. 2d 221, 224, note 2 (5th Cir. 1971). Moreover, while the district judge did apparently fail to account for four units rented to black persons at Tan House before the suit (see D. Exh. I), this is of comparatively little significance, for this particular building in one of two to which Tan directed his employees to "steer" blacks. (R.T. I 16-17; D. Exh. G).

- C. The District Court properly held Appellants responsible for the discriminatory conduct of their employees.

Appellants claim on appeal that, even if their rental agents engaged in discriminatory rental practices, such conduct is not attributable to them because Mr. Tan assertedly had no knowledge of these violations. The law, however, is to the contrary. Judge Wollenberg correctly concluded that the conduct of rental agents during the course of their employment is chargeable to their principal both under the doctrine of respondeat superior and because the duty to obey the law is non-delegable.^{*/} If the discriminatory conduct of an agent acting on the principal's business were not imputed to the principal, the incentive for apartment owners to assure nondiscrimination by their agents would be removed, to the detriment of "the policy of the United States to provide fair housing throughout the United States." 42 U.S.C. 3601.

^{*/} See, e.g. United States v. Bob Lawrence Realty Co., 474 F. 2d 115 (5th Cir. 1973), aff'g United States v. Mitchell, 335 F. Supp. 1004 (N.D. Ga. 1971) cert. den., No. 72-1574, U.S. ; United States v. Northside Realty Associates, 474 F. 2d 1164 (5th Cir. 1973); United States v. Reddoch, supra; United States v. Real Estate Development Corp., supra, 347 F. Supp. at 785; Williamson v. Hampton Mgt. Co., 339 F. Supp. 1146, 1149 (N.D. Ill. 1972); Martin v. Bowers, 334 F. Supp. 5 (N.D. Ill. 1971); Marshall v. Pendley, P.H. E.O.H. Rptr. Para. 13,615 (N.D. Ga. July 17, 1973), and see James v. Hafler, C.A. No. 13,738 (N.D. Ga. 1971) (owner of apartment complex held responsible for rental discrimination by independent management firm).

In United States v. Bob Lawrence Realty Co., 474 F. 2d 115 (5th Cir. 1973), aff'g United States v. Mitchell, 335 F. Supp. 1004 (N.D. Ga. 1971),^{*/} cert. den. U.S. ,42U.S.LW. 3195(1973), two agents of the defendant's real estate company, which had a total of twenty-seven agents, were found to have made a total of four unlawful "blockbusting" representations, all on a single weekend, to homeowners in a racially transitional area of Atlanta, Georgia. The proof showed that the defendant had held regular meetings with his agents on a daily or weekly basis to discuss the Fair Housing Act and to admonish them to observe its provisions. The offending agents were not joined as defendants. The Court of Appeals affirmed an injunction against the defendant and all of his agents, holding that the proof was sufficient to show that the defendant had denied equal housing opportunity to a group of persons and had participated with others in a "group pattern or practice" of discrimination in the area.^{**/} The defendant argued that the illegal conduct of the two agents should not be attributed to him and that he had done "nothing

^{*/} Appellants' citation of United States v. Mitchell at page 43 of their brief alludes to an earlier opinion in the case in which a motion for summary judgment was denied. That decision is in volume 327 of the Federal Supplement, not in volume 335.

^{**/} See 42 U.S.C. 3613.

wrong," but the Court of Appeals rejected this contention as "inexplicable," since the unlawful conduct of his agents was legally his own. 474 F. 2d at 126. The Supreme Court denied certiorari.

In United States v. Reddoch, supra, an injunction was entered against all four members of a partnership which owned an apartment house on the basis of the resident manager's discriminatory conduct, even though two of the defendants were "silent" partners who lived in another city and who did not participate in the operation of the apartments. The Court grounded its decision on the proposition that the resident manager's discriminatory conduct was "attributable to the defendants, who, at least, failed to take adequate steps to assure that she would comply with the law." United States v. Reddoch, supra, Conclusion of Law No. 18. The Court of Appeals affirmed "per curiam", and subsequently denied a rehearing.

In enacting 42 U.S.C. 3604(a), Congress not only prohibited unlawful refusals to sell or rent a dwelling for racial reasons, but also made it unlawful to make a dwelling unavailable on prohibited grounds. This catchall phraseology may not be easily discounted or de-emphasized, and appears to be as broad as Congress could have made it. United States v. City of Parma, supra. A landlord makes housing unavailable to blacks when he delegates the

responsibility for nondiscrimination to his agents and fails to assure compliance on their part. The consequences of such a course of conduct are the same as if he had engaged in personal discriminatory practices. To permit the landlord to abdicate his responsibility to assure equal housing opportunity by delegating his dealings with customers to others, where that results in blacks not obtaining housing on an equal basis, would necessarily defeat the very policies underlying the Fair Housing Act to which Congress has assigned so high a priority. Trafficante v. Metropolitan Life Ins. Co., supra.

Appellants' contention that they cannot be held accountable for any alleged discriminatory conduct by resident managers and rental agents because of a claimed lack of personal knowledge of such wrongdoings (Brief, pp. 42-45) seeks to avoid the central thrust of their legal obligation to assure nondiscrimination. Since their duty to comply with the law is nondelegable, United States v. Real Estate Dev. Corp., supra, 347 F. Supp. at 785, it cannot be escaped by leaving everything to the discretion of subordinates who then discriminate. The degree to which Mr. Tan supervised his employees' actions was a matter of his own choice, and, in any event, his knowledge was at least as great as that possessed by the defendants

in Lawrence,^{*/} Reddoch, Real Estate Development Corp., and Marshall.

If trustees for the owner of an apartment building (Marshall) and silent partners (Reddoch) can be held liable for their resident manager's discriminatory activities, then a fortiori, an owner, like Mr. Tan, who devoted considerable time to the day by day operations of his apartment complexes, (RT IV141-143, 146-148, 150-151, 156) also violates the law when his agents do so.

* * *

Mr. Tan also contends that even if Mrs. Boatwright discriminated^{**/} against blacks, he cannot be liable for her actions because she is no longer employed by him. This assertion is without merit. In the first place, the District Court found instances of discrimination proven at eight Tan buildings, and Mrs. Boatwright's discrimination occurred only at the Americana. But even if the district court were limited to a consideration of the events at the Americana -- which it was not -- relief in equity cases is not limited to the

*/ If a principal who gives regular instructions to his agents concerning their obligations under the Fair Housing Act can be held liable for the misdeeds of his agents (Lawrence), then the same must be true to a greater extent as to a principal like Tan, who claims to have given what the District Court termed "perfunctory" instructions "to obey the law" to his agents at the outset of their employment. It is of note that at least seven or 1/3 of the agents called by Tan denied receiving such instructions. (RT III 356, 378-379; RT IV 36-37, 71-77).

**/ The resident manager of the Americana. See Tan brief, pp. 46-47.

particular employee who did the discriminating. When his agent, Mrs. Boatwright, discriminated, Tan discriminated. Since an injunction against a principal is binding on all of his agents, see Rule 65, F.R.Civ.P., and not merely on those who did the wrong imputed to the principal, the departure of Mrs. Boatwright does not obviate the necessity for the decree.*/

In Hodgson v. First Fed. Savings & Loan Assn. of Broward Co., Fla., 455 F. 2d 818, 826 (5th Cir. 1972), the District Court, after finding discrimination because of age in the employment of a bank teller, issued an injunction prohibiting discrimination only in the employment of tellers. The Court of Appeals held that the denial of a broader and more comprehensive injunction constituted an abuse of discretion:

. . . we find no legal justification in compartmentalizing an employer corporation in order to warrant an injunction against illegal employment practices to be applied only as to the particular job category in which the violation occurred. When confronted by a situation such as this courts should not be loathe to issue injunctions of general applicability. See Wirtz v. Ocala Gas Company, 336 F. 2d 236 (C.A. 5, 1964). The aim of such an injunction is remedial, not punitive. McComb v. Jacksonville Paper Company, 336 U.S. 187, 69 S.Ct. 497, 93 L.Ed. 599 (1949). As this court said in a Fair Labor Standards Act case, 'The injunctive processes are a

*/ In the Bob Lawrence case, supra, the defendant Mitchell, against whom an injunction was entered, was held liable primarily on the basis of blockbusting representations by two agents who had left the company. This issue was raised by Mitchell and rejected by the district court; this defendant did not appeal.

means of effecting general compliance with national policy as expressed by Congress, a public policy judges too must carry out -- actuated by the spirit of the law and not begrudgingly as if it were a newly imposed fiat of a presidium.' Mitchell v. Pidcock, supra, 299 F. 2d at 287.

* * *

Were the injunction in the instant case to be limited to the hiring of tellers the government would have to maintain its surveillance over defendant in order to insure that violations of the Act in job categories other than teller did not occur. Having once made out a case of unlawful discrimination, we think the government should not have to bear this administrative burden. This consideration, balanced against the minimal inconvenience to the defendant, weighs heavily in favor of enforcement by an injunction of general applicability without reference to specific jobs.

In United States v. Real Estate Dev. Corp., supra, the Court, expressly applying the First Fed. Savings & Loan Assn. decision to fair housing suits by the Attorney General, held that

in cases of this kind, injunctions should not be granted grudgingly and should be sufficiently broad to assure nondiscrimination. 347 F. Supp. at 785.

As part of its decree, the Court made it clear that the injunction, which by its terms applied to all violations of Title VIII, was not limited to the complexes at which the discrimination occurred, by

D. The District Court's Order was a temperate exercise of its discretion and was not erroneous.

specifically requiring the defendants to report to the Court immediately upon the acquisition of additional residential property.^{*/} See also United States v. Gilman, 341 F. Supp. 891 (S.D. N.Y. 1972) (two incidents at one building held sufficient to sustain prohibitory injunction as to all of defendants' buildings). The "model decree" in West Peachtree Tenth Corp. and the decree affirmed by the Court of Appeals in Reddoch also prohibit discrimination generally, and are not limited to any particular building.

Finally, the District Court held that its "paramount concern" in a "pattern or practice" case is the underlying violation by the principal in failing to exercise sufficient control over his agents to prevent them from discriminating at several of Tan's complexes. That central theme of the violation was not affected by Mrs. Boatwright's departure.

^{*/} The decree in the Real Estate Development case is not officially reporter, but may be found in P.H. E.O.H. Rptr. Para. 13,572, at pp. 13,792 et seq.

D. The District Court's Order was a temperate exercise of its discretion and was not erroneous.

We have noted in our discussion of defendants' liability for the conduct of their rental agents that the scope of an injunction in this kind of case should not be unduly circumscribed. "It was not necessary that all the untravelled roads [to violation of the law] be left open, and only the worn one closed."

International Salt Co. v. United States, 332 U.S. 392, 400 (1947).

Indeed, in framing its decree, the District Court had:

"not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.:"

Louisiana v. United States, 380 U.S. 145, 154 (1965). See also

United States v. West Peachtree Tenth Corp., supra.

Tan contends that injunctive relief is improper on the grounds that he is in good faith and that there is therefore no danger that he will violate the Act in the future. (Brief pp. 46-47, 49-51). But once substantial violations have been proved, an injunction is appropriate to assure compliance. United States v. Bob Lawrence Realty Inc., supra, 474 F. 2d at 125-126; see also United States v. West Peachtree Tenth Corp., supra, 437 F. 2d at 228. As Judge Dyer said for the Court of Appeals in

West Peachtree Tenth Corp., supra, in reversing the District Court's denial of relief in that case as an abuse of discretion,

. . . the good faith and present disposition of the defendant to adhere to the letter and spirit of the law does not preclude us from granting relief. Id. at 228.

If it was an abuse of discretion by the District Court in Peachtree not to enter an order like that prepared by the Court of Appeals, it was surely an appropriate exercise of Judge Wollenberg's discretion to enter such a decree in this case.*/

Turning from the propriety of issuing any injunction to the scope of an appropriate one, appellants contend that it was error for the District court (1) to require nondiscrimination in employment in a Title VIII case (Brief, pp. 52-55) and (2) to require them to keep racial records concerning applicants for apartments and to make reports to the court for three years rather than one year. (Id., pp. 55-56). We turn to these contentions.

1. The District Judge did not abuse his discretion in prohibiting Tan from engaging in discriminatory employment practices.

*/ It is noteworthy that the relief granted in this case does not include provisions which would have been within the Court's discretion to grant, such as monetary relief for individual victims of discrimination, United States v. Georgia Power Co., 474 F. 2d 906 (5th Cir. 1973), or a requirement that defendants attempt to attract nonwhite residents by advertising in nonwhite media. United States v. Ironworkers Local No. 86, supra.

Associates, C.A. No. 13932 (N.D. Ga. 1973), on remand from 474 F. 2d 1104 (5th Cir. 1973) (real estate broker enjoined from employment discrimination not alleged or proved). In addition, I. 325, Finding No. 3; see also Brief pp. 56-57). A virtually all-white work force, no matter how innocent its origin,*/ reinforces the discriminatory all-white image which inevitably results from the racially discriminatory conduct in which these appellants have been found to have engaged. Since appellants have a legal obligation to correct their discriminatory image, United States v. Real Estate Dev. Corp., supra; United States v. Plumbers Local No. 73, 314 F. Supp. 160 (S.D. Ind. 1969), it was within the district court's discretion, at least, to assure equal employment opportunity in Tan's operation, and courts in fair housing cases have consistently so held. See United States v. Bob Lawrence Realty Co., supra, (appellate court affirmed injunction in "blockbusting" case which required defendants to take steps to assure nondiscrimination by their agents in employment as well as housing, although no Title VII violations were alleged or proved); United States v. Northside Realty

*/ A former employee, Lynette Watkins, testified that she observed Mrs. Boatwright refuse to interview a black female job applicant for a vacant rental position. (R.T. II. 107-108).

Associates, C.A. No. 13932 (N.D. Ga. 1973), on remand from 474 F. 2d 1164 (5th Cir. 1973) (real estate broker enjoined from discriminating in engagement of services of sales agents although employment discrimination not alleged or proved). In addition, the Secretary of Housing and Urban Development has issued Affirmative Fair Housing Marketing Regulations pursuant to the Fair Housing Act, 37 F.R. 75, 76 (January 5, 1972), which explicitly require that developers under FHA subsidized^{*/} and unsubsidized programs "maintain a nondiscriminatory hiring policy in recruiting from both minority and majority groups for staff engaged in the sale or rental of properties." This recognition by the officer charged with the administration of Title VIII of the relevancy of employment practices to fair housing is entitled to great weight. Trafficante v. Metropolitan Life Ins. Co., supra; 409 U.S. at 210. Udall v. Tallman, 380 U.S. 1, 15 (1965); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Nor is the approach represented by the foregoing authorities and adopted by the District Court out of step with the interpretation of other civil rights laws. In the field of school desegregation, it has long been settled that a black pupil seeking student desegregation has standing to complain of segregation of

^{*/} We cite these Regulations not because the record shows the Tan apartments to be subsidized, but rather to show the Secretary's recognition of how employment practices affect equal housing opportunity.

faculties as well, even though no teacher has complained.

Bradley v. School Board, 382 U.S. 103, 105 (1965); Rogers v.

Paul, 382 U.S. 198, 200 (1965). As in school desegregation, so too in housing cases,

Freedom of choice, in other words, does not mean a choice between a clearly delineated "Negro School" (having an all-Negro faculty and staff) and a "white school" (with all-white faculty and staff). Kier v. County School Board of Augusta County, Va., 249 F. Supp. 239, 246 (W.D. Va. 1966).

As the late Judge Michie aptly put it in Brown v. County School Board of Frederick County, Va., 245 F. Supp. 549, 560 (W.D. Va. 1966), the presence of a faculty made up of members of one race denotes the race of the pupils for which the school was intended "just as certainly as if the [racial] words were printed across its entrance in six-inch letters."

By analogy to the foregoing, Tan's all-white rental staff, when considered in conjunction with the housing discrimination in which the District Court found appellants to have engaged, creates a virtually all-white image, and the District Court could reasonably conclude that such an image would have an adverse influence on a black applicant's choice. But "if choice influencing factors are not eliminated, freedom of choice is a fantasy." Lee v. Macon County Board of Education, 267 F. Supp.

large holdings. Moreover, the amount of discrimination found in 458, 479 (M.D. Ala. 1967), aff'd, sub nom Wallace v. United States, 389 U.S. 215 (1967). Accordingly, the District Court properly exercised its discretion in directing defendants to engage in nondiscriminatory employment practices, especially since the law required this of them in any event. Hodgson v. First Fed. Savings and Loan Assn. of Broward Co., Fla., supra.

2. The three-year reporting period was not an abuse of discretion.

Defendants argue that three years is too long a reporting period, and assert as grounds for this contention that the testimony for the United States about discrimination -- which the district judge found credible -- was allegedly unreliable. This patent non-sequitur is hardly a basis for setting aside Judge Wollenberg's exercise of his discretion, especially since 42 U.S.C. 3613 authorizes permanent injunctive relief, while the reporting requirement is limited in duration. While it is true that reporting for two years was ordered in the West Peachtree Tenth and Reddoch cases, each of those decisions involved discrimination at a single apartment complex with fewer than 100 units. The detection of discrimination at a smaller operation would obviously be easier, without reporting, than at Tan's relatively

large holdings. Moreover, the amount of discrimination found in the Tan case, whether computed in terms of the number of agents reporting discriminatory instructions or policies or in terms of the number of incidents of discriminatory treatment of blacks, far surpassed what was proved in either Reddoch or West Peachtree Tenth.

CONCLUSION

For the foregoing reasons, we respectfully request that the judgment of the District Court be in all respects affirmed.

Respectfully submitted,

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(4) Gross and Johnson were treated differently

APPENDIX

Summary of Evidence Relating to the Availability of
Apartments at Tan Village on January 24, 1971
(of apartments available to meet Johnson's request)

Direct Evidence (23);

Rebuttal (1) On January 24, 1971, at Tan Village, Gross (white) was told that a furnished two-bedroom apartment was available; Johnson (black) was told that an unfurnished two-bedroom apartment was not available (RT I 174-179, 199-202; II 190, 202, 219);

(2) Appellants' records, as of the close of business January 23, 1971, show that four furnished and five unfurnished two-bedroom apartments were vacant (P.Exh. I (A-4)); (A-4); D. Exh. AF);

Defense (7) Mrs. Roberts, the resident manager of Tan V (3) When apartments are vacant they are not necessarily available because vacated apartments must be cleaned and prepared for new tenants; specific apartments at Tan Village were vacant, but not clean on January 24, 1971, because persons who usually cleaned up could not do so (RT IV 88-92, Brief, pp. 25-26); r 27, 1970 (RT IV 100-102);

two of these three apartments had been furnished

(4) Gross and Johnson asked for differently furnished apartments (thereby reducing the number of apartments available to meet Johnson's request) (Brief, p. 23);

Rebuttal

(5) Tan's announced policy (with instructions on how it was to be accomplished) was to refurbish apartments within one day for new tenants (P.Exh. 9, September 17, 1968 memorandum from Tan to all of his apartment managers);

(6) On January 24, 1971, specific two-bedroom apartments at Tan Village had been vacant for up to five months (P.Exh. 1 (A-4), D. Exh. AF);

(7) Mrs. Roberts, the resident manager of Tan Village testified that during the week ending January 10, 1971, eight apartments were rented to new tenants (RT IV 95);

(8) Three of the apartments rented at Tan Village during the week ending January 10, 1971, had been vacated, less than 3 weeks before, during the week ending December 27, 1970 (RT IV 100-102); two of these three apartments had been furnished

for the tenants who vacated during the week of December 27, 1970, but were rented as unfurnished apartments during the week of January 10, 1971 (Ibid.);

(9) The period of time between the vacating and rental of the apartments described in the preceding paragraph coincides with the period in which Tan claimed persons who usually clean up could not do so (RT IV 88-92);

(10) Mrs. Roberts testified that her husband and "other employees of Mr. Tan" moved the furniture from the two apartments described in paragraph (8), that this furniture was placed in storerooms at Tan Village, and that these storerooms were also used for furniture brought from other Tan buildings by means of a Tan Company truck (RT IV 104-105).

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Brief for the United States on the appellants by mailing two copies, postage prepaid, to its attorneys at the addresses set forth below on this the 17th day of December, 1973.

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