City of Chicago
COMMISSION ON HUMAN RELATIONS
740 N. Sedgwick, 4th Floor, Chicago, IL 60654
312/744-4111 (Voice), 312/744-1081 (Fax), 312/744-1088 (TDD)

IN THE MATTER OF:

Jessica Ridenour
Complainant,
v.

Carol Kimball and Joshua Berngard
Respondents.

Case No.: 19-H-32

Date of Ruling: September 14, 2023
Date Mailed: September 25, 2023

TO:

Jessica Ridenour
5000 S. Cornell Ave., Apt. 18A
Chicago, IL 60615
Jessica.e.ridenour@gmail.com

Caitlin Brown
Kozacky Weitzel McGrath, P.C.
77 W. Wacker Drive, Suite 4500
Chicago, IL 60601
cbrown@kwmlawyers.com

George Flynn
Karbal, Cohen, Economou, Silk & Dunne LLC
200 S. Wacker, Suite 2550
Chicago, IL 60606
gflynn@karballaw.com

FINAL ORDER ON LIABILITY AND RELIEF

YOU ARE HEREBY NOTIFIED that, on September 14, 2023, the Chicago Commission on Human Relations issued a ruling in favor of Complainant in the above-captioned matter, finding that Respondents violated the Chicago Fair Housing Ordinance. The findings of fact and specific terms of the ruling are enclosed. Based on the ruling, the Commission orders Respondents:

a. Make payment to Complainant for out-of-pocket damages in the total amount of $5,575.38, broken down as follows: $5,400.38 in rent differential; $100 in moving costs; and $75 in application cost;
b. Payment to Complainant of $4,000 in emotional distress damages;
c. Payment to Complainant of pre- and post-judgment interest on the emotional distress damages from the date of the violation, June 26, 2019;
d. Payment to Complainant of reasonable costs;
e. Refer this Order to the City of Chicago Department of Law to file a notice with the Department of Professional Regulation of the State of Illinois within the Illinois Department of Financial and Professional Regulation with respect to Respondent Joshua Berngard, a licensed real estate broker; and
f. Payment to the City of Chicago of fines of $500 by Respondent Kimball and $500 by Respondent Berngard.
g. To pay a fine to the City of Chicago in the amount of $1,000.[1]

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[1] **COMPLIANCE INFORMATION:** Parties must comply with a final order after administrative hearing no later than 28 days from the date of mailing of the later of a Board of Commissioners' final order on liability or any final order on attorney fees and costs, unless another date is specified. See Reg. 250.210. Enforcement procedures for failure to comply are stated in Reg. 250.220.

Pursuant to Commission Regulations 100(15) and 250.150, a party may obtain review of this order by filing a petition for a common law *writ of certiorari* with the Chancery Division of the Circuit Court of Cook County according to applicable law.

CHICAGO COMMISSION ON HUMAN RELATIONS

Payments of damages and interest are to be made directly to Complainant. **Payments of fines** are to be made by check or money order payable to City of Chicago according to an invoice which will be mailed under a separate cover.

Interest on damages is calculated pursuant to Reg. 240.700, at the bank prime loan rate, as published by the Board of Governors of the Federal Reserve System in its publication entitled "Federal Reserve Statistical Release H.15 (519) Selected Interest Rates." The interest rate used shall be adjusted quarterly from the date of violation based on the rates in the Federal Reserve Statistical Release. Interest shall be calculated on a daily basis starting from the date of the violation and shall be compounded annually.

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FINAL RULING ON LIABILITY AND RELIEF

I. PROCEDURAL HISTORY

Complainant Jessica Ridenour (Complainant) filed this Complaint on July 1, 2019, naming as Respondent, "Owner of 4900 N. Marine Drive, Unit 403." Complainant alleged that the owner refused to rent Unit 403 to her and her co-applicants, Complainant's husband, Shawn Pfautsch, and their friend Sydney Stier,[1] based on Complainant's source of income – independent contract earnings instead of W-2 earnings. Complainant alleged that she primarily earned income as a real estate agent and not a salaried employee. She alleged that her income is generated as flat fees per appointment completed, including but not limited to showings, inspections and closings.

[1] Jessica Ridenour is the only Complainant in this matter; Mr. Pfautsch and Ms. Stier did not join in this action. Complainant stated in her Position Statement, "[Ms. Ridenour's] co-applicants desired to be named as Complainants, but due to a miscommunication at the Commission and delays caused by the Covid-19 pandemic, the window in which they could have been added closed without their or Complainant's knowledge." Complainant's Statement of Position, at p.3, Ridenour Pre-Hearing Memorandum and Position Statement. The hearing officer is not aware of what bar Complainant is referring to, as the Commission Rules permit the addition of parties, and Complainant actually amended the Complaint twice during the investigation to properly name and add Respondents. The fact remains that neither Pfautsch nor Stier were added as Complainants.

Complaint ¶1. Complainant alleged that the owner refused to rent Unit 403 to her based on her source of income. *Id.* ¶ 2.

In the initial Complaint, Complainant alleged that on June 22, 2019, she, Pfautsch, and Stier submitted their rental application through the owner's real estate agent, Joshua Berngard, and that on June 24, 2019, Berngard ran their individual credit reports and background checks. Complainant alleged that on June 26, 2019, she received a text message from Berngard in which he wrote, "The owner is not comfortable with the income, and she does not want to move forward." (*Id.*, ¶6). Complainant alleged that in an effort to eliminate any of the owner's concerns about their income she offered to provide the owner with her and Pfautsch's 2018 tax returns to show that their incomes were stable. (*Id.*, ¶7) The unit owner still refused to rent to them, and Complainant believed it was due to her source of income.

On July 24, 2019, the Commission issued a Notice of Potential Dismissal for No Action Possible Against Respondent and directed Complainant to amend the Complaint on or before August 15, 2019, with information sufficient to enable service of the Complaint. Subsequently, on August 20, 2019, Complainant filed an Amended Complaint identifying Carol Kimball as the owner of 4900 N. Marine Drive, Unit 403. The Commission successfully served the Amended Complaint on Respondent Kimball. (The Amended Complaint was filed to cure the technicality of naming Kimball as the unit owner, but in all other respects remained the same as the initial Complaint. For that reason, citations are to the Amended Complaint).

On September 18, 2019,[2] Respondent filed her Verified Response, Position Statement and Supporting Documentation with the Commission. On October 7, 2019, Complainant filed Complainant's Reply to Response and Supporting Documentation.

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[2] In what appears to be a technical error, Respondent dated the Notice of Filing and Certificate of Service June 18, 2019, but it is clear from the Response to the Amended Complaint that the date of filing was September 18, 2019.

On March 1, 2021, Complainant filed a Motion for Amendment of the Complaint to add Real Estate Agent Joshua Berngard as a Respondent. Complainant stated that it was not until Berngard participated in the investigation of the original Complaint against Kimball that she became aware of the agency relationship between Kimball and Berngard. (Berngard allegedly stated during the investigation, "[M]y concern was the difference in the level of risk between 1099 and W2 income, the latter being generally regarded as more stable. We had two applicants, one is guaranteed income from W2, and the other is from 1099 employment. Our concern was both timing and consistency"). Motion for Amendment to Add Respondent, March 1, 2021, ¶¶ 2, 3.

Complainant alleges that Respondents Kimball and Berngard refused to rent the unit to her, in violation of the Chicago Fair Housing Ordinance, because she worked as an independent contractor and received a Form 1099; she was not a regular employee receiving steady wages; and she was not paid on a W-2. Motion for Amendment, *Id.*, ¶¶ 4, 5. On December 30, 2020, the Commission issued the Order Finding Substantial Evidence, determining that there was substantial evidence of a violation of the Chicago Fair Housing Ordinance, as alleged by Complainant. Specifically, the Commission found substantial evidence of source of income discrimination. The Commission granted Complainant leave to file the Amended Complaint on April 6, 2021. Complainant filed the Amended Complaint naming both Berngard and Kimball as Respondents on April 19, 2021. On May 13, 2021, the Commission served Notice of Amended Complaint, enclosed a copy of the Amended Complaint and a full set of the Commission's Regulations on Berngard, and advised the parties that the matter would be set for a settlement conference by Order to be issued at a later date.

On February 3, 2022, the Commission issued the Order Appointing Hearing Officer and Commencing the Hearing Process.

On April 21, 2022, the hearing officer entered the Order Granting Respondent Berngard's Motion to File Response to Amended Complaint.[3] Counsel for Berngard noted that although he participated in the investigation stage and in the settlement conference, Berngard was *pro se* at the time and apparently did not file a Response to the Amended Complaint. Once Berngard secured counsel, he did file his Response and fully participated in the hearing process. On April 21, 2022, Complainant filed her Reply to Berngard's Response to the Amended Complaint.

The parties actively engaged in discovery. See, Complainant's First Request for Documents; Respondent Kimball's May 12, 2022, Response to Complainant's First Request for Documents, and her First Amended Response to Complainant's First Request for Documents; and Respondent Berngard's May 25, 2022, Reply to Complainant's Objections to Requests for Production of Documents. On May 18, 2022, the hearing officer granted Complainant's Motion for Extension of Time to Serve Responses to Requests for Production until on or before May 25, 2022. Thereafter, Complainant served her Response and Objections to Respondents' Discovery Requests.

On June 8, 2022, Berngard filed his Reply to Complainant's Objections to Requests for Production. Thereafter, and over several pre-hearing conferences, the parties resolved the objections with Complainant providing more documentation. See, Scheduling Order, August 1, 2022, and Scheduling Order, September 21, 2022.

The final pre-hearing conference was held on September 21, 2022. All parties were present and/or represented by counsel at all meetings. Pursuant to the Scheduling Order, the parties' pre-hearing memoranda were due on or before October 19, 2022. In addition, counsel for Berngard

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[3] The record is somewhat confusing. Complainant titled both the Amended Complaint to add Carol Kimball as well as the second Amended Complaint to add Joshua Berngard, "Amended Complaint." Accordingly, it is clear that Berngard's Response is to what should have been titled the Second Amended Complaint.

requested leave to file a motion to issue a subpoena for Complainant's husband, Shawn Pfautsch, to appear at the hearing. Complainant had no objection, and the motion was granted. The parties timely served their respective pre-hearing memorandums on or before October 19, 2022.

On November 8, 2022, this matter proceeded to administrative hearing, and was continued until December 14, 2022, for closing arguments. At the administrative hearing, Complainant appeared *pro se,* Respondent Kimball was represented by Attorney Caitlin Brown, and Respondent Berngard was represented by Attorney George Flynn. Shawn Pfautsch, Complainant's husband, was also present and ready to proceed as a witness; however, when the hearing proceeded to Berngard's case in chief, counsel stated that he would not be calling Pfautsch as a witness, despite the subpoena. The parties concluded the evidentiary portion of the hearing on November 8, 2022, and closing arguments were held on December 14, 2022.

II. FINDINGS OF FACT

1. At all times relevant to the Complaint, Complainant Jessica Ridenour was a resident of the City of Chicago and earned lawful income through independent contract work as a licensed real estate agent with RedFin, a realty company, among other contract work.

2. Complainant also received income as an actor and is paid by contract for the days that she works. Complainant's earnings may vary from $300 to $1400, and she also receives residual payments in some instances. Transcript of November 8, 2022[4] at 72.

3. Complainant explained further, using the term "gig worker," "Currently I'm still an independent contractor for Redfin. I am associated – so my position with Redfin is that I am a gig worker. I get paid for events that I perform and close for Redfin. So that includes showings, inspections, like special inspections, and any sort of real estate activity on open houses that are

[4] Hereinafter, the hearing transcript will be referred to by "Tr.," followed by the page number.

performed on behalf of the lead agents for Redfin. So, I am not a salaried employee. I am self-employed." *Id.*, at 72.

4. Respondent Kimball is the owner of Unit 403, 4900 N. Marine Drive, located in the City of Chicago. Kimball is 73 years old, and still works part time. *Id.*, at 155. Kimball's part-time work includes working as a signing notary or mobile notary, and also closing real estate transactions, primarily lending documents, refinancing, and purchases. She is paid per assignment, in amounts ranging from $75 to $125, and receives a Form 1099. *Id.*, at 156.

5. Prior to the time of the incident, Kimball worked as a customer service representative for PNC Bank, and before that as a loan officer in the mortgage industry in Chicago. *Id.*, at 155. Kimball is also a musician, and a published composer and playwright. She has been working with different musicians and playing different "gigs" occasionally, for which she is mostly paid in cash. *Id.*, at 159-161.

6. Kimball has owned Unit 403 at 4900 N. Marine Drive since July 2004. She lived in the unit until March or April 2019, when she moved into a property she owns in Indiana. Kimball purchased the Indiana property in May 2017, and it needed a lot of work to convert it to a residence. *Id.*, at 154, 157.

7. While Kimball was still working full-time, she was working on the Indiana property, and rented out part of the Marine Drive unit. The second bedroom and bathroom were "sitting empty," and she thought, "Why don't I get a roommate?" *Id.*, at 158. Kimball had difficulties with one roommate, who vacated the unit owing $1,200 in rent; and then with another roommate, who took over renting the unit. Kimball paid that roommate to vacate the property because she believed that evicting a tenant takes a long time and "you don't get rent

during that time." *Id.* Kimball did not use a real estate agent to help her screen rental applications for the unit until July 2019. *Id.*, at 159.

8. Respondent Berngard is a real estate agent, employed by Exit Strategy Realty. Berngard acted as Kimball's listing agent for Unit 403 at 4900 N. Marine Dr. *Id.*, at 197-198. Berngard was paid on a 1099 as a real estate agent. *Id.* at 199. Berngard also worked as a private dancer – primarily hip hop and breakdancing – and as an emcee for private events; he was paid on a 1099 for those gigs as well. About four or five years before this listing, Berngard met Kimball at a networking event and developed a business relationship with her. At the time, Kimball was a lender. *Id.*, at 198.

9. On June 21, 2019, Complainant, her husband, Shawn Pfautsch, and a friend, Sydney Stier, inquired about renting Unit 403, which was listed for $1,900 per month. *Id.*, at 40; Ridenour Exhibit 4.[5] See also, Berngard Exh. 3, the residential listing for the unit and photos of the interior of the unit.

10. According to Complainant, the unit "suited the specific needs of me and my co-applicants as it is a two-bedroom, two-bath apartment with garage parking and was in a pet-friendly building. The monthly rent included Wi-Fi, basic cable, cooking gas, heat, water, parking, and storage." Tr., at 40; Ridenour Exhs. 1, 5; Complainant's Pre-Hearing Memorandum and Statement of Position. Complainant and her co-applicants were hoping for a move-in date of no later than July 15, 2019. Tr., at 22.[6]

11. The rental listing, which provided more information about the unit and the building, identified the listing broker as Exit Strategy Realty. Berngard Exh. 2; Ridenour Exh. 3. That

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[5] Hereinafter, exhibits will be referred to by, "Exh,," preceded by the name of the party offering the exhibit.

[6] Regrettably, Complainant did not paginate Complainant's Statement of Position. The hearing officer notes the statement is fifteen pages long, and here refers to the pages in order, 1 to 15.

rental listing also indicated that "[the broker] need[s] to meet you there please..." *Id.*

12. The listing agreement included the general provision regarding the Fair Housing Act, "It is illegal for either the owner or the sponsoring broker to refuse to display, list, lease or sell, or refuse to negotiate for the lease or sale of, or otherwise make unavailable or deny real estate to any person because of one's membership in a protected class (e.g., race, color, religion, national origin, sex, ancestry, age, marital status, physical or mental handicap, familial status, or any other class protected by Article 3 of the Illinois Human Rights Act). Owner and sponsoring broker acknowledge that they shall also be bound by the provisions of state and local (city and/or county) human rights or fair housing ordinances, if any, and agree to comply with same." *Id.*, at 3, 4.

13. Complainant is a real estate agent and earned income on a fee schedule and was not a salaried employee. The majority of her income came from self-employment as an independent contractor with Redfin Corporation as "evidenced by the tax documents." Ridenour Exh. 2. Tr., at 39.

14. Berngard showed the property to Complainant on June 21, 2019, and Complainant began filling out the application that same day. Tr., at 41, 202.

15. Complainant and her co-applicants completed their applications on June 22. Complainant and Pfautsch included bank statements as well as the prior year's joint tax return as proof of income.[7] Ridenour Exh. 6.

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[7] Complainant also attached a photo of co-applicant Sydney Stier's 10-pound Maltese dog and labeled the photo "Gidget's application." (At hearing, Kimball's counsel acknowledged that Kimball made an error in stating that the dog was a large breed and from all the pleadings and testimony, it was clear that Stier's dog was small, and was not a factor in deciding to which applicant to rent Unit 403).

16. Berngard recalled that he received the application at about 9:00 p.m., "Thursday, or maybe the day after, Friday." He reviewed the application and the attached documents, and sent those to Kimball, "probably on Monday." On June 22, Berngard asked for additional documents about Complainant and Pfautsch, including an additional bank statement for Pfautsch, a letter of engagement for Pfautsch's current contract position, and Complainant's recent pay stub from Redfin, because what Complainant presented "wasn't enough for us to make a decision…" Tr., at 44, 203-04.

17. Complainant's application was accompanied by the following documents: records showing deposits of $2,700 and $2,230 from Redfin; Pfautsch's documentation of a deposit of $5,010; and Stier's application showing deposits totaling $6,195.94. *Id.*, at 42. See also, Ridenour Exh. 19. Complainant further stated that the joint tax return they submitted with the application showed non-wage income of $35,598. Tr., p. 42.

18. Berngard told Complainant that Kimball's rental criteria required that tenant(s) earn 2.5 times the monthly rent, or $4,750 per month. *Id.*, at 43; Ridenour Exh. 21, p. 121. Complainant testified that her monthly income in May 2019 was $4,930, which by itself exceeded Kimball's criteria. Complainant also noted that the combined monthly income of Complainant, Pfautsch, and Stier totaled $16,140.94. Complainant further stated that her combined income from tax returns for 2018 averaged $4,837.92 per month, and that in 2019, her and Pfautsch's actual income averaged $10,140.33 per month. Ridenour Exh. 3.

19. Berngard ran credit reports on the three applicants on June 24, 2019. Complainant's credit scores ranged from 770 to 788; Pfautsch's ranged from 722 to 735; and Stier's ranged from 649 to 666. Ridenour Exh. 8.

20. On June 25, 2019, Berngard received the application for the couple who would become the successful applicants for Unit 403. Tr., at 47, Ridenour Ex. 10. Applicant CM[8] included documentation that she had full-time employment and earned an annual salary of $80,454. Applicant DM indicated that he was employed as a clerk at a wage rate of $12 per hour and earned additional income as an Uber driver. Ridenour Exh. 10.

21. On June 26, 2019, Berngard sent Kimball an email stating, "I need you to look at these guys. Husband and wife – kid on the way. I believe a long-term tenant because of the kid on the way. I need to run a credit and background but that will take another 2 days. Credit can be done in 20 min. The other applicant wants an answer so please let me know what you would like to do." (*Sic*). Ridenour Exh. 11.

22. On June 26, 2019, Berngard ran a credit report for the couple: DM's credit scores ranged from 716 to 722, and CM's scores ranged from 771 to 785. Tr., at 48-49; Ridenour Exh. 12.

23. Kimball made the decision to rent to DM and CM. The lease for Unit 403 was dated June 26, 2019, and listed the lease term as July 15, 2019, to July 31, 2019 (*Sic*). Ridenour Exh. 14.

24. Kimball stated that CM and DM requested a two-year lease. Although Berngard stated that he never recommends that any landlord agree to a two-year lease, in his text message to Kimball he suggested that the applicants would be long-term tenants. Ridenour Exh. 11. Kimball testified, "To me, the best situation is somebody who wants a two-year lease but will agree to a one-year lease, because typically rents are increased a little bit each year. And with

[8] Because the identities of the successful applicants are not relevant here, only their initials will be used.

a two-year lease you don't have that opportunity. On the other hand, a two-year lease means that you know that that's guaranteed for two years." Tr., at 174-175.

25. CM and DM still lived in the unit as of the hearing date, with what amounts to another two-year lease, but with a slight rent increase after the first year. *Id.*, at 175.

26. At 5:36 p.m. on June 27, 2019, Complainant, Pfautsch, and Stier received a group text message from Berngard stating, "The owner is not comfortable with the income, and she does not want to go forward. I am very sorry, guys. As a fellow dancer and artist, I was pushing for u." (*Sic*) *Id.*, at 49; Ridenour Exh. 13.

27. Complainant was driving at the time, "doing [her] real estate gig," and was very confused by the text. She stated that she believed their income was more than adequate – she pulled over and called Berngard. Complainant said, "From my conversation with Mr. Berngard I understood…I walked away from that conversation understanding that Miss Kimball did not want to rent to us because we did not have salaried income and that our income was from self-employment – that my income was from self-employment. I understood that she was concerned – I understood from Mr. Berngard that there was concern that one of us would break a leg and would be unable to pay rent because our jobs were not salaried." Tr., at 50-51.

28. At some point after the initial rejection, Complainant offered to purchase disability insurance to reassure Kimball and to allay her concerns "about the potential for a broken leg." *Id.*, at 129. Complainant said that Berngard was the first one to raise the issue about potential injuries, by telephone, even though Complainant had made the offer to purchase disability insurance. *Id.* Berngard acknowledged that he did not discourage Complainant from offering additional insurance, even though the decision to approve another application had already been made. *Id.*, 206-207.

29. Kimball stated that as the owner of the unit, she made the decision as to which application to approve. *Id.*, at 194. She stated that before the decision to reject Complainant was made, Berngard helped her review all the materials that she had received and to do "a kind of a comparative analysis and talk about the pros and cons of each applicant." *Id.* Berngard then left the final decision up to Kimball. *Id.*, at 177.

30. Regarding her involvement with Berngard, Kimball stated, "It seemed to me that he was being fair and neutral and not trying to guide me in any way, but to help me understand the applications so that I could make a decision." *Id.*, at 195. Berngard also stated that the decision to rent to CM and DM was Kimball's. *Id.*, at 205.

31. Kimball stated that the reason she rejected Complainant and her co-applicants was because she was concerned about the "consistency of their income," and that she believed that the successful applicants were preferable. Kimball also believed that the other applicants had better credit scores. *Id.*, at 176.

32. Complainant understood that Kimball was concerned about the timing and consistency of their income, and that she believed that Complainant's income was too unstable. *Id.*, at 182. Kimball also stated that she did not ask for additional documentation because she "didn't need to." *Id.*, at 183-184

33. Kimball claimed that she "seriously considered" Complainant's application and that she "initially thought they looked pretty good until I got what I felt was a stronger application. But if I hadn't received this one, I would have rented to them." *Id.* at 174. Kimball later stated that she "strongly considered the Ridenour group's" applications. *Id.*, at 196. Kimball stated that the reason she rejected Complainant and her co-applicants was because she was concerned about the "consistency of their income," and that the successful applicants were

preferable, but denied that the decision was based on Complainant's (and her co-applicants') source of income. *Id.*

34. Kimball stated that she believed that there was a gap in communication from Complainant, and that is why Respondents continued considering other applicants. *Id.*, at 176-177. Kimball stated that she was aware that Berngard informed Complainant that she would be proceeding with other applicants. *Id.*, at 177.

35. Complainant understood that the basis for Kimball's decision was "source of income," in that Kimball stated [to the Commission during the investigation] that she was concerned about the consistency of income and that the successful applicant had steady W-2 income. *Id.*, at 62-63, Letter of September 20, 2019.

36. Kimball's testimony that but for DM and CM being better applicants, she would have approved Complainant and her co-applicants, was not creditable. There was almost no difference in credit score ratings, or income; CM and DM were expecting a baby, which would add to the number of people in the unit; and Kimball received Complainant's application before DM and CM submitted their application. Kimball admitted that even if Complainant had provided additional documentation, it would not have mattered. Kimball made the decision to accept CM and DM the day after they submitted their application.

37. After Kimball rejected Complainant's, Pfautsch's and Stier's applications, Complainant stated they lost an entire week searching for an apartment and had less than three weeks until their intended move-out date from their current apartment.

38. They began a new search and saw a number of apartments, including units located at 2906 W. Lawrence, 3003 N. California, 4725 N Paulina, 3518 N. Palmer, and 3822 N. Kenneth. Complainant also made other attempts to locate an apartment through her contacts

with Redfin. Complainant and her co-applicants made significant efforts to find alternative housing following Kimball's rejection of their applications. Tr., at 54; Ridenour Exh. 15.

39. On July 9, 2019, Complainant and her co-applicants were approved as tenants at 4000 W. Diversey. The building was formerly the warehouse for Marshall Field's and Co. and was a new renovation "reinvisioned as unique urban loft apartments boasting soaring ceiling heights and beautiful large-scale industrial windows." The unit was a two-bedroom, two-bath unit with garage parking and a secure entrance; the unit included a utility package comparable to the Marine Drive unit (heat, Wi-Fi, basic cable), parking, pets, and storage, at $2,900 per month in 2019, and $2,935 per month in 2020. Tr., at 55-56, Ridenour Exh. 16. See also, Berngard Exh. 3, print-out of the online description of the building, "The Field's Lofts."

40. Complainant and Pfautsch each paid $66 in application fees for the unit at 4000 W. Diversey. Tr., at 56.

41. Complainant, Pfautsch and Stier remained in the 4000 W. Diversey unit for two years. They never missed a rent payment, even though they experienced income loss due to the COVID-19 pandemic and had to draw from unemployment. *Id.*, at 56, 57. The property manager of the Field's Lofts stated, "[They] lived here from July 2019 to July 2021. ... During their time here, they always paid their rent on time, most of the time paying early or overpaying. We did not have any problems with the ... tenants when it comes to noise or misconduct of any sort. They were respectful and would be welcomed back to the Fields Lofts..." Ridenour Exh. 18.

42. Complainant calculated her out-of-pocket damages for a two-year period at 4000 W. Diversey; she, Pfautsch and Stier paid a total of $44,783.13 in rent. Complainant made the assumption that based on a Google search for average rent increases, there would have been a

5% rent increase for the 4900 N. Marine Drive unit starting in July 2020, so she added 5% to the (2019) monthly rent of $1,900. Based on average rent increases, Complainant believed that in 2020, they most likely would have paid $1,995 per month at the Marine Drive unit. Complainant determined that she and Pfautsch would have paid a total of $31,371 for the two-year period at 4900 N. Marine Drive, compared to the $44,783.13 at the Diversey unit, for a difference of $13,412.13. Tr., at 103; Ridenour Exh. 18.

43. In 2020, Kimball increased the rent for CM and DM, with each lease, and she believed it was increased by $100 in 2020. Tr., at 191.

44. Complainant claimed $900 in moving costs but did not provide documentation to support the claim. Complainant explained that she believed the additional cost was justified due to the fact she and her co-applicants had to move quickly; the three of them ended up moving together. *Id.*, at 100-102. Complainant acknowledged that they paid about $700 on their previous move (to 3139 W. Lawrence, where Complainant resided at the time of the application to 4900 N. Marine Drive). *Id.*, at 101.

45. Complainant also sought damages for $133.90 for the application fees for her and Pfautsch for the 4000 W. Diversey property, and an additional $150 for the application fee for the Marine Drive property. *Id.*, at 99, Ridenour Exh. 19.

46. Complainant credibly testified that she and Pfautsch shared joint finances for household expenses; however, Pfautsch was not a named Complainant in this matter. Complainant stated, "My husband and I being married, our finances are one and the same. We share bank accounts; we have a joint bank account. We have...money moves freely between [the accounts]. It is our money; we were both directly impacted." Tr., at 68, 69.

47. Kimball did not believe that Berngard ever informed her of what qualifies as discrimination under Illinois law. When asked, "Do you know what the ordinance that we're relying on here today says about source of income discrimination?" Kimball responded, "I find it to be overly broad. To me it is vague, and I at the time assumed that that applied to people who were living on non-wage-earning income such as Social Security, Section 8, and so on as protective (*Sic*) classes." *Id.*, at 177-78.

III. CONCLUSIONS OF LAW

48. This case arises under the Chicago Fair Housing Ordinance, which provides, "It shall be an unfair housing practice and unlawful for any owner,…,managing agent, or other person, firm or corporation having the right to sell, rent, lease, sublease…to refuse to sell, lease or rent, any real estate for residential purposes within the City of Chicago because of the race, color,…source of income of the proposed buyer or renter. Chi.Muni.Code 5-8-030 (c).

49. Under the Code, "source of income" means the lawful manner by which an individual supports himself or herself and his or her dependents." *Id.*, Section 2-160-020 (n). In addition, Rule 420.130 of the Commission on Human Relation's Rules provides that "it is a violation of the FHO for a person to refuse to sell, rent or lease a dwelling to a person…because of that person's membership in a Protected Class...Membership in one of the Protected Classes means that a person is or has, or is perceived to be or have, one or more of the following: a particular race, color, sex,...source of income,…" Rule 420.130; Chi.Muni.Code 2-160-020 (c) (24).

50. "A respondent violates the CFHO when s/he refuses to consider an applicant to rent an apartment due to his/her *protected status* under the Ordinance." *Jones v. Shaheed,* CCHR No. 00-H-82, at 7 (Mar. 17, 2004) (emphasis added).

51. The Commission has jurisdiction over this case given that the alleged violation occurred within the City of Chicago, and Complainant filed her Complaint within 300 days of the actions of which she complains. Rule 210.110. At all times relevant to the Complaint, Respondents, Kimball as landlord, and Berngard as Kimball's leasing agent, were subject to the CFHO.[9]

52. Throughout the analysis of a discrimination complaint, a complainant "has the burden of proving her claim of discrimination by a preponderance of the evidence using either the direct or indirect methods of proof." *Shipp v. Wagner and Wagner,* CCHR No. 12-H-19, at 6 (July 16, 2014). See also, *Diaz v. Wykurz,* 07-H-28 (Dec. 16, 2009) at 5. "Under the direct evidence method in a fair housing case, a complainant may meet her burden of proof through credible evidence that the respondent directly stated or otherwise indicated that s/he would not offer housing to a person based on *a protected class*, such as having and intending to use a Section 8 voucher." See, *Shipp v. Chicago Realty Consulting Group, LLC d/b/a Keller Williams Realty*, CCHR No. 12-H-31 at 8 (Jan. 10, 2019), citing *Shipp v. Wagner and Wagner, supra*, at 6. "Direct evidence is that which, if believed, will allow a finding of discrimination with no need to resort to inferences." *Id.* See also, *Richardson v. Boy Scouts of' America,* CCHR No. 92-E-80 (Feb. 21, 1996); and *Matias v. Zachariah,* CCHR No. 95-H-110 (Sept. 18, 1996).

53. Using the indirect method, to establish a *prima facie* case of housing discrimination the complainant must show that she 1) belongs to a protected class; and 2) was denied the

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[9] Respondents maintained an agency relationship. *See*, e.g., *Warren v. Lofton & Lofton Management d/b/a McDonalds, et al.*, CCHR Nos. 07-P-62/63/92, at 19 (July 15, 2009). Although Kimball made the decision to not rent to Complainant, Kimball relied on Berngard as her leasing agent to list the unit, take applications, request additional information, conduct credit report checks, assist in screening applicants, etc. Thus, he is also potentially liable under the Ordinance.

opportunity to rent or own housing that was available; or 3) was offered housing on terms different from the offers made to others. *Shipp v. Wagner and Wagner, supra*, at 6.

54. Respondents vigorously contend that the Ordinance was not intended to protect "gig" workers; workers who earn income on a contract-by-contract basis, and not on regular income earned as an employee receiving W-2 wages. Respondents argue that the "source of income" protected status should be interpreted to *only* protect against non-wage and non-employment-based income. Tr. 2, at 21-25. Therefore, Respondents contend that Complainant cannot prevail either directly or indirectly, because she lacks evidence to show that she is in a protected class.

55. Respondents argue that the City of Chicago adopted the CFHO "in an effort to mirror the federal Fair Housing Act and mitigate such [racial] discrimination." *Id.*, at 23. The argument continues that the federal law was intended to protect "non-wage" income, citing the list on the National Low Income Housing Coalition's website, including as examples, "housing choice vouchers, Veterans vouchers, single parents relying on child support and alimony, seniors relying on Social Security, and persons using rental subsidies to flee domestic violence." *Id.*, at 24.

56. Respondents contend that 1099 "high wage" earners like Complainant are not part of the subset of the population that needs protecting. As Complainant admitted, she made well over 2.5 times the income-to-rent criteria required by Respondents," *Id.*, and indeed, the basis of Complainant's claim is that Respondents discriminated against her based on *how* she earned her income, although she did not describe herself as a "high wage" earner.

57. While it is true that in a number of cases, the Commission has found non-wage-related income to be protected, such as Section 8 vouchers and Social Security disability

benefits, See, e.g., *Pigram v. Elects Realty Champions LLC et al.*, CCHR No. 14-H-77, at 6 (Apr. 14, 2016), and *Shipp v. Wagner and Wagner, supra*, at 6 (citing to *Smith, Torres & Walker v. Wilmette Real Estate & Mgmt. Co.*, CCHR Nos. 95-H-159 & 98-H-44/63 (Apr. 13, 1999), the Commission has never found that "source of income" was intended to protect *only* low income residents who rely on income through Section 8 vouchers and the like.[10]

58. Kimball testified that she believed that "source of income" applied to people who were living on non-wage-earning income such as Social Security, Section 8…" Tr., at 178. Respondents did not consider that 1099 contract workers could or should be protected from discrimination [based on source of income].

59. Respondents' argument misses the point. There is nothing in the language of the ordinance to limit the meaning of source of income as Respondents seek to do here. In construing the CFHO, the Commission first looks to its language, giving words their popular, ordinary, and plain meaning, unless otherwise defined. *Smith, supra.* Under the Chicago Human Rights Ordinance, "source of income" means the lawful manner by which an individual supports himself [or herself] and his or her dependents. CHRO §6-10-020.[11] The plain meaning of the statute shows that the only restriction is that the manner of income must be "lawful." Here, Respondents cannot and have not shown that the manner in which Complainant (or her co-applicants) earned their income was unlawful.

60. Moreover, if the CFHO is construed in this manner a whole class of persons living within the City of Chicago, e.g., "gig" workers, independent contractors, or others whose

[10] Although many "source of income" cases involve benefits such as Social Security and Section 8 Housing Choice Vouchers, not all do. In one case, the Commission considered income from a second job and determined that it came within the meaning of source of income. *Adams v. Chicago Fire Department*, CCHR No. 92-E-72 (Sept. 20, 1995). The complainant did not prevail in that case, not because of his source of secondary income [flute player] but because he failed to meet his burden to show that the alleged discriminatory acts were due to his source of income.
[11] The Chicago Fair Housing Ordinance provides that the term "source of income" shall have the same meaning as described in Chapter 6-10-020 of the Code.

income is reflected on 1099 forms, would have no protection against discrimination based on source of income. The ordinance clearly states that it is the policy of the City of Chicago "to assure full and equal opportunity to all residents of the city to obtain fair and adequate housing for themselves and their families in the City of Chicago without discrimination against them because of their...source of income." CFHO 5-8-010. The intent and policy of the CFHO would be frustrated if Complainant (and other "gig" workers) were determined to have no protection under the CFHO based on source of income because of the manner in which she earns her lawful income.

61. Respondents' reliance on *Nibbs v. PT Chicago*, CCHR No. 14-H-61 (May 11, 2017), misses the mark. Tr., at 23. In that case, the complainant attempted to prove "source of income" discrimination based on the fact that she was a participant in a voucher program. The Commission made clear in its ruling that the facts of that case showed that Respondent declined to rent to the complainant based on the amount of her income, and that criteria based on the *amount* of income where that amount was insufficient to meet reasonable rental qualifications does not violate the CFHO. *Nibbs, supra.*

62. Clearly, Complainant is within the protected status based on her source of income.[12] Complainant asserts that she has offered direct evidence of source of income discrimination. Complainant may meet her burden of proof if she can offer "credible evidence that the

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[12] Respondents asserted that because some of Complainant's income was reported on a W-2, she should be barred from pursuing this claim. Complainant performed some acting contracts, and because she is a member of a union, when she performs under certain contracts, she receives payment on a W-2. Tr., at 75-76. Complainant stated, "The W-2 income is from income as an actor. That income is not – I am not an employee of the people who – of the companies that I act for...taxes are withheld because of my union membership." *Id.*, at 78. Respondents are attempting to argue that because Complainant received a W-2 for some acting gigs she should not be permitted to claim source of income discrimination. It is clear from the testimony and documents at hearing that Respondents considered Complainant's income to be "unstable" because she was a contract or "gig" worker and did not have steady employment as did CM (one of the successful applicants).

respondent directly stated or otherwise indicated that s/he would not offer housing to a person based on *a protected class…*" *Shipp v. Wagner and Wagner, supra.*, at 6 (July 16, 2014).

63. Complainant contends that Kimball's statements about her income are direct evidence of discrimination. Kimball and Berngard refused to rent to Complainant and her co-applicants because of their sources of income, largely "gig" work, on a contract-by-contract basis. The record is clear that Respondents' refusal was based on how Complainant and her co-applicants earned their income.

64. Kimball's testimony at hearing denying that she took Complainant's source of income into account in making the decision to not rent to her, but rather that she was concerned about the "consistency" of income, is not credible. In her Response to the Amended Complaint, Kimball stated, "Given my financial position – turning 70 in December with an unfinished home, about $5,000 in savings and just enough income to get by and hang on to my only asset (my rental property) – it was critical for me to choose the candidates with the most stable income. Surely it is clear that I cannot afford any more financial disasters. Unfortunately for [Complainant], my decision was based on my concern regarding the consistency of her income, not the source. The applicants I chose, based on Josh's recommendation, was a couple, both of whom have steady W2 income at a higher level." Kimball's testimony at hearing was consistent; her concern was for her financial position.

65. In determining the credibility of a witness, the Commission considers a number of factors including: (a) the witness's demeanor; (b) the clarity, certainty, and plausibility of the testimony; (c) whether the testimony has been impeached or contradicted by other testimony or documentary evidence; (d) whether the testimony has been corroborated by other testimony and documentary evidence; and (e) the witness's interest or disinterest in the outcome of the

proceedings. See, e.g., *Hodges v. Hua,* CCHR No. 06-H-11, at 4 (May 21, 2008) (citing cases). Kimball's claim that she was only concerned about "consistency" of income and that she would have considered Complainant's application but for a better candidate, contradict other testimony and documents, and was plainly made because of her interest in the outcome of this case. At one point, Kimball admitted that she did not need to see Complainant's additional evidence, as it would not have made a difference. With respect to timing, CM and DM signed the lease agreement the day after they applied for the unit. A fair reading of Kimball's testimony is that she discounted Complainant's application because she had determined that the manner in which Complainant, Pfautsch and Stier earned their income was unacceptable; and she rented to CM and DM because she believed that CM's income from the position at the Art Institute meant that CM and DM were "stable."

66. With respect to Berngard, his testimony that he was "pushing for" Complainant was inconsistent with his admission that the decision not to rent to Complainant and the co-applicants had already been made when he spoke with Complainant about the June 27, 2019 text. Ridenour Exh 13. Respondents cannot escape the ultimate conclusion, that the statements made to Complainant were "[d]irect evidence…which, if believed, [allow for] a finding of discrimination with no need to resort to inferences." See, e.g., *Shipp v. Wagner and Wagner, supra*, at 6.

67. Even if Complainant was relying on the indirect method of proof, she has made out a *prima facie* case of "source of income" discrimination against Kimball, and Berngard, as Kimball's leasing agent.[13] Complainant is 1) in a protected status, and 2) was denied the

[13] Berngard was acting as Kimball's agent throughout this transaction. As the Commission has recognized, an "agency relationship is a consensual, fiduciary one between two legal entities, where the principal has the right to control the conduct of the agent and the agent has the power to affect the legal relations of the principal." *Warren, et al., v. Lofton & Lofton Management d/b/a McDonalds, et al,* CCHR Nos. 07-P-62/63/92, at 19 (July 15, 2009)

opportunity to rent housing that was available. *Shipp v. Wagner and Wagner, supra*, at 6. More generally, "Complainant [has established] by a preponderance of evidence that sufficient facts exist to imply discrimination in the absence of a credible, non-discriminatory explanation for Respondents' actions." See, e.g., *Blakemore v. Treasure Island Foods and Charles James*, 10-P-50, at 17 (June 2, 2011).

68. Respondents attempted to articulate a legitimate non-discriminatory reason for their refusal to rent to Complainant. Respondents asserted that they made the decision because CM and DM were "better applicants," had better credit history, and "steady" W-2 income. Kimball was concerned about Complainant's "lack of consistency of income."

69. Complainant offered credible evidence that Respondents' asserted reasons for their decision were false and mere pretext for discrimination. Even if words such as "steady W-2 income" and "consistency" of income were not direct evidence of discrimination, Kimball admitted that she did not consider Complainant's additional documentation to support the level of her income, and she did not believe it would make a difference. Berngard acknowledged in the telephone conversation with Complainant that "the owner is not comfortable with the income and she does not want to go forward," and when Complainant offered to purchase disability insurance to allay Kimball's concerns over potential loss of income, it would not have made a difference because Kimball had already made the decision to approve CM and DM for tenancy.[14] Tr., at 50-51, 207-08, and Ridenour Exh. 13.

(internal quotation marks omitted). While Berngard stated that the decision not to rent to Complainant and her co-applicants was Kimball's, and Kimball acknowledged as such, Berngard was acting as her agent in delivering the message.

[14] Respondents also argued that since both Berngard and Kimball had worked on contract as real estate agents and in the arts as a dancer and as musicians, and were paid on 1099s, that they could not discriminate against Complainant on that basis. The notion that unlawful discrimination cannot have occurred, since the alleged victim and the alleged discriminator/harasser are in the same "protected class," is contrary to the law. See, e.g., *Oncale v. Sundowner Offshore Service, Inc.*, 523 U.S. 75,79-80 (1998); *Shepherd v. Slater Steel Corp.*, 168 F. 3d 990 (7th Cir. 1999); *Smith v. Rosebud, Inc.* 898 F. 3d 747 (7th Cir. 2018).

70. Kimball's concern over her financial position, which she believed supported her choice to find the candidates with what she determined was the most stable income, may be understandable.

71. Kimball stated, "Given my financial position – turning 70 in December with an unfinished home, about $5,000 in savings and just enough income to get by and hang on to my only asset (my rental property) – it was critical for me to choose the candidates with the most stable income. Surely it is clear that I cannot afford any more financial disasters. Unfortunately for [Complainant], my decision was based on my concern of consistency of income not source of income. The applicants I chose, based on Josh's recommendation, was a couple, both of whom have steady W2 income at a higher level." Kimball's financial fears, however, without any basis to connect those fears to Complainant's application, cannot and do not justify discrimination.

72. Respondents cannot have it both ways, asserting that their only concern was "consistency of income" and the desire to rent to a couple with "steady W2 income," but then state that it was not based on "source of income." The Commission finds that Respondents' reasons for denying Complainant's rental are pretext for discrimination based on source of income.

73. Accordingly, the Commission agrees with and adopts the hearing officer's recommendation, finding that Respondents are liable for refusing to rent to Complainant based on her source of income, and their actions violated the CFHO.

IV. RELIEF

Damages Sought

74. Complainant requested all relief available under law, including but not limited to

out-of-pocket damages ($13,413.12 rent differential, $150 application fee for 4900 N. Marine, Unit 403, $133.90 in application fees for substitute housing, $900 in moving costs); punitive damages (in an amount sufficient to "punish the wrong-doer and deter him and others like him from similar conduct); and all other relief available under the ordinance. Complainant's pre-hearing memorandum and Statement of Position.

75. Upon determining that there was a violation of the Chicago Fair Housing Ordinance, the Commission may award relief which "may include but is not limited to an order: to cease the illegal conduct complained of; to pay actual damages, as reasonably determined by the Commission, for injury or loss suffered by the complainant...to extend to the complainant the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of the respondent; to pay to the complainant all or a portion of the costs, including reasonable attorney fees, expert witness fees, witness fees, and duplicating costs incurred in pursuing the complaint before the Commission or at any stage of judicial review; and to take such action as may be necessary to make the individual complainant whole, including, but not limited to, awards of interest on the complainant's actual damages and back pay from the date of the civil rights violation. These remedies shall be cumulative, and in addition to any fines imposed for violations of provisions of Chapters 6-10 and 5-8. Chi.Muni.Code 2-120-510 (l).

76. While the Commission's Board of Commissioners must adopt the hearing officer's factual findings unless they are contrary to the evidence presented, in making the final ruling the Board has the authority to adopt, reject or modify the hearing officer's recommendations. *Wiles v. The Woodlawn Org. et al.,* CCHR No. 96-H-1 (Mar. 17, 1999).

Out-of-pocket Damages

77. Complainant seeks the difference in rent between what Kimball's unit rented for at the time of the denial [and allowing for a small increase for the following year's rent] and what Complainant and Pfautsch actually paid to rent the unit at 4000 W. Diversey, or $13,412.13, over a period of two years.[15] Ridenour Exh. 19; Kimball Exh. 2. Complainant also sought $283.90 for application fees, and $910 in moving costs. Complainant's pre-hearing memorandum.[16] Ridenour Exh. 19.

78. Before determining an award for out-of-pocket expenses, it is necessary to address several of Respondents' arguments. First, Respondents contend that since only Complainant pursued this charge, and neither Pfautsch nor Stier were named as Complainants, Complainant's out-of-pocket damages should be limited to her expenses only.

79. Citing *Hall v. Woodgett*, CCHR No. 13-H-51 (Oct. 8, 2015) counsel for Kimball strenuously argued in closing that Complainant is not entitled to recover damages that may be due to a non-party. Tr., at 28. In *Hall*, the Commission found that the complainant was not entitled to recover damages for the amounts of background and credit checks Complainant's fiancé, Rankin, paid, stating, "Complainant is not entitled to recover for the amounts paid by Rankin (a non-party) towards these costs." *Id.* at 8.

80. In justifying her claim, Complainant noted that unlike the complainant in *Hall*, she lived with the non-parties, and was, in fact, married to Pfautsch. All three applicants applied for the unit in question with the understanding that the three of them would be

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[15] Complainant did not include the losses incurred by her roommate, Sydney Stier.

[16] The parties' Pre-Hearing Memoranda and Position Statements are part of the Official Record (See Commission Rule 240.510 (g)) and the Commission has previously cited to such position statements filed by parties in its past decisions. See, *e.g., Lockwood v. Professional Neurological Services, Ltd.*, CCHR No. 06-E-89, at 6 (July 8, 2009).

responsible for the rent. As Complainant noted, in applying for the unit, she submitted additional documentation that included bank statements from Pfautcsh, and that the combined income from her bank account and her and Pfautsch's joint checking account would have been sufficient to cover seven months' rent. Tr., at 44. Complainant noted, "The extra money that we paid for this substitute housing had a direct financial impact on myself and my husband. The calculations that I have made are for myself and my husband, they don't include our roommate. It is a direct financial consequence to me and my husband. They were very real during a really like trying time for everybody and having the extra $500 a month as a family during that time, it would have made a big difference because we did pay rent every single month, and there was never – there was never a moment we thought we would not pay rent and that we would withhold rent during that time." *Id.* at 68, 69. "My husband and I being married, our finances are one and the same. We share bank accounts, we have a joint bank account, we have – money moves freely between us. It is our money; we were both directly impacted." *Id.*, at 68, 69.

81. Further, in response to counsel's cross examination as to whether the three applicants split the rent equally, Complainant noted, "Sometimes there were some differences, and so by month my husband would pay like a little, pay whatever because it was a third. We split it in thirds. And since my husband and I, we share our money, we just split our portions of it, and for the rest of it, it came out of both of our accounts." *Id.*, at 82.

82. Complainant never sought to add either Pfautsch or Stier as Complainants. The Commission rules and regulations permit the addition of parties. Reg. 210.160 (a) provides: Substitution or Addition of Complainant, (1) A complaint may be amended to substitute or add complainants. The amendment shall relate back to the original filing date upon finding

all of the following: 1) The claims of the new complainant arise out of the same transaction(s) or occurrence(s) set forth in the original complaint; 2) The respondent(s) knew or should have known that the new complainant might be involved as a complainant; and 3) If after a determination of substantial evidence, the addition does not raise new, material factual or legal issues not considered by the Commission in its investigation.

83. A complainant's spouse has been added after a finding of substantial evidence, and even at hearing, when the spouse had been mentioned throughout the complaint, and it was determined that the spouse was integrally involved in the incidents complained of. See, *Friday v. Dykes*, 92 FHO-23-5773 (Nov. 2, 1992), citing, *Campbell v. Brown/Dearborn Pkwy*, 92-FHO-18-5630 (Dec. 16, 1992); and *Cerezzo v. Davidovac*, 98-H-132 (Apr. 8, 1999).

84. Complainant referred to Pfautsch and Stier throughout the proceedings, from filing the initial complaint through discovery, in her pre-hearing memorandum, in calculating the rent differential for all three of them, and in testifying during the hearing about the damages both she and Pfautsch incurred. Complainant never moved to amend the complaint to add Pfautsch or Stier. That failure is notable because Complainant moved to amend the complaint first to name Kimball as a Respondent, and then to add Berngard, Kimball's agent, as a Respondent. Moreover, counsel for Berngard sought and was granted leave to subpoena Pfautsch as a witness at hearing [although he ultimately decided not to call him as a witness], which also should have alerted Complainant to the understanding that Respondents might consider Pfautsch an integral part of the proceedings. For all those reasons, the Commission agrees with the hearing officer that Complainant is not entitled to receive damages sustained by her husband.

85. Next, Complainant seeks the difference in rent for two years, not just one year. Respondents contend that since the lease in question was for a one-year period, Complainant's out-of-pocket expenses should be limited to that term. However, Kimball stated that the successful tenants still reside in the unit [with appropriate rental adjustments each year], well beyond the two years, and Complainant credibly testified that she, Pfautsch, and Stier remained in the unit at 4000 W. Diversey for two years. It is not unreasonable that Complainant would base her loss of rent on her and her co-applicants' actual lease term of two years, as well as on the lease term that Kimball allowed for the successful applicants. The damages flowed from the discriminatory act and were not remedied until Complainant found alternative housing at a comparable rate.

86. In closing arguments, counsel for Respondents contended that Complainant should not be awarded *any* out-of-pocket damages because the unit that she and her co-applicants ultimately rented was in a new construction building with more amenities than those in Kimball's building. Berngard Exh. 3; Tr. 2, at 28. However, there was no indication that Complainant would have voluntarily selected the new unit over Kimball's if it had been an option. Indeed, it is impossible to conclude that one unit is better than the other, given that personal preference is key in housing decisions. As Complainant pointed out, the unit at 4900 N. Marine Drive had numerous attributes that the new construction unit did not, including its location right near the park and the lake, "lovely" vintage features, and substantially the same amenities that mattered to Complainant – dog-friendly, parking, etc. Although there might be style and design differences between a newly constructed building and a vintage building, Complainant had the right to and credibly testified that she preferred the vintage building.

Respondents did not provide evidence that there was any lower priced and comparable unit available at the time.

87. Complainant made numerous efforts to find new housing within the limited time that she and her co-applicants had. An award of rent differences has been made in numerous cases. See, e.g., *Gould v. Rozilsky*, 91-FHO-5610 (Jan. 15, 1992), where the complainant was awarded $2,280 for the difference between present rent payments and the lower rent he would have paid had he not been discriminated against; *Fulgern v. Pence*, 91-FHO-65-5650 (Sept. 16, 1992), where the complainant was awarded $1,007.23 in a failure to rent case, including lost income, difference in rent paid, and the increased gas bill; and *Friday v. Dykes*, 92-FHO-23-5773 (Apr. 22, 1993), where the complainant was awarded $1,500 for payment of rent and security deposit to the respondent. Indeed, a rent differential has only been denied where it has not been justified. For example, in *Johnson v. City Realty and Development*, 91-FHO-165-5750 (Mar. 17, 1993), the complainant rented a more expensive apartment where it was proven that she deliberately passed up less expensive apartments. In this case, Complainant presented evidence that she made numerous efforts to mitigate the loss she, Pfautsch and Stier incurred by seeking new housing within the limited time they had. There was no evidence that Complainant passed up a lower cost comparable apartment in the few weeks that she and her co-applicants had to find substitute housing. The Commission finds that Complainant is entitled to the rent differential that she has proven.

88. Complainant also sought several smaller out-of-pocket damages: $900 in moving costs and $283 in application fees. Complainant's pre-hearing memorandum; Ridenour Exh. 14; Tr., at 101. Complainant did not present receipts to support her request for moving costs; she relied on her testimony that she and her co-applicants would have paid higher moving

costs because they had to move both houses at one time. Complainant estimated that they paid $700 in moving costs when they moved into the apartment where they were living prior to this incident. Complainant is entitled to $100, for her share of the additional moving costs. Complainant conceded that they would have paid application fees for the unit that they were seeking, and that her portion of that fee was $66.95; however, Complainant stated that she also paid application fees for the 4900 N. Marine Drive Unit, and her portion was $75.

89. Accordingly, the Commission agrees with the hearing officer's recommendation that Complainant's out-of-pocket damages claim be based only on her losses for the two years of rent differential. None of the parties offered any evidence as to what the amount would be solely for Complainant. Accordingly, relying on the damages calculation Complainant provided, she is entitled to the difference between what she paid in rent and what she would have paid but for the discrimination from July 2019 to July 2021, for a total of $5,400.38. Ridenour Exh. 19.

90. In addition, the Commission agrees with the hearing officer that Complainant is entitled to $100 for her portion of the additional moving costs, and her application fee of $75 for the application to the unit at 4900 N. Marine Drive.

91. The Commission, therefore, totals Complainant's out-of-pocket damages to be $5,575,38.

Emotional Distress Damages

92. Compensatory damages include damages for embarrassment, humiliation, and emotional distress caused by discrimination. See, *Nash and Demby v. Sallas Realty, et al.*, CCHR No. 92-H-128 at p. 20 (May 17, 1995). Moreover, as the Commission stated in *Sercye v. Reppen et al.*, CCHR No. 08-H-42 (Oct. 21, 2009), "Because of the difficulty in evaluating

the emotional injuries which result from deprivations of civil rights, courts do not demand precise proof to support a reasonable award of damages for such injuries" ..."Humiliation can be inferred from the circumstances as well as established by testimony." *Id.*, p. 3 (omitting cases). Emotional distress damages may be proved solely by the testimony of a complainant without medical evidence. See, e.g., *Figueroa v. Fell,* CCHR No. 97-H-5 (Oct. 21, 1998); *Soria v. Kern*, CCHR No. 95-H-13 (July 17, 1996); and *Nash and Demby, supra.*

93. In their objections, Respondents' counsel objected to an award to Complainant for emotional distress, arguing that emotional distress was not an element of damages sought in Complainant's pre-hearing memorandum.

94. Complainant noted in the Statement of Position submitted with her pre-hearing memorandum that she was seeking "all remedies under law."

95. Even if it was not clear that Complainant was seeking emotional distress damages specifically, the Commission has authority to order relief, even if not requested, if a complainant prevails on their claim of discrimination and the relief is appropriate to carry out the purpose of the ordinance. See, e.g., *Rafferty v. Great Expectations*, CCHR No. 04-8-35 (May 7, 2008), where the Commission ruled that it has the authority to order monetary relief even if not requested by the complainant and the relief is appropriate to carry out the purposes of the ordinance, and where the respondent did not establish that the complainant sought only non-monetary relief.

96. The discriminatory conduct negatively affected Complainant, and her distress was evident throughout the hearing. Although her direct testimony was controlled, and she maintained a professional demeanor, at various points during her testimony, and at cross examination and closing argument, her emotional distress was apparent. See, e.g., Tr., at 65-

66. (Complainant was shocked when she found out that Kimball claimed not to have received any additional documentation from CM and DM, but nonetheless made the decision to rent to them).

97. The Commission modifies the hearing officer's recommendation of $2,500 in emotional distress damages and increases the amount to $4,000. The Commission agrees that while Complainant did not offer specific evidence of losses, she was able to show evidence of emotional distress. This figure is consistent with, and in fact, somewhat lower than other Commission cases, See, e.g., *Nash and Demby, supra* (awarding $15,000 in emotional distress); *Pierce and Parker v. New Jerusalem Christian Development Corp.*, CCHR No. 07-H-12 (Feb. 16, 2011) (awarding $20,000 per complainant); *Hutchison v. Iftekaruddin*, CCHR No. 08-H-21 (Feb. 17, 2010) (awarding $2,500 in emotional distress damages); and *Draft v. Jercich*, CCHR No. 05-H-20 (July 16, 2008) (awarding $5,000 in emotional distress damages).

<u>Reasonable Costs</u>

98. Section 2-120-510 (1) of the Chicago Municipal Code allows the Commission to order a respondent to pay a prevailing complainant's reasonable attorney fees and associated costs. The Commission has routinely found that prevailing complainants are entitled to such an order. See, *Brown v. Nguyen and Nguyen*, CCHR No. 15-H-07 (Jan. 12, 2017).

99. Complainant was not represented by an attorney in this proceeding; however, when a complainant is not entitled to attorney fees, they may receive reasonable costs. See, e.g., *Austin v. Harrington*, CCHR No. 94-E-237 (Mar. 18, 1998) (*pro se* complainant not entitled to attorney fees but may be allowed reasonable costs); *Huezo v. St. James Property*, CCHR No. 90-E-44 (Oct. 9, 1991) (awarding photocopying costs). The Commission agrees

with the hearing officer's recommendation that Complainant be awarded her reasonable costs, upon satisfactory proof of same.

Punitive Damages

100. Complainant declined to set an amount she is seeking for punitive damages, instead requesting punitive damages in an amount "at the discretion of the Commission."

101. Punitive damages may be awarded when a respondent's actions are found to be a product of evil motives or intent or when it involves reckless or callous indifference to the protected rights of others. *Houck v. Inner City Horticultural Foundation*, CCHR No. 97-E-93 (Oct. 21, 1998), quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983).

102. The purpose of an award of punitive damages is to punish discriminatory conduct and to deter such conduct in the future. See, *Brown, supra.* See also, *Nash & Demby* v. *Sallas Realty et al., supra*; and *Blacher v. Eugene Washington Youth & Family Services,* CCHR No. 95-E-261 (Aug. 19, 1998). Significant punitive damages awards have been ordered by the Commission when the respondent's conduct was willful and wanton or in reckless disregard or callous indifference to the complainant's rights. *Salwierak v. MRI of Chicago, Inc. et al.,* CCHR No. 99-E-1 07 (July 16, 2003); *Collins and Ali v. Magdcnovski,* CCHR No. 91-FH0-70-5655 (Sept. 16, 1992) (awarding punitive damages where there is proof of egregious conduct such as callous indifference to protected rights).

103. "The prospect of punitive damages being awarded for egregious violations of protected rights has played a critical role in the enforcement of civil rights statutes and thus, society's efforts to establish normative values of conduct in the workplace. Merely requiring a respondent to henceforth comply with the law and to make a victim of discrimination

"whole," after the damage has been done, minimizes the seriousness of the offense." *Brown supra*, at 7.

104. Where a respondent's interactions with a complainant were courteous and respectful, but "[t]he fact that in blatantly discriminating against the complainant, the respondent may have treated [her] 'politely' does not mean that their actions were not malicious." See, *City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.* 982 F.2d 1086, 1099-1100 (7th Cir. 1992).

105. As noted above, in this case, neither Respondent offered evidence that they believed Complainant's income was *insufficient*; their decision was clearly based on Complainant's *source of income*. Complainant observed that both Berngard and Kimball [at some point in her career] worked in real estate and should have been familiar with the fair housing and anti-discrimination laws. Moreover, because Respondents also received income from what the parties have called "gig" work, that should have made them more aware of the need to consider Complainant's income, not less.

106. Nonetheless, the Commission finds that there was insufficient evidence that Respondents' conduct in this matter was egregious or otherwise exhibited evil motives or intent, or reckless or callous indifference. Accordingly, the Commission rejects the hearing officer's recommendation of $1,500 in punitive damages and rules there should be no award for punitive damages.

Interest

107. Pursuant to Section 2-120-510 (1), the Commission may award interest on a complainant's actual damages. Commission Rule 240.700 provides for an award of pre- and

post-judgment interest at the prime rate, adjusted quarterly, and compounded annually starting from the date of the violation.

108. Complainant is entitled to pre- and post-judgment interest on the award of out-of-pocket damages starting from June 26, 2019, the date Respondents accepted DM and CM as tenants, making it clear that Complainants would not be able to rent the unit.

Fines

109. Section 5-8-130 of the CFHO provides that any covered party found in violation of the Ordinance shall be punished by a fine not exceeding $1,000 per violation.[17]

110. Because the hearing officer intended for Respondents to each be assessed half of the maximum fine allowed by the CFHO, the Commission assesses a fine in the amount of $500 as to each Respondent, payable to the City of Chicago.

Referral to Illinois Division of Professional Regulation

111. Under Section 5-8-140 of the CFHO, the corporation counsel [Department of Law] of the City of Chicago shall file a notice with the Department of Professional Regulation of the State of Illinois (now the Division of Professional Regulation within the Illinois Department of Financial and Professional Regulation) if any licensed real estate broker or salesperson has been found to have violated the ordinance.

112. Respondent Berngard was acting as Kimball's agent in the leasing of this unit. See, Tr., at 199-200; Ridenour Exh. 4. (Although Kimball testified that at one point in her career she had been employed as a real estate agent, there was no evidence that she maintained a real estate license at the time of the violation).

[17] In her recommended decision, the hearing officer stated that the Chicago Fair Housing Ordinance allows for fines up to $500 per violation. This was in error; the Ordinance was amended in 2019 to allow for fines up to $1,000 per violation.

113. Therefore, the Commission agrees with the hearing officer and Berngard will be referred to the Division of Professional Regulation of the Illinois Department of Financial and Professional Regulation.

V. OBJECTIONS

114. Commission Rule 240.610 (b) provides that each party is permitted to file objections to a hearing officer's recommended ruling. The Rule further provides that objections must include (i) relevant legal analysis for any objections to legal conclusions, (ii) specific grounds for reversal or modification of any findings of fact including specific references to the record and transcript, and (iii) specific grounds for reversal or modification of any recommended relief.

115. Respondent Kimball properly filed objections to the hearing officer's recommended decision, citing two main arguments: (1) the CFHO should not be interpreted to protect 1099 workers because they are not a vulnerable class; and (2) Kimball's evidence presented reasonable and non-discriminatory reasons for why she selected the successful applicants. Kimball further argues that if the Commission agrees with the hearing officer's recommendation of liability, several of the recommended damages should be decreased as "unreasonably unfair."

116. Regarding Kimball's first two arguments, she made these assertions during the hearing. In reviewing a party's objections to the hearing officer's [] Recommended Decision, [the Commission] shall not simply reweigh the credibility of witnesses or other evidence unless the recommendation is against the manifest weight of the evidence. See, e.g., *Flax-Jeter v. Chicago Dept. of Aviation,* CCHR No.91-E-146 (June 15, 1994); and *Reid v. F.J. Williams Realty et al.,* CCHR No. 93-H-42 (Feb. 22, 1995). See also, *Bosh v. CAN et al.,*

CCHR No. 92-E-83 (Apr. 19, 1995) (objections are generally not granted when no new arguments are raised); and *Hall v. Becovic,* CCHR No. 94-H-39 (June 21, 1995) (the Commission will not sustain objections which merely reargue what was presented at hearing, unless it finds the recommended decision contrary to the manifest weight of the evidence). Kimball's objections expound on her argument that 1099 workers are not a vulnerable group that should be protected by the CFHO's prohibition against source of income discrimination by specifically pointing to the legislative intent behind recent amendments to the Illinois Human Rights Act. This expansion of her original argument, however, does not change the essence of the argument, which she proposed at hearing and the hearing officer considered in her recommended decision. The plain meaning of the statute shows that the only restriction when considering a source of income case is that the manner of income must be "lawful." Further, Kimball argued at the hearing that she had legitimate, non-discriminatory reasons for selecting the successful applicants.

117. Kimball finally argues that several of the hearing officer's recommended damages should be decreased as "unreasonably unfair." Kimball asserts that (1) the award for out-of-pocket damages in the rent differential should be for one year of rent, not two; (2) Complainant failed to present any evidence to support an award for moving fees; (3) the hearing officer's recommendation for emotional distress and punitive damages is unreasonable; and (4) interest accrued since 2019, considering the setbacks caused by the COVID-19 pandemic are unreasonable. Objections will not cause a change in a recommended order unless new and material facts are asserted, clearly erroneous findings are made, errors of law are made, or conflicts exist with Commission precedent. *Bosh v. CHA et al.,* CCHR No. 92-E-83 (Apr. 19, 1995). Kimball's arguments do not present new and

material facts, clearly erroneous findings, errors of law, or conflicts with Commission precedent. However, the Commission did reject the hearing officer's award of punitive damages.

VI. SUMMARY AND CONCLUSION

In conclusion, the Commission rules that Complainant has established a claim of housing discrimination based on source of income in violation of the Chicago Fair Housing Ordinance. Accordingly, the Commission finds Respondents jointly and severally liable for source of income discrimination in violation of the Chicago Fair Housing Ordinance. As detailed above, the following relief shall be made jointly and severally:

a. Make payment to Complainant for out-of-pocket damages in the total amount of $5,575.38, broken down as follows: $5,400.38 in rent differential; $100 in moving costs; and $75 in application cost;
b. Payment to Complainant of $4,000 in emotional distress damages;
c. Payment to Complainant of pre- and post-judgment interest on the emotional distress damages from the date of the violation, June 26, 2019;
d. Payment to Complainant of reasonable costs;
e. Refer this Order to the City of Chicago Department of Law to file a notice with the Department of Professional Regulation of the State of Illinois within the Illinois Department of Financial and Professional Regulation with respect to Respondent Joshua Berngard, a licensed real estate broker; and

f. Payment to the City of Chicago of fines of $500 by Respondent Kimball and $500 by Respondent Berngard.

CHICAGO COMMISSION ON HUMAN RELATIONS

By: Nancy Andrade
Entered: September 14, 2023