



**Division of  
Human Rights**

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**CITYVISION SERVICES, INC.,**

Complainant,

v.

**MENANDS GARDENS APARTMENTS, KATHY  
KELLEY, TRI CITY RENTALS, L.L.C.,**

Respondents.

**NOTICE AND  
FINAL ORDER**

Case No. 10185528

Federal Charge No. 02-17-5629-8

**PLEASE TAKE NOTICE** that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on October 18, 2018, by Thomas S. Protano, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE HELEN DIANE FOSTER, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any

member of the public during the regular office hours of the Division.

**PLEASE TAKE FURTHER NOTICE** that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

**ADOPTED, ISSUED, AND ORDERED.**

DATED: **DEC 04 2018**  
Bronx, New York



---

HELEN DIANE FOSTER  
COMMISSIONER

TO:

Complainant

CityVision Services, Inc.

Attn: Gary Lacefield or Leigh Renner

c/o Lacefield Compliance Consulting LLC 121 Silver Ridge Court

Burleson, TX 76028

Complainant Attorney

Andy Winchell

Attn: Law Offices of Andy Winchell, P.C.

100 Connell Drive, Suite 2300

Berkeley Heights, NJ 07922

Respondent

Menands Gardens Apartments

2 MacDonald Circle

Albany, NY 12204

Respondent

Kathy Kelley

Menands Gardens Apartments

2 MacDonald Circle

Albany, NY 12204

Respondent

Tri City Rentals, L.L.C.

Attn: Timothy Owens, General Manager

255 Washington Avenue Ext.

Albany, NY 12205

Respondent Attorney

Matthew R. Mead, Esq.

Stockton, Barker & Mead, LLP

433 River Street, Suite 6002

Troy, NY 12180

Hon. Barbara Underwood, Attorney General

Attn: Civil Rights Bureau

120 Broadway

New York, New York 10271

State Division of Human Rights

Robert Goldstein, Director of Prosecutions

Lilliana Estrella-Castillo, Chief Administrative Law Judge

Thomas S. Protano, Administrative Law Judge

Michael Swirsky, Litigation and Appeals

Caroline J. Downey, General Counsel

Melissa Franco, Deputy Commissioner for Enforcement

Peter G. Buchenholz, Adjudication Counsel

Matthew Menes, Adjudication Counsel



**Division of  
Human Rights**

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF  
HUMAN RIGHTS**

on the Complaint of

**CITYVISION SERVICES, INC.,**

Complainant,

v.

**MENANDS GARDENS APARTMENTS,  
KATHY KELLEY, TRI CITY RENTALS,  
L.L.C.,**

Respondents.

**RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER**

Case No. **10185528**

Federal Charge No. 02-17-5629-8

**SUMMARY**

Complainant, an advocacy group, hired a tester who sought a rental apartment from Respondents. The tester was unable to rent an apartment due to Respondent's policies, which have a discriminatory impact on families with children. Complainant is awarded damages and attorney's fees. Civil fines and penalties are assessed against Respondents as well.

**PROCEEDINGS IN THE CASE**

On December 8, 2016, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents with unlawful discriminatory practices relating to housing in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Thomas S. Protano, an Administrative Law Judge (“ALJ”) of the Division. A public hearing session was held on February 28, 2018.

Complainant and Respondents appeared at the hearing. Complainant was represented by Andy Winchell, Esq. Respondents were represented by Matthew R. Mead, Esq. At hearing, ALJ Protano requested information regarding the attorney’s fees incurred by Complainant during the course of this matter. Pursuant to 9 N.Y.C.R.R. §465.12(f)(4), those documents were placed in evidence as ALJ Exhibit 6.

### **FINDINGS OF FACT**

1. Complainant is a not-for-profit, fair housing advocacy organization. (Tr. 17)
2. Complainant employs testers who pose as potential tenants to identify landlords who may be violating fair housing laws. (Tr. 18-21)
3. Respondent Menands Gardens Apartments (“Menands Gardens”) is a 104-unit apartment complex. (Joint Exhibit 2; Tr. 42-43)
4. Respondent Kathy Kelley is the property manager for Menands Gardens. (Tr. 42)
5. Respondent Tri City Rentals owns and operates rental properties throughout New York State, including Menands Gardens. Within those properties are approximately 10,000 apartment units. Tri City Rentals employs approximately 500 people. (Tr. 82)
6. Menands Gardens has 43 two-bedroom, one-bathroom units. (Joint Exhibit 1)

7. The bedrooms in these units are approximately 224 square feet and 88 square feet. The units are approximately 725 square feet in total. (Joint Exhibit 1)

8. Menands Gardens' policy prohibits renting two-bedroom apartments to households consisting of more than three persons. (Joint Exhibit 1)

9. Menands Gardens' parking lot has spaces for 114 vehicles. (Tr. 44)

10. Kelley receives complaints from residents about limited parking in late evenings and on weekends. She receives such complaints "probably once a month." (Tr. 45)

11. Menands Gardens has no assigned parking and does not issue parking stickers or permits to residents. (Tr. 49)

12. Menands Gardens does not limit the number of vehicles that residents can park in its lot. (Tr. 48)

13. On October 3, 2016 and October 8, 2016, Katrina Hall, a tester employed by Complainant, sought a two-bedroom apartment at Menands Gardens. (ALJ Exhibit 1; Tr. 24-25)

14. Hall is a single mother with three young girls, all of whom are under 13 years of age. (Tr. 6, 25-26)

15. Hall spoke to Kelley. Kelley explained Menands Gardens' policy regarding the three-person limit for two-bedroom apartments to Hall. Complainant was told that she would not be able to rent a two-bedroom apartment at Menands Gardens. (Tr. 44)

16. Complainant, as an organization, has expended \$4,295.75 in diverted resources on this case. That figure is based upon the time and resources Complainant's members expended with respect to this matter. (Alj Exhibit 6; Tr. 32-34)

17. In prosecuting this case, Complainant spent \$16,826.75 in legal fees. The charges are based upon a rate of \$425.00 per hour for 38.2 hours of attorney work product and \$150.00 per

hour for 2.5 hours paralegal work product over the course of five months leading up to the public hearing and \$240.50 in travel expenses (including \$10.78 for lunch after the hearing). (ALJ Exhibit 6)

### **OPINION AND DECISION**

New York Executive Law, Article 15 §296.5(a)(1) provides that it is an unlawful discriminatory practice to “refuse to sell, rent or lease... housing accommodations because of the... familial status of such persons...”

Complainant asserts that Respondents’ policy of limiting its two-bedroom apartments to no more than three persons is discriminatory. It cites “The Keating Memorandum” issued by the United States Department of Housing and Urban Development (“HUD”) on March 20, 1991 (Federal Register, volume 63, number 243, December 18, 1998). The Keating Memorandum was issued to clarify a previous memo issued one month earlier. The two memos were issued as a guide for evaluating evidence in familial status discrimination claims when a provider has set an occupancy policy. The Keating Memorandum noted that it was not attempting to create a definitive test for liability. It noted that an occupancy policy of two persons per bedroom is reasonable. There is no assertion that any policy that is contrary to that two-person standard is discriminatory. Rather, a housing provider may rebut any presumption regarding the reasonableness of its policy. The Keating Memorandum is an internal HUD document; it is a guide not a liability rule. See, *Rhode Island Human Rights Commission v. Graul*, 120 F.Supp. 3d 110, 129 (D. Rhode Island, 2015). Complainant’s argue that the Keating Memorandum “requires” a minimum of two persons per bedroom. Such a ruling would create a *per se* violation any time a landlord refuses to adhere to the two-person per bedroom standard. Given

the Keating Memorandum's status as an internal memo, not a rule, it would be inappropriate for the Division to make such a ruling. The Keating Memorandum must be considered for what it is intended to be: a guide, rather than a rule.

If one uses the Keating Memorandum as a guide only, Complainant does establish that Respondents' policy is discriminatory. A prima facie case of discrimination occurs when a facially neutral policy has a disparate impact on a protected group. When a housing policy has a disparate impact on a protected group and there is an alternative, less discriminatory policy, the housing provider must then show that a significant business objective is served by that policy. *Levin v. Yeshiva University*, 96 N.Y. 2d 484, 503 (2001). In this case, Menands Gardens has a policy that could, potentially, discriminate against a family with multiple children as it has in this case. There is no overcrowding issue here: a two-bedroom apartment is appropriate for four persons (as the Keating Memorandum indicates). A restriction that limits the availability of appropriate apartments based on the size of an applicant's family is a restriction based upon familial status.

Menands Gardens counters with a business necessity argument. However, Menands Gardens does not argue that the two-bedroom apartments are inappropriate for a four-person household. Instead, it argues that it needs to limit the tenants in its two-bedroom apartments because of a general lack of parking. That argument falls flat, however, because the policy fails to account for the number of cars that the tenants in a particular apartment own. For example, a woman like Hall, with three children under the age of 13, is not likely to have more than one car; however, a household consisting of two parents and a senior in high school could, conceivably, have three cars. If one is concerned about the availability of parking spaces, the remedy should be to limit the number of cars, not the number of persons. A policy that limits the number of cars

a tenant can park in the Menands Gardens lot, or one that assigns spaces, would be less restrictive and, hence, have a less disparate impact.

Complainant is an advocacy group that supports fair housing. Advocacy groups can obtain monetary relief based upon injury to the organization. In order to obtain damages, an organization must show “injury in fact.” *MFY Legal Services, Inc. v. Dudley*, 67 N.Y.2d 706, 708, 499 N.Y.S.2d 930, 931 (1986). An organization is injured when it is forced to divert resources from its mission to address discriminatory actions. When unlawful discriminatory practices “perceptibly impair [the housing group’s] ability to provide...services...there can be no question that the organization has suffered an injury in fact.” *Havens Realty Corp. V. Coleman*, 455 U.S. 363, 379 (1982). Complainant expended \$4,295.75 in the investigation of this matter. It should be compensated for that amount.

Human Rights Law § 297.4 (c) (iv) permits the award of punitive damages to a person aggrieved of housing discrimination, as well. The Division is vested with an “extremely strong statutory policy of eliminating discrimination.” *Van Cleff Realty, Inc. v. New York State Div. of Human Rights*, 216 A.D.2d 306, 307, 627 N.Y.S.2d 744, 746 (2nd Dept. 1995). Punitive damages may be awarded “where the wrong complained of is morally culpable, or is actuated by... reprehensible motives, not only to punish the [respondent] but to deter [the respondent], as well as others who might otherwise be so prompted, from indulging in similar conduct in the future.” *Micari v. Mann*, 126 Misc.2d 422, 481 N.Y.S.2d 967 (N.Y. Sup. Ct. 1984). Although a discriminatory policy exists in this case, Respondents were not attempting to eliminate single mothers with minor children from their Menands Gardens. Respondents did not have a “reprehensible motive” and their intent was not to discriminate. The unintended result of a plan to ease parking problems was a plan that had a disparate impact on families with children. As

such, given Respondents' lack of discriminatory intent, no punitive damages shall be awarded to Complainant.

Section 297(4)(c)(vi) of the Human Rights Law permits the Division to assess civil fines and penalties in cases of housing discrimination in an "amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious."

There several factors that determine if civil fines and penalties are appropriate: the nature and circumstances of the violation; whether respondent had previously been adjudged to have committed unlawful housing discrimination; respondent's financial resources; the degree of respondent's culpability and the goal of deterrence. A penalty of \$2,000.00 in the matter is appropriate given the nature of the violation and the goal of deterrence. The Human Rights Law allows families with children an equal opportunity to obtain housing accommodations without the burdens of prejudice. In this case, Respondent's policy has a disparate impact on families with children and the stated reason for the policy fails to establish that the policy is necessary to redress the parking problem Respondent described.

Complainant is entitled to recover reasonable attorney's fees expended in litigating this matter. *See* Human Rights Law § 297.10.

The standards for determining reasonable attorney's fees under the Human Rights Law are consistent with federal precedent. *See McGrath v. Toys "R" Us, Inc.*, 3 N.Y.3d 421, 429, 788 N.Y.S.2d 281, 284 (2004). Attorney's fees are to be calculated utilizing the "lodestar" method which calculates the amount of the fee award "by multiplying the number of hours

reasonably expended by a reasonable hourly rate.” *Id.* at 430, 788 N.Y.S.2d at 285.

When seeking to determine the number of hours reasonably expended by counsel on a given case, the Division should discount duplicative or inefficient hours; disallow excessive, unnecessary, or “padded” hours; and utilize the Division’s inherent knowledge, experience and expertise regarding the typical time required to complete similar activities. *See McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 176 Misc. 2d 325, 328, 672 N.Y.S.2d 230, 232 (N.Y. Sup. Ct. 1997), *appeal dismissed*, 256 A.D.2d 269, 682 N.Y.S.2d 167 (1st Dept. 1998), *appeal dismissed*, 93 N.Y.2d 919, 691 N.Y.S.2d 383 (1999), *lv. denied*, 94 N.Y.2d 753, 700 N.Y.S.2d 427 (1999).

In this case, Complainant’s counsel seeks compensation for 38.2 hours of substantive legal work on this case, plus 2.5 hours of paralegal work and \$240.50 in travel expenses. The travel expenses include \$10.78 for lunch after the hearing.

Complainant’s counsel submitted a description of the services he rendered and the time he expended representing Complainant as well as time records in support of his claim for attorney’s fees. An application for a fee award “should generally be documented by contemporaneously created time records that specify, for each attorney, the date, the hours expended, and the nature of the work done.” *Kirsch v. Fleet St., Ltd.*, 148 F.3d 149, 173 (2d Cir. 1998).

Courts “have determined that reasonable hourly rates...are approximately \$300–\$450 per hour for partners, \$200–\$300 per hour for senior associates, and \$100–\$200 per hour for junior associates.” *See id.* at 298-99 (collecting cases). The highest rates are reserved for experienced civil rights attorneys practicing in this district. *See id.* at 300.

Complainant’s counsel has not described his experience litigating civil rights cases.

However, I must also consider “the relationship between the amount of the fee awarded and the results obtained” in fashioning an appropriate fee award. *McGrath* at 430, 788 N.Y.S.2d at 285. Accordingly, an hourly billing rate for Complainant’s attorney of \$425.00, is within the prevailing rate and it is, therefore, reasonable. The charge of \$10.78 for lunch, however, is not reasonable, given the fact that Complainant’s attorney has not established that his dietary needs on the day of the hearing are related to his representation of Complainant. Therefore, an award of \$16,815.97 is appropriate.

### **ORDER**

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division’s Rules of Practice, it is hereby

ORDERED, that Respondents, their agents, representatives, employees, successors, and assigns, shall cease and desist from discriminating against any tenants or rental applicants, in the terms and conditions of housing; and it is further

ORDERED, that Respondents, their agents, representatives, employees, successors, and assigns, shall cease and desist from employing policies that result in a discriminatory impact against members of any class of persons protected by New York Executive Law, Article 15 §§290-301; and it is further

ORDERED, that Respondents, their agents, representatives, employees, successors and assigns shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within 60 days of the date of the Commissioner’s Final Order, Respondents shall pay

Complainant \$4,295.75 as damages for the diversion of resources Complainant suffered as a result of Respondents' unlawful discrimination. The payment shall be made by Respondents in the form of a certified check, made payable to the order of CityVision Services, Inc., and delivered by certified mail, return receipt requested, to its Attorney, Andy Winchell, Esq., at Law Offices of Andy Winchell, P.C., 100 Connell Drive, Suite 300, Berkeley Heights, NJ, 07922. Interest shall accrue on this award at the rate of nine percent per year, from the date of the Commissioner's Final Order until payment is made by Respondents.

2. Within 60 days of the date of the Commissioner's Final Order, Respondents shall pay Andy Winchell \$16,815.97 as attorney's fees for Respondents' unlawful discrimination against Complainant. The payment shall be made by Respondents in the form of certified checks, made payable to the order of Law Offices of Andy Winchell, P.C., and delivered by certified mail, return receipt requested, to Andy Winchell, Esq., at Law Offices of Andy Winchell, P.C., 100 Connell Drive, Suite 300, Berkeley Heights, NJ, 07922. Interest shall accrue on this award at the rate of nine percent per year, from the date of the Commissioner's Final Order until payment is made by Respondent.

3. A copy of the certified checks shall be provided to Caroline Downey, Esq., General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

4. Within 60 days of the date of the Commissioner's Final Order, Respondents shall pay to the State of New York \$2,000.00 as a civil fine and penalty for Respondents' unlawful discrimination. Interest shall accrue on this award at the rate of nine percent per year, from the date of the Commissioner's Final Order until payment is made by Respondents. Payment shall be made in the form of a certified check, made payable to the order of the State of New York and delivered by certified mail, return receipt requested, to Caroline Downey, Esq., General Counsel

of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

5. Respondents shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained within this Order.

DATED: *10/15/18*  
Bronx, New York

A handwritten signature in blue ink, appearing to read 'T. S. Protano', with a long horizontal flourish extending to the right.

Thomas S. Protano  
Administrative Law Judge