

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
Willie E. Minis,

Charging Party,

v.

Ann Corrigan, Chapel Oaks
Development Company, Inc.,
Ross S. Barber, and Denise Mize
Webster,

Respondents.

HUDALJ 07-92-0591-1
Decided: October 24, 1994

Shirley Ward Keeler, Esquire

For the Respondent

Linda Tapper, Esquire
For the Government

Before: William C. Cregar
Administrative Law Judge

INITIAL DECISION AND ORDER

Statement of the Case

This matter arose as a result of a complaint filed by Willie E. Minis ("Complainant") alleging discrimination based on race and color in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601, *et seq.* ("the Act"). On March 1, 1994, following an investigation and a determination that reasonable cause existed to believe that discrimination had occurred, the Department of Housing and Urban Development

("HUD" or "the Charging Party") issued a charge of discrimination against

Ann Corrigan, Ross S. Barber, Denise Mize Webster, and Chapel Oaks Development Company, Inc. ("Respondents") alleging that they had discriminated against Complainant in violation of 42 U.S.C. §§ 3604(a), (b), and (d), by denying him housing because of his race and color. Respondents counter that no housing was available.

A hearing was held in Overland Park, Kansas, on May 25-26, 1994. The parties' post-hearing briefs were timely filed by July 28, 1994. Respondents filed a reply brief on August 8, 1994; the Charging Party filed its reply brief on August 24, 1994. Accordingly, this case is ripe for decision.

Findings of Fact

1. Chapel Oaks is a 164-unit apartment complex located in Lee's Summit, Missouri, a suburb of Kansas City, Missouri. The complex is comprised of individual buildings with four townhouses per building. The two outside units have three bedrooms and the two inside units have two bedrooms. At the time of the alleged discrimination, some of the units had finished basements and decks. All units have garages. Tr. pp. 226-31, 275; R. Exs. 8(S) and 15.¹

2. The Chapel Oaks complex is owned by Respondent Chapel Oaks Development Company, Inc. ("CODC"), which, in turn is owned by its president, Ross S. Barber. C. P. Ex. 15, at 2 and 9. Denise Mize Webster (formerly, Denise Mize) is secretary and treasurer of CODC. Since June of 1992, she has been a leasing agent for Chapel Oaks. Tr. pp. 165-66. Mr. Barber and Ms. Webster are white.

3. Respondent Ann Corrigan was a leasing agent at Chapel Oaks from August 1990 until May 1992. Her duties included responding to inquiries about vacancies, showing and renting units, collecting rents, and supervising maintenance and repairs for the complex. Tr. pp. 262-64. Ms. Corrigan received a bonus for each rental. Tr. pp. 271-72. Ms. Corrigan is white.

4. Complainant Willie E. Minis teaches advanced electronics and computer technology at a high school in Kansas City, Missouri. He is black. Tr. pp. 88-89. Complainant's fiancée, Elizabeth Brown, is Dean of Student Services at Penn Valley Community College. Ms. Brown is white. Tr. pp. 33-34.

5. According to a 1990 census, 1.7% of Lee's Summit's population is black. From at least August of 1990 until September of 1991, approximately five to ten percent

¹The following reference abbreviations are used in this decision: "Tr." followed by a page number for the hearing transcript; "C. P. Ex." for the Charging Party's Exhibit; and "R. Ex." for Respondents' Exhibit.

of Chapel Oaks' units were rented by black tenants. Tr. pp. 275, 328, 332-35, 358-59; R. Exs. 14, 16, 17, and 18, at 28-29.

6. From Summer of 1990 until May of 1992, Chapel Oaks' occupancy rate hovered around 100%. Tr. pp. 263, 271. On average, six tenants moved out every month. CODC requires 30-day notices from tenants. When a vacating tenant provides a notice at the end of a month, that unit is not normally available until the end of the following month, at the earliest. Accordingly, units do not normally become available for rental in the same month as the notice is given. Tr. pp. 219, 269-70, 291.

7. The rental office at Chapel Oaks is located in a separate building. The office is a three-bedroom model unit that leasing agents show to prospective tenants when no other units are available for inspection. Tr. pp. 223-24, 299-300; R. Ex. 14. The rental office hours are 9:00 a.m. to 5:00 p.m. weekdays, and 11:00 a.m. to 5:00 p.m. Saturdays. For reasons of personal safety, leasing agents do not show townhouses late in the afternoon without an appointment. In addition, when the complex is full, leasing agents must arrange a showing with the current tenant. As a courtesy, current tenants are normally provided at least one day's prior notice. Tr. pp. 224-25, 236, 296.

8. Leasing agents use "guest cards" to create a waiting list for vacancies. Prospective tenants fill out the guest cards to provide information such as name, address, occupation, desired move-in date, and the type of unit sought. Agents refer to the cards to notify prospective tenants when vacancies occur. Tr. pp. 238-39; C. P. Ex. 29, at 2.

9. CODC uses a credit bureau, CSC Credit Services, Inc. ("CSC") for credit checks. A leasing agent requests a credit check after an applicant fills out a credit application and makes a deposit. CSC responds to CODC's request within a day. Tr. pp. 189-90, 194-95, 198, 200-01; R. Exs. 20 and 23. After an applicant's credit has been approved, CODC reserves the desired unit for three days. Tr. pp. 198, 251-52.

10. CODC's records include a tenant file for each lessee and "rent rolls." Tenant files include an application, lease, termination notice, and occasionally, a completed guest card. Rent rolls are monthly lists of all units by address, tenant's name and telephone number, ending lease date, and "tenant numbers," numbers assigned to each tenant by CODC's controller. While employed by CODC, Ms. Corrigan typed up each month's rent roll, either on the last day of the current month or the first day of the following month. She recorded rent payments or delinquency notices by making handwritten notations on

the typed rent roll. She also crossed out the names of departing tenants and penciled in the names of future tenants. She would then type in those new tenants' names in the next

month's roll. Tr. pp. 263, 272-77, 279; R. Ex. 10.

11. CODC's attorney orally instructs leasing agents regarding their duty under the Fair Housing Act not to discriminate. Tr. pp. 248-49, 328, 343-44.

12. In August of 1991, Complainant and Ms. Brown lived in separate apartments with leases which expired respectively on August 31, 1991, and September 30, 1991. Around the end of August, Ms. Brown gave her landlord a 30-day notice that she would vacate her apartment by September 30, 1991. Although Mr. Minis never gave his landlord a 30-day notice, after August 31st, his lease converted to a month-to-month tenancy. Tr. pp. 36-39, 99, 100, 103.

13. Complainant and Ms. Brown sought an apartment where they could live together. They desired a suburban apartment with two to three bedrooms and a garage. Tr. pp. 37-39, 103. During the course of their search they did not find any acceptable housing until they discovered Chapel Oaks. Tr. pp. 40-43.

14. They first visited Chapel Oaks on Sunday, September 22, 1991, when the rental office was closed.² They liked the development and wanted to inquire about vacancies. Tr. pp. 43-44. Because Ms. Brown had to leave town on business, they decided that Mr. Minis would return to the rental office the next day. Tr. p. 109.

²Both Mr. Minis and Ms. Brown testified at the hearing that they drove out together. Tr. pp. 40, 43-44, 104. However, during his deposition, Mr. Minis stated that he drove to Chapel Oaks unaccompanied. Tr. pp. 132-33.

15. On Monday, September 23, 1991, at approximately 4:30 p.m.,³ Mr. Minis arrived at the Chapel Oaks rental office. Because no employee at the office approached him, Mr. Minis introduced himself to Ms. Corrigan. He told her that he wanted to rent, "a two- to three-bedroom unit with a place for a recreation room and a garage." Tr. pp. 110-11. He explained that his lease expired in August and that he wanted to move to the complex in September. He offered her six months rent in advance and asked if there were any vacancies. Ms. Corrigan replied that there were none.⁴ He nevertheless asked to view a model unit. Ms. Corrigan showed him the rental office. He repeated his prior inquiry and Ms. Corrigan repeated her prior response. Mr. Minis took Ms. Corrigan's business card and left. Ms. Corrigan did not encourage Mr. Minis to fill out an application, furnish his name or phone number, or leave a deposit. Tr. pp. 111-13, 115.

16. That evening Mr. Minis spoke to his fiancée over the telephone. He voiced his suspicion that Ms. Corrigan's treatment was motivated by racial discrimination. The couple decided that Ms. Brown would investigate the situation herself. Tr. p. 117.

17. On Thursday morning, September 26, 1991, Ms. Brown telephoned Ms. Corrigan to make an appointment to visit Chapel Oaks.⁵ Ms. Corrigan encouraged

³Regarding the Monday visit, Mr. Minis testified at the hearing that he went to Chapel Oaks after work, "probably around 3:30, 4:00 o'clock, somewhere in that area." Tr. p. 110. However, on July 31, 1992, he provided an affidavit to the HUD investigator, that stated that he went to Chapel Oaks "at approximately 4:30 p.m." C. P. Ex. 6, at 2; Tr. p. 154. Because his affidavit was more precise in identifying the time that he arrived at the complex and because the affidavit was provided nearly two years closer in time to the alleged discriminatory incident than his hearing testimony, I find by a preponderance of the evidence that Complainant visited the office close to 4:30 p.m.

⁴Mr. Minis claims that Ms. Corrigan also stated that there would be no vacancies until the first part of the year. Ms. Corrigan testified that although she did not remember Mr. Minis' visit, "it is highly unlikely" that she would have told him that. Tr. p. 290. Rather, her standard response would have been that there were six openings a month. Tr. p. 291. I credit Ms. Corrigan's testimony. First, whereas Mr. Minis' testimony contradicted both his deposition and his statements to the HUD investigator, *see supra* notes 2-3, Ms. Corrigan's testimony was consistent and supported by the record. *See infra* pp. 13-15. Second, Ms. Brown corroborated Ms. Corrigan's testimony. Ms. Brown testified that Ms. Corrigan told her that on the average, there were six vacancies per month. Tr. pp. 52-53.

⁵Contrary to his hearing testimony, Mr. Minis told the HUD investigator on July 31, 1992, that Ms. Brown visited Chapel Oaks on September 25, 1991. *See* R. Ex. 6, at 5. According to Ms. Brown's appointment calendar and her testimony, she had not returned from her business trip until the evening of September 25th. C.P. Ex. 7, at 3; Tr. p. 48.

her to visit the complex and made an appointment for her to view an apartment. Ms. Brown arrived at Chapel Oaks for her appointment sometime between 1:00 and 3:00 p.m. that day. Ms. Corrigan offered her a guest card. Ms. Brown described the type of unit that she wanted. She also told Ms. Corrigan that she wanted to move in by mid-October or the first of November. Tr. pp. 48-51.

18. Together they drove to an occupied, furnished end unit with a deck and finished basement. While in the townhouse, Ms. Brown saw a small dog. They drove past another unit that Ms. Brown did not inspect because it was being painted and repaired. Tr. pp. 51-52, 69.

19. Ms. Corrigan was friendly and accommodating. She told Ms. Brown that, on the average, six units became available monthly. Ms. Corrigan encouraged Ms. Brown to leave a deposit to guarantee a townhouse and invited her to complete an application. Ms. Brown did neither. Tr. pp. 52-54.

20. Ms. Brown described her visit to Mr. Minis. He became incensed. That day, on Ms. Brown's insistence, Mr. Minis phoned Ms. Corrigan to inquire again about occupancies. Ms. Brown listened in on another telephone. Mr. Minis identified himself, referenced his prior visit, and asked Ms. Corrigan if anything had become available since Monday. Ms. Corrigan told him that nothing had become available. Tr. pp. 56-57, 120-21.

21. The next day, Mr. Minis filed a complaint with HUD. R. Ex. 3; C.P. Ex. 15, at 4. HUD referred the complaint to the Missouri Commission on Human Rights ("MCHR").⁶ Because MCHR was unable to locate Complainant by regular or certified mail or by telephone, at the end of December 1991, MCHR closed this case. In January of 1992, HUD also closed its file. C. P. Ex. 16.

22. In or around June 1992, Complainant requested that MCHR reactivate his case. MCHR referred him to HUD because MCHR's statutory deadline had passed. On July 7, 1992, Complainant refiled his complaint with HUD. HUD duly investigated and processed the complaint. R. Ex. 5; C. P. Ex. 15, at 4 and 17; Tr. p. 147.

⁶HUD made the referral to MCHR, an agency certified by HUD as "substantially equivalent," as defined by 42 U.S.C. § 3610(f). See C. P. Exs. 20 and 21. As part of its investigation, on October 7, 1991, MCHR conducted a test at Chapel Oaks with black and white female testers. MCHR found that the testers received equal treatment. However, the agency also noted that the "results may be skewed [because the Complainant] may have inadvertently tipped [Respondents] off." C. P. Ex. 16, at 34.

23. In late August or early September 1991, and prior to the Minis-Brown visits to Chapel Oaks, a white single mother with two children, Shelly Hensley (nee, Shelly Blair) sought housing at Chapel Oaks. Ms. Hensley's ex-husband wanted to move back into the house where she was staying. She told Ms. Corrigan that she wanted to move into Chapel Oaks "as soon as possible." Ms. Corrigan described a unit that, although presently unavailable, would soon be vacant because CODC was in the process of evicting the current tenants (the Bajwas). However, she told Ms. Hensley that the Bajwas' possessions were still in the townhouse and had to be removed before the unit could be ready for occupancy. C. P. Ex. 15, at 23; Tr. pp. 19-20, 27-28, 30, 310-15; Charging Party's Brief, proposed finding no.15.

24. Ms. Corrigan showed Ms. Hensley the rental office. Ms. Hensley filled out a guest card, but did not leave a security deposit. Ms. Corrigan ascertained that Ms. Hensley was employed but that, because she was paid monthly, she would not be able to make a security deposit until the end of the month. Ms. Corrigan told Ms. Hensley that she would contact her when the (Bajwa) townhouse became available. Tr. pp. 22-24, 27.

25. On the last day of September, Ms. Hensley had not yet brought in her deposit. Ms. Corrigan telephoned her at work to inquire whether she had forgotten to put down her deposit and to ask her when she was going to pay. Ms. Hensley told Ms. Corrigan that she had found other housing. Tr. pp. 23-24, 28, 319. The Bajwa townhouse was eventually rented on October 1, 1991, to the Millers, a white married couple, and was ready for occupancy on October 10, 1991. Tr. p. 326; C. P. Ex.12.

26. Ms. Corrigan's first rental as a leasing agent at Chapel Oaks was to a black tenant. As of September 1991, nine Chapel Oaks units were rented to black tenants. Ms. Corrigan had rented seven of these nine units. Tr. pp. 331-33. One of the tenants in the seven units, Rev. Donald Gilmore, was treated "graciously" by Ms. Corrigan. She allowed him to move in early and returned his deposit even though she had no legal obligation to do so. Tr. pp. 212-13. In addition, the HUD investigator interviewed other black tenants, none of whom alleged any discrimination based on race or color. R. Ex. 8 (X).

Discussion

Respondents' Motion to Dismiss

Respondents filed a Motion to Dismiss this case based on HUD's purported lack of jurisdiction because HUD 1) previously referred the case to a state agency; 2) once closed

the case; 3) failed to notify Respondents of the complaint within ten days from the date of filing; and 4) failed to complete its investigation and make a determination of reasonable cause within 100 days of the filing of the complaint. *See* 42 U.S.C. §§ 3610 (a)(1)(A)(i), (a)(1)(B)(ii) and (iv), (f), and (g). I deny Respondents' Motion.

Respondents argue that when HUD referred the case to MCHR, it thereby transferred jurisdiction, which it could not thereafter recapture. Respondents cite no authority for this assertion. Indeed, the Act provides that HUD may take "further action with respect to" a previously referred complaint "with the consent of [the] certified agency." 42 U.S.C. § 3610(f)(2). Accordingly, the statute envisions that, under certain circumstances, HUD may regain the authority to process a complaint after it has been transferred to a certified agency. MCHR closed this case because it was unable to locate Mr. Minis. When Mr. Minis later requested that MCHR reactivate the case, an employee of MCHR told him to "contact HUD" because the state statutory deadline had passed. Tr. p. 147; *see* Mo. Ann. Stat. § 213.075(1) (Vernon Supp. 1994). Because MCHR referred Complainant to HUD, I find that MCHR consented to HUD's handling of the complaint. Accordingly, HUD was authorized to process the complaint pursuant to 42 U.S.C. § 3610(f)(2). *See also* 24 C.F.R. § 103.110(a).

In addition, Respondents claim that unspecified "procedural rights" were violated by HUD's reactivation of the case more than six months after its initial closing. Respondents, however, have not only failed to identify those "procedural rights;" they also failed to cite any authority to support their claim that HUD may not reactivate a closed case. While the Act specifies limitations on HUD's statutory authority to process a case, no such limitation applies here. The Act's limitations on HUD's authority to process a case include 1) the consent of a state agency once HUD has referred a case to it as discussed above; and 2) a requirement that a complaint must be filed within a year of the alleged discriminatory action. 42 U.S.C. §§ 3610(a), (f). No such specific statutory limitation precludes HUD from reactivating a closed case. As discussed above, MCHR consented to HUD's reactivation. In addition, Complainant visited Chapel Oaks in September 1991, and signed his reactivated complaint in July 1992, well within the twelve-month period. Accordingly, this contention also lacks merit.

The Act requires that HUD notify Respondents within ten days of the filing of a complaint of the alleged discriminatory housing practice and of their procedural rights and obligations. 42 U.S.C. § 3610(a)(1)(B)(ii). Respondents claim that the ten-day initial notice letter to Ms. Corrigan was misaddressed, and that no additional attempt was made by HUD to notify them. The Charging Party asserts that notice was sent to CODC and was not returned. Even assuming Respondents were not timely notified, they have failed to demonstrate that they were prejudiced by this failure. *See Baumgardner v. HUD*, 960 F.2d 572, 578 (6th Cir. 1992).

Finally, Respondents claim HUD failed to meet the 100-day deadline. The Act provides that within 100 days after filing of the complaint, HUD shall complete its investigation and make its reasonable cause determination "unless it is impracticable to do so." 42 U.S.C. §§ 3610 (a)(1)(B)(iv), (a)(1)(C), and (g). When HUD is unable to meet the 100-day time limit, it must notify Respondents of any reasons for the delays. *Id.* at (a)(1)(C) and (g). Although HUD did not complete its investigation within the 100-day deadline, it did notify Respondents of the reasons for the delay. C.P. Ex. 18; Tr. pp. 170, 176. Accordingly, Respondents' Motion to Dismiss is denied. *See* 42 U.S.C. §§3610 (a)(1)(C) and (g).

Adequacy of Conciliation

Respondents allege that they were not provided adequate opportunity to conciliate this case. The Act requires that HUD "shall, to the extent feasible, engage in conciliation." 42 U.S.C. § 3610 (b). Both the HUD investigator and an Equal Opportunity Specialist attempted conciliation at various times up until February of 1994. Tr. pp. 169, 370-72. The Equal Opportunity Specialist contacted and spoke with all of the parties, except for Ross Barber, who was unavailable on two or three different occasions. Tr. pp. 370-72. Respondents failed to demonstrate that HUD's conciliation attempts were inadequate, and therefore failed to prove that they had been prejudiced.

Governing Legal Framework

The Charging Party alleges that Respondents discriminated against Complainant because of his race and color in violation of 42 U.S.C. §§ 3604 (a), (b), and (d). These sections of the Act make it unlawful:

- (a) To refuse to . . . rent . . . or to refuse to negotiate for the . . . rental of . . . a dwelling to any person because of race [or] color.
- (b) To discriminate against any person in the terms, conditions, or privileges of . . . rental of a dwelling . . . because of race [or] color.
- (d) To represent to any person because of race [or] color . . . that any dwelling is not available for inspection . . . or rental when such dwelling is in fact so available.

The Charging Party has the burden of proving, by a preponderance of the evidence, that Respondents discriminated against Complainant. The Charging Party may prove discrimination either by direct or indirect evidence.

Absent direct evidence, the Charging Party may prove racial animus by indirect evidence of discriminatory intent by establishing a *prima facie* case. See *HUD v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990); *Pinchback v. Armistead Homes, Corp.*, 907 F.2d 1447, 1451 (4th Cir.), *cert. denied*, 498 U.S. 983 (1990). The elements of a *prima facie* case are "not fixed," rather, they depend on the circumstances of each case. *Pinchback*, 689 F. Supp. 541, 549 (D. Md. 1988), *aff'd* 907 F.2d 1447; see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.13 (1973). Once HUD has established a *prima facie* case, the burden of production shifts to Respondents to articulate a nondiscriminatory reason for their actions. The Charging Party then may prove that the asserted legitimate reasons are pretextual. See *McDonnell Douglas Corp.*, 411 U.S. 792; see also *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). However, pretext alone does not necessarily prove discrimination. The Charging Party still maintains the burden to demonstrate that an asserted reason, even though pretextual, evidences an intent to discriminate. See *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742; 125 L.Ed. 2d 407 (1993).

Because there is no direct evidence of discrimination,⁷ the Charging Party must rely on indirect evidence to carry its burden. Accordingly, it must first prove a *prima facie* case of discrimination. It has failed to do so.

Purported Violations of Sections 3604(a) and (d)

Under the circumstances of this case, to prove a *prima facie* case under 42 U.S.C. §§ 3604(a) and (d), the Charging Party must establish the following: (1) Complainant is a member of a protected class; (2) he was qualified for and attempted to rent housing; (3) despite the availability of housing, Respondents rejected Complainant; and (4) housing was thereafter available. See, e.g., *Blackwell*, 908 F.2d at 870; *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1979).

The Charging Party has established the first two elements. Mr. Minis is black.

⁷Direct evidence establishes a proposition directly rather than inferentially. Examples of direct evidence are found in *Pinchback*, 907 F.2d at 1452 (Applicant was told that blacks were not allowed in the housing development.) and *Cato v. Jilek*, 779 F. Supp. 937 (N.D. Ill. 1991) (Apartment owner stated that he "would like to kill [a white woman] for bringing a black man" to his property.). Although the Charging Party alleges direct evidence of discrimination, it mischaracterizes indirect evidence as direct evidence. The Charging Party states that direct evidence is present because Ms. Corrigan offered Ms. Brown a townhouse only hours after informing Mr. Minis that there were no vacancies. See Charging Party's Post-Hearing Brief at 24. However, before determining that Ms. Corrigan's treatment of Mr. Minis was because of his race or color, inferences must be made from the predicate facts.

Accordingly, he is a member of two protected classes (race and color) under the Act. *See* 42 U.S.C. § 3604. The evidence also demonstrates that he attempted to rent a townhouse at Chapel Oaks and was qualified. The Charging Party, however, is unable to prove the third and fourth requirements. It is clear from Mr. Minis' testimony that he told

Ms. Corrigan that he wanted a lease beginning at the end of September, or at the latest by October 1st. He gave no indication that he would consider a mid- to late-October or a November occupancy date.⁸ Thus, in order to establish a *prima facie* case, the Charging Party must prove that there were available units by October 1, 1991, at the latest.

Based on an examination of the rent rolls and the tenant files, there were four vacancies between September 23, 1991, the date of Mr. Minis' visit and October 1, 1991, his latest desired move-in date. *See* C. P. Ex. 10. These units are located at the following addresses and were rented by the following tenants as of September 23rd:

1. 623 N.E. Newport Drive Darrell Quiring
2. 544 N.E. Malibu Drive Robert Lyon
3. 521 N.E. Newport Drive Thomas Miller
4. 548 N.E. Malibu Drive Jessie Bajwa

C. P. Ex. 10; R. Ex. 10 (Sept. roll). A preponderance of the evidence establishes that none of these units was available for rent at the time of Mr. Minis' visit or telephone call.

1. Units One through Three

The tenants in units 1 and 2 (Messrs. Quiring and Lyon) sent Ms. Corrigan 30-day notices dated August 27th and 30th, respectively. C. P. Exs. 10, 13A, 13C. Thus, these apartments would have been vacant by September 28th and October 1st, absent CODC's prior commitments to new tenants. New prospective tenants had already filled out credit applications, put down deposits, and had had credit checks weeks before Mr. Minis' visit. The tenants for unit 1 filled out a credit application and put down a deposit on September

⁸Mr. Minis' direct testimony was as follows:

Q: Did you specify anything at that point [to Ms. Corrigan] about when you were interested in moving?

A: I said my lease [was] up in August, and that I was looking for a place to stay.

Q: But did you specify any particular period when you were intending to move?

A: September.

Tr. p. 111.

4, 1991. Their credit check was complete by September 7, 1991. C. P. Exs. 10 and 13B; R. Ex. 20. The tenant for unit 2 filled out an application and put down a deposit on September 13, 1991. Her credit check was complete as of September 13th. C. P. Exs. 10 and 13D. Accordingly, these units were unavailable at the time of Mr. Minis' visit.

The tenant in unit 3, Mr. Miller, had sent a 30-day notice dated August 31, 1991. Thus, this apartment would have been vacant by October 1, 1991, absent a prior commitment. As was the case with units 1 and 2, the subsequent tenant for unit 3 had been approved prior to Mr. Minis' visit. CODC had called CSC on September 6, 1991, to check his credit. C. P. Exs. 13E and 13F; R. Ex. 20. Although the prospective tenant's credit application is undated, it had to have been prior to September 6th, the date that Chapel Oaks contacted the credit bureau about the tenant. C. P. Ex. 13F; R. Ex. 20; *see supra* finding 9. Moreover, the undated application also shows that a deposit had been made. C. P. Ex. 13F. Accordingly, this unit was also unavailable on the date of Ms. Minis' visit.

2. 548 N.E. Malibu Drive

The HUD investigator concluded that the fourth unit was the *only unit* that "could possibly have been available at the time that complainant inquired about renting a unit." C. P. Ex. 15, p. 22; *see also* Tr. pp. 307-08; R. Ex. 8(M). However, a preponderance of evidence establishes that Ms. Corrigan had reserved this unit for Ms. Hensley prior to Mr. Minis' visit to Chapel Oaks, and accordingly, it was not available.

In August of 1991, 548 Malibu, a small three-bedroom townhouse without a deck or basement, was rented by a married couple, the Bajwas, whose lease ended on January 31, 1992. Tr. pp. 228, 311; R. Ex. 14; C. P. Ex. 11. Because the Bajwas' March and August rent checks were returned for insufficient funds, Ms. Corrigan sent them a notice to vacate dated August 23, 1991. When Ms. Corrigan was unable to contact the Bajwas by telephone, she went to their apartment and found numerous overdue notices posted on their door. Ms. Corrigan also left an overdue rent notice on the door. C. P. Ex. 11; Tr. pp. 311-14.

The Bajwas had left the country and could not be contacted. CODC wanted to evict the Bajwas and rent the apartment to another tenant. However, Ms. Corrigan was unable to rent the apartment until the Bajwas' possessions were out of the unit. Therefore, when Ms. Hensley arrived at Chapel Oaks around the end of August 1991, Ms. Corrigan informed her about the unit and told her that, although she did not know when it would be available, it would be vacant soon, because Chapel Oaks was in the process of evicting the current tenants. Tr. pp. 20-22, 181-84, 314-16; C. P. Ex. 11.

After the Hensley-Corrigan conversation, Ms. Bajwa called Ms. Corrigan from Canada telling her that relatives would remove the Bajwas' possessions. Ms. Corrigan told Ms. Bajwa to have their possessions removed by the 1st of October. R. Ex. 8(ZZ); Tr. pp. 314-15. Ms. Corrigan called Ms. Hensley to let her know that "there was some activity going on and that [she] anticipated that [the unit would be vacant] at the end of September." Tr. p. 315. Ms. Hensley did not get paid until the end of the month. She was therefore, unable to make a deposit until the end of September. Ms. Corrigan agreed to allow Ms. Hensley to put down a deposit at that time. They also agreed that Ms. Hensley would sign the lease at the time she made the deposit and paid her first month's rent. Tr. pp. 314-16.

The Bajwas' relatives removed their possessions sometime in September. After the townhouse was empty, Ms. Corrigan observed a hole in the wall, a black streak on the carpet, and insect infestation requiring fumigation.⁹ She could not rent the apartment until these problems were corrected. Tr. pp. 307, 310-14, 317; C. P. Ex. 11.

September 30th arrived and Ms. Hensley had not yet brought in her deposit. Ms. Corrigan telephoned her at work to remind her to put down her deposit, sign her lease, and make her first month's rent. Ms. Hensley told Ms. Corrigan that she had located other housing. Tr. pp. 23-24, 28, 314-16, 319.

The Charging Party contends that 548 Malibu was available at the time of Complainant's visit. It argues that Ms. Corrigan did not reserve the unit for Ms. Hensley because (1) Ms. Corrigan's explanation as to why she held the apartment without requiring a deposit was a fabrication, and (2) it was unlikely that Ms. Corrigan would have entered into an arrangement, contrary to CODC "policy." I disagree.

⁹The record indicates that the carpet in the Bajwa apartment was cleaned September 26, 1991. The new tenants did not move in until October 14th. C.P. Ex. 12, at 3; R. Ex. 21, at 3.

I credit Ms. Corrigan's testimony because Ms. Hensley's recollection is uncertain, her testimony is contradictory, and she admits that she and Ms. Corrigan not only discussed her finances, but that she provided sufficient information for a credit check. Ms. Hensley testified that she didn't "remember anything. . . specific about the discussion" that she had with Ms. Corrigan when she visited. Tr. p. 22. She couldn't recall if the Bajwa unit had two or three bedrooms. Tr. pp. 21. She could not even recall her interview with the HUD investigator. Tr. pp. 25-26. Ms. Hensley's testimony was also contradictory. She originally testified that she visited Chapel Oaks "toward the end of September," but later indicated that it was, in fact, weeks earlier. Tr. pp. 19, 28. When Ms. Hensley was asked if Ms. Corrigan discussed the amount of rent, she initially responded, "No. I don't have any idea." Then she immediately corrected herself stating, "I am sure she did tell me." Tr. p. 21. She originally testified that Ms. Corrigan was given to understand that she would keep looking for other housing, but later admitted that she asked Ms. Corrigan to hold an apartment for her. Tr. pp. 23, 28.¹⁰ Finally,

Ms. Hensley provided Ms. Corrigan with enough information about her financial circumstances to perform a credit check. Tr. pp. 23, 27. Because it is unlikely that Ms. Hensley would have provided this information unless she intended to rent a unit, I infer that the initial conversation had progressed to the point where Ms. Corrigan reasonably believed that a mutual oral commitment had been made.

In addition, Ms. Corrigan's testimony is both internally consistent and corroborated by the rent roll entries. These entries establish that Ms. Corrigan reserved 548 Malibu for Ms. Hensley. Ms. Corrigan typed up the rent rolls each month, at the last day of each month or the first day of the following month. She penciled in names of future tenants and typed in those new tenants' names in the next month's roll. On the September rent roll, Ms. Hensley's name was penciled in (as "Shelly Blair," her birth name) over "Jessie Bajwa." Her name was typed in as a tenant on the October rent roll. R. Ex. 10 (Sept. and Oct. rolls). Accordingly, I credit Ms. Corrigan's testimony that she had an understanding that Ms. Hensley would rent the Bajwa apartment at such time as it became available.

Ms. Hensley did not put down a deposit¹¹ and, indeed, it is normal CODC practice

¹⁰Her testimony wherein she spoke of the arrangement is as follows:

Q: Did you specifically ask Ann Corrigan to hold a unit for you that day you went to visit?

A: I do remember letting her know that I was desperate and very interested if a two-bedroom came available. Yes.

Tr. pp. 28-29 (emphasis added).

¹¹Ms. Hensley denies filling out a credit application. I credit Ms. Corrigan's testimony that she did. For the reasons discussed above, Ms. Hensley's memory concerning her Chapel Oaks' visit is unreliable, and I am persuaded that because Ms. Hensley provided sufficient

to obtain a deposit before a unit is reserved. However, I credit Ms. Corrigan's testimony that she had some discretion concerning this policy, and that on at least two other occasions, she exercised this discretion by reserving units for applicants without a deposit because she thought it a certainty that they were going to rent a unit. Tr. pp. 316, 322-23. Her testimony was corroborated by Michelle Giacomo, the current Chapel Oak's manager. Ms. Giacomo testified that occasionally a leasing agent may verbally commit to an applicant that a unit will be held for a short period of time until the applicant is able to leave a deposit. In these instances, the unit will not be reserved for anyone else until the allotted time has lapsed. Tr. p. 253.

Because at the time of Mr. Minis' visit, Ms. Corrigan was unaware that Ms. Hensley had obtained another dwelling, she reasonably believed that she would violate her arrangement with Ms. Hensley if she rented to any subsequent applicant, including Mr. Minis.

3. Availability of Units Discussed with Ms. Brown

The Charging Party claims that even if 548 Malibu were not available,

information to perform a credit check that this information would have been provided on a credit application. Finally, Ms. Corrigan specifically recalled that Ms. Hensley's income was "close" for qualifying for a rental, but that she "felt like she was a good possibility, because she had a stable job, and her credit was good." Tr. p. 321. This is the type of information typically provided in a credit application.

Ms. Brown's testimony proves that two other units were available. However, I do not credit Ms. Brown's testimony on this point.¹²

Ms. Brown testified that Ms. Corrigan showed her a unit and told her that it would be available soon. She further stated that while driving to the one unit that they inspected, they passed another available unit, but that Ms. Corrigan told her that she could not view it because it was being painted and repaired. Finally, Ms. Brown testified that when she telephoned Ms. Corrigan, she informed her that there was an available townhouse. Tr. pp. 50, 51-53, 73, 76.

A preponderance of evidence demonstrates that the unit that Ms. Brown inspected was 601 N.E. Newport Drive ("601 Newport"), and that this unit was unavailable. Indeed, it was rented by Mr. Barber's daughter, Connie Barber, who still resided at Chapel Oaks at the time of the hearing. Tr. p. 309; R. Ex. 10 (Aug.-Oct. rolls). Ms. Brown described the unit she viewed as an occupied end unit with a deck and a finished basement. She also observed a dog. Tr. pp. 52, 68-70. Ms. Corrigan testified that Ms. Barber would often let leasing agents show her townhouse, provided that they had given her enough notice. Ms. Corrigan testified that because there were no available units at the time of Ms. Brown's visit, she must have called Ms. Barber the day that she spoke with Ms. Brown to get her permission to show her apartment. Tr. pp. 306-07, 350. Ms. Barber had a dog. Tr. 306. Uncontradicted evidence in the form of a map,¹³ a computer-generated description of each unit as explained by Ms. Giacomo, and the rent rolls, establishes that Ms. Barber lived at 601 Newport, an end unit with a finished basement and a deck. R. Exs. 10 (Aug.-Oct. rolls), 14, and 15; Tr. pp. 227-28.¹⁴ Ms. Barber's apartment perfectly matches Ms. Brown's description. Therefore, I

¹²I also note that Ms. Brown's testimony contradicted her statement to the HUD investigator. She testified that she called Chapel Oaks prior to her visit. In her September 10, 1992, interview with the investigator she stated that she did not telephone Chapel Oaks first. See Tr. p. 49; R. Ex. 7, at 2; C. P. Ex. 15, at 15.

¹³The Charging Party questions the accuracy of Respondents' map based on two flaws: 1) that the map indicates a finished basement in one unit while other evidence shows that the basement was not finished until 1992, and 2) that it shows all end units have three bedrooms while another document indicates that one end unit has only two bedrooms. Charging Party's Brief, pp. 35-36. Despite these minor discrepancies, the Charging Party failed to demonstrate that the map was inaccurate in any way material to this case.

¹⁴The Bajwa unit does not match the description provided by Ms. Brown because 548 Malibu has neither a deck nor a basement. See R. Exs. 14 and 15; Tr. p. 228.

conclude that the apartment shown to Ms. Brown was not available and that Ms. Corrigan did not inform her that the unit was available.

Ms. Corrigan identified the other unit that Ms. Brown claims she described as available for rent, but not inspection, as 638 N.E. Newport Drive ("638 Newport"). Based on Ms. Corrigan's uncontradicted testimony, as well as the record evidence which corroborates her testimony, I find that the unit that Ms. Corrigan discussed with Ms. Brown was, in fact, 638 Newport, and that 638 Newport was unavailable at the time of Ms. Brown's or Mr. Minis' visit. Ms. Corrigan identified 638 Newport as the unit under repair, that she discussed with Ms. Brown. She remembered that it was being painted and that contractors were installing new carpeting and vinyl, all in preparation for a new tenant. Ms. Corrigan also testified that this unit had already been rented. Tr. pp. 308-09. According to the map of the complex, Ms. Corrigan and Ms. Brown would have driven by 638 Newport on the way to 601 Newport. R. Ex. 14. The record also corroborates her testimony that it had already been rented. R. Exs. 10 and 11. In fact, this unit was not even one of those four units discussed above, *see supra*, pp. 9-10.¹⁵ Accordingly, I find that Ms. Corrigan did not inform Ms. Brown that this unit was available. The Charging Party failed to prove a *prima facie* case because it did not prove that there was an available unit for rent at the time of Complainant's visit and telephone call.

Purported Violations of Section 3604(b)

1. Ms. Corrigan's Failure to Require a Deposit from Ms. Hensley

Section 3604(b) of 42 U.S.C. makes it unlawful to discriminate in the "terms" and "conditions" of rental. The Charging Party has established, *prima facie*, a violation of this section by proving that Ms. Corrigan did not require a deposit from Ms. Hensley, a white woman. Thus, the record establishes that 1) Mr. Minis is black; 2) he offered to make a deposit and was otherwise qualified to rent an apartment; 3) his offer was rejected; and 4) that a nonblack was not required to make a deposit.

However, Respondents have articulated nondiscriminatory reasons for not requiring a deposit from Ms. Hensley, and therefore, for refusing to negotiate for the unit with Mr. Minis. The record demonstrates that 1) Ms. Hensley's flexibility made her a good match for the Bajwa apartment; 2) Ms. Corrigan sympathized with Ms. Hensley's personal and financial circumstances; and 3) Ms. Corrigan reasonably believed that

¹⁵The unit being repaired could not have been the Bajwa apartment, 548 Malibu, because the record reflects that Ms. Corrigan and Ms. Brown would not have passed the Bawja unit in their drive from the office to Ms. Barber's townhouse. R. Ex. 14.

Ms. Hensley would return to make her deposit. The Charging Party has failed to establish that these articulated reasons are pretextual.

Ms. Corrigan viewed Ms. Hensley as having an attribute that Mr. Minis did not -- flexibility. Although Ms. Hensley wanted to move into Chapel Oaks "as soon as possible," Ms. Corrigan viewed her as having some flexibility concerning her moving date. The availability date of 548 Malibu was tentative because, although Ms. Corrigan had requested that Ms. Bajwa remove her possessions by October 1st, Ms. Bajwa did not specify when her relatives would move them out of the unit. Further, there was a lot of work that needed to be done on the unit before it was ready for occupancy. The carpet had a black streak, one of the walls had a hole about a foot wide in diameter, and the apartment needed to be fumigated because rotting food resulted in bugs throughout the unit. Tr. pp. 314, 317; R. Ex. 21. Accordingly, I credit Ms. Corrigan's testimony that she considered Ms. Hensley to be "just perfect" for 548 Malibu. Respondent testified, "I did not know exactly when we would have [548 Malibu] ready for [Ms. Hensley], and I believe she told me that would not be a problem. . . it was not. . . that her lease was going to be up and she had to be out at exactly the last day of the month." Tr. pp. 320-21.

Ms. Hensley's perceived flexibility concerning a moving date is in contrast to Mr. Minis' situation as he subsequently¹⁶ conveyed it to Ms. Corrigan. He testified that he told Ms. Corrigan that his lease expired in August and that he wanted to move in September. Thus, even if Respondent hadn't reserved 548 Malibu for Ms. Hensley, she would not have considered Mr. Minis as a prospective applicant for that unit.

The record establishes that Ms. Hensley was a single parent with two children, in "desperate" need of housing. Her ex-husband wanted to move back into the house where she was staying and she needed to move out as soon as possible. However, she was unable to make a deposit until the end of the month when she was paid. Because she sympathized with her plight, Ms. Corrigan held the apartment for Ms. Hensley without requiring an immediate deposit. Finally, as discussed above, Ms. Corrigan considered Ms. Hensley's tenancy to be a certainty. *See supra* pp. 11-14.

2. Respondent's Willingness to Rent to Ms. Brown

By Respondents' willingness to rent to Ms. Brown, but not to Mr. Minis, the Charging Party has established a *prima facie* case of discrimination. The record

¹⁶The Charging Party's argument would be more compelling, if Mr. Minis' visit had *preceeded* Ms. Hensley's. There is no indication that Ms. Corrigan would have rented the Bajwa apartment to any applicant arriving after Ms. Hensley's visit, no matter what race or color.

establishes that 1) Mr. Minis is black; 2) he attempted and was qualified to rent a unit at Chapel Oaks; 3) he was not encouraged to apply; and 4) Ms. Brown, a nonblack, was encouraged to apply for a unit. Respondents have again articulated nondiscriminatory, nonpretextual reasons for their treatment of Mr. Minis.

Mr. Minis' lack of flexibility, as well as the circumstances surrounding his visit, explain why he was treated differently than Ms. Brown. He arrived at the rental office unannounced on September 23, 1991, around 4:30 p.m., one-half hour before the office closed. He informed Ms. Corrigan that his lease expired in August and he wanted to move in September. Not only did he request a move-in date of September 30th (a mere seven days from the date of his visit), but he had informed her of a specific type of unit that he wanted. He was shown only the model unit, and Ms. Corrigan was not encouraging.

Three days later, Ms. Brown called Ms. Corrigan to make an appointment to visit the complex. The appointment was for sometime between 1:00 and 3:00 p.m. Ms. Brown informed Respondent that she wanted to move in by mid-October or the first of November. Ms. Corrigan was obliging to Ms. Brown; she showed her an apartment other than the office/model unit.

Whereas Complainant told Ms. Corrigan that he wanted to move in by September 30th (or perhaps October 1st, at the latest), Ms. Brown expressed a preference for a mid-October or November 1st moving date, an entirely different request, given the unavailability of Chapel Oaks' units in September. *See supra* pp. 10-16; *see also supra* finding 6. Mr. Minis arrived unannounced near closing time. Agents are instructed not to show apartments toward the end of the day. In contrast, Ms. Brown had called ahead for an early afternoon appointment. Therefore, Ms. Corrigan was able to contact Ms. Barber to ask if she could show her apartment - something she could not do for Mr. Minis.¹⁷ Thus, the circumstances surrounding their visits, as well as how they described their housing situations to Ms. Corrigan, explain the differing treatment received by Mr. Minis as compared to Ms. Brown. Because the visits of Ms. Brown and Mr. Minis were dissimilar, Ms. Corrigan's differing treatment of Ms. Brown and Mr. Minis fails to demonstrate discrimination against him based on his race or color.¹⁸

¹⁷Not only are the agents instructed not to show apartments at the end of the work day, but in addition, Ms. Corrigan would not have been able to telephone Ms. Barber to seek her permission to show her apartment to Complainant late in the day because after 3:30 p.m., Ms. Barber picked up her children at school. Tr. p. 350.

¹⁸Although I conclude that there was no discrimination against him, I credit Mr. Minis' testimony that he honestly believed that had been discriminated against. I concur with Ms. Corrigan's statement that this situation was "just simply a misunderstanding." Tr. p. 338

Conclusion and Order

The Charging Party has failed to prove by a preponderance of the evidence that Respondents engaged in discriminatory housing practices in violation of the Fair Housing Act. Accordingly, it is

ORDERED, that the charge of discrimination is *dismissed*.

This **ORDER** is entered pursuant to 42 U.S.C. § 3612(g)(3) of the Fair Housing Act and the regulations codified at 24 C.F.R. § 104.910, and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary within that time.

WILLIAM C. CREGAR
Administrative Law Judge

Dated: October 24, 1994.

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION AND ORDER issued by WILLIAM C. CREGAR, Administrative Law Judge, in HUDALJ 07-92-0591-1, were sent to the following parties on this 24th day of October, 1994, in the manner indicated:

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