UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

The Secretary, United States Department of Housing and Urban Development, Charging Party, on behalf of: SHANNON SPOEHR, and her minor children, Complainants, v. CHUCK HIETPAS, and LYNN HIETPAS, Respondents.	18-JM-0251-FH-020 September 3, 2019

Appearances

For Complainants: Ayelet R. Weiss and M. Casey Weissman-Vermeulen, Attorneys, United States Department of Housing and Urban Development, Washington, District of Columbia

For Respondents: Chuck Hietpas, *pro se*

INITIAL DECISION AND ORDER

BEFORE: J. Jeremiah **MAHONEY**, Chief Administrative Law Judge

On September 27, 2018, the Secretary for the United States Department of Housing Urban Development ("HUD" or "Charging Party") filed a *Charge of Discrimination* against Chuck Hietpas and Lynn Hietpas (collectively, "Respondents") on behalf of Shannon Spoehr and her children (collectively "Complainants"). The *Charge of Discrimination* alleged Respondents impermissibly discriminated against Complainants in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601 *et seq.* ("the FHA").

Specifically, the *Charge of Discrimination* alleges Respondents refused to negotiate the rental of a dwelling and stated they would not rent to Complainants based on their familial status, in violation of 42 U.S.C. § 3604(a) and (c) and the FHA's implementing regulations at 24 C.F.R. Part 100.

The Court conducted a hearing in Green Bay, Wisconsin from April 16-17, 2019. The parties submitted documentary evidence and presented the testimony of Complainant Shannon

Spoehr; Jerome Van Epps, a fair housing investigator for HUD; Jon Uldenburg, a building inspector in Kaukauna, Wisconsin; Scott Susin, an economist for HUD; and Respondent Chuck Hietpas.

Following receipt of the hearing transcript, the Court issued a *Post-Hearing Order* on May 3, 2019, requiring the submission of post-hearing briefs and response briefs by May 24, 2019 and June 7, 2019, respectively. This matter is ripe for decision.

FINDING OF FACTS

1. Respondents are the owners of a three-bedroom, three-bathroom unit ("Subject Property") that is part of a duplex located in Kaukauna, Wisconsin.

2. In June of 2015, Respondents were in the process of purchasing the Subject Property from the previous owner.

3. The main level of the Subject Property, measuring 1,175 square feet, is comprised of three bedrooms, a living room, dining room, kitchen, and two bathrooms.

4. The bedrooms are 134.50 square feet, 146.41 square feet, and 147.16 square feet respectively.

5. The living room is comprised of the rectangular, carpeted area that is defined by extending the wall between the living room and "bedroom one" across the hallway accessing the three bedrooms, and by extending the partition between the dining room and the living room to the wall of the bathroom.

6. To exit the Subject Property or access the kitchen and dining areas, occupants in each of the three bedrooms must proceed through the living room.

7. The basement measures 1,000 square feet but does not meet necessary ventilation requirements to qualify as a sleeping room.

8. At the time Respondents purchased the Subject Property, it was their intent to move into it within one or two years. In the interim, they considered renting the Subject Property to a tenant.

9. While the sale of the Subject Property to Respondents was pending, the sellers permitted Respondents to negotiate rental agreements with prospective tenants.

10. Mr. Hietpas is a landlord with more than 20 years of experience. He owns five rental properties with neither reported complaints nor HUD violations.

11. Based on Mr. Hietpas's general knowledge of local housing codes, Respondents typically enforced a policy permitting two occupants per bedroom. Thus, they would typically limit the three-bedroom Subject Property to no more than six occupants.

12. In June 2015, Shannon Spoehr ("Complainant") was looking for alternative housing for herself and her two minor children to reside with Joshua Spoehr, who at the time was her fiancé.

13. Mr. Spoehr has shared custody of three minor children from a prior marriage. This arrangement resulted in his children residing with him every other week and was anticipated to continue after Complainant and Mr. Spoehr moved into a new home.

14. Complainant is an experienced landlord herself. She has owned and managed the rental of the home she is currently living in for thirteen years.

15. On June 16, 2015, Complainant noticed a sign advertising a property for rent. Complainant contacted the phone number on the sign via text message to inquire about the property and reached Mr. Hietpas.

16. Mr. Hietpas informed Complainant that someone signed a lease on that property earlier that day. After Complainant asked if Mr. Hietpas knew of other available properties, Mr. Hietpas told Complainant the Subject Property would soon be available.

17. Mr. Hietpas described the Subject Property as a three-bedroom, three-bathroom "executive type" unit with a garage and a finished basement. Mr. Hietpas sent Complainant pictures of the property via text message. The parties scheduled a tour for the following evening.

18. Complainant arrived for the tour with Mr. Spoehr and two children while Mr. Hietpas was finalizing a lease at the neighboring property.

19. The previous owners of the Subject Property were still residing there at the time and allowed Complainant, Mr. Spoehr, and the two children to look around while they waited for Mr. Hietpas.

20. By the time Mr. Hietpas arrived, Complainant had already toured the majority of the property.

21. Mr. Hietpas showed Mr. Spoehr the garage and gave Complainant and Mr. Spoehr each a rental application.

22. The next day, Complainant delivered the completed rental applications to Mr. Hietpas's mailbox along with a $100 check for the application fee.

23. Mr. Spoehr's application stated that he worked at Kish Vaper Lounge, and listed his three children with the words "50% placement" next to their names to explain that they would live in the home every other week.

24. Complainant listed her two children on her application, writing "100% placement" next to their names to explain that her children would live in the home at all times.

25. On the rental application, Complainant purposely misrepresented that she did not own a pet, despite the fact that she did have a pet.

26. Respondent reviewed the application and noticed that Mr. Spoehr worked at a vape shop. Mr. Spoehr's place of employment immediately raised a concern in Mr. Hietpas's mind regarding the potentiality of Mr. Spoehr smoking in the Subject Property. This deeply concerned Mr. Hietpas. He and his wife planned on moving into that unit in the near future and Mrs. Hietpas is allergic to smoke.

27. On their rental applications, Complainant and Mr. Spoehr listed a total of seven occupants that would reside at the Subject Property at any given time. This gave Mr. Hietpas pause, because that number of occupants exceeded his general policy of allowing two residents per bedroom.

28. On June 22, 2015, Respondent called Complainant to express his concerns.

29. Mr. Hietpas asked Complainant if Mr. Spoehr smoked. Complainant responded that Mr. Spoehr did not smoke, but he did vape. Mr. Hietpas explained that smoking and vaping were not permitted at this property, due to his wife's allergy.

30. Mr. Hietpas also told Complainant he was concerned that the number of occupants on the application exceeded the limit for this property. Complainant countered that the bedrooms were sizeable enough to fit more than two occupants and the basement could be used as a sleeping area.

31. Complainant clarified that Mr. Spoehr's three children would only live in the home part of the time, as Mr. Spoehr shared custody of them with his former wife.

32. Mr. Hietpas was not persuaded that this satisfied his occupancy concerns and maintained that he did not feel the property was large enough for seven people.

33. At the end of the conversation, Complainant asked Respondent to reconsider his denial.

34. Mr. Hietpas agreed to consult his wife regarding Mr. Spoehr's vaping and to further consult the local occupancy standards.

35. Immediately after this conversation, Respondent researched vaping. Following his inquiry, Mr. Hietpas was still not satisfied and determined that Respondents would not allow smoking or vaping at the subject property, as Respondents were planning to live there soon.

36. Mr. Hietpas also researched the Kaukauna Municipal Code and HUD's guidance on

occupancy limits set forth in the Keating Memo.[1] Mr. Hietpas felt that both resources confirmed his understanding that the subject property could only hold six occupants.

37. Complainant contacted Mr. Hietpas on June 28, 2015, via text message to inquire about the status of the rental applications.

38. Mr. Hietpas answered, "I thought about it quite a bit, but I still think it would be best if you found a 4br there was one that looked pretty good on Craig's list you should check that one out. I am sorry as you seem like nice people but we just wouldn't feel comfortable."

39. Complainant replied that she did not want a four-bedroom unit and that it was illegal to discriminate.

40. Mr. Hietpas answered that according to his research, he was not discriminating in any way, as the recommended occupancy limit for the subject property is two persons per bedroom.

41. Complainant responded with a series of unanswered text messages informing Mr. Hietpas that she and Mr. Spoehr "will be in contact with our lawyer tomorrow, and this could get costly for you." She then wrote that Mr. Spoehr wanted to add that they "see the for rent sign in front of the property, he will be talking with our lawyer tomorrow, and if the lawyer believes we have a case then you can expect to pay for our legal fees on top of whatever the state awards. Hell of a way to establish a relationship with your landlord."

42. Complainant also informed Mr. Hietpas that she had recorded their conversations. This was a lie.

43. Mr. Hietpas returned Complainant's application fee with a handwritten note confirming his rejection.

44. Ultimately, Respondents did not rent the Subject Property to any prospective tenants.

45. As originally planned, Respondents moved into the Subject Property on June 1, 2016, and continue to reside there.

46. Sometime after the alleged discrimination, Complainant and Mr. Spoehr were married. They are now separated and living apart.[2]

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[1] On December 2, 1998, the HUD Office of General Counsel published a memorandum that had been issued to all regional counsel ("Keating Memo") on March 22, 1991. The purpose of the Keating Memo was to "assure [sic] that the Department's position in the area of occupancy policies is fully understood" and to "articulate more fully the Department's position on reasonable occupancy policies." Fair Housing Enforcement Policy: Occupancy Cases, Fed. Reg. 70983 (Dec. 2, 1998).

[2] At one time, Mr. Spoehr and his three minor children were parties in this matter as Complainants. However, prior to the hearing, Mr. Spoehr formally withdrew as a party on April 2, 2019, leaving Ms. Spoehr and her minor children as the only Complainants.

APPLICABLE LAW

The Fair Housing Act. The Fair Housing Act ("FHA"), enacted as Title VIII of the Civil Rights Act of 1968, purports to eliminate "artificial, arbitrary, and unnecessary barriers" for protected classes facing invidious discrimination, particularly in access to dwellings. HUD v. Ro, 1995 HUD ALJ LEXIS 46, *10 (HUDALJ June 2, 1995) (quoting United States v. Parma, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), rev'd on other grounds, 661 F.2d 562 (6th Cir.), cert. denied, 465 U.S. 926 (1982)). The FHA originally prohibited discrimination in the sale, rental, and financing of housing based on race, color, religion, or national origin. Pub. L. No. 90-284, §§ 801-819, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. §§ 3601-3631). Congress added protections against discrimination based on familial status and disability through amendments to the FHA in 1988. Pub. L. No. 100-430, 102 Stat. 1619 (1988).

The statute defines "familial status" as "one or more individuals (who have not attained the age of 18 years) being domiciled with" a parent, legal custodian, or designee of such parent or legal custodian. 42 U.S.C. § 3602(k). The FHA prohibits, in relevant part:

> (a) To refuse to... rent after the making of a bona fide offer, or to refuse to negotiate for the...rental of, or otherwise make unavailable or deny, a dwelling to any person because of...familial status...
>
> * * *
>
> (b) To make...any...statement...with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on...familial status...or an intention to make any such preference, limitation, or discrimination.

42 U.S.C. §§ 3604(a), (c); see also 24 C.F.R. §§ 100.50, 100.60, 100.75.

An FHA claim manifests as either disparate impact or disparate treatment. Batista v. Cooperativa de Vivienda Jardines, 776 F.3d 38, 43 (1st Cir. 2010) (citing Astralis Condo. Ass'n v. HUD, 620 F.3d 62, 66 (1st Cir. 2010)); see Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507 (2015) (explaining that a disparate impact case involves a practice that disproportionately affects a protected class and is otherwise unjustified by a legitimate rationale, while a disparate treatment case involves discriminatory intent or motive).

Here, the Charging Party pursues a claim under both theories, alleging that Respondents violated the prohibitions of the FHA by (1) making discriminatory statements in the rental of a property; and (2) refusing to negotiate the rental of a property because of a protected status. 42 U.S.C. § 3604(c), (a).

Discriminatory Statements. Pursuant to Section 3604(c) of the FHA, landlords may not make, print, or publish, (or cause to be made, printed, or published), any notice, statement, or advertisement with respect to the rental of a dwelling that indicates any preference, limitation, or discrimination based on protected status or an intention to make any such preference, limitation, or discrimination. 42 U.S.C. § 3604(c). Any written or oral notice or statement by a person engaged in the rental of a dwelling that indicates a preference, limitation, or discrimination because of familial status violates section 3604(c). See 24 C.F.R. § 100.75(b). This includes

using words or phrases that convey the dwelling is not available to a particular group because of familial status or expressing a preference against or limitation on a tenant because of familial status. Id. at § 100.75(c).

The Charging Party bears the burden of establishing a section 3604(c) violation by providing evidence of the following elements: (1) Respondent made a statement; (2) the statement was made with respect to the rental of a dwelling; and (3) the statement indicated a preference, limitation, or discrimination against Complainants on the basis of their status as members of a protected class. Corey v. Sec'y, 719 F.3d 322, 326 (4th Cir. 2013); White v. U.S. Dep't Hous. & Urban Dev., 475 F.3d 898, 904 (7th Cir. 2007); HUD v. Morgan, 2012 HUD ALJ LEXIS 30, at *5 (Sept. 28, 2012), modified on other grounds, 2012 HUD ALJ LEXIS 33 (Oct. 26, 2012) (order on Secretarial review). Courts apply an "ordinary listener" standard to discern whether a statement indicates impermissible discrimination based on a protected status. E.g., Rodriguez v. Village Green Realty, Inc., 788 F.3d 31, 52-53 (2d Cir. 2015); HUD v. Carlson, 1994 HUD ALJ LEXIS 45 (HUDALJ Nov. 14, 1994); Miami Valley Fair Hous. Ctr. v. Connor Grp., 725 F.3d 571, 577 (6th Cir. 2013); Corey, 719 F.3d at 326; White, 475 F.3d at 905-06. A discriminatory statement suggests to an ordinary listener that a person or group from a protected class is favored or disfavored for the housing in question. Jancik v. Dep't Hous. & Urban Dev., 44 F.3d 553, 556 (7th Cir. 1995); see also Ragin v. New York Times Co., 923 F.25 995, 1002 (2d Cir. 1991), cert. denied, 502 U.S. 821. The Court asks whether the statement, in context, indicates a preference against or limitation on a tenant because of her familial status. Morgan, 2012 HUD ALJ LEXIS at *20 (noting that the ordinary listener is "neither the most suspicious nor the most insensitive of our citizenry"); see Ragin v. New York Times Co., 923 F.2d at 999. This is an objective test, and the speaker's subjective belief is not determinative. See Rodriguez, 788 F.3d at 53 ("Under subsection 3604(c), the speaker's subjective belief is not determinative ... the 'touchstone' of the inquiry is the message conveyed.").

Additionally, a party may establish sections 3604(c) violations "by proving an actual intent to discriminate" against the protected class. Soules v. U.S. Dep't Hous. & Urban Dev., 967 F.2d 817, 824-25 (2d Cir. 1992) (noting that a statement that is not facially discriminatory may still evince an impermissible preference and constitute a violation of the FHA); see Jancik, 44 F.3d at 556 (acknowledging that while proof of subjective intent to discriminate is not mandatory, "if such proof exists, it may provide an alternate means of establishing a violation" of 3604(c)); Hous. Opportunities Made Equal v. Cincinnati Enquirer, 943 F.2d 644, 646 (6th Cir. 1991) (stating that a party may establish a 3604(c) violation by proof of actual intent to discriminate or by proof that an ordinary reader would interpret the advertisement to indicate preference).

Refusal to Negotiate. Section 3604(a) of the FHA makes it unlawful for a housing provider to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling because of familial status. 42 U.S.C. § 3604(a). Refusing to rent or negotiate for the rental of a dwelling, refusing to accept or consider a bona fide offer, or imposing different rental charges, qualifications, or conditions on a tenant or prospective tenant based on the tenant's familial status violate this provision. 24 C.F.R. § 100.60(b).

To make a claim under section 3604(a), the Charging Party must present evidence that Respondents took one of the prohibited actions and the action was motivated, at least in part, by

a discriminatory purpose or intent. E.g., Reg'l Econ. Cmty. v. City of Middletown, 294 F.3d 35, 48-49 (2d Cir. 2002) (requiring showing that discriminatory intent was "significant" motivating factor); Woods-Drake v. Lundy, 667 F.2d 1198, 1202 (5th Cir. 1982) (same); Morgan, 2012 HUD ALJ LEXIS 30, at *6 (same); see also Smith & Lee Assocs. v. City of Taylor, 102 F.3d 781, 790-91 (6th Cir. 1996) (explaining that discriminatory purpose need not be dominant, primary, or sole motivating factor).

Standard and Burden of Proof. "Standard of proof" refers to the degree of proof necessary for a party to carry the burden of persuading the factfinder of the veracity of its claims. Steadman v. SEC, 450 U.S. 91, 95 (1981). The standard of proof thus serves to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Santosky v. Kramer, 455 U.S. 745, 754-55 (1982) (quoting Addington v. Texas, 441 U.S. 418, 423 (1979), and *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

The standard of proof in FHA cases is that generally applicable in civil actions, proof by a "preponderance of the evidence." Marr v. Rife, 503 F.2d 735, 739 (6th Cir. 1974); see Grogan v. Garner, 498 U.S. 279, 286 (1991) (noting presumption that preponderance standard applies in civil actions). *Black's Law Dictionary* defines the "preponderance of the evidence" as "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Black's Law Dictionary* (9th ed. 2009). Thus, the standard is qualitative, not quantitative. See Ortiz v. Principi, 274 F.3d 1361, 1365 (Fed. Cir. 2001) ("This burden of proof is not amenable to any mathematical formula, such as the often-recited 'fifty-one percent/forty-nine percent' rule ... Rather, a preponderance of the evidence can be said to describe a state of proof that persuades the factfinders that the points in question are more probably so than not.") (internal quotation marks omitted); United States v. Montague, 40 F.3d 1251, 1254-55 (D.C. Cir. 1994) ("Often, under a preponderance-of-the-evidence standard, it is assumed that the trier of fact piles up the evidence arguably on the plaintiff's side and the evidence arguably on the defendant's side and determines which pile is greater ... In fact, a more accurate notion ... is 'evidence which as a whole shows that the fact sought to be proved is more probable than not.'").

Succinctly stated, showing something by a preponderance of the evidence "simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence." Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997) (quoting Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 622 (1993)). Accordingly, to prevail under this standard, a party must establish that its allegations are more probably true than not.

The allocation of the burden of proof refers to the rule of substantive law that identifies which party bears the risk of nonpersuasion—that is, which party loses if the evidence is closely balanced. Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 56 (2005); Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 271 (1994). Thus, allocation of the burden of proof to one party functions as "a sort of default rule of liability" that operates in the

opposing party's favor. Am. Dredging Co. v. Miller, 510 U.S. 443, 454 (1994).

Absent evidence that Congress intended otherwise, the ordinary rule is that the party seeking relief bears the burden of proving all the essential elements of his claim. Schaffer, 546 U.S. at 56-58. This rule flows from the longstanding principle that the party who "seeks to change the present state of affairs ... naturally should be expected to bear the risk of failure of proof or persuasion." Id. at 56 (quoting 2 J. Strong, McCormick on Evidence § 337, at 412 (5th ed. 1999)); see JUSTINIAN DIG. 22.3.2 (Paulus, Ad Edictum 69) ("*Ei incumbit probatio qui dicit, non qui negat*": the burden of proof lies with the declarer, not the denier).

For example, consistent with this principle, the Supreme Court has struck down as impermissible a rule that shifted the burden of persuasion away from the party seeking relief in certain proceedings before the Department of Labor's administrative law judges. See Greenwich Collieries, supra, 512 U.S. 267. The Department of Labor's now-defunct "true doubt" rule provided that the benefits claimant in a workers' compensation case would prevail if the evidence was in equipoise. Id. at 269. The Supreme Court held that this ran afoul of section 7(c) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 556(d), which states, consistent with the ordinary default rule allocating the burden of proof to the plaintiff, that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof" in administrative proceedings. Id. at 280-81.

In FHA cases, a complainant alleging disparate treatment bears the initial burden of producing either (1) direct evidence of discriminatory intent or (2) indirect evidence creating an inference of such intent. Batista, 776 F.3d at 43. If the complainant offers only indirect evidence, courts analyze the evidence under the inferential burden-shifting framework set forth by the Supreme Court in McDonnell Douglas Corp. v. Green for the analysis of claims of intentional discrimination. 411 U.S. 792, 800-02 (1973) (employment discrimination case); see, e.g., Committee Concerning Cmty. Improvement v. Modesto, 583 F.3d 690, 711 (9th Cir. 2009) (applying McDonnell Douglas framework in FHA case); Reg'l Econ. Cmty., 294 F.3d at 48-49 (same); Kormoczy v. Sec'y, 53 F.3d 821, 823-24 (7th Cir. 1995) (same).

If direct evidence is available, the McDonnell Douglas framework need not be applied, and the court may proceed directly to the ultimate question of whether unlawful discrimination occurred. Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004); Pinchback v. Armistead Homes Corp., 907 F.2d 1447, 1452 (4th Cir. 1990); see Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (explaining why burden-shifting framework is unnecessary under these circumstances) (citing Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)). Regardless of whether direct or only indirect evidence of discriminatory intent is available, the Supreme Court's Civil Rights opinions emphasize that the complainant at all times retains the ultimate burden of persuasion with respect to his claims. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-08, 511 (1993) (citing Tex. Dep't Cmty. Affairs v. Burdine, 450 U.S. 248 (1981)); accord Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-43 (2000).

Accordingly, in this case, consistent with the Supreme Court's Civil Rights discrimination jurisprudence, section 7(c) of the APA, and the ordinary rules governing allocation of burdens of proof, the Charging Party bears the ultimate burden of proving the

essential elements of its claims by a preponderance of the evidence. If the evidence is in equipoise, the Charging Party cannot prevail. See Burch v. Reading Co., 240 F.2d 574, 579 (3d Cir. 1957) ("[T]he plaintiff's burden is to convince [the jury] upon all the evidence before them that the facts asserted by the plaintiff are more probably true than false. This, we think, is the intended effect of the 'preponderance of the evidence' rule ... if in [the jurors'] minds the probabilities of those facts being true or false appear equal the plaintiff has not met his burden of proof.") (footnotes omitted).

DISCUSSION[3]

The Charging Party claims that Respondents made discriminatory statements in the rental of a dwelling. They also claim that Respondents' occupancy policy operates as a refusal to negotiate the rental of a dwelling based on familial status.

Respondents deny making any discriminatory statements and counter that the occupancy policy is reasonable and consistently applied to families with children and families without children alike. Moreover, Respondents claim their denial was primarily the result of Mr. Spoehr's vaping habit.

I. Respondents did not make discriminatory statements in violation of section 3604(c).

The Charging Party alleges that Respondents made discriminatory statements to Complainant. Specifically, the Charging Party claims Mr. Hietpas stated that Complainant and Mr. Spoehr's children would stain or damage his property, that Complainant "has too many children" for the unit, and that she should find a four-bedroom property as he would not feel comfortable renting to her.

Section 3604(c) of the FHA provides that it is unlawful to "make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on ... familial status ... or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. § 3604(c). Discouraging any person from inspecting, purchasing or renting a dwelling because of familial status may constitute an unlawful steering practice. 24 C.F.R. § 100.70(c)(1). However, the unlawful steering must be the product of a discriminatory mental state and not due to some non-invidious reason. Mont. Fair Hous., Inc. v. City of Bozeman, 854 F. Supp. 2d 832, 840 (D. Mont. 2012).

To prevail on a claim under section 3604(c), the Charging Party must prove by a preponderance of the evidence that (1) Mr. Hietpas made a statement, (2) with respect to the sale or rental of a dwelling, (3) which indicated a preference, limitation, or discrimination on the basis of protected status. White, 475 F.3d at 904. As detailed above, the Charging Party bears the burden of showing that Mr. Hietpas more probably than not made the claimed statements. Schaffer, 546 U.S. at 56-58. If this is not established, or even if the evidence weighs in equipoise for both sides, Complainant cannot prevail. Burch, 240 F.2d at 579; see also Aylett v.

[3] The Court has considered all issues raised and all documentary and testimonial evidence in the record and presented at hearing. Those issues not discussed here are not addressed because the Court finds they lack materiality or importance to the decision.

Sec'y of Hous. & Urban Dev. *ex rel.* Burris, 54 F.3d 1560, 1562 (10th Cir. 1995) (finding that where Complainant's testimony was not incredible, but still not more believable than Respondent's testimony, the preponderance of the evidence did not show Respondent discriminated against Complainant).

The parties do not dispute that the Subject Property in this matter constitutes a "dwelling" within the meaning of the statute. The parties disagree, however, regarding whether Complainant and her children are members of a protected class under section 3604(c) by virtue of their familial status and whether Mr. Hietpas made a discriminatory statement to Complainant during conversations surrounding the rental of the subject property. See 42 U.S.C. § 3602(k) (defining "familial status"). Although the Court is not necessarily persuaded that Ms. Spoehr and her two children, and Mr. Spoehr and his three children, together form a single familial unit,[4] the Court need not decide this issue to determine whether or not Mr. Hietpas made a discriminatory statement.

The Court, as the fact finder, must resolve the conflicts in evidence regarding the existence and nature of any purported discriminatory statements. Morgan, 2012 HUD ALJ LEXIS at *20 (citing Thunder Basin Coal Co. v. S.W. Pub. Serv. Co., 104 F.3d 1205, 1212 (10th Cir. 1997) (noting that the fact finder has the "exclusive function of appraising credibility, determining the weight to be given to the testimony, drawing inferences from the facts established, resolving conflicts in the evidence, and reaching ultimate conclusions of fact")). When the evidence presented by the parties in the record differs, it is the Court's prerogative to determine whether a respondent acted with impermissible discriminatory intent. See Morgan, 2012 HUD ALJ LEXIS at *20.

Determinations of credibility rightly rest with the ALJ who has directly observed the demeanor and heard the testimony of witnesses. See Powers v. Apfel, 207 F.3d 431, 435 (7th Cir. 2000) (stating that ALJ's credibility determination is entitled to deference because the ALJ is in the "best position to see and hear the witnesses and assess their forthrightness"); see also Shramek v. Apfel, 226 F.3d 809, 811 (7th Cir. 2000) ("A credibility assessment is afforded special deference because the ALJ is in the best position to see and hear the witness and determine credibility"); see, e.g., Chicago Tribune Co. v. N.L.R.B., 974 F.2d 933 (7th Cir. 1992) (noting that the ALJ's determinations are entitled to a certain weight); General Dynamics v. OSHRC, 599 F.2d 453, 463 (1st Cir. 1979) (acknowledging a hearing officer's factual conclusions are entitled to considerable deference).

First, the Charging Party alleges Mr. Hietpas expressed concern that Complainant and Mr. Spoehr's children would stain, damage, or destroy the property, as Respondents were planning to eventually live in the unit themselves. The only evidence proffered in support of this

[4] According to the Kaukauna Code, "family" is defined as "one or more persons occupying a single dwelling unit, provided that, *unless all members* are related by blood, marriage, or adoption, no such family shall contain over five persons, but further provided that domestic servants employed on the premises may be housed on the premises without being counted as family." Kaukauna, WI., Code of Ordinances § 19.04. At the time of application, Complainant and Mr. Spoehr were not married, and each child was related to only one parent by blood, adoption, or marriage. Indeed, Ms. Spoehr listed that she was engaged to Mr. Spoehr on her application, but engagement does not legally join the two families together. Housing two families in a single-family dwelling in excess of the local occupancy restriction is not only the landlord's prerogative to protest, but it is also unlawful. See id. (defining "single-family dwelling" as a building containing a single-family of not more than five unrelated persons).

allegation is competing testimony from Complainant and Mr. Hietpas. The parties stipulate that Mr. Hietpas and Complainant spoke on the phone on June 22, 2015. They discussed Mr. Hietpas's apprehension regarding Mr. Spoehr's vaping and the number of occupants at the property. Complainant contends that Mr. Hietpas then stated he would not rent to Complainant because he was afraid the children would damage the home. However, Mr. Hietpas adamantly denies making these statements, asserting that "there was no mention of children at any point in time during the conversation" and that cleanliness and maintenance were never discussed "in any form or fashion."

The burden is on the Charging Party to establish that it is more likely than not that Mr. Hietpas made the alleged statements. See Schaffer, 546 U.S. at 56 (noting the party seeking relief bears the burden of proving all the essential elements of his claim). Respondents need prove nothing. Respondents do not bear the burden of proving that Mr. Hietpas is more credible than Ms. Spoehr or that he did not make the alleged statements. Rather, the Charging Party bears the burden of proving that Mr. Hietpas more likely than not made the statements. Based on competing testimony and credibility assessments, the Court cannot find Complainant's account more likely than Respondent's account.

Although Complainant's testimony is plausible, the Court finds more reasons to discredit her allegations than to credit them. First, Complainant admitted to lying to Mr. Hietpas when she told him she had recorded their conversations. She admitted she was trying to strong-arm him into renting the subject property to her. Complainant's argument that she "only lied one time" is unpersuasive (and yet another lie), because she also falsely stated on her rental application that she did not own pets. Complainant rationalized that she answered "no" on her rental application because she was willing to give up the pet if it became an issue. However, a lie is a lie regardless of the motivation. A lie to assist in getting what one wants is particularly telling in a legal context especially in evaluating credibility.

Conversely, the Court finds Mr. Hietpas's testimony to be credible. He never wavered from his assertions that the occupancy policy originated from his understanding of city ordinances. He researched local housing codes, reviewed HUD's guidance on occupancy limits in the Keating Memo, and created policies in accordance with these resources. Unlike Complainant, Mr. Hietpas did not attempt to spin his testimony in a light favorable to him. His retelling of the events included both positive and potentially adverse facts. Therefore, the Court credits Respondent's claim that he did not say the children would stain, damage, or destroy his property.

Moreover, circumstantial evidence supports the assertion that Respondents were concerned with the *number* of potential occupants rather than their *age*. Respondents have been landlords for 26 years and have rented to several families with children with no prior complaints. Cf. HUD v. Carlson, 1994 HUD ALJ LEXIS 45, *28 (HUDALJ November 14, 1994) (finding evidence that the landlord had rented to other Native American families persuasive in establishing the landlord did not hold a prejudice against Native American families). In fact, Mr. Hietpas was housing families with children in four of his five rental properties at the time of the alleged discrimination. The record is devoid of evidence that Respondents preferred tenants who did not have children.

Additionally, Mr. Hietpas's dealings with Complainants during their tour of the Subject Property further undercut the claim that Respondents are biased against families with children. Complainant testified that when she toured the property, her youngest child and Mr. Spoehr's youngest child were with them. There is no indication that Mr. Hietpas commented on the children or discouraged Complainant from applying. Instead, he freely offered the rental application to Complainant and Mr. Spoehr. In fact, there is testimony that Mr. Hietpas initiated the conversation by asking Complainant and Mr. Spoehr if they would like to apply for rental in his unit. The next day, Mr. Hietpas responded to Complainant's question regarding the application fee and let her know she could deliver the applications to his mailbox for his review. This evidence suggests that Respondents are willing to rent to tenants with children. The Charging Party has not established by a preponderance of the evidence that Mr. Hietpas made statements to the contrary.

Next, the Charging Party alleges Mr. Hietpas made discriminatory statements in reference to Respondents' occupancy limit. Complainant claims Mr. Hietpas asserted he would not feel comfortable renting to Complainant because she has "too many children" for the unit. Complainant also contends that Respondent's text message advising her to seek a four-bedroom rental he saw on Craig's List reflected a discriminatory mental state and discouraged her from applying for housing.

Mr. Hietpas denies telling Complainant that she had too many children, but admits that he stated they had too many occupants for his unit. In addition, Respondent admits messaging Complainant, "you should find a 4br," but argues he was not invidiously steering Complainant away; rather, Respondent was attempting to aid Complainant's housing search once he determined she did not qualify to rent the subject property. As the old adage goes, "no good deed goes unpunished."

Whether Mr. Hietpas stated that Complainant had "too many children" or "too many occupants," a landlord's assertion that he is not comfortable renting to a family because of the number of children or occupants they have is not necessarily discriminatory. See Jones v. Baecker, 891 N.W.2d 823, 839 (Wis. Ct. App. 2016). Either statement directly corroborates Mr. Hietpas's testimony that he had valid occupancy concerns.

"Familial status" as defined by federal law "refers to the *presence* of minor children in the household," not to their number. Jones, 891 N.W.2d at 839 (quoting Pfaff v. HUD, 88 F.3d 739, 744 (9th Cir. 1996) (emphasis added)). Courts consistently define discrimination based on familial status as preferring households without children to households with children. See Carlson, 1994 HUD ALJ LEXIS 45 at 36 (expressing that desire to rent to no more than two people did not constitute discrimination based on familial status, because landlord did not prefer two adults over one adult and a child); see also Gilligan v. Jamco Dev. Corp., 108 F.3d 246 (9th Cir. 1997); R.I. Comm'n for Human Rights v. Graul, 120 F. Supp. 3d 110, 125-26 (D.R.I. 2015) (favorably citing methodology comparing "households with children" and "households with no children"); United States v. Branella, 972 F. Supp. 294, 298 (D.N.J. 1997) ("Specifically, the FHAA provides that it is unlawful to make a dwelling unavailable to any prospective buyer or renter because of the presence of minor children in the prospective household."). Therefore, a landlord may not express a preference for renting to families without children. It is also discriminatory to discourage families with minor children in a specified age range from applying

for housing, see HUD v. Dellipaoli, 1997 HUD ALJ LEXIS 22 (HUDALJ Jan. 7, 1997), or to refuse to rent to a prospective tenant because he or she is a single parent with young children, see White, 475 F.3d at 905.

However, a landlord may lawfully inquire into the number of children residing with the applicant for occupancy code purposes. See Jones, 891 N.W.2d at 842 (stating that "no reasonable fact finder could find intentional family status discrimination" where the landlord's concern was not that prospective tenants had children, but that they had "too many children" for his unit). For example, in Jones v. Baecker, a landlord felt his apartment was too small for the number of occupants listed on the rental application, many of whom were children. Id. at 830. He placed an occupancy limit of four residents on his three-bedroom unit due to overcrowding concerns in the complex and in the parking lot. Id. The court evaluated the occupancy policy for reasonableness and found it did not inherently disadvantage families with children, as it would accommodate a family consisting of two parents and two children. Id. at 842. Thus, the court in Jones held that the landlord did not make a discriminatory statement when he told the prospective tenant that she had "too many kids" to qualify for housing in the unit because his statement merely explained the landlord's policy which did not exclude all families with children. Id. at 830.

Like the landlord in Jones, Mr. Hietpas's comments wholly concerned the number of occupants in the unit, even if he used the word "children" instead of "occupants" (a fact which has not been established). A facially neutral occupancy policy, i.e., one that does not inherently prefer families without children over families with children, is not discriminatory. Similarly, Mr. Hietpas's message to Complainant that she should seek a four-bedroom unit would not convey to an ordinary listener that a family with children was disfavored from applying for housing. Instead, an ordinary listener would understand that Mr. Hietpas felt that his unit was too small for the number of occupants recorded on the application. Mr. Hietpas's reference to feeling "uncomfortable" renting to Ms. Spoehr did not signal an unwillingness to rent to a mother with children. Mr. Hietpas testified that he would have been willing to rent to a family of six, which could easily include two adults and four minor children. But based on his understanding of local occupancy restrictions, seven residents would overcrowd his three-bedroom unit. Mr. Hietpas's well-intentioned recommendation of a four-bedroom unit is not unlawful steering.

In assessing evidence, the Court oftentimes finds itself in a quandary. No such quandary is present here. Indeed, the evidence is not close to equipoise, because the Charging Party has failed to establish even a scintilla of preponderance. See Burch, 240 F.2d at 579.

The Charging Party failed to demonstrate that Mr. Hietpas made statements to Complainant reflecting an impermissible discriminatory intent. Moreover, the Charging Party failed to proffer any credible evidence that Mr. Hieptas made the alleged statements to Complainant. Accordingly, the Court finds Mr. Hietpas's statements that he was uncomfortable renting to Complainant and that she should seek a four-bedroom dwelling were not discriminatory. Thus, Respondents did not violate section 3604(c) of the Fair Housing Act.

II. Respondents did not violate the Fair Housing Act in refusing to rent the Subject Property to Complainant.

The parties do not deny that Complainants are members of a protected class, that Respondents denied their request to rent the Subject Property, and that the Subject Property remained available after Respondents' denial. Accordingly, the Charging Party has established a *prima facie* case of discrimination. See Corey, 2012 HUD ALJ LEXIS 20, at *19-20 (Order on Secretarial Review).

Respondents, however, claim their denial of Complainants' request to rent the Subject Property was permissible due to local occupancy restrictions and HUD guidance. Respondents also claim their denial was due, primarily, to concerns over Mr. Spoehr's vaping habit. In response, the Charging Party claims that Respondents' occupancy policy disproportionately harms families with children and is, therefore, unreasonable. The Charging Party also alleges that Respondents' purported concerns over Mr. Spoehr's vaping habit are pretextual and that Respondents were actually motivated by discriminatory animus.

A. Respondents' occupancy policy is permissible for the Subject Property.

The Charging Party claims Respondents' occupancy policy has a disparate impact on families with children and is unreasonable.[5] The Charging Party claims Respondents' denial of Complainant's housing request based on the occupancy policy is, therefore, a violation the Fair Housing Act.

A landlord may not refuse to negotiate the rental of a dwelling based on the presence of minor children. Pfaff, 88 F.3d at 744. This is not to say that any family of any size can occupy any unit. However, Congress in enacting the Fair Housing Act did not intend to strip landlords of the power to impose reasonable occupancy limits on their properties. See, e.g., City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 735 n.9 (1995) (explaining that Congress added to the FHA at the same time as the familial discrimination provision a statutory exemption permitting maximum occupancy restrictions, indicating that "landlords legitimately may refuse to stuff large families into small quarters"). There is no special treatment for large families under the FHA. Borum v. Brentwood Vill., LLC, 218 F. Supp. 3d 1, 22 (D.D.C. 2016); see also Debolt v. Espy, 832 F. Supp. 2019, 215 (S.D. Ohio 1993), aff'd, 47 F.3d 777 (6th Cir. 1995) ("The Court notes that as opposed to families in general, 'large families' are not a specifically protected class under Title VIII."); Fair Hous. Advocates Ass'n Inc., 209 F.3d at 638 ("[F]amilies of four, as opposed to families of three, are not protected classes."). Large families receive the same protection as families with any minors, but they do not receive additional privileges such as

[5] The Charging Party presented testimony from Scott Susin, who is an economist for HUD. Mr. Susin evaluated a policy of not renting to households with seven or more people and found that such a policy would disproportionately affect households with children. In one analysis, Mr. Susin found that households with children were twenty times more likely to be affected by such a policy. However, Mr. Susin's findings have little weight in this proceeding, because he analyzed the wrong occupancy policy. Respondents' policy was not to strictly refuse rental to households with seven or more people. Rather, their policy was to apply a two-person-per-bedroom limit to their properties. This means that Respondents would generally limit a property with two bedrooms to a family of no more than four; and a property with four bedrooms to a family of no more than eight. This distinction was not raised by either party nor was Mr. Susin's testimony challenged by Respondents. For argument's sake, the Court's continues its analysis with the unsupported assumption that Respondents' policy had a disparate impact on families with children and considers the reasonableness of Respondents' occupancy policy.

unconditional qualification for a dwelling. As such, rejecting a tenant because she has children is distinguishable from rejecting a tenant who does not qualify because a unit requires fewer occupants than the number of children she has.[6]

Compliance with reasonable federal, state or local government restrictions relating to the maximum number of occupants permitted to occupy a dwelling unit does not constitute discrimination based on familial status. 42 U.S.C.S. § 3607(b)(1). Federal and state laws permit landlords to impose "reasonable occupancy requirements based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit." Jones, 891 N.W.2d at 841 (citing Pfaff, 88 F.3d at 748 (quoting the Keating Memo)).

HUD guidance presumes that an occupancy policy of two persons per bedroom is reasonable. United States v. Badgett, 976 F.2d 1176, 1179 (8th Cir. 1992); *Keating Memo* ("[T]he Department believes that an occupancy policy of two persons in a bedroom, as a general rule, is reasonable under the Fair Housing Act."). However, this presumption is rebuttable upon a showing of discriminatory intent. See United States v. Lepore, 816 F. Supp. 1011, 1023 (M.D. Pa. 1991) (finding that a two-person occupancy limit violated the FHA because it was designed to exclude families with children); see also FEHC v. Merribrook Apartments, FEHC Decision #89-19 (Calif. Fair Empl. & Hous. Comm'n, Nov. 11, 1988) (finding that a one person per bedroom restriction violated the FHA because it was used to maintain a no children policy).

The Code of Ordinances for Kaukauna, Wisconsin ("Code") defines "family" as "one or more persons occupying a single dwelling unit, provided that, unless all members are related by blood, marriage, or adoption, no such family shall contain over five persons, but further provided that domestic servants employed on the premises may be housed on the premises without being counted as family." Kaukauna, WI., Code of Ordinances § 19.04. The Code provides that "[i]n every dwelling unit every room occupied for sleeping purposes by one occupant shall have a minimum gross floor area of at least 70 square feet. Every room occupied for sleeping purposes by more than one occupant shall contain at least 50 square feet of floor area for each occupant." Id. at § 19.15(9). Any person over one year of age that is living and sleeping in the dwelling unit, or having actual possession of such dwelling or room unit is considered to be an occupant. Id. at § 19.04. Additionally, "no…dwelling unit containing two or more sleeping rooms shall have such room arrangement that…access to a sleeping room can be had only by going through another sleeping room, bathroom, or water closet compartment." Id. at § 19.15(11).

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[6] As discussed previously, the Court is not convinced that Complainant, her children, Mr. Spoehr, and his children form a singular familial unit as defined by the Kaukauna Municipal Code. The Code provides that no family shall exceed five persons unless they are all related by blood, marriage, or adoption. This "family" is made up of seven people. At the time of the alleged discrimination, Complainant and Mr. Spoehr were not married, and there is no evidence in the record that they co-parented any children. Complainant and her two children are related by blood. Mr. Spoehr and his three children are related by blood. However, the record does not reflect that Mr. Spoehr or any of his children were related to Complainant by blood, marriage, or adoption while they sought housing. Likewise, Complainant and her children were not related to Mr. Spoehr or his children by blood, marriage, or adoption. In fact, none of the children were listed on both applications submitted by Complainant and Mr. Spoehr, which would indicate that they were the children of both applicants. As these seven persons were not all related at the time of the alleged discrimination, they were not a family for housing code purposes. Moreover, even if these two households did qualify as a singular family, it would still be permissible for Respondents to deny them housing because the unit is too small.

The subject property's three bedrooms are 134.50 square feet, 146.41 square feet, and 147.16 square feet respectively. A bedroom for two occupants must measure 100 square feet, and a bedroom for three occupants must measure 150 square feet. Each bedroom at the subject property exceeds 100 square feet, but no bedroom measures 150 square feet or greater. Thus, each of the bedrooms may sleep two occupants, but not three. Looking only at bedrooms as sleeping rooms, the Kaukauna Code permits only six occupants in the subject property.

Rooms other than bedrooms may serve as sleeping rooms provided they meet applicable size and other requirements. The basement, measuring 1,000 square feet, and the living room, measuring 230.61 square feet, exceed 70 square feet and meet the size requirement for a sleeping room. However, the basement does not qualify as a sleeping room, because it lacks the necessary ventilation accommodations. Therefore, the only possible sleeping room for a seventh occupant might be the living room. The Charging Party contends the living room qualifies as a sleeping room, but Respondent argues it does not.

Section 19.15(11) of the Kaukauna Code provides that a room arrangement shall not "be such that access to a sleeping room can be had only by going through another sleeping room, bathroom, or water closet compartment." The Charging Party contends that a person may feasibly proceed from one sleeping room to another without passing through a third sleeping room; therefore, the living room qualifies as a sleeping room. This argument is problematic, as the Code does not permit required access to a sleeping room *through another sleeping room.* All three bedrooms are only accessible from the kitchen, dining room, or the only first floor exit by going through the living room.

The Charging Party's witness, Mr. Oldenburg,[7] originally opined that a person need not walk through the living room to access the other sleeping rooms; one must only "skirt the corner" of the living room, which does not qualify as "going through" a room in his mind. However, after revisiting the issue, Mr. Oldenburg determined that an occupant of one of the bedrooms could not exit the duplex without passing through the living room. Therefore, the living room cannot be used as a sleeping room because it is impermissible to have a room arrangement such that access to a sleeping room can only be had by going through another sleeping room, bathroom, or water closet compartment. See id. Consequently, Mr. Oldenburg further testified that if the living room could not be used as a bedroom, the Subject Property would be limited to a maximum occupancy of six people.

As noted *supra*, the Court finds that the boundaries of the living room can be defined by the carpeted area spanning from the dining room wall. And, because a person must walk through the living room to access the other sleeping rooms from most areas of the house, the living room cannot constitute a sleeping room pursuant to the Kaukauna Code. Accordingly, Respondents' occupancy policy was reasonable as it complies with the local Code. There is no permissible sleeping room for a seventh occupant. It is not discrimination based on familial status to comply with local law. Respondents have not committed impermissible discrimination by imposing the code maximum six-person occupancy limit.

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[7] Jon Oldenburg is a building inspector and contractor for the city of Kaukauna since 2011. Mr. Oldenburg is the city official responsible for enforcing the local code that sets forth the minimum space and occupancy standards for residential properties in Kaukauna.

B. The Charging Party has not demonstrated Respondents' non-discriminatory bases for denying Complainants housing were pretext.

The Charging Party claims Respondents' concern regarding Mr. Spoehr's vaping was pretext for denying Complainants the opportunity to rent the Subject Property based on their familial status. In support of this argument, the Charging Party cites the fact that Respondents rent other properties to known smokers and that Respondents did not raise concerns about smoking or vaping until they were confronted with the number of children that would be residing at the Subject Property with Complainant.

The fact that Respondents rent other properties to smokers raises the question whether their denial because of Mr. Spoehr's vaping habit was pretextual. However, this question is settled by the credible, unrebutted evidence that Respondents intended to move into the Subject Property and Mrs. Hietpas is allergic to smoke. Unlike the Subject Property, there is no evidence that Respondents had any intention to move into their other rental properties. And, Mr. Hietpas explained that smokers were already residing in some of his other rental properties when he purchased them. Mr. Hietpas testified that Respondents did not feel a need to break their leases with those tenants or restrict those properties to nonsmoking tenants because damage related to cigarette smoke was already present and Respondents had no intention of living in those properties. Conversely, Respondents planned on moving into the Subject Property from the onset and eventually did so without renting to any tenants in the interim. In addition, Mr. Hietpas could not have known to raise the issue of Mr. Spoehr's vaping before he spoke with Complainant on the phone, because he was unaware of the issue until it was indirectly disclosed on Mr. Spoehr's rental application. This evidence supports Respondents' claim that Mr. Spoehr's vaping habit was their reason for rejecting Complainant's request to rent the Subject Property.

Respondents acknowledged that if Mr. Spoehr's vaping habit was not an issue, they still would have denied Complainants' request because of their occupancy policy. Factors such as (1) making discriminatory statements; (2) adopting discriminatory rules governing the use of common facilities; (3) taking other steps to discourage families with children from living in housing; or (4) enforcing occupancy policies only against families with children may indicate that an occupancy policy is pretext for family status discrimination. Id.

None of those factors exist in this case. The Court has found that Mr. Hietpas did not make discriminatory statements. There is no evidence that Respondents adopted discriminatory rules governing the use of common facilities or that they took steps to discourage families with children from living in the housing. Mr. Hietpas testified credibly that he would allow a family of six to live in the Subject Property, and four of the five families renting from Respondents at the time of the *Charge* included minor children. Mr. Hietpas also testified credibly and sincerely that he has always applied his occupancy policy to families with children and families without children alike. He testified his concern about complying with local housing codes is wholly unrelated to the mere presence of minor children in the household. Respondents, having years of experience as landlords, had a general knowledge of local housing regulations at the time of the denial. Local law makes no distinction between children and adults in occupancy restrictions, except that an occupant is any person over one year of age. See Kaukauna, WI., Code of *Ordinances* § 19.04. Moreover, the record is devoid of any evidence that Respondents would

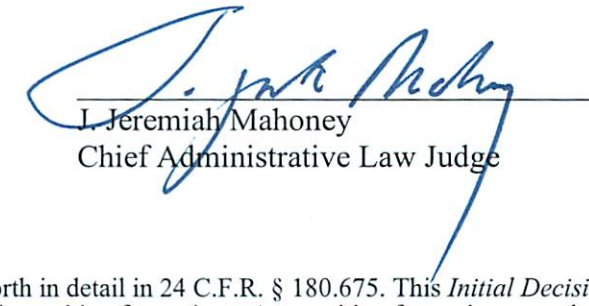
have waived their occupancy policy for tenants without children. Thus, the Court rejects the argument that Respondents' occupancy policy is pretext for excluding families with children.

In conclusion, both of Respondents' reasons for refusing Complainant are legitimate, non-pretextual, and non-discriminatory. This Court is satisfied that the Subject Property contained three bedrooms that could accommodate a maximum of two persons per bedroom and that neither the living room nor the basement could qualify as sleeping rooms pursuant to the City of Kaukauna's Code of Ordinances. The Charging Party has not persuaded the Court that the presumptively reasonable two-person-per-bedroom policy is unreasonable for the Subject Property. Respondents refused to negotiate the rental of the subject property based on legitimate occupancy concerns and a personal interest in maintaining a property free of smoke residue, not on the basis of familial status. Accordingly, the Court finds Respondents did not violate the FHA by refusing to rent the Subject Property to Complainants.

CONCLUSION

The Court finds that the Charging Party's presentation was insufficient to prove that Mr. Hietpas made discriminatory statements that Complainant and Mr. Spoehr's children would destroy or damage the Subject Property. And, Mr. Hietpas's statements concerning the number of children as that relates to occupancy limits were permissible and nondiscriminatory. Respondents' refusal to rent the Subject Property to Complainants does not constitute discrimination based on familial status. Evidence in the record supports the finding that Respondents' nondiscriminatory bases for refusing to rent the Subject Property to Complainants were legitimate. Accordingly, the Court finds that Respondents did not violate the Fair Housing Act in this case.

So **ORDERED**,



J. Jeremiah Mahoney
Chief Administrative Law Judge

Notice of appeal rights. The appeal procedure is set forth in detail in 24 C.F.R. § 180.675. This *Initial Decision* may be appealed by any party to the Secretary of HUD by petition for review. Any petition for review must be received by the Secretary within 15 days after the date of this *Order*. Any statement in opposition to a petition for review must be received by the Secretary within 22 days after issuance of this *Order*.

Service of appeal documents. Any petition for review or statement in opposition must be served upon the Secretary by mail, facsimile, or electronic means at the following:

U.S. Department of Housing and Urban Development
Attention: Secretarial Review Clerk
451 7th Street S.W., Room 2130
Washington, DC 20410
Facsimile: (202) 708-0019
Scanned electronic document: secretarialreview@hud.gov