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
Ashley Pierce, Monique Castro Pierce
and Gary Grabarczyk,

Charging Party,

v.

Florence Gunderson and
Milan Gunderson,

Respondents.

HUDALJ 05-98-0298-8
HUDALJ 05-98-0715-8
Decided August 14, 2000

Konrad J. Rayford, Esq.
For the Charging Party

Rod W. Rogahn, Esq.
For the Respondents

Before: William C. Cregar
Administrative Law Judge

INITIAL DETERMINATION ON REMAND AND ORDER

Introduction

This case arises under the Fair Housing Amendments Act of 1988. 42 U.S.C. §§ 3601-3619. After an investigation, the Department of Housing and Urban Development issued a Finding of Reasonable Cause and a Charge of Discrimination on

May 13, 1999. Respondents filed their Answer on June 10, 1999. On August 5, 1999, Respondents filed a Motion for Summary Judgment. I granted the Motion and issued an Initial Determination and Order on September 28, 1999. On October 28, 1999, the Secretary's Designee set aside the order granting the Motion and remanded the case for a full hearing. Following the Charging Party's two unopposed requests for delay, the hearing was held in Milwaukee, Wisconsin on April 4 and 5, and May 2, 2000. At the conclusion of the Charging Party's case-in-chief on April 4, 2000, Respondents moved to dismiss the Charge of Discrimination. After I denied the Motion, Respondents renewed it at the conclusion of the hearing on April 5th. I again denied the Motion and determined that it was necessary to continue the hearing to take additional evidence. On May 2, 2000, I held that additional hearing. Post hearing briefs were filed on June 16, 2000. After consideration of the record and the briefs of the parties, I have reconsidered my denial of Respondents' Motion. I now grant the Motion and dismiss the Charge of Discrimination.

Statement of Facts

1. Respondent Florence Gunderson owns two four-family residential rental units at 1653 Kettle Cove Court in Delafield, Wisconsin, that are managed by her son, Milan Gunderson. On or about October 23, 1997, Complainant Monique Castro-Pierce called Mr. Gunderson regarding an ad for one of the four rental units seeking occupancy for herself; her husband, Complainant Ashley Pierce; and their friend, Complainant Gary Grabarczyk. Ms. Castro-Pierce is black; Mr. Pierce and Mr. Grabarczyk are white. Charge of Discrimination ¶ 6, Respondents' Answer, ¶ 6; Tr. p. 372.[1]

2. The Pierces ran a computer resume business, Direct Data Service, out of their residence. This business involved writing and printing resumes, brochures, fliers, and newsletters on a personal computer at their home. Their equipment consisted of a computer, two laser printers, and a facsimile machine. The Pierces are the only employees. The business generated approximately 1200 documents per month. R. Ex. 3; Tr. pp. 104, 144-45.

3. In the course of her conversation with Mr. Gunderson, Ms. Castro-Pierce told

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[1]The following reference abbreviations are used in this decision: "Tr." for transcript followed by a page number; "J.E. Ex." for Joint Exhibit; "C.P. Ex." for the Charging Party's Exhibit; and "R. Ex." for Respondents' Exhibit. Due to an administrative error, no court reporter was available to transcribe the May 2, 2000, portion of the hearing. However, a tape was made of the testimony of witness, Scott Botcher. This tape also includes a summarization of the telephone testimony of witness, John Stockham. The tape is referred to as "Tape of May 2, 2000, hearing."

him about the resume business and informed him that she met her clients outside of her home. She also stated that she wanted to leave her present apartment because of noisy children and problems with her landlord. She claimed that the children were creating a problem because the noise they made in the hallway interfered with her work. During the course of their conversation, she told Mr. Gunderson that her "biggest necessity" was that the residence be quiet and have a separate entrance. Complainants and Mr. Gunderson agreed to meet the next day at 11:00 a.m. to view the apartment. After this conversation, Mr. Gunderson called Ms. Castro-Pierce back to give her directions to the apartment. Tr. pp. 110-11, 113, 148, 162-63, 374, 404.

4. The next day, the Complainants arrived at the agreed upon time. When they arrived, Mr. Pierce and Mr. Grabarczyk walked to a lake adjoining the property. Ms. Castro-Pierce remained in the car, reading. Mr. Gunderson arrived at the same time that Mr. Pierce and Mr. Grabarczyk returned to the car. The men introduced themselves and carried on a conversation behind the car. Mr. Gunderson asked where Ms. Castro-Pierce was and, as he walked along the driver's side of the car, Ms. Castro-Pierce got out of the car and said, "Hello." Mr. Gunderson did not respond or acknowledge Ms. Castro-Pierce. Mr Gunderson then conducted Complainants on a tour of the apartment. At some point he mentioned that his mother was ill. Mr. Gunderson asked them to remove their shoes because the apartment had recently been cleaned. During the tour, Mr. Gunderson was uncommunicative and "formal." He pointed out the rooms and provided brief answers to questions from the white male Complainants, but did not respond to questions from Ms. Castro-Pierce. The tour took about ten minutes. At its conclusion, Mr. Grabarczyk took out his checkbook and stated that he liked the apartment. Mr. Gunderson told them not to rush into a decision, to think about it, and that he would call them at 5:30 p.m. to find out if they wanted the apartment. He also stated that he wanted to "look into some things."[2] Tr. pp. 114-18, 120, 192-97, 249-58.

5. Following the tour of the apartment, Mr. Gunderson called his insurance agent, Rob Timm, to ask whether the Pierces' resume business would affect his insurance liability. Mr. Timm told him that his rates might be affected depending on the type of business and advised him to check with the municipality to determine the existence of any zoning restrictions. Mr. Gunderson next called Scott Botcher, who was at the time,

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[2]Mr. Gunderson's account of the meeting differs markedly from that of Complainants. He stated that he opened the car door for Ms. Castro-Pierce, that he said, "Hi, Monique," that she said nothing in response, and that he shook her hand. He also claimed that during the tour of the apartment he had to initiate the questioning. Tr. pp. 383, 434-35. In ruling on Respondents' Motion to Dismiss, I am assuming Complainants' testimony to be true where it conflicts with that of Mr. Gunderson. *See* C.P. Ex. 2; Tr. pp. 313-23.

City Administrator for the City of Delafield. He asked Mr. Botcher if a resume business

was permissible in a residence. Without consulting any authority, Mr. Botcher opined that the scenario might be possible. The conversation lasted less than a minute.[3] Tr. pp. 73-74, 387-90.

6. Mr. Gunderson went to his "junk room" and located a copy of the Delafield zoning ordinances. The applicable section of the City of Delafield Municipal Code ("the Code") defines "Home Occupation" as follows:

> Section 1724. *Home Occupation.* An occupation for gain or support that is conducted entirely within the principal building whose primary use is as a *single-family or duplex residence*, is incidental to the principal use of the premises as a residence, does not exceed 25 percent of the total floor area of the principal structure, does not require a sign larger than 2 square feet, and does not involve the employment of any individual not living on the premises. A home occupation shall not include the use of any machinery, tools, or other appliances that create a nuisance to the surrounding residential area by reason of noise, vibration, dust, smoke, or odor.

J.Ex. 1 (second emphasis added).

7. Based on his reading of the ordinance, Mr. Gunderson concluded that Complainants' computer business was not permitted in a four-unit dwelling. While the ordinance provided a specific exception to allow "home occupations" in residences, the exception was limited to single family dwellings and duplexes. Mr. Gunderson correctly interpreted the ordinance.[4]

8. Prior to March 1997, the Municipal Code of the City of Delafield permitted "home occupations" in residences without limitation. In March 1997, the definition of "home occupations" was changed by inserting the "single family or duplex residence" limitation. The limitation was intended to restrict "home occupations" to these dwellings. The concern over allowing such businesses in multi-family dwellings was based on four considerations: limited parking spaces, "signage" (multiple business signs outside of

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[3]Mr. Botcher did not recall this particular conversation. This is not surprising considering the volume of calls Mr. Botcher received while he was City Administrator and the brevity of this call. Tr. pp. 388-90; Tape of May 2, 2000 hearing.

[4]The City Attorney of Delafield, William Chapman, the Planning Consultant for the City of Delafield, John Stockham, and Mr. Botcher, all agree that the ordinances prohibit the operation of "home occupations" in four-unit dwellings. At the conclusion of the hearing on May 2, 2000, Counsel for the Charging Party concurred with their conclusion. Accordingly, I ruled from the bench that the Code's prohibition of "home occupations" in four-unit dwellings was an established fact no longer in dispute. Res. Ex. 1; Tr. pp. 42-43; Tape of May 2, 2000, hearing.

apartment dwellings), noise, and security (strangers entering multi-unit residences through a single entrance). J.E. Exs. 1-4, 6; Tr. pp. 38; Tape of March 2, 2000, hearing.

9. The Pierces liked the apartment so much that, in their excitement, they called Mr. Gunderson at 4:30 that afternoon rather than await his call. Mr. Pierce placed the call and held the phone so that his wife could listen in. Mr. Gunderson told Mr. Pierce that they could not rent the apartment because he would be in violation of the Delafield zoning code. He also said that insurance premiums would increase and that the apartment was already rented. Tr. pp. 120-21; 201-02.[5]

10. Without identifying himself, Mr. Pierce called Mr. Gunderson the next day, October 25th, inquiring if the apartment was still available. Mr. Gunderson, recognizing Mr. Pierce's voice but not acknowledging that he knew who it was, told him that it was available. Tr. pp. 201-02, 435-37.

11. Sometime in late October 1997, Mr. Gunderson called a friend, Brian Karo, who is white, about renting the apartment. Mr. Karo is a landscape contractor. He owns a truck, uses a computer and drafting table in his apartment for business related activities, and sees customers at "their location," all of which Mr. Gunderson knew. In an initial conversation Mr. Karo said he might agree to rent. Within a day or two, they had a second conversation in which Mr. Gunderson expressed a concern about Mr. Karo's need to park trucks on the property. At that point Mr. Karo decided not to rent the unit. Tr. pp. 89-95, 395.

12. The successful applicant, Stephen Zweig, who is white, rented the apartment on November 1, 1997. He was employed as an independent meat deliverer, conducting his business out of his truck. Mr. Gunderson permitted him to rent the apartment on condition that he not have customers coming to the apartment. Tr. pp. 423-25.

13. On January 28, 1998, Complainants filed complaints with the Department of Housing and Urban Development alleging discrimination in violation of the Fair Housing Amendments Act, 42 U.S.C. §§ 3604(a) and (d), based on race and color.

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[5]Mr. Gunderson's version of the conversation is that he told Mr. Pierce that the City of Delafield would not permit a business in a four-unit dwelling, that his insurance rates would increase if he rented to Complainants; and that he "might" have the apartment rented. In addition, he testified that he advised Complainants to "rent a store." Tr. p. 395

Discussion

The Charge of Discrimination alleges that Respondents unlawfully refused to rent or negotiate with Complainants because of Ms. Pierce's race and color (Section 3604(a)) and represented to them that a dwelling was unavailable when in fact it was (Section 3604(d)). The Charging Party has failed to establish a *prima facie* case of discrimination.

Absent direct evidence,[6] the Charging Party may fulfill its burden of persuasion by indirect evidence. To do so the Charging Party must first establish a *prima facie* case of housing discrimination. *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). Elements of a *prima facie* case "are not fixed;" they vary depending on the circumstances of each individual case. *Pinchback*, 689 F. Supp. 541, 549 (D.Md. 1988). Under the circumstances of this case, the Charging Party must prove the following to establish a *prima facie* case: (1) Complainants are members of a protected class; (2) they were *qualified* to rent Ms. Gunderson's apartment; (3) they applied to rent the apartment; and (4) Respondents rejected the Complainants as tenants. *See, e.g., Soules v. HUD*, 967 F.2d 817, 822 (2d Cir. 1992); *Blackwell*, 908 F.2d at 870; *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1979). By failing to establish the second element, the Charging Party did not carry its initial burden. *See e.g., HUD v. Ramapo Towers Owners Corp.*, Fair Housing-Fair Lending (Aspen) ¶25,122 at 26037 (HUD ALJ 1996).

To be "qualified" an applicant must meet the "legitimate, objective requirements of the landlord." *Smith v. Anchor Building Corp.*, 536 F.2d 231, 233-35 (8th Cir. 1976). The Charging Party argues that "qualified" means *financially* qualified. While most cases have addressed the criteria in these terms, "qualified" is not limited solely to financial requirements.[7] Financial qualifications are merely an example of legitimate and objective requirements. Respondents' adherence to the Delafield City Code was legitimate. The 1997 revisions were passed for legitimate reasons balancing the needs of the community to permit small, unobtrusive businesses in single family and duplex

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[6] *Black's Law Dictionary* defines "direct evidence" as evidence that "proves the fact without inference or presumption." *Id.* at 577 (7th ed. 1999).

[7] At least two United States District Courts have dismissed cases because of nonfinancial disqualifications. *See United States v. The Salvation Army*, No. 96 Civ. 2415 WHP, 1999 WL 756199 (S.D. N.Y. Sep. 24, 1999) (non-student disqualified by restriction to students); *Walker v. Cox*, No. 95 CV 1219, 1997 WL 177854 (E.D. N.Y. Mar. 27, 1997) (plaintiff disqualified for failure to adhere to lease provision requiring Housing Manager's consent prior to adding non-family members as tenants).

residences while avoiding parking, signage, security, and noise problems in larger housing complexes. There is no evidence, nor contention, that the change to the existing ordinance was a pretext for some form of illegal discrimination. It was also "objective." It was published and applicable to all housing providers in the City of Delafield.

Excepting "home occupations" and "home businesses,"[8] there is no evidence that the Delafield City ordinance authorized businesses in residential areas. The Delafield City ordinance provides an exception for "home occupations," but it is limited to single family dwellings and duplexes. The City Attorney of Delafield, the Planning Consultant to the City of Delafield, and the former City Manager all agree that "home occupations" were prohibited in four-unit dwellings. At the conclusion of the hearing, Counsel for the Charging Party agreed that there was no evidence to the contrary.[9] Res. Ex. 1; Tr. Pp. 42-43, Tape of May 2, 2000, hearing.

Conclusion and Order

The uncontroverted evidence demonstrates that Complainants were not qualified to rent the apartment because they intended to operate a business in the apartment, and, accordingly, the Charging Party has failed to meet its initial burden to establish a *prima facie* case of discrimination. Therefore, it is **ORDERED**, that the charge of discrimination is *dismissed.*

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[8]The only difference between a "home occupation" and a "home business" is that the latter entails the employment of one nonresident. J.E. Ex. 1.

[9]In the Initial Determination and Order granting Respondents' Motion for Summary Judgment, I granted Respondents' Motion after concluding that Complainants could not operate a computer resume business in a four-unit dwelling without violating the City of Delafield ordinance. The Remand of the Secretary's Designee was premised on the possibility that, despite the limitation for "home occupations" to single family residences or duplexes, evidence might exist that the City of Delafield ordinance was read, or could be read, to include dwellings that did not fall within the limitation. The Secretary's Designee stated that it was not clear whether the definition of "home occupation" in the Delafield ordinance should "1) be construed as limited in its application to single family and duplex residences, or 2) whether an activity cannot qualify as a permissible home occupation unless, as one of the criteria for satisfying the definition, such activity would be conducted in a single family or duplex residence." Secretary's Final Decision and Order. The evidence clearly demonstrates the correctness of the former.

This **ORDER** is entered pursuant to 42 U.S.C. § 3612(g)(3) and 24 C.F.R. § 180.670(b)(4), and will become final upon expiration of 30 days or the affirmance, in whole or in part, by the Secretary of HUD within that time.

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WILLIAM C. CREGAR
Administrative Law Judge

Dated: August 14, 2000