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 Colleen McGuire, Charging Party, v. Joanne Hacker, Respondent.	HUDALJ 05-90-1181-1 Decided: December 2, 1992

Elizabeth Crowder, Esq.
For the Charging Party

Brian R. McKillip, Esq.
For the Respondent

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 Colleen McGuire ("Complainant"), alleging discrimination based on familial status in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601, *et seq.* ("the Act"). On May 5, 1992, 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 against Joanne Hacker ("Respondent"), alleging that she had engaged in discriminatory practices in violation of Section 804 of the Act, 42 U.S.C. § 3604.

A hearing was held in Chicago, Illinois on July 21, 1992. The parties' post-hearing briefs were timely filed on September 18, 1992. Respondent timely filed a reply brief on October 2, 1992.[1]

Findings of Fact

1. Respondent is currently the owner of a 53-unit apartment building. Since 1977, she has resided in Indianhead, Illinois. Respondent is a licensed real estate agent.
Tr. 207, 230-32.[2]

2. In June 1990, Respondent was the owner of an apartment building located at 547-559 Spring Road, Elmhurst, Illinois ("the Spring Road building"). The Spring Road building consists of 27 residential units and 7 stores. Of the 27 residential units, 23 are one-bedroom apartments and 4 are two-bedroom apartments. The one-bedroom apartments measure approximately 550 square feet. The two-bedroom apartments measure approximately 750 square feet. Tr. 207, 209, 242.

3. Respondent and her late husband acquired the Spring Road building in 1972. Respondent's husband died in 1985. Prior to his death, he was primarily responsible for management of the Spring Road building, although Respondent would answer phone calls. After her husband's death, Respondent undertook sole management of the building. Tr. 207-08, 225.

4. Complainant is divorced, and has two daughters. Since November 1990, Complainant has resided in a rental apartment located on South York Road in Elmhurst, Illinois. Tr. 118, 120, 142, 171; J.Exs. 1, 7 and 8.

5. In June 1990, Complainant's children were ages 11 and 9. Complainant and her children resided with her parents in their Elmhurst, Illinois home. Because her parents had decided to sell their home, Complainant was searching for an apartment for herself and her two children. Complainant's children attended a parochial school located in Elmhurst. The Spring Road building was within the geographic boundary of the school's residency requirement. Complainant was employed at the American Association of Insurance Services. Tr. 97-99, 118-22; J.Ex. 1.

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[1]The Secretary did not file a reply brief.

[2]The following reference abbreviations are used in this decision: "Tr." for Transcript, "J.Ex." for Joint Exhibit, "C.P.Ex." for Charging Party's Exhibit, and "R.Ex. for Respondent's Exhibit.

6. After her husband's death, Respondent was solely responsible for showing and renting apartments at the Spring Road building. Because Respondent was often concerned about showing an apartment alone, Al Martin, the former owner of the building who had remained on the premises, was available to accompany Respondent. Mr. Martin kept the building's keys either in his shop in the building or in a safe located in the building's boiler-room. If an apartment had not yet been vacated by the current tenant and the tenant was not home when the apartment was shown, Respondent would arrange to obtain the keys from Mr. Martin. Tr. 208-09, 211, 225.

7. When advertising a vacancy at the Spring Road building, it was Respondent's practice to post a sign on the premises listing her phone number, to place an advertisement with Press Publication's DuPage Press, and to spread news of the vacancy by word of mouth. Dupage Press published an identical classified section for all its newspapers, including the Elmhurst Press. In June 1990, the Elmhurst Press was published on Wednesdays and Fridays. Tr. 19, 48, 208-09, 234; J.Ex. 9.

8. The drive from Respondent's Indianhead home to the Spring Road building and back takes approximately one hour. Tr. 210-11. When showing an apartment at the Spring Road building, Respondent would make multiple appointments for the same time because of the distance between her home and the Spring Road building. Tr. 212-13.

9. In June 1990, John Brancaleon and his wife resided in apartment 1B of the Spring Road building. The Brancaleons had moved into the Spring Road building in June 1988, and had signed a one-year lease. In or about June 1989, as their lease neared expiration, Respondent asked the Brancaleons if they wanted to renew their lease. The Brancaleons told Respondent that they wanted to renew the lease, and did so for a second year. At that time, Mrs. Brancaleon was three or four months pregnant.[3] The Brancaleon's child was born on November 1, 1989. In May or June 1990, as their second lease term neared expiration, Respondent again asked the Brancaleons if they wanted to renew their lease. They declined because they had an opportunity to move in with
Mrs. Brancaleon's mother, but requested and were granted a one-month extension to July 31, 1990. Respondent then asked the Brancaleons if she could show the apartment to prospective tenants. The Brancaleons gave their permission, but requested that Respondent give them one or two days notice before showing the apartment so they could make it presentable. Respondent also asked the Brancaleons if she could show the apartment on weekends. Since the Brancaleons were usually out of town on weekends, they were amenable. Tr. 186-92, 209-10; J.Ex. 4.

10. Respondent first advertised apartment 1B in the Dupage Press newspapers on Wednesday, June 27, 1990. Tr. 210, 221, 233-36. The advertisement stated:

ELMHURST
5 room, 2 bedroom apartment,
dining room, stove, refrigerator,
heated, parking. August 1st.
$535.....708-246-3444

J.Ex. 9.

[3]The record does not establish whether Respondent knew of the pregnancy at the time she offered to renew the Brancaleon's lease. Tr. 188-189.

11. The only newspapers in which Respondent placed an advertisement for apartment 1B were those published by Press Publications' Dupage Press. Tr. 239.

12. Before she was able to reach the Brancaleons and Mr. Martin, Respondent began receiving responses to the advertisement. Tr. 211, 236.

13. When responding to telephone inquiries about the apartment, it was Respondent's practice to ask the caller how many people would be occupying the apartment and the identity of those persons. It was also Respondent's practice to advise the caller that the building was old and offered no amenities such as laundry facilities, air conditioning, carpeting, an elevator, or balconies. She made such comments either on her own or in response to a caller's questions so that the caller would not needlessly schedule an appointment to see the apartment. Respondent would also write down the caller's name and telephone number on pieces of paper she left at each of the three phones in her home. Tr. 211, 213-16, 221-23, 232, 236.

14. On Wednesday, June 27, 1990, at approximately 2:30 p.m., Complainant, after reading the advertisement Respondent had placed in the Elmhurst Press, telephoned the number listed in the advertisement from a pay phone near her place of employment. This was the first call she had made in her apartment search. Respondent answered the telephone.[4] Complainant stated that she was interested in the apartment. Respondent asked who the apartment was for, and Complainant responded that it was for herself and her two daughters. Respondent stated that the apartment was "very, very small" and that she was not yet showing the apartment. She also stated that she would take Complainant's phone number, and that she would call Complainant back when she was setting up appointments. Complainant gave Respondent her name and phone number at work. Complainant did not ask Respondent for her name. Tr. 123-25, 149-51, 153, 170; J.Exs. 1, 2 and 3.

15. Another applicant, Daniel Larberg, received a telephone call from a friend while at work on Wednesday, June 27, 1990. The friend, who was bedridden, was reading newspaper advertisements in order to assist Mr. Larberg and his wife in their search for an apartment. The friend told Mr. Larberg that she had seen Respondent's advertisement in the Elmhurst Press and had obtained the address of the apartment by calling the telephone number listed in the advertisement. That night, after work, Mr. Larberg drove by the Spring Road building. At that time the Larbergs had no children. Tr. 195, 202-03.

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[4]Complainant did not ask Respondent to identify herself during this call, nor did Respondent volunteer that information. Tr. 125, 153. Moreover, other than her conversation with Daniel Larberg discussed *infra*, Respondent does not recall any specific conversation with Complainant or any of the other persons who called to inquire about the apartment. Tr. 220, 227-30, 236, 239-41. However, Respondent does not deny that she is the person to whom Complainant and other callers spoke when they called the telephone number listed in the advertisement.

16. On Wednesday evening, June 27, 1990, Respondent made arrangements with the Brancaleons to show the apartment the following evening.[5] After Respondent had made those arrangements, Mr. Larberg called Respondent and scheduled an appointment to see the apartment for the following evening, Thursday, June 28, 1990. Tr. 191-92, 195-96, 202-03, 212, 215, 232-34.

17. The appointment with the Larbergs was the first made by Respondent to show the apartment. Tr. 212.

18. As of 2:30 p.m. on Thursday, June 28, 1990, Complainant had not received a return call from Respondent. Complainant telephoned the number in the advertisement, using the alias "Mary Savage." Complainant told Respondent that the apartment would be for herself and her husband. Respondent told Complainant that she was showing the apartment at 6:00 p.m. that evening and offered Complainant an appointment. Although Complainant had no plans for that evening she declined, and made an appointment for that Saturday at 11:00 a.m. Respondent then identified herself and gave Complainant the building's address. Tr. 125-27, 153-54, 164-65; J.Ex. 1.

19. On June 28, 1990, after her call to Respondent as Mary Savage, Complainant telephoned HUD and was referred to Homes of Private Enterprise Fair Housing Center ("HOPE"), located in Lombard, Illinois. Complainant telephoned HOPE that same day, and spoke with Catherine Cloud, who at the time was HOPE's Assistant Director. Ms. Cloud had conducted 15 to 20 discrimination tests and had trained other testers. Complainant told Ms. Cloud about the calls she had placed to Respondent as herself and as "Mary Savage." Tr. 18, 52-53, 56, 129, 131, 158.

20. The Larbergs met with Respondent at the Spring Road building on Thursday, June 28, 1990, between 6:30 and 7:00 p.m. The Brancaleons were in the apartment

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[5]According to the Charging Party, Mr. Brancaleon's hearing testimony supports a finding that Respondent showed the apartment before Wednesday, June 27, 1990. *See* Charging Party's Post-Hearing Brief at 13-14. In support of that allegation, the Charging Party relies on the following excerpt from Mr. Brancaleon's hearing testimony:

> She asked us if it would be all right if she showed it on weekends and we said yes. Normally on those weekends we made arrangements that we'd be out of town anyway.

Tr. 192. There is nothing in the record, including this excerpt, that supports the Charging Party's allegation. The testimony relied upon by the Charging Party concerns the conversation Mr. Brancaleon and his wife had with Respondent in May or June 1990 during which they declined Respondent's offer to renew their lease. The testimony does not refer to any particular instance for which Respondent sought permission to show the apartment, but rather, concerns the Brancaleons' request that Respondent give them notice before showing the apartment and the Brancaleons' grant of permission to show the apartment on weekends.

when the Larbergs entered, but soon left. The Larbergs remained in the apartment a total of 10 or 15 minutes. They told Respondent that they wanted to rent the apartment. Respondent gave them an application, and instructed them to mail it back to her. Because they had only been at their jobs for a short period of time, Respondent also told the Larbergs that she wanted to confirm their employment status. Respondent did not tell the Larbergs that she would rent the apartment to them. Tr. 192-96, 200, 212-13.

21. After meeting with Respondent, the Larbergs returned home and completed the application. Mr. Larberg mailed the completed application at the Indianhead Park post office the next morning, Friday, June 29, 1990. Tr. 198-99, 201, 204.

22. On Friday, June 29, 1990, at 4:40 p.m., Ms. Cloud conducted a test by telephoning the number listed in the advertisement placed by Respondent. She posed as "Cathy Hoffman," a single mother with two sons, ages 3 and 4. Ms. Cloud told Respondent that she was calling about the two bedroom apartment that was for rent. Respondent asked how many people would be living in the apartment. Ms. Cloud replied three. Respondent then asked whether that meant Ms. Cloud, her husband, and a child. Ms. Cloud replied no, and stated that she and her two sons would reside there. Respondent asked if she could have Ms. Cloud's name and telephone number and call her back. Ms. Cloud replied that that was not convenient, and that she would have to call her back. Respondent then stated that a couple was taking the apartment. Ms. Cloud asked if that meant she could not get the apartment. Respondent replied "'[w]ell, you never know what's going to happen, but there's not much hope.'" Ms. Cloud then thanked Respondent and hung up. Tr. 21-25, 49, 54-56, 58-60, 239-40; C.P. Ex. 1.

23. Approximately 10 minutes after Ms. Cloud completed her test, William Riddle, then a HOPE employee, conducted another test, his first. Respondent asked who the apartment would be for, and Mr. Riddle replied that it would be for himself and his wife. Respondent told Mr. Riddle that she would call him back over the weekend to set up an appointment. Mr. Riddle gave Respondent his own name and own home telephone number.[6] Tr. 25-26, 61-62, 70, 228-30; J.Ex. 13.

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[6]According to the Charging Party, after Respondent asked Mr. Riddle who the apartment would be for and Mr. Riddle replied that it was for himself and his wife, Respondent stated that the apartment was available and asked Mr. Riddle to leave his name and phone number so she could call him over the weekend to set up an appointment. *See* Charging Party's Post-Hearing Brief at 4. Respondent, however, denies having stated to Mr. Riddle that the apartment was available, and asserts that she only told him that she would call him back. *See* Respondent's Reply Brief at 3.

I cannot credit Mr. Riddle's version of the event. He averred that his written report, in which he states that Respondent "never called me over the weekend to set up the appointment," was prepared immediately after the conversation that occurred on Friday. Tr. 64-65, 69-70; C.P.Ex. 2. However, it is clear from the face of the report that it had to have been written at least three days later in order for him to be able to conclude that Respondent did not call over an ensuing weekend! When pressed by Respondent's Counsel, he was unable to state when he prepared the report, but implied that because it was standard "procedure" to immediately prepare a written report, he did so. Moreover, he failed to make any notes of the conversation at any time. Tr. 72. Accordingly, in light of his confusion, neither his present recollection of events nor his written report of them are reliable evidence.

24. Respondent telephoned the Larbergs on Friday evening, June 29, 1990, and spoke with Mrs. Larberg. By then, she had confirmed the Larbergs' employment. She told Mrs. Larberg that they could have the apartment, contingent on their giving her a deposit check. Mrs. Larberg arranged to meet Respondent at the Spring Road building the following morning, June 30, 1990, to give Respondent her check. Tr. 200, 216-17, 230.

25. Respondent did not consider the apartment rented until she had the Larbergs' check in hand. Persons who called Respondent on Friday, June 29, 1990, were not advised that the apartment had been rented. To avoid the disruption of receiving numerous follow-up calls, Respondent took down the callers' names and phone numbers so she could return the calls in the event the Larbergs did not give her the check. Tr. 217-18, 227, 230. *See also* Tr. 204.

26. Respondent received the Larbergs' application in the mail on Saturday, June 30, 1990. Tr. 204-05, 227.

27. Respondent met with the Larbergs at the Spring Road building between 8:00 a.m. and 9:00 a.m. on Saturday, June 30, 1990, for approximately 5 minutes. At that meeting, the Larbergs gave Respondent the deposit check. Tr. 200-01, 204-05, 218, 227; R.Ex. 1.

28. Complainant neither telephoned Respondent after the call during which she posed as "Mary Savage," kept the Saturday appointment, nor called to cancel. Tr. 153-54, 165.

29. Ms. Cloud, as "Cathy Hoffman," never attempted to contact Respondent after she conducted the test on Friday, June 29, 1990. Tr. 48.

30. Respondent received approximately 30 telephone inquiries about the apartment. She never attempted to return any of the calls, including the calls placed by Mr. Riddle and Complainant. Tr. 218, 221-22.

31. Lynn Becker was a tenant at the Spring Road building from December 1983 to July 12, 1992. While a tenant at the Spring Road building, Ms. Becker executed eight one-year leases. She moved into the building with her daughter, Kim, who at the time was 10 years old. Respondent's husband had shown Ms. Becker the apartment, but before she moved into the building, she had also spoken with Respondent. Kim lived at the building with Ms. Becker during the entirety of Ms. Becker's tenancy. When Ms. Becker moved into the building, a married couple with a 4 to 5 year old girl was living upstairs. That couple remained at the building for the next two years. A woman with a teenage son lived next door to Ms. Becker when she moved into the building. The woman and her son remained at the building for the next year. Respondent never complained to Ms. Becker about Kim or the other children at the building. Ms. Becker observed no children at the building in June 1990, and at the time she moved out of the building, she was not aware of any children who resided at the building. Tr. 178-85; J.Ex. 5.

32. During the time the Brancaleons resided in apartment 1B, including June 1990, they could occasionally hear a baby crying in the building. The Brancaleons moved out of the building by August 31, 1990. Respondent never complained to the Brancaleons about their child. Tr. 190-93.

33. In March or April 1990, a Dr. Sejedki moved into the Spring Road building. His child, who was approximately eighteen months old, resided with him in the apartment three days a week. Dr. Sejedki had not listed the child on the lease application. Dr. Sejedki was residing in the building when Respondent sold it in November 1990. Tr. 219-20, 226-27, 238-39.

34. In June 1990, Respondent began taking steps to sell the Spring Road building. She wanted to sell the building because she felt the responsibilities associated with its management had become burdensome. She sold the Spring Road building in November 1990. In March 1991, Respondent purchased the 53-unit building that she currently owns. Respondent does not manage that property herself. Tr. 221, 230-31, 241.

35. The Larbergs moved into unit 1B at the Spring Road complex during the end of July 1990. They had a child on October 4, 1991, during the second year of their tenancy at the Spring Road building. The Larbergs moved out of the Spring Road building in June 1992. During the time they resided at the Spring Road building with their child, they had no problems concerning the child, and did not move out of the apartment because of any such problems. Tr. 194, 205-06.

Discussion

The Congress passed the Fair Housing Act to "[e]nsure the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of impermissible characteristics." *United States v. Parma*, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *rev'd on other grounds,* 661 F.2d 562 (6th Cir. 1981), *cert. denied,* 465 U.S. 926 (1982). *See also United States v. City of Black Jack,* 508 F.2d 1179, 1184 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975); *cf. Griggs v. Duke Power Co.,* 401 U.S. 424, 430-31 (1971). The Act was designed to prohibit "all forms of discrimination [even the] simple-minded." *Williams v. Matthews Co.,* 499 F.2d 819, 826 (8th Cir. 1974).

On September 13, 1988, the Act was amended to prohibit, *inter alia,* housing practices that discriminate on the basis of familial status.[7] 42 U.S.C. §§ 3601-19. "Familial status", as relevant to this proceeding, is defined as:

> [O]ne or more individuals (who have not attained the age of eighteen years) being domiciled with. . .a parent or another person having legal custody of such individual or individuals. . . .

[7] In amending the Act, Congress recognized that "families with children are refused housing despite their ability to pay for it." H.R. Rep. No. 711, 100th Cong., 2d Sess., at 19 (1988). Congress cited a survey finding that 25 percent of all rental units exclude children and that 50 percent of all rental units have policies restricting families with children in some way. *Id., citing* Marans, *Measuring Restrictive Rental Practices Affecting Families with Children: A National Survey*, Office of Policy Planning and Research, HUD (1980). The survey also found that almost 20 percent of families with children were forced to live in undesirable housing due to restrictive housing policies. *Id.* Congress therefore intended the 1988 amendments to remedy these problems for families with children.

Id. at § 3602(k)(1). *See also* 24 C.F.R. § 100.20.

The Act makes it unlawful, *inter alia,*

> (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. . . .
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> * * *
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> (d) To represent to any person because of. . .familial status. . . that any dwelling is not available for inspection. . .or rental when such dwelling is in fact so available.

42 U.S.C. § 3604(a), (d).[8] *See also* 24 C.F.R. §§ 100.60, 100.80.

[8]The "deny" or "otherwise make unavailable" language in 42 U.S.C. § 3604(a) proscribes any conduct which makes housing unavailable, as well as all practices that have the effect of denying dwellings on prohibited grounds, and that in any way impede, delay, or discourage a prospective renter. *See United States v. Youritan Constr. Co.,* 370 F. Supp. 643, 648 (N.D. Cal. 1973), *modified on other grounds,* 509 F.2d 623 (9th Cir. 1975); *Zuch v. Hussey*, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975).

The legal framework to be applied in a case under the Fair Housing Act depends on whether the evidence offered to prove the alleged violation is direct or indirect. Direct evidence, if it constitutes a preponderance of the evidence as a whole, will support a finding of discrimination. *See Pinchback v. Armistead Homes Corp.,* 907 F.2d 1447, 1452 (4th Cir.), *cert. denied,* __ U.S. __, 111 S.Ct. 515 (1990). However, in the absence of direct evidence of discrimination, the analytical framework to be applied in a fair housing case is the same as the three-part test used in employment discrimination cases under Title VII of the Civil Rights Act, as set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). *HUD v. Blackwell,* 908 F.2d 864, 870 (11th Cir. 1990); *Pinchback*, 907 F.2d at 1451. Under that test:

> First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. . . . Second, if the plaintiff sufficiently establishes a prima facie case, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for its action. . . .Third, if the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance [of the evidence] that the legitimate reasons asserted by the defendant are in fact mere pretext. . . .

Pollitt v. Bramel, 669 F. Supp. 172, 175 (S.D. Ohio 1987), *citing McDonnell Douglas,* 411 U.S. at 802, 804.

The shifting burdens analysis in *McDonnell Douglas* is designed to ensure that a complainant has his or her day in court despite the unavailability of any direct evidence of discrimination. *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121 (1985), *citing Loeb v. Textron, Inc.,* 600 F.2d 1003, 1014 (1st Cir. 1979).

Although Complainant has not presented any direct evidence of discrimination, she has presented a prima facie case of discrimination. Complainant, as the parent with whom her two children, ages 11 and 9, were domiciled, is a member of a protected class. The record also shows that she was qualified to rent the apartment, that when she expressed an interest in seeing the apartment it was available, but that she was not provided with an appointment. Finally, the record shows that after Complainant was denied an appointment, the apartment remained available. *See, e.g., Selden Apartments v. HUD,* 785 F.2d 152, 159 (6th Cir. 1986); *Robinson v. 12 Lofts Realty, Inc.,* 610 F.2d 1032, 1038 (2d Cir. 1979).

Having concluded that Complainant has established a prima facie case, the burden of production shifts to Respondent to articulate a legitimate, nondiscriminatory reason for her actions. *See Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981); *McDonnell Douglas,* 411 U.S. at 802. To meet this burden, the evidence

offered by Respondent must raise a "genuine issue of fact" as to whether she discriminated against Complainant. *See Burdine,* 450 U.S. at 254-55. Furthermore, the evidence must be admissible and must enable the trier of fact "rationally to conclude" that Respondent's actions have not been motivated by "discriminatory animus." *Id.* at 257.

To rebut the presumption of unlawful discrimination created by the establishment of a prima facie case, Respondent testified that she did not give Complainant an appointment to see the apartment when Complainant telephoned her at 2:30 p.m. on Wednesday, June 27, 1990, because she had not yet made arrangements with the Brancaleons or Mr. Martin to show the apartment. According to Respondent, she first advertised the apartment in the newspaper on Wednesday, June 27, and not until that evening, did she make arrangements with the Brancaleons to show the apartment the following night, Thursday, June 28. According to Respondent, Mr. Larberg telephoned her on Wednesday evening, after she had made the arrangements with the Brancaleons, and, therefore, she was able to schedule an appointment with him for the following night.

Respondent has articulated a legitimate, nondiscriminatory reason for her actions. Because Respondent has met her shifting burden of production, if Complainant is to prevail, she must demonstrate that the reason for Respondent's actions is pretextual and that familial status did in fact play a part in Respondent's decisional process. Complainant need not prove that familial status was the sole factor motivating Respondent. Complainant need only show by a preponderance of the evidence that familial status is one of the factors that motivated Respondent in her dealings with Complainant. *See, e.g., Robinson,* 610 F.2d at 1042; *United States v. Mitchell,* 580 F.2d 789, 791 (5th Cir. 1978); *Pollitt,* 669 F. Supp. at 176.

To demonstrate pretext, the Charging Party first ascribes a sequence to the events in this case which is contrary to the evidence. The Charging Party's demonstration depends upon proof that Respondent scheduled the appointment with the Larbergs *before* Complainant's initial telephone call to Respondent on Wednesday. The Charging Party then interprets the telephone conversations between Respondent and herself and as "Mary Savage" and between Respondent and testers Ms. Cloud and Mr. Riddle, in light of this error. Second, the Charging Party takes issue with Respondent's inquiry into the number and identity of persons who intended to occupy the apartment. Finally, the Charging Party strains to attribute pretext to the uncontroverted fact that no additional families with children became tenants after Respondent assumed full ownership of the apartment, following the death of her husband.

The Charging Party asserts that Respondent had already scheduled the appointment with the Larbergs when Complainant first called to inquire about the apartment, and that therefore, Respondent could have given Complainant an appointment when she first called. In sole support of its argument, the Charging Party relies on Mr. Larberg's and Mr. Brancaleon's imprecise recollections of when Respondent made the appointment with the Larbergs. Mr. Larberg equivocally testified that he called

Respondent "like on a Tuesday."[9] Tr. 195. Mr. Brancaleon stated :

> One time she showed it while we were there. It was during the week. It was in the evening. She called us *a couple of days prior* and said that she would like to show it on this date because this is when this couple would be around to see it. We had no problem with that whatsoever.[10]

[9]When asked if he recalled the conversation he had with Respondent, Mr. Larberg replied, "Specifically, no. I remember talking to her and setting up Thursday night, though." Tr. 195-96. Only when Government Counsel during cross-examination restated Mr. Larberg's testimony with particular reference to Tuesday, June 26, did Mr. Larberg express the belief that the appointment was scheduled on that date. Tr. 203.

[10]Mr. Brancaleon's testimony is not only indefinite as to the day on which he was called by Respondent and the day on which the apartment was shown, but given the placement of the word "because" in Mr. Brancaleon's response, it is unclear whether Mr. Brancaleon was testifying that Respondent referred to an appointment she had already made when she spoke with him, or whether his reference to "this couple" merely reflected information that he subsequently learned.

Tr. 191 (emphasis added). The Charging Party's assertion, however, fails to take into account the following unrebutted evidence: Mr. Larberg learned of the apartment from a friend who had seen the advertisement in the Elmhurst Press; Mr. Larberg telephoned Respondent during the evening of the same day that he learned of the apartment; the Elmhurst Press was published on Wednesdays and Fridays; and the only advertisement introduced into the record is the advertisement published on Wednesday, June 27. Based on this evidence, it is a factual impossibility for Mr. Larberg to have scheduled the appointment on Tuesday, June 26 as asserted by the Charging Party.

Because Respondent credibly testified that she made arrangements with the Brancaleons and the Larbergs after receiving Complainant's initial phone call, the evidence demonstrates the following: When Complainant telephoned Respondent during the afternoon of Wednesday, June 27, Respondent had not yet made the arrangements with the Brancaleons to show the apartment. Respondent conveyed that information to Complainant, and consistent with her practice, she took down Complainant's name and phone number for future reference.[11] By the time "Mary Savage" telephoned Respondent on Thursday afternoon, Respondent had already scheduled an appointment with Mr. Larberg for that evening. Consistent with Respondent's practice of scheduling several appointments for the same time, when telephoned on Thursday afternoon, she offered "Mary Savage" an appointment for that evening.[12] By the time Ms. Cloud and Mr. Riddle conducted their tests on Friday afternoon, Respondent had already met with the Larbergs. Although Respondent did not commit to renting to the Larbergs at that meeting, the Larbergs indicated their desire to do so and were given a rental application by Respondent. At that time, Respondent also indicated that she was going to confirm their employment status. Thus, as of Thursday evening, although Respondent did not consider the apartment as being rented to the Larbergs, she was preparing to do so. Indeed, because Respondent did not consider the apartment rented until that Saturday, when she had the Larbergs' check in hand, she made the contract contingent on receipt of a deposit check when she telephoned the Larbergs on Friday evening to tell them that they could have the apartment.

When Respondent spoke to Ms. Cloud posing as "Cathy Hoffman" on Friday

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[11]Both Respondent's statement to Complainant that she would return Complainant's call when she was ready to schedule appointments, and the fact that she never did so, are consistent with the casual method she used to keep track of her phone inquiries, the considerable number of phone inquiries she received in the short period of time, and the fact that by Thursday evening, she was preparing to rent the apartment to the Larbergs.

[12]As set forth above, "Mary Savage" declined the offer of a Thursday appointment, and instead scheduled an appointment for that Saturday. Respondent did not need to confer with the Brancaleons before scheduling the Saturday appointment since the Brancaleons had already advised Respondent that they were usually out of town on weekends and that therefore, she could "go ahead" and show the apartment on weekends. Tr. 210. *See also* Tr. 191-92. Moreover, since the call with "Mary Savage" occurred on Thursday, Respondent would have had ample time, if necessary, to make arrangements with Mr. Martin to obtain the keys for the Saturday appointment.

afternoon, she asked Ms. Cloud for her phone number, and when Ms. Cloud declined to furnish it, she told Ms. Cloud that a couple was taking the apartment. When asked by Ms. Cloud whether that meant she would not get the apartment, Respondent replied, "[w]ell, you never know what's going to happen but there's not much hope." Respondent did not want to give Ms. Cloud the false impression that there was a likelihood that she would be able to rent the apartment, particularly since she did not want the disruption of receiving follow-up calls. Yet, she wanted to have Ms. Cloud's number in the event a contract with the Larbergs fell through. As with Ms. Cloud, she requested Mr. Riddle's phone number in the event the apartment was not rented to the Larbergs.

The Charging Party also attempts to cast as pretext Respondent's inquiry of Complainant, Ms. Cloud and Mr. Riddle into the number and identity of the persons who intended to occupy the apartment. This attempt fails because Respondent has proffered a credible explanation, unrebutted by the Charging Party, for her inquiry. She made the inquiry because there was a potential problem with parking availability if several adults were to occupy the apartment. Tr. 214-215, 232. She also made the inquiry because she "didn't feel...if five, six people would...really fit" in a two-bedroom unit and because she did not want to waste her or the caller's time by showing an apartment in which the caller would not be interested. Tr. 215.

Not only did Respondent articulate her explanation forthrightly and with candor, but the Charging Party proffered no evidence to rebut Respondent's testimony. There is nothing in the record which contradicts Respondent's testimony that the Spring Road building parking lot did not have enough spots for every apartment, that there was no overnight street parking in Elmhurst, and that therefore, a tenant might have to locate off-street parking. There is also nothing in the record to indicate that Respondent applied a different occupancy standard depending on whether children were involved.[13]

Finally, the Charging Party asserts that Respondent's history of renting apartments to persons with children demonstrates an attempt, following her husband's death, to minimize the number of children living in the building. There is no evidence that after her husband's death any families with children under 18 applied for any of her vacant apartments and were rejected. To infer discrimination from the absence of this evidence would improperly shift the burden of persuasion to the Respondent to rebut a negative inference arising *ex nihilo*.

CONCLUSION AND ORDER

[13]Although Respondent once mentioned that the apartment was "very, very small," the context in which the comment was made to the Complainant is not a matter of record. Moreover, Respondent made no similar comment to Ms. Cloud. Accordingly, I do not find that this single description of the size of the apartment manifests an intent to discriminate. *See* Charging Party's Post-Hearing Brief at 12.

The Charging Party has failed to prove by a preponderance of the evidence that Respondent engaged in any discriminatory housing practices. Although there is a prima facie case of discrimination, Respondent has asserted a legitimate, nondiscriminatory reason for her actions which the Charging Party has failed to establish is merely pretextual. 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.

/s/

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WILLIAM C. CREGAR
Administrative Law
Judge