

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
Sherry Soules, and Housing
Opportunities Made Equal, Inc.,

Charging Party,

v.

1991

HUDALJ 02-89-0322-1
HUDALJ 02-89-0323-1
Decision issued: Sept. 20,

Mary Jean Downs and
Professional Realty Service,

Respondents.

Timothy A. McCarthy, Esq.
For the Respondent

Kathleen M. Pennington, Esq.
For the Secretary

Before: William C. Cregar
Administrative Law Judge

INITIAL DECISION AND ORDER

This matter arose as a result of complaints of discrimination based upon familial status in violation of the Fair Housing Act as amended, 42 U.S.C. Secs. 3601, et seq ("Fair Housing Act" or "Act") and 24 C.F.R. Parts 103 and 104. The complaints were filed with the Department of Housing and Urban Development ("the Department" or "HUD") on July 5, 1989. A determination of Reasonable Cause was made and a Charge of Discrimination filed on behalf of the Complainants by the Secretary of the Department ("Secretary" or "the Government") on February 28, 1991. A hearing was held in Buffalo, New York on May 22 and 23, 1991. Post-hearing briefs were filed by the parties on July 8, 1991. Reply briefs were filed on July 22, 1991.

The Secretary alleges that Respondents Mary Jean Downs and Professional Realty Service, Inc. ("PRS"): 1) refused to lease or negotiate the rental of, or otherwise made unavailable, the upper story of a two family dwelling located at 431 Bird Avenue, Buffalo, New York, to Complainant Sherry Soules and Robin Barnes, a "tester" for Complainant Housing Opportunities Made Equal ("HOME"), because of familial status in violation of 42 U.S.C. Sec. 3604(a); 2) made statements indicating a discriminatory preference based upon familial status in violation of 42 U.S.C. Sec. 3604(c); and 3) represented to Ms. Soules and Ms. Barnes that a dwelling was not available when a dwelling was, in fact, available, in violation of 42 U.S.C. Sec. 3604(d). The Secretary further alleges that Respondents engaged in real estate transactions which discriminated based on familial status in violation of 42 U.S.C. Sec. 3605(a).

The Secretary seeks damages for Ms. Soules in the amounts of \$7,500 for inconvenience, \$3,000 for lost housing opportunity, and \$12,500 for emotional distress. The Secretary also seeks damages for Complainant HOME in the amounts of \$1,876.75 for out-of-pocket expenses, \$5,000 for the frustration of HOME's purpose, and \$1,109 to compensate HOME for its future monitoring and testing of Respondents. Finally, the Secretary seeks civil penalties totaling \$10,000.

Respondents admit that they did not make the apartment on Bird Avenue available to Ms. Soules. They contend that their actions resulted not from Ms. Soules' familial status, but, rather, from Respondent Downs' negative reaction to Ms. Soules' questioning during a telephone conversation. Respondents also assert that they were not unwilling to rent the Bird Avenue apartment to Ms. Barnes and that the Secretary has been unable to prove their unwillingness.¹

¹ Respondents also assert that evidence in the record reveals a failure to meet the mandatory conciliation requirement, set forth at 42 U.S.C. Sec. 3610(b)(1), and that this requirement is mandatory, hence jurisdictional. Res. Reply Brief at pp. 18-19. A similar argument was addressed in the case of *HUD v. Morgan*, HUDALJ 08-89-0077-1, slip op. at 8 (July 25, 1991). In that case it was held that, while the conciliation requirement is mandatory, failure to conciliate is not a jurisdictional bar to the issuance of a charge of discrimination. This result was reached by analogy to those cases in which the Secretary has failed to complete an investigation within 100 days of the filing of the complaint and has not given Respondent the notice required by the statute setting forth the reasons that it is impracticable to complete the investigation within the 100 days. 42 U.S.C. Sec. 3610(a)(1)(B)(iv). The 100 day investigation requirement is not jurisdictional because there is no stated consequence for a failure to comply with its terms. *U.S. v. Hakki*, Fair Housing-Fair Lending (P-H) para. 15676 at 16,473 (E.D. Pa.). See also, *Fort Worth National Corp. v. FSLIC*, 469 F.2d 47, 58 (5th Cir. 1972). Similarly, the conciliation section of the statute contains a mandatory requirement but specifies no consequences for a failure to meet its provisions. In a subsequent pleading Respondents take issue with the holding in *Morgan*. While not clearly articulated, they appear to contend that if a statutory provision is stated in mandatory terms, it is sufficient to require compliance with the provision as a jurisdictional prerequisite.

Findings of Fact

Complainant Sherry Soules is a single mother employed by Belmont Shelter Corporation ("Belmont") where she processed applications for financial assistance applicants. Tr. pp. 28, 62.² Prior to May 1989, she lived with her mother and daughter, Leslie Ann, age 12, in a two-bedroom apartment at 261 Richmond Avenue in Buffalo, New York. Tr. pp. 23, 53.

Complainant HOME is a non-profit membership organization dedicated to insuring that all persons receive equal housing opportunities. Its activities include referring individuals to available housing, conducting education programs for housing providers and victims of housing discrimination, publishing pamphlets and newsletters, broadcasting public service announcements, providing legal and emotional counseling to those who believe they have been victimized by housing discrimination, investigating allegations of discrimination, and seeking legal redress for those people HOME believes have been victimized. As part of its investigation of alleged discrimination, it utilizes volunteer "testers". These individuals impersonate applicants, record the results of their tests, and supply these results to HOME.³ Sec. Exs. 3-6, 17 at p. 6; Tr. pp. 60, 128-130, 133-136, 146, 228.

Respondent Mary Jean Downs, a 51-year-old widow, is a licensed realtor and sole owner of Respondent PRS, a New York Corporation. She is a member of the Greater Buffalo Board of Realtors. Res. Ex. 68; Tr. pp. 372, 468. At all times herein, PRS contracted with owners to sell, list, manage and lease their housing. It was paid the first month's rent for obtaining a renter or a percentage of the gross income of property which it contracted to manage. Tr. pp. 469. Eileen Anderson was a part-time employee who assisted Ms. Downs by showing units and taking lease applications. Ms. Downs, however, actually selected the successful tenants from among the applicants. Tr. pp. 373, 410, 441, 468.

In addition, Respondents cite to the legislative history of the 1988 amendments to the Fair Housing Act to show the importance of the conciliation mechanism. Nothing cited by Respondents, including the legislative history, contradicts this interpretive rule, i.e., that in order to preclude jurisdiction, a statute must specify a consequence for failure to comply with its terms. Accordingly, I have rejected Respondents' contentions on this issue.

²The following reference abbreviations as used in this decision: "Sec. Ex." for Secretary's Exhibit; "Res. Ex." for Respondents' Exhibit; and "Tr." for transcript.

³Testers are not informed of the allegations they have been selected to investigate. They are given a profile by HOME based upon the allegations being investigated. The profile is designed to reveal the selection criteria actually being used by the individual or entity being investigated.

Ms. Downs operated her business out of the living room of her rented residence on Lafayette Avenue in Buffalo. She used an answering machine to collect inquiries resulting from her newspaper and yard sign solicitations.

PRS used lease applications completed by the applicant and accompanied by a deposit. If the applicant was not selected by Ms. Downs, she refunded the deposit. Because of a Health Department rule which requires separate bedrooms for children of different sexes over five years of age, the PRS written application form asks the number and ages of any children.⁴ Secs. Exs. 11, 22; Res. Ex. 9; Tr. p. 430. Ms. Downs routinely asked these questions during telephone interviews of prospective tenants. Res. Ex. 68. She did not reveal the address of a listing to a caller unless she was first satisfied that the caller would likely qualify to rent. *Id.*

During April, 1989, Ms. Downs was caring for an elderly aunt who lived in Lima, New York. Lima is approximately an hour and fifteen minutes from Buffalo. The necessity of caring for her aunt included driving her to the hospital or doctors. These visits would extend overnight. Tr. pp. 411-413.

In March 1989, Ms. Downs signed an agreement with Robert Campise, the owner of a two-family dwelling at 431 Bird Avenue, Buffalo, New York (the "Bird apartment"), agreeing to locate a renter for the upper flat of the building. Res. Ex. 1; Tr. pp. 377-378, 394-395, 539-540. The lower flat was occupied by Jeanette and Jerry D'Amaro, a couple in their late 50's or early 60's. The D'Amaros had helped Mr. Campise's mother when she had lived in the upper flat prior to her entry into a nursing home in 1988. Mr. D'Amaro suffered from poor eyesight and possibly diabetes. Tr. p. 538.⁵ Mr. Campise's instructions to Ms. Downs were to find someone who could "live harmoniously" with the D'Amaros. Tr. p. 541. He did not indicate to Ms. Downs that she should not consider families with children. *Id.* The Bird house and apartment were in good repair. Res. Ex. 69 at p. 12; Tr. p. 552. Although the apartment needed interior painting, this was completed before the eventual tenant, Diana Lennox, moved in. Tr. p. 262.

On or about April 8th and 18th, 1989, Ms. Downs placed advertisements in two Buffalo newspapers. Each of the two advertisements identified one, two, and three bedroom apartments

⁴The Secretary does not contest the existence of this purported requirement. Accordingly, I accept Respondents' statement that such a requirement exists. HUD regulations do not limit reasonable local, state or Federal restrictions regarding the maximum number of occupants per dwelling. 24 C.F.R. Sec. 100.10(a)(3).

⁵Ms. Downs claims the D'Amaros had heart conditions. Tr. p. 397. Mr. Campise limits their infirmities to Mr. D'Amaro's poor eyesight and possible diabetes. Because Mr. Campise has known the D'Amaros much longer than Ms. Downs, I have credited Mr. Campise's testimony.

in the "Richmond Area".⁶ Sec. Exs. 18, 19. In addition to the Bird apartment, the listings included a one-bedroom apartment on Colonial Circle, one and three-bedroom apartments on West Utica Avenue, a two-bedroom apartment on Richmond Avenue, itself, and two and three-bedroom apartments on Lafayette Avenue.⁷ Tr. pp. 384, 386.

In April 1989, Ms. Soules was dissatisfied with the size and condition of her present apartment. She did not intend to renew her existing lease and sought a three bedroom apartment in order to provide sufficient space for herself, her daughter and her mother. Tr. pp. 23-24, 106. She wanted to locate an apartment near Richmond Avenue to be near both her daughter's school and her mother's place of employment. She also wished to be on a bus line with easy access to Belmont, a laundry and a grocery store. Tr. p. 52. The three-bedroom Bird apartment is one-tenth of a mile from Richmond Avenue. Tr. p. 168.

Responding to one of Respondents' advertisements, Ms. Soules telephoned PRS on or about April 19, 1989. She left several messages on the answering machine, but received no response. Tr. pp. 26, 68-69. On or about April 20, 1989, she again telephoned and, this time, spoke to Ms. Downs. Res. Ex. 69; Tr. pp. 26-27, 450. Ms. Soules stated that she was responding to the Respondents' advertisement and was interested in a three-bedroom apartment in the Richmond area. Tr. p. 70. Ms. Downs then asked the number of persons who would live in the apartment and the number of adults. Ms. Soules replied that two adults and a child would reside there. Tr. p. 27. At this point Ms. Downs posed the question, "How old is your child", or words to that effect. Ms. Soules then asked Ms. Downs why she needed to know the child's age. Ms. Downs replied that an elderly woman lived in the first-floor unit and she did not want "anyone in there" who was going to make too much noise. Res. Ex. 69; Tr. pp. 27, 29, 71-72. Ms. Downs reacted negatively to the questioning by Ms. Soules. Tr. pp. 454-455. At this point she ceased volunteering information about the apartment, while Ms. Soules continued to ask questions concerning the cost of utilities, the source of heat, and whether the apartment was owner occupied. Tr. pp. 27, 70. Ms. Downs refused to supply the address of the Bird apartment and

⁶For example, the advertisement in the April 23, 1989, Elmwood Metro Community News states:

Richmond area, 1-2-3-bedrooms; 1 bedroom utilities, \$350, 2 bedroom, \$250. plus; 3 bedroom, \$350. No pets 884-0831.

Sec. Ex. 19.

⁷The Lafayette apartments are a mile from Richmond Avenue. The parties dispute whether this is close enough to fall within the meaning of the term, "Richmond Area". Other than its distance, the Secretary has not produced any evidence that it is unreasonable to include it within the meaning of that term. Accordingly, I conclude that the Lafayette apartments are in the Richmond Area.

even went so far as to state that "they didn't give her that information".⁸ Tr. pp. 27, 455. Finally, she refused to supply her last name to Ms. Soules.⁹ Tr. p. 27. Ms. Downs told Ms. Soules that she would telephone her on the following Monday (April 24, 1989) if the apartment was available. Tr. pp. 28-29, 78.

After her conversation with Ms. Downs, Ms. Soules contacted HOME and spoke to Brenda Watford. Ms. Watford recommended that she wait until Monday, April 24, 1989, to see if Ms. Downs would return her call. Tr. pp. 31, 76, 90. In the meantime, HOME arranged for one of its volunteer testers, Marjorie Murray, to call Respondents.

Ms. Murray telephoned Respondents on April 22nd, and 24th, 1989, and left a message on the PRS answering machine. Tr. pp. 223, 228. On April 24, 1989, at about 11:00 a.m., Ms. Downs returned the calls, leaving a message with Ms. Murray's secretary. Ms. Murray called back, explaining that she was inquiring about the Richmond area three-bedroom apartment. Tr. p. 223. Ms. Downs explained that it was an upper unit in a two-family house. She asked Ms. Murray how many people would be living in the apartment. Ms. Murray stated that she would be alone. Ms. Downs described the apartment as big, including, a living room, dining room, and kitchen. Tr. p. 224. She also stated that it was on Bird Avenue near Richmond Avenue. Ms. Murray asked if she could see it and Ms. Downs supplied her with the address. Tr. p. 225. Ms. Downs called again on April 25, 1989, to confirm the appointment. At HOME's request Ms. Murray cancelled the appointment later that day. Tr. p. 226.

Ms. Downs did not telephone Ms. Soules on April 24, 1989. On either April 24th or April 25th, Ms. Soules again telephoned Ms. Downs who made an appointment to show an apartment. Tr. pp. 31-32, 96. However, the address given by Ms. Downs was not that of the Bird apartment; but, rather, a three bedroom apartment at 934 Lafayette Avenue, Buffalo, New York ("Lafayette apartment").

The Lafayette apartment is the lower unit of a two-family house. Res. Ex. 69; Tr. pp. 35-36. In April 1989, both units at 934 Lafayette were vacant. The Lafayette house is one mile from Richmond Avenue. Res. Ex. 69; Tr. pp. 52, 114, 386, 475-476. The Lafayette units were in need of interior and exterior repair and maintenance and were located in a less desirable neighborhood than the Bird apartment. The house had a torn screen door, a rotted back porch, and peeling paint on the exterior. Tr. pp. 107, 457, 535. The backyard was filled with trash, including a discarded couch. Res. Exs. 68, 69; Tr. pp. 32, 106, 477. The Lafayette apartment

⁸Although Ms. Downs stated that she did not know the address, she had been to the Bird apartment prior to this conversation and had, on March 22, 1989, entered into the listing agreement which contained this information. Res. Ex. 1; Tr. pp. 468, 540.

⁹Ms. Soules routinely declined to disclose her last name over the telephone. Tr. p. 399.

also required interior painting.¹⁰ A floor board in one bedroom was warped and sank when walked upon. Tr. pp. 36, 262, 457, 477. The oil tank needed repair and the chimney needed cleaning. Tr. pp. 477, 529. PRS was under contract with its owner to manage, rather than merely lease, the Lafayette apartment.

Records of tax assessments of the two properties establish that the Bird property was assessed at \$45,600 for tax purposes on the 1989-90 tax roll and in average condition, while the Lafayette property was assessed at \$18,400 on the same tax role and rated in less-than-average condition. Sec. Exs. 20, 21; Res. Ex. 69; Tr. pp. 199, 203-205.

Although her appointment with Ms. Downs was set for April 26, 1989, at 6:00 p.m., Ms. Soules made a preliminary visit to the Lafayette apartment on that date during her lunch hour. She walked the mile from the bus stop, observed the poor condition of the house, and decided she did not want to live there. Tr. pp. 32-34. She again telephoned HOME who recommended that she keep her appointment to find out if Ms. Downs would offer any other apartments. Tr. p. 34.

Ms. Soules again arrived at the Lafayette house sometime before 6:00. Ms. Downs arrived at about 6:20, twenty minutes late. She did not apologize for being late, shake Ms. Soules' hand or establish eye contact. Tr. pp. 35-38, 80-82, 96-97. There was little or no effort on Ms. Downs' part to interest Ms. Soules in the apartment. Ms. Downs showed her the lower apartment. Ms. Soules asked her if she had any three-bedroom apartments near Richmond Avenue. Ms. Downs denied that she had any available and failed to mention either the Bird or West Utica apartments, although both were available. Tr. p. 36, 51-52.

In its investigation of this matter, HOME used the services not only of Ms. Murray, but a second volunteer tester, Robin Barnes. Ms. Barnes telephoned PRS on April 27, 1989. She left a message on the answering machine indicating an interest in a three-bedroom unit on Buffalo's west side. Sec. Ex. 17, at p. 8. Ms. Downs returned the call later that day. She asked Ms. Barnes who would be living in the unit and was told that she, her roommate, and her seven-year-old son would be living there. Ms. Downs asked if her son was quiet, to which Ms. Barnes replied that he was. Ms. Downs mentioned that an elderly couple lived downstairs and "would probably not be able to take a noisy child or a loud child running around." *Id.* at p. 9. Ms. Downs told Ms. Barnes that the apartment was on Bird avenue. However, she did not furnish the address spontaneously, but rather, only after questioning by Ms. Barnes. *Id.* at pp. 9, 20; Res. Ex. 67. Ms. Downs said that Ms. Anderson would call her to set up an appointment. Ms. Downs never received a call from Ms. Anderson, nor was Ms. Anderson told by Ms. Downs to contact Ms. Barnes. *Id.* at p. 9-10, Tr. p. 442. Ms. Barnes left messages on the PRS answering machine on May 1st, 2nd and 5th. On May 6, 1989, Ms. Downs called Ms. Barnes and apologized for not getting back to her sooner and told her that the Bird apartment had been rented. Sec. Ex. 17 at

¹⁰ Both units at the Lafayette house were eventually leased to tenants who agreed to assist Ms. Downs by painting and cleaning up the interior.

pp. 11, 21; Res. Ex. 67.

The Bird apartment was rented to Diana Lennox, a single woman. She had responded to a PRS advertisement and told Ms. Downs that she was interested in an apartment in the Richmond area. Ms. Lennox, who had no children under eighteen, mentioned to Ms. Downs that she had a twenty-four-year-old daughter.¹¹ Tr. p. 260. Ms. Downs suggested she look at the Bird apartment. Tr. p. 263. She met with Mr. Campise and Ms. Anderson¹² in the Bird apartment and signed the application on May 2, 1989. Sec. Ex. 11; Tr. pp. 543-544. She paid a \$50 deposit rather than the usual \$100. Her application was approved a few days later. Sec. Ex. 12; Res. Ex. 6A; Tr. pp. 260, 460, 469-470, 542. She moved in on June 1, 1989. Sec. Ex. 12; Res. Ex. 66; Tr. pp. 261, 271.

The Lafayette apartment was rented to Deborah Boykins. She has three children. The oldest child was then seven years old. The other children, twins, were five years old at the time. Tr. p. 526. She moved into the apartment on May 16, 1989. The upper apartment at the Lafayette house was rented to Patrick and Camille Perry in May, 1989. In April, 1989, the Perrys had two children, aged six and two, and Ms. Perry was expecting a third. The Perrys formerly lived in an apartment managed by Ms. Downs at 820 Fillmore. In April, 1989, their house was pending foreclosure, and they had a month to find a three bedroom home. During the time the Bird apartment was listed by PRS, Camille Perry talked to Ms. Downs. Ms. Perry described the conversation as follows:

[Ms. Downs] told me about Lafayette, and this one on West Utica *and on Bird*; and I didn't want to go, you know, into the west side. . .you know, I'm going over there now, come have a look at it [the Lafayette house] and I did and I liked the place so I took it. (emphasis added)

Tr. pp. 515-516.

¹¹It is not clear when Ms. Downs learned that Ms. Lennox, who had a college-age daughter, had no minor children who would live with her. Ms. Downs recalls that Ms. Lennox may have volunteered this information, but it is not established that she learned of this before she began discussing the Bird apartment.

¹²I have credited Ms. Anderson's recollection that it was she, rather than Ms. Downs, who was present on this date. Tr. pp. 437, 440.

At the time this conversation occurred, Ms. Downs knew that the Perrys had children under the age of 18. Tr. p. 524. Because Ms. Perry was interested in the Lafayette building's location, she did not look at the Bird apartment.¹³ Tr. p. 522.

Governing Legal Framework

Respondents have been charged with having violated 42 U.S.C. Secs. 3604(a),(c),(d) and 3605(a). Among other things, these sections prohibit certain actions by housing providers taken because of familial status.

Section 3604(a) of 42 U.S.C. makes it unlawful "(t)o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of . . . familial status" Section 3604(c) makes it unlawful "(t)o 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 a preference, limitation, or discrimination based on . . . familial status . . . or an intention to make any such preference, limitation, or discrimination."¹⁴ It is also unlawful "(t)o represent to any person because of . . . familial status . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." 42 U.S.C. Sec. 3604 (d). Finally, Section 3605(a) prohibits "any person or entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of . . . familial status"

Subsections 3604(a) and (d)

The Secretary contends that discrimination under Subsections 3604(a) and (d) is demonstrated in this case by the application of the three-part test formulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See also, Pollit v. Bramel*, 669 F. Supp. 172, 175 (S.D. Ohio); *Secretary of HUD v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990). The purpose of the analysis required by the three part test is to assure that a plaintiff has his day in court despite the unavailability of direct evidence of discrimination. The analysis can be summarized as follows:

First, the plaintiff has the burden of proving a prima facie case of

¹³Having observed her demeanor, I find Ms. Perry to be a credible witness. Since Ms. Downs ceased managing the Lafayette property in the summer of 1989, Ms. Perry no longer sees her. Tr. pp. 419, 517. Ms. Perry lacks any apparent interest in the outcome of this proceeding.

¹⁴*See also*, 24 C.F.R. Secs. 100.50(b)(4) and 100.75 (a), (b), (c) (1) and (2).

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 that the legitimate reasons asserted by the defendant are in fact mere pretext.

Pollitt v. Bramel 669 F.Supp. at 175 (quoting *McDonnell Douglas* 411 U.S. at 802, 804). The elements of a prima facie case are not fixed, but, rather, depend on the discrimination alleged to have occurred. *Pinchback v. Armistead Homes Corp.*, 689 F. Supp. 541, 549 (D. Md. 1988), *aff'd in pertinent part*, 907 F.2d 1447 (4th Cir.), *cert. denied.*, 111 S. Ct. 515 (1990).

If a prima facie case is established, the burden of production shifts to Respondents to articulate a legitimate, nondiscriminatory reason for their action. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). If the articulation of a legitimate, nondiscriminatory reason for the challenged conduct raises a genuine issue of fact, the burden again shifts to the Secretary to demonstrate that the articulated reason is a mere pretext. *Asbury v. Brougham*, 866 F.2d 1276, 1279 (10th Cir. 1989; *Seldon Apartments v. HUD*, 785 F.2d 152, 159 (6th Cir. 1986).

Specifically, in the circumstances of this case, a prima facie case under Subsection (a) would be demonstrated by proof that: 1) Complainant is a person with a child under eighteen years of age; 2) Complainant attempted to rent the Bird apartment; 3) Respondents, having knowledge of her familial status, denied the Bird apartment to Ms. Soules; and 4) the apartment was rented to a person without a child under the age of eighteen years of age. A prima facie case under Subsection (d) would be demonstrated by evidence that 1) Complainant is a person with a child under eighteen years of age; 2) Complainant knew of Ms. Soules familial status; 3) Ms. Downs represented that an apartment was not available; 4) an apartment was, in fact, available. In this case Respondents assert that Ms. Downs reacted negatively to Ms. Soule's questions during their initial phone conversation and never intended to rent to her. With regard to Ms. Barnes, Respondents assert that Ms. Barnes' telephone calls were not returned because Ms. Downs was out of town during the time she could have set up an appointment with her.

Subsection 3604(c)

Proof of a violation of this subsection would consist of evidence that Respondents made statements either oral or written which either indicated a preference, limitation, or discrimination, based on familial status or indicates the intention to prefer, limit or discriminate based upon Ms. Soules or Ms. Barnes familial status.

Section 3605(a)

This section makes it unlawful to discriminate in real estate transactions based on familial status, including brokering. 24 C.F.R. Sec. 100.115(b). Proof of a violation of the Subsection in the instant case would consist of evidence that Respondents, acting in the capacity of a residential real estate broker, prevented the rental of an apartment to either Ms. Soules or Ms. Barnes because of their familial status.

Discussion

Subsection 3604(a)

The Secretary has established a prima facie violation of 42 U.S.C. Sec. 3604(a). Thus, the record establishes that in April, 1989, Ms. Soules had a twelve year old daughter; 2) she attempted to rent a three bedroom apartment in the Richmond area of Buffalo, and one of the apartments available at that time was the Bird apartment; 3) Respondents denied the Bird apartment to Ms. Soules, knowing of the familial status; and 4) the Bird apartment was rented to Diana Lennox, a person without a child under the age of eighteen years of age.¹⁵

As a legitimate, nondiscriminatory reason for not renting the Bird apartment to Ms. Soules, Respondents assert that the questioning of Ms. Downs by Ms. Soules as to the reason for asking the age of her child caused Ms. Downs to react negatively to her as a tenant in the Bird apartment and that this negative reaction colored all of their subsequent dealings.¹⁶ Ms. Downs acknowledges that, after this phone conversation, she never intended to rent the Bird apartment to Ms. Soules. In order for Ms. Downs' negative impression of Ms. Soules to be legitimate and nondiscriminatory, however, the chain of events resulting in her negative view of Ms. Soules as a

¹⁵ Similarly, a prima facie case has been established that the Bird apartment was denied to Ms. Barnes because of her purported familial status.

¹⁶ The Secretary claims that Ms. Downs' claim that Ms. Soules had a negative attitude is a *post hoc* explanation which is not based on her actual recollection of the conversation of April 20, 1989. He bases this claim on Ms. Downs' failure to recollect all of the details of the telephone conversation of April 20, 1989, and her inability to testify that she had actually spoken to Ms. Soules, who did not identify herself. Sec. Brief at p. 34-36; Sec. Reply Brief at pp. 4-5. Although Ms. Downs could not remember all of the details of the conversation, her deposition described her recollection of a conversation that was "unpleasant", with a woman she characterized as "having a very bad attitude problem", in which she was "challenged on the phone". Tr. p. 485-488. In her statement of August 15, 1989, to the HUD investigator, Mr. Norrington, Ms. Downs stated that she took umbrage if someone tried to take over the questioning during an interviews. Res. Ex. 68. Ms. Soules' testimony establishes that she asked Ms. Downs why she was asking Leslie's age - - precisely the kind of question which Ms. Downs viewed as a challenge. Accordingly, I have concluded that Ms. Downs is describing her reaction to the telephone conversation of April 20, 1989.

tenant in the Bird apartment cannot have originated with unlawful statements or questions posed by Ms. Downs.

The dialogue giving rise to Ms. Downs' reaction to Ms. Soules began when Ms. Downs asked the question, "How old is your child?" or words to that effect. Ms. Soules stated that her child's age was 12, and then asked why Ms. Downs needed to know Leslie's age. Ms. Downs described her reaction to Ms. Soules' question as follows: "She was challenging me and almost trying to tell me how to - - at least I took it she was trying to tell me how to do my job." Tr. p. 454.

The record reveals two possibly legitimate reasons for Ms. Downs to ask Leslie's age. The first is the health code requiring separate bedrooms for children of different sexes over five years of age. But that reason is not legitimate since Ms. Soules stated she only had one child. The second reason is that Ms. Downs wanted to insure that any new tenants in the Bird apartment would not disturb the D'Amaros. As Ms. Downs stated to Ms. Soules, "there's an elderly woman living downstairs and we don't want anyone in there that's going to make too much noise." Tr. p. 27. For the reasons discussed below in connection with Section 3604(c), the second reason is a legitimate and nondiscriminatory explanation for Respondents' conduct.

This articulation of a legitimate, nondiscriminatory reason shifts the burden to the Secretary to demonstrate by a preponderance of evidence that the articulated reason is a mere pretext. The Secretary points to Respondents' disparate treatment of Ms. Soules and Ms. Barnes compared to Ms. Murray and Ms. Lennox as evidence of pretext. The record establishes that Ms. Downs encouraged Ms. Murray, who stated she had no minor children, and Ms. Lennox who had no minor children, in contrast to Ms. Soules and Ms. Barnes. Ms. Downs described the Bird apartment to Ms. Murray, made an appointment to show the Bird apartment, and gave her the address. She promised to confirm the Bird apartment's availability the next day and did so. Tr. pp. 224-226. When Ms. Lennox, the ultimate renter of the Bird apartment called, Ms. Downs encouraged her to see it as it would suit her needs Tr. pp. 262-263, 408. Ms. Lennox paid only a \$50.00 deposit while others paid \$100.¹⁷ Res. Exs. 6A, 8; Tr. pp. 470-471. Ms. Downs told both Ms. Soules and Ms. Barnes that she was concerned about noisy children because elderly tenants lived in the lower unit of the Bird building. Sec. Ex. 17 at p. 9, 20; Res. Exs. 67, 69; Tr. pp. 27, 30, 70-71, 77, 340-341. She did not volunteer information to Ms. Barnes about the Bird apartment; she also failed to have Ms. Anderson contact Ms. Barnes to schedule an appointment as she had agreed to do. Sec. Ex. 17 at p. 9-10.

Other evidence which the Secretary asserts establishes pretext is less persuasive than the evidence of disparate treatment because it is also consistent with Respondent's assertion of a nondiscriminatory reason for Ms. Downs' behavior - - her negative reaction to Ms. Soules. The

¹⁷ Respondents' records of the escrow accounts for listed properties in 1989 indicate that the amount of deposits varied considerably. Although deposits were normally in the amount of \$100, often they were greater. Occasionally, \$50 deposits were accepted. Res. Ex. 8.

record shows that Ms. Downs was reticent about discussing the Bird apartment, stating that she was unaware of the address when it was readily obtainable, and went so far as to deny being aware of the address. She did not call Ms. Soules on April 24, 1989, as she had agreed to do. When they met at the Lafayette house on April 26, 1989, Ms. Downs denied having any three bedroom units in the Richmond area even though both the Bird and West Utica apartments were available.¹⁸ Res. Ex. 69; Tr. p. 36. Ms. Downs' behavior while showing the Lafayette apartment to Ms. Soules was negative as well. She did not make eye contact with Ms. Soules, shake her hand, or demonstrate a sincere effort to encourage the rental. Tr. pp. 36-38, 56, 80-81, 97, 107. Despite the condition of the Lafayette property, she never explained to Ms. Soules that it was going to be repaired. Tr. p. 37. Finally, as indicated by the tax assessments, the Lafayette property was less desirable than the Bird property.

Respondents supply evidence that Ms. Downs lacked any reason to discriminate and that she had not discriminated against families with children on other occasions. The record reflects that Mr. Campise never instructed Ms. Downs not to rent to a family with children and that Ms. Downs could not have expected repeated commissions from Mr. Campise. Respondents also rely upon the testimony of Ms. Downs and Eileen Anderson that a couple expecting a child were rejected as tenants for the Bird apartment, not because of the expected child, but because he only had a part-time job.¹⁹ Tr. pp. 439, 461. The record does not reflect when this occurred. Respondents offered the testimony of a tenant, Helen Gonzales, that Respondents rented an apartment located above a flat occupied by a senior citizen to a family with children. This occurred nine months after the events which are the subject of this case and after the complaints were filed. Tr. pp. 356-366. Respondents also introduced testimony of David Mix, the Assistant Corporation Counsel for the City of Buffalo, that during the process of renting a flat above that of his elderly mother, he explained to Ms. Downs that his mother was being unaccustomed to non-family members in the house. Ms. Downs replied, "well of course, you know that I can't discriminate." Tr. pp. 508-509.

The conflicting evidence in this case, particularly the Secretary's evidence of disparate treatment, would be sufficient to establish that Respondents' articulated reason for denying the Bird apartment is pretextual, were it not for the testimony of Ms. Perry. Thus, the Secretary's evidence that Ms. Soules and Ms. Barnes were treated less favorably is more persuasive than Respondents' evidence that Ms. Downs did not discriminate on other occasions and that she may have lacked any direct motive to discriminate against Ms. Soules. However, the testimony of Ms. Perry conclusively establishes that Ms. Downs was willing and, in fact, attempted to rent the Bird apartment to a family with children under the age of eighteen. It also establishes that Ms. Downs volunteered to Ms. Perry that the Bird apartment was available; she was, therefore, as

¹⁸Ms. Soules had learned of the existence of the Bird apartment from HOME. Tr. p. 52.

¹⁹Ms. Anderson was uncertain of the precise reason for rejection. However, the fact that she remembers the possibility of inadequate employment as a reason for rejection serves to corroborate Ms. Downs' recollection.

encouraging to Ms. Perry as she was to Ms. Murray and Ms. Lennox. The only reason Ms. Perry was not shown the Bird apartment was because she was uninterested in its location.²⁰ Accordingly, the Secretary has failed to demonstrate that the reason articulated by Respondents for not renting to Ms. Soules is pretextual, hence, that Ms. Downs refused to negotiate for the rental of the Bird apartment with Ms. Soules, or that Ms. Soules was denied the Bird apartment *because of* her familial status.

The Secretary's claim that Respondents discriminated against Ms. Barnes also fails. The nondiscriminatory reason articulated by Respondents for not renting to Ms. Barnes is that Ms. Downs was out of town a great deal during this period caring for her aunt. Therefore, she did not take care of her business as efficiently as she otherwise would have. Ms. Downs testified that April 1989, was the period her aunt was ill. Tr. p. 410. The Secretary argues that it is unlikely that Ms. Downs was out of town the entire period from April 28, 1989 until May 6, 1989, the date Ms. Downs told Ms. Barnes that the apartment had been rented. The Secretary notes that Ms. Downs would typically only stay overnight with her aunt and return and that Ms. Lennox may have spoken to Ms. Downs while she was at her home on May 2, 1989.²¹ Sec. Reply Brief, p. 7; Tr. p. 413. On the other hand, Ms. Campise testified that he often could not reach Ms. Downs during this period. Tr. pp. 542-543. In addition, it was Ms. Anderson, not Ms. Downs, who was present at the interview between Ms. Lennox and Mr. Campise. Tr. p. 437. The unclear state of the record on this issue must be resolved in favor of Respondents, again, as a result of the testimony of Ms. Perry. Ms. Perry's testimony demonstrates that she was willing and, in fact, attempted to rent the Bird apartment to a family with children under eighteen. Accordingly, a preponderance of evidence supports Ms. Downs' claim that she did not return Ms. Barnes' call due to her unavailability.

Subsection 3604(d)

The Secretary has established, *prima facie*, that Respondents violated Section 3604(d) by representing that the Bird apartment was unavailable when in fact it was available because of familial status, that is, the record reflects that: 1) in April, 1989, Ms. Soules had a twelve year

²⁰The Secretary contends that Ms. Downs knew Ms. Perry would not accept the offer of the Bird apartment. Accordingly, it is urged that Ms. Downs' offer to Ms. Perry was bogus and, by implication, was made in order to be able to defend herself against a claim of discrimination. The record does not support this claim. At the time this conversation occurred Ms. Downs had no reason to believe she was being investigated. Accordingly, the record fails to demonstrate any motive on her part to make bogus offers in order to later defend herself against charges of unlawful discrimination.

²¹Because Ms. Lennox is not certain of either the identity of the person with whom she spoke or the date she called Ms. Downs apartment, it has not been proved that a telephone conversation occurred between Ms. Lennox and Ms. Downs on May 2, 1991. Tr. p. 268.

old daughter; 2) Ms. Downs knew of Ms. Soules familial status; 3) Ms. Downs represented that the Bird apartment was not available; and, 4) the Bird apartment was, in fact, available.²²

For the reasons discussed above with regard to Section 3604(a), the Secretary has not demonstrated that the legitimate nondiscriminatory reasons articulated by Respondents are pretextual. In other words, the Secretary has not proved that Ms. Downs said the Bird apartment was not available because she did not want to rent the Bird apartment to any family with children.

Subsection 3604(c)

The Secretary contends that Respondents made statements which indicate a preference, limitation, or discrimination based on familial status or the intention to make such preference, limitation, or discrimination. The Secretary claims that Respondents' oral inquiries as to the number and ages of any children and whether they were "quiet", and that similar written inquiries on lease applications are impermissible. In addition, the Secretary finds violations in Ms. Downs' statements to Ms. Soules and Ms. Barnes indicating that an elderly woman living in the first floor unit did not want a tenant noisy neighbor and the statement to Ms. Barnes that the D'Amaros "would probably not be able to take a noisy child running around." Sec. Brief at p. 42; Res. Exs. 17 at p. 9, 69; Tr. pp. 27, 29, 71-72.

The Secretary asserts that, while it is permissible to ask the number of persons who will reside in a unit, there is no legal justification for inquiring into their ages. It is asserted that such a question is akin to inquiries about ones race, color, religion, or national origin. Sec. Brief at p. 42. The Secretary contends that questions as to whether children are noisy are based upon the assumption that children, in general, are noisy.

Congress amended Section 3406(c) in 1988, adding "familial status" to preexisting protected classifications such as race. The novelty and uniqueness of familial status as the distinguishing feature of a protected class raised the concern in the Congress that the legislation would preclude housing providers from exercising their existing rights to protect themselves from unqualified tenants and buyers. The legislative history shows that the Congress concluded that nothing in the legislation was intended to deprive housing providers of these existing rights.²³

²²The same prima facie showing has been made with regard to Ms. Barnes.

²³The legislative history of the 1988 amendments to the Act establishes that Congress did not intend the protection of families with children to be absolute. During the debate in the House, several members recognized and discussed the potential in this legislation for depriving housing providers

In order to conclude that a written or oral statement violates Section 3604(c), the evidence must demonstrate that an ordinary person would naturally interpret the statement to be discriminatory. *United States v. Hunter*, 459 F. 2d 205 (4th Cir. 1972), *cert. denied*. 409 U.S. 934 (1972). Statements held to have been prohibited by this statute typically, on their face, express a present or future preference, limitation, or discrimination, based on membership in the protected class.²⁴ However, a statement or question designed to ascertain the qualifications of the housing applicant may also *imply* a preference, limitation, or discrimination based on familial status. In order to balance the protection of families against discriminatory statements on the one hand with the interest of housing providers in making legitimate inquiries of applicants on the

of their existing right to insure that tenants are qualified and specifically rejected the notion that this right was to be eliminated by this legislation. Congresswoman Pelosi stated:

H.R. 1158 would prohibit discrimination against families with children, and, at the same time would protect the rights of owners and landlords by allowing them to reject anyone who is not otherwise qualified to rent This bill is carefully crafted to protect American families, without placing an undue burden on owners and landlords.

134 Cong. Rec. H4687 (daily ed. June 23, 1988).

Congressman Synar stated:

[N]othing in this bill will prevent a landlord from determining that a family is otherwise qualified before agreeing to rent to them.

134 Cong. Rec. H4681 (daily ed. June 23, 1988)

Congressman Glickman stated:

[B]oth this law as well as common law protects landlords from renting to people who may be viewed as particularly undesirable in terms of cleanliness or in terms of being a nuisance, *regardless of their families or anybody*. *Those rights are still protected.* (emphasis added)

134 Cong. Rec. H4683 (daily ed. June 23, 1988).

²⁴Examples of such statements have arisen heretofore in the context of race discrimination cases. These include: statements that black tenants were not allowed in a trailer park because white tenants would move out; *Stewart v. Furton*, 774 F. 2d 706, 708-709 (6th Cir. 1985); that no blacks lived within a development; that blacks were not allowed there and that the applicant could not have black persons as guests, *United States v. L & H Land Corp., Inc.*, 407 F. Supp. 576, 580 (S.D. Fla. 1976).

other, it is necessary to determine whether or not the statements or questions were made for a legitimate, nondiscriminatory reason.

The statements alleged to violate the statute in this case do not, on their face, reveal a discriminatory motive. The statements include: 1) Written questions on the tenant application form in which the applicant is asked to supply information as to the number and ages of persons who will occupy the premises and similar oral questions, 2) the oral question, "How old is your child?", and 3) statements and questions such as, "the [tenants] would probably not be able to take a noisy child running around", and "is your child noisy?", which convey information about the non desirability of a characteristic which the hearer reasonably may associate with familial status. Because these statements are not discriminatory on their face, but imply a preference, limitation, or discrimination, based upon familial status, the intent of the author must be determined, either by direct evidence in addition to the statement or by using the three-part analysis described above in connection with Section 3604(a). Since there is no direct evidence of intent in this case, Ms. Downs' intent must be determined using the three-part analysis.

The Secretary has established prima facie that all the statements and questions at issue imply a limitation, preference, or discrimination based on familial status. That is, 1) statements and questions were made to a person with a child under eighteen years of age, and 2) the statements and questions sought to ascertain whether the applicant's family included a member under eighteen years of age, or conveyed information about the possible undesirability of a characteristic which the hearer reasonably could associate with having a child under eighteen years of age. Since a prima facie case has been established, it may be overcome by the articulation of a legitimate, nondiscriminatory reason for asking the question or making the statement or asking the question.

Respondents contend that the reason for the written questions on the application and Ms. Downs' oral questions regarding the numbers and ages of children were asked because a local health code precludes children above age five of different sexes from sharing the same bedroom. The Secretary has failed to demonstrate that reason is pretextual as applied to the questions at issue.

However, the reason for asking the question, "How old is your child?" is not satisfactorily explained by the health code requirement when, as here, there is only one child. Nevertheless, the question is legitimately explained by Respondents' desire to insure that the D'Amaros continued to live in a quiet environment. As is clear from the record, Ms. Downs did not ask this question in isolation. She consistently asked a follow-on question which specifically inquired whether the prospective tenant's child was noisy, or made a statement to the effect that the downstairs tenants were elderly and did not want noisy children. The Secretary has failed to demonstrate that reason articulated by Respondents to explain Ms. Downs' questions and statements is either nondiscriminatory or not legitimate.

Respondents were entitled to ask questions designed to locate quiet tenants for the Bird Apartment. If sufficiently noisy, tenants can be deemed a nuisance and can be evicted. A housing provider is not precluded from attempting to ascertain whether prospective tenants will be noisy before the tenants move in. Nor is a housing provider precluded from advising prospective tenants that a quiet environment is desired by existing tenants. Thus, a claim that the questions and statements were designed to determine whether the tenants were noisy²⁵ shifts the burden to the Secretary to demonstrate that this reason is a mere pretext for a desire to avoid renting to families with children under eighteen. The Secretary has failed to demonstrate that Respondents' desire to insure that the D'Amaros lived in a quiet environment was pretextual. Accordingly, the Secretary has not demonstrated that Respondents violated Section 3604(c).²⁶

Section 3605(a)

For the reasons discussed above in connection with Subsections 3604(a) and (d), the Secretary has failed to demonstrate that Respondents prevented the rental of an apartment to either Ms. Soules or Ms. Barnes because of their familial status.

CONCLUSION AND ORDER

The Government has failed to prove by a preponderance of the evidence that Respondents have violated 42 U.S.C. Section 3604 (a), (c), and (d) and Section 3605(a). Accordingly, it is

²⁵The Secretary contends that the association of the word "noise" or "noisy" with children in the questions and statements constitutes improper stereotyping, since it assumes children are noisy and conveys this message to the applicant. Sec. Brief, p. 43. The statements themselves reflect that Ms. Downs is not guilty of stereotyping. If she automatically assumed that all children are noisy, there would be no need for her to ask two questions - 1) "Do you have children?" and 2) "Are they noisy?". If she assumed they were noisy, she would only need to ask whether prospective tenants the first question.

²⁶Although housing providers may ask questions designed to ascertain whether applicants, including those with children, are likely to disturb other tenants, any denials of housing to these applicants must be legitimate and nondiscriminatory. If an applicant were to respond negatively to the question, "Is your child noisy?", the housing could not be denied without some additional reason to conclude that this particular child (as opposed to children in general) is noisy.

ORDERED that the Charge is DISMISSED.

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WILLIAM C. CREGAR
Administrative Law Judge

Dated: September 20, 1991.