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 James O. and Delores Bad Horse and Christina Antelope (minor child), Charging Party, v. Richard D. Carlson and Dale Summy, Respondents.	HUDALJ 08-91-0077-1 Decided: November 14, 1994

Joseph H. Reed, Esquire
For Respondent Carlson

Thomas W. Clayton, Esquire
For Respondent Summy

Dorothy Crow-Willard, Esquire
For the Government

Before: Constance T. O'Bryant
Administrative Law Judge

INITIAL DECISION

Statement of the Case

This matter arose as a result of a complaint filed by James O. and Delores Bad Horse and Christina Antelope Bad Horse (minor child), ("Complainants") alleging discrimination based on national origin and familial status in violation of the Fair Housing Act, as amended, 42 U.S.C. §§ 3601, *et seq.* ("the Act"). On April 29, 1994, following an investigation and a determination that reasonable cause existed to believe that discrimination had occurred, the Department of Housing and Urban Development ("HUD"

or "the Charging Party") issued a charge against Richard D. Carlson and Dale Summy ("Respondents") alleging that they had engaged in discriminatory practices in violation of 42 U.S.C. §§ 3604 (a), (b) and (c).

Respondent Carlson filed a prehearing Motion to Dismiss the Complaint based on delay by the Government in bringing this action. That Motion was subsequently joined in by Respondent Summy. By Order dated July 29, 1994 the Motion was denied. The Motion was renewed at the hearing, and ruling reserved pending this decision.

A hearing was held in Canton, South Dakota on August 3 and 4, 1994. The parties' post-hearing briefs were filed on September 14, 1994. This case is now ripe for decision.

The Fair Housing Act makes it illegal to "refuse to . . . rent a dwelling after a *bona fide* offer has been made, or to refuse to negotiate for the . . . rental of a dwelling because of race, . . .familial status, or national origin"; to "discriminate in the terms, conditions, or privileges of sale or rental of a dwelling. . . because of race . . . familial status or national origin" [or] to "make, print or publish, or cause to be made, printed or published, any notice, statement. . . with respect to the . . . rental of a dwelling that indicates any preference, limitation, or discrimination based on race . . . familial status or national origin, or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. §§ 3604 (a), (b) and (c).

The Charging Party alleges that Respondents, directly or through an agent, discriminated against Complainants on the basis of familial status and national origin in violation of 42 U.S.C.A. §3604 (a) and (b) by: (1) requesting and/or requiring Complainants to move out of their rented unit, and (2) by "stating that the owner did not rent to 'your kind' of people and (stating) that the owner had had problems with Native Americans in the past", and in violation of 42 U.S.C.A. § 3604 (c) by having published, made and/or caused to be made notices or statements indicating a limitation based on national origin. The Charging Party alleges further that Respondent Carlson, in directing Respondent Summy to rent preferably to a single person or, at most, to a couple or two single persons, published, made and/or caused to be made notices or statements indicating a limitation based on familial status in violation of 42 U.S.C.A. § 3604 (c).

Respondents counter that the Complainants were not discriminated against in the rental of the unit because Respondents, in fact, rented to them; that Complainants were not required to leave but rather were asked to leave. They counter that Respondents had a legitimate nondiscriminatory reason for asking them to leave; and that no discriminatory statements were found to be made in the context of "seeking a buyer or renter" but even if discriminatory statements were made, they were not acted upon; thus, there was no act by Respondents that was in violation of 42 U.S.C.A. § 3604 (a) (b) or (c).

Respondents' Motion to Dismiss

Respondents moved to dismiss the complaint, pursuant to 24 C.F.R. § 104.450(b), on the basis that the Government unreasonably delayed conducting an investigation and making the determination of reasonable cause in this case. They contended that the Government's failure to make the determination of reasonable cause within 100 days, and its failure to notify the Respondents of the reasons why the 100 days were exceeded, provide grounds for dismissal. By Order dated August 2, 1994, I concluded that the 100-day limit of §3610 is neither a jurisdictional bar nor a statute of limitations.

Respondents also allege that they were prejudiced by the Government's delay such that dismissal of the complaint was warranted; however, their evidence of prejudice has not been persuasive. They allege prejudice inasmuch as one primary defense witness, Brenda Madrid, was believed to be dead and another witness, Ms. Kathy Bader, could not be located. They also allege that the unreasonable time delay interfered with Respondent Summy's ability to defend himself. They contend that Mr. Summy has become totally disabled and legally blind, rendering him unable to see and read documents presented to him.

Respondents have not proved sufficient prejudice due to the unavailability of witnesses to warrant dismissal. The evidence shows that Mr. Carlson was in touch with Ms. Madrid after the complaint was lodged against him. He was allowed, without objections from the Government, to relate the conversation he had with Ms. Madrid and to introduce written correspondence from her relating to the incident in question.
As to Ms. Bader, there is no evidence that she had material evidence to provide in this case. Thus, there is no persuasive evidence of prejudice as to her and dismissal is not warranted on that basis.

Although it is alleged that Mr. Summy became totally disabled during the delay (RC Brief, p. 6),[1] Mr. Summy's testimony showed that he was adjudged disabled in 1973 (TR. 422). Further, Mr. Summy acknowledged as much in his brief (RS Brief, p. 4). Further, Respondent Summy has failed to established that his blindness severely prejudiced him in his defense of the case.

For all the above reasons, and those included in my Order of August 2, 1994, which I hereby incorporate herein, I find that Respondents have failed to establish that dismissal is warranted in this case based on the Government's delay in making the determination of reasonable cause.

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[1]The following reference abbreviations are used in this decision: "RC" for Respondent Carlson; "RS" for Respondent Summy; "TR" for Transcript; "GX" for Government's exhibit; "RCX" for Respondent Carlson's exhibit; "RSX" for Respondent Summy's exhibit; and "Stip." for Stipulation by the parties.

Findings of Fact

Richard D. Carlson, a resident of Houston, Texas, owned rental property at 1311-1311 1/2 South Duluth Avenue, Sioux Falls, South Dakota. The property consisted of two rental units - a downstairs apartment on the first floor at #1311 South Duluth Avenue, and an upstairs apartment, #1311-1/2 South Duluth Avenue. (TR. 25, 263, 289; RC Answer #8). He has since sold the property in question and no longer owns rental property (TR. 431-33).

Dale Summy, a resident of Sioux Falls, and a former renter from Mr. Carlson, assisted Mr. Carlson in managing his Sioux Falls rental properties for several years, including October 1990. However, there was never a formal employment agreement between the two. (TR. 289, 429, 471-473). Mr. Summy's duties included showing the units for rental to prospective renters, communicating with prospective renters concerning the terms and conditions of tenancy, and signing leases for rental on behalf of Respondent Carlson. (TR. 289; RS Answers #9 and 10 of 5/29/94).

During the time that Respondent Summy managed the unit, Respondent Carlson stated to Respondent Summy that he preferred that the unit be rented to a single person or at most, a couple or two single persons. (GX-11; GX-13; RS Answer of 5/29/94). However, there was never any strict policy, procedure, or rule that was to be applied in renting.(Tr. 431, 473). Mr. Summy understood that he was to use his own best judgment in considering applicants (TR. 473-474) based on their ability to live up to their responsibilities as tenants (Tr. 294-296).

In early October 1990, Mr. and Mrs. Bad Horse and their daughter, Christina, moved to Sioux Falls, South Dakota. Upon arriving in Sioux Falls they saw an ad in the local newspaper, the Argus Leader, for a two-bedroom unit, (TR. 68), which was for the 1311-1/2 South Duluth Avenue property. (TR. 68-69). They called the listed number and spoke to Mr. Summy about possibly renting the place. (TR. 69, 144, 204).

On October 3, 1990, in the afternoon, the Bad Horses met with Mr. Summy who showed them the apartment unit at 1311-1/2 South Duluth Avenue. The unit was comprised of two bedrooms, with one of the bedrooms fashioned out of a sunroom[2], and a total of 670 square feet of living space (GX-1). The Bad Horses found it to be comfortable, affordable, quiet, and convenient to Mr. Bad Horses' job, to shopping, and to the hospital where Mr. Bad Horse's mother resided. (TR. 69, 144, 204).

Mr. Bad Horse was limited in funds and did not have the full deposit and first month's rent. (TR. 69, 156). Mr. Summy agreed to an arrangement that allowed them to

[2]Mr. Bad Horse described it as a "porch", but said it was made into a bedroom that was a good size . . . big enough for a little girl. (Stip. p. 4)

move in with a partial payment. (TR. 133-136) Instead of paying $450.00 up front ($100 security deposit and first month's rent of $350.00), Mr. Bad Horse was allowed to pay $275.00, with an agreement to pay the remaining amount of $175.00 in two weeks. (TR. 69-72, 156, 220, 474-475, 482.)

Mr. Summy agreed to rent the unit at 1311-1/2 South Duluth Avenue to the Bad Horses, (TR. 70). The parties executed a lease on that day. Mr. Bad Horse paid $275 toward the lease, (TR. 70) and his family was allowed to move in on that day (October 3, 1990).

When Mr. Summy agreed to rent the unit to the Bad Horses he knew that they were Native American. (TR. 475). He also knew that they were a family and that a young child would reside in the apartment. (TR. 468, 475-476).

On October 3, 1990, at 5:28 p.m. (RC #5) Mr. Summy called Mr. Carlson in Texas, and in a conversation that lasted 20 minutes, informed him that he had signed a lease agreement with the Bad Horse family. Mr. Summy told Mr. Carlson that the Bad Horse family consisted of Mr. Bad Horse, his wife, and a child who would be moving into the property. (TR. 475-76) Mr. Carlson was "upset", concerned that there were three persons who would be residing in the unit, but reluctantly agreed to the lease. (GX 11; TR. 433, 476).

At the time Mr. Carlson approved the lease, he knew or had reason to believe that the Bad Horse family were Native American. (TR. 433). Also, at the time Mr. Carlson approved the lease, he understood that there would be three family members living in the apartment unit, Mr. Bad Horse, his wife, and the small child. (TR. 475-76).

On October 3, 1990, near night time, the Bad Horses moved into the apartment unit at 1311-1/2 South Duluth Avenue. (TR. 67, 71, 475).

The apartment on the first floor of 1311 South Duluth was rented to two persons, Brenda Madrid and her friend, Jeff Olson. During the time the Bad Horses moved in, Brenda Madrid was on the premises and observed the move. (RCX-4)

Mr. Bad Horse hired a man to help him move. (TR. 102). While helping the Bad Horses to move, the hired helper made statements to the effect that there would be up to 10 people moving into the apartment with the Bad Horses. These statements were made to, or were overheard by, Brenda Madrid, and they upset her. (RCX-4; TR. 68, 102, 142, 143, 222-223, 434, 438-439).

During the time the Bad Horses were moving in, Brenda Madrid was not friendly to them. (TR. 103, 227). She complained a lot. She specifically complained that they would use too much hot water, stating that the two units shared the same hot water heater and that there would not be enough water for her with so many of them upstairs. (TR. 223, 434, 438-439).

On October 3, 1990, at 7:40 p.m. Brenda Madrid called Mr. Carlson in Texas. (RCX-5; TR. 433-34). Mr. Carlson was not home, so she left a message on his answering machine to return her call. He returned her call that same day at 8:36 p.m. Their conversation lasted 20 minutes. (RCX-5; TR. 461) She was very angry - "breathing fire" as he described her. (TR. 434). She stated that the Bad Horses had damaged the property while moving in - they had damaged the lawn, trampled flowers, broken the front door, and damaged a front foyer table. She was also very upset because she had been told that there would be up to 10 people living in that upstairs property, including 4-5 adults and 2-3 children. (TR. 438-440). She didn't know how many people would be living there and complained there could be lots of kids running around making noise (TR. 438-439; 476); also that there would not be enough hot water for her downstairs if so many people lived upstairs. She gave Mr. Carlson an ultimatum: either he tell the Bad Horses to leave or she would leave. (Tr. 439-440).

On that same evening (October 3, 1990), at 9:18 p.m., Mr. Carlson called Mr. Summy (RCX-5; TR.440). In that conversation Mr. Carlson told Mr. Summy to ask or tell the Bad Horses to move out. (TR. 440-443) Mr. Carlson had decided that he wanted the Bad Horses to vacate his property (TR. 272, 275, 284, 440). He hoped that they would be willing to leave upon his request, but was prepared to seek legal assistance, if necessary. (TR. 458).

The Bad Horses spent the night at the apartment unit at 1311-1/2 South Duluth Avenue. (TR. 75-86). Early the following morning, on October 4, 1990, Mr. Summy went to the Bad Horses and told them that Mr. Carlson wanted them to move and that they had to leave. Although the exact statements made by Mr. Summy are in dispute, it is clear that the Bad Horses understood that Mr. Carlson wanted them out. (TR. 76). The Bad Horses decided to comply, feeling they had no good alternative. (TR. 76-77). Mr. Summy, acting for Mr. Carlson, permitted them to stay on at 1311-1/2 South Duluth until they could find another place. (TR. 78, 443) They moved out on October 13, 1990. (TR. 99).

Within weeks after the Bad Horses moved out of 1311-1/2 South Duluth Avenue, the Respondents rented the unit to George and Colleen Donnell, a Native American couple, with two children under the age of 18. (TR. 166,-167; 180; 187; 483, G-X-10).

The Bad Horses filed a complaint of discrimination on December 21, 1990, alleging discrimination based on national origin. (GX-4). Later, on January 21, 1991, they amended the complaint to allege, in addition, discrimination based on familial status. (GX-8; TR. 97).

Mr. Carlson, through Mr. Summy, had previously rented the upstairs unit to Native Americans (TR. 432) and to families (TR. 431-32). He had never before turned down anyone who had been referred to him by Mr. Summy for rental for any reason (TR. 431),

and he had never before evicted any of his tenants. However, he had asked tenants to leave for nonpayment of rent. (TR. 431-432).

Mr. Summy had reason to believe that Ms. Madrid was prejudiced against Native Americans. Ms. Madrid told Mr. Summy that she had had trouble with Native Americans before she came to Sioux Falls, and had moved there with the expectation that she would not be bothered by them there. (TR. 298).

There is no evidence that Mr. Carlson knew, or had reason to know, that Ms. Madrid was prejudiced against Native Americans.

There was sufficient evidence of a legitimate basis for Ms. Madrid's complaints regarding her concern about the number of people who would be living in the upstairs unit and the adequacy of the hot water supply.

Subsidiary Findings and Discussion

Legal Framework

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 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975); *cf. Griggs v. Duke Power Co.,* 401 U.S. 424 (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.) *cert. denied,* 419 U.S 1027 (1974).

The Act makes it unlawful for anyone to "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 race . . . ." 42 U.S.C. § 3604(a). Furthermore, the Act prohibits a housing provider from "discriminat[ing] against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race . . . ." 42 U.S.C. §3604(b).

Special methods have been devised to analyze the proof adduced in cases alleging violations of civil rights. The 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*, 498 U.S. 983 (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). *See 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); *see also 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 absence of any direct evidence of discrimination. *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121, (1984) (citing *Teamsters v. United States,* 431 U.S. 324, 358 n.44 (1977)).

Prima Facie Case Established

There is direct evidence in this case, in the form of discriminatory statements the Respondents are alleged to have made, which, if credited, would show both discrimination based on national origin and based on familial status. The evidence includes Mr. Bad Horse's testimony that Mr. Summy told him the reason his family was being required to move was that "the owner (Respondent Carlson) did not rent to 'your kind' of people" (meaning Native Americans) and that the owner "had had problems with Native Americans in the past." Further, Mr. Bad Horse testified that Mr. Summy told him that Mr. Carlson required them to leave because they were a couple with a child. The Charging Party asserts that these statements alone establish a prima facie case of violation as to both charges. For reasons discussed below, I do not credit these statements. Thus, I do not find them to be direct evidence of discrimination.

However, I find that the record contains indirect evidence sufficient to establish the four elements of a prima facie case of unlawful discrimination: (1) As a Native American family, Complainants are members of a protected class under the Act; and, as a family with children Complainants are members of a protected class under the Act, (2) they entered into, and were qualified to enter into, a contract to rent Respondents' apartment; (3) after they were required to move out of the apartment, it remained available for a time (at least ten days); and (4) the apartment was later rented to someone else. See *Robinson v. 12 Lofts Realty, Inc.,* 610 F.2d 1032, 1038 (2d Cir. 1979); *Soules v. HUD,* 967 F.2d 817, 822 (2d Cir. 1992). The burden, therefore, shifts to Respondents to articulate a legitimate, nondiscriminatory reason for their rejection of Complainants. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253-56 (1981); *Blackwell,* 908 F.2d at 871.

Respondents' Explanations for Their Conduct

Respondents deny that racial, national origin, or familial status considerations played any part in their request that Complainants vacate the apartment at 1311-1/2 South Duluth Avenue, and assert that they had legitimate non-discriminatory reasons for their actions. According to Respondents, the *only* reason Mr. and Mrs. Bad Horse and child were asked to leave the apartment Respondents had just leased to them was due to problems that quickly developed between the Bad Horses and the downstairs neighbor, Brenda Madrid. Respondents assert that Mr. Carlson acted to resolve an early acrimonious, tenant to tenant dispute, and did so without regard to race, national origin, or familial status. On the basis of complaints from Ms. Madrid, Respondent Carlson had reason to believe that the Complainants had damaged the property and disrupted and upset a valued tenant. Mr. Carlson concluded that immediate response on his part was required in order to quickly resolve the matter. (RC Brief, pp. 11-13; RS Brief pp. 7-8).

The evidence with regard to Respondent Carlson's motivation includes his letter of January 8, 1991, to Mr. Burke of the Sioux Falls Human Relations Commission. (GX-11). This letter was in response to a notice sent to him that Mr. and Mrs. Bad Horse had filed a complaint alleging that he discriminated against them because they were Native Americans. In this letter Mr. Carlson denied that the fact the Bad Horses were Native Americans played any part in his decision to require them to move. He stated that he had agreed to allow them to rent the unit, knowing they were Native Americans. However, when he agreed to rent to them he understood that they were a family of three. After they moved in he received a call from the downstairs neighbor. She complained of damage done to the property during their move and related that there were two children moving in. With the knowledge that there would be more than the three people originally agreed upon, and the indication that there would be constant conflict between the upstairs and downstairs neighbor, he decided it was necessary to ask the Bad Horses to move out.

Mr. Carlson's trial testimony explained in greater detail the conversation he had with the neighbor, Brenda Madrid. He testified that after he agreed with Mr. Summy to rent to the Bad Horses on October 3, 1990, he got a call from Ms. Madrid. As Mr. Carlson describes it, she was "breathing fire, . . . very upset". (TR. 434). She had never complained to him before and he had confidence in her as a very good tenant. She planted flowers in front of the unit. This was the first time that one of his tenants had done so in his 20 years of renting. She fertilized the yard, cleaned the house, and performed minor repairs. Ms. Madrid complained that during the Bad Horses' move in, flowers were trampled down. They had backed a trailer over the retaining wall and "tore the grass up" getting into the yard. They had broken the front door and damaged her table in the front foyer. They had had a big fight. Ms. Madrid stated that there would be a number of people moving in. As she talked, the image being formed in his mind was of 4 - 5 adults and at least 2 - 3 kids moving in. She said she had been told that there would be 10 people living there. When she finished, Mr. Carlson had no idea how many people

would be living in the unit. She gave him an ultimatum: he could require the Bad Horses to leave or she would leave. (TR. 440).

Complainants, in contrast, argue that Respondents' proffered reasons for requiring the Bad Horses to vacate the premises are merely pretexts for racial/national origin and familial status discrimination. The preponderance of the evidence does not support that argument.

Discussion

A. The claim that Respondents discriminated against the Complainants based on their national origin:

In this case, the clear preponderance of the evidence shows that Respondents initially agreed to rent to Complainants and allowed them to move into the unit in question. Thus, the claim of discrimination grows out of the Respondents' requirement that they vacate the unit.[3] The evidence of that discrimination is based solely on a statement(s) allegedly made by Respondent Summy to Mr. Bad Horse.

According to the Complaint (¶ 18), during the conversation Mr. Summy had with Mr. Bad Horse on the morning of October 4, 1990, Mr. Summy told Mr. Bad Horse that Respondent Carlson "did not like 'your kind' of people" and that he had had problems with their kind in the past. Mr. Bad Horse testified that Mr. Summy made this statement (TR. 76) and Mrs. Bad Horse testified to having overheard Mr. Summy say the same.(TR. 205). It is this statement that is alleged to be direct evidence of discrimination by Respondents against the Bad Horses based on national origin.

The evidence as to what Mr. Summy told Mr. Bad Horse is in dispute. The pertinent evidence is as follows:

Mr. Summy signed a lease with Mr. and Mrs. Bad Horse on October 3, 1990. Early on the morning of October 4, 1990, Mr. Summy came to their home and asked them to leave. This is how it occurred based on the Complainants' testimony and their other statements. Mr. Bad Horse's statement in the complaint states:

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[3]According to the chronology outlined in the Complaint, Mr. Summy informed Mr. Carlson that he had rented to the Complainants only after they had moved in. Mr. Carlson at that time told Mr. Summy to ask the Complainant and his family to move out. (Nos. 14 - 17). However, this chronology was contrary to that established by the testimony that Mr. Carlson approved the rental. Further, the telephone records of Mr. Carlson and Mr. Summy tend to corroborate the chronology testified by Respondents. They show a call to Mr. Carlson from Mr.Summy at 5:28 p.m. lasting 20 minutes (RCX-5); a call from Ms. Madrid at 7:40 p.m. returned by Mr. Carlson at 8:36 p.m., and then a subsequent call by Mr. Carlson to Mr. Summy at 9:18 p.m. It would appear that Mr. Bad Horse moved in between 5:28 p.m. and 7:40 p.m.. He testified that it was at night (Stip. p. 4) and Ms. Madrid's first call was made at 7:40 p.m. (RCX-2, 5).

> Mr. Summy came to our door and said that, "he had bad news" and that the owner of the premises living in Texas told him that he didn't want people of my kind in the apartment and that he had had several bad experiences in the past with Native Americans, especially as I recall Mr. Summy saying trouble in Pine Ridge. Mr. Summy advised me and my wife and family (one daughter) that we had until mid-October to vacate the apartment. We did so. (GX-4. See also TR. 76 and Stip.).

Mrs. Bad Horse, who states she overheard the conversation between her husband and Mr. Summy, said she heard Mr. Summy say they had to move out because "he had previous, some Indian lady had lived there before and he (Mr. Carlson) had a bad experience with her or something like that, and he didn't like our kind, meaning that we were Indians" (TR. 206). On the basis of what she overheard, she felt that they were being put out because they were Native Americans. She felt that they had no choice but to move. (TR. 212).

According to Mr. Bad Horse, he and Mrs. Bad Horse moved out without challenging the action because they did not want to stay where they were not wanted. [4] (TR. 77). On December 28, 1990, Mr. Bad Horse filed a complaint alleging housing discrimination on the basis of national origin. (TR. 101; See also GX-1 and 2).

[4] Respondent Summy argues that this shows the Complainants left voluntarily. (RS Brief pp. 4, 14). I find no merit to this contention.

At the hearing Respondent Summy denied making any statement(s) to Mr. Bad Horse on the morning of October 4, 1990 to the effect that Mr. Carlson did not like their "kind", or stating that Mr. Carlson had had a bad experience with Native Americans in the past. (TR. 480). His testimony in this regard was consistent with his Answer to the Complaint filed on May 25, 1994 and his letter of February 28, 1991 (GX-11). Mr. Summy further stated that Mr. Carlson never expressed to him a policy of not renting to Native Americans. (TR. 480). He testified that he had informed Mr. Carlson on October 3, 1990, before the Bad Horses were allowed to move in that he had entered into the rental agreement with the Bad Horses who were Native American and that Mr. Carlson approved the rental agreement. (TR. 475-476). Mr. Summy testified that he had previously rented the unit to Native Americans, and that after the Bad Horses moved out, he again rented the unit to Native Americans (the Donnells family) with Mr. Carlson's approval. (TR. 488, See also GX-14)

Mr. Carlson testified that he was aware on October 3, 1990, when he approved the Bad Horses' rental agreement that the Bad Horses were Native Americans. He has consistently denied that he ever had a policy against or had refused to rent his property to Native Americans or anyone else based on race or national origin. He testified that he had rented to Native Americans before the Bad Horses rented from him, and rented to a Native American family subsequent to the Complainants departure. (TR.432, 443; GX-11).

Mr. Carlson's testimony that he rented to a Native American family after the Bad Horses vacated the unit was corroborated by the testimony of George and Colleen Donnell. The Donnells testified that they lived at South Duluth Avenue on Mr. Carlson's property for nearly a year and a half, beginning October 20, 1990. They testified that they never experienced any problems from either Mr. Carlson or Mr. Summy due to the fact that they were Native Americans or a family with two children under 18.

<u>The preponderance of the evidence does not support finding that Respondents discriminated against Complainants because they were Native Americans</u>

Although there is some reason to credit the Bad Horses' testimony that the statement in question was made[5], there are more reasons to question the reliability of

[5]As evidence of the credibility of the Complainants the Government points to the fact that because the Bad Horses were new in town, they had no way of knowing some of what Mr. Summy was alleged to have said in the conversation, other than through Mr. Summy They state that Mr. Bad Horse would have had no way of knowing that any Native American women had ever lived in the unit, that any Native Americans had been late on their rent, that Mr. Carlson had ever had any contact with an Indian reservation or that the lady downstairs had allegedly complained about several kids being there. I disagree. The Bad Horses stayed on at the unit for approximately nine days after they were asked to leave (from October 4th to October 13th). Moreover, they did not file the complaint until ten weeks later. Thus, they had opportunity to acquire the information about Mr. Carlson (who had for a time lived in one of the units himself) independent of Mr. Summy even *after* they had vacated the unit.

the testimony.[6] These are outlined below.

It is clear that Mr. Summy asked the Complainants to move only at the direction of Mr. Carlson. The testimony of the Bad Horses was that throughout their dealings with Mr. Summy, he was polite, cordial and friendly toward them. He showed no hesitation in showing them the property. He invited them into his home. He agreed to rent to them on the spot, without first checking out references or credit history. And, he allowed them to rent the unit when they did not have the amount of money necessary for the full security deposit and first month's rent. Finally, according to Mr. Bad Horse, when Mr. Summy came to ask them to leave, he was apologetic (Stip.). Thus, the case turns on Mr. Carlson's motivation.

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[6]Mr. Bad Horse's statement to Mr. Burke in January 1991 of his conversation with Mr. Summy is somewhat different and less pointed than his December statement. (Stip.) For the first time he made reference to the previous Native American tenants - he had made no mention of knowledge of their tenancy in his original complaint. Also, after a long recounting of the conversation, when Mr. Burke asked if Mr. Summy told him that the reason Mr. Carlson wanted him out was that he was Native American, his response was less emphatic. He said: *That's what I was getting around to the point where that's -- I understood it as that.* The full account, based on the transcript of the recorded conversation, is as follows:

> Well, when he called . . . When he come it was 8 o'clock in the morning and he come in and he said well, he had bad news. He said we had to vacate the apartment. And it was because --he didn't come righ--he came funny--he didn't come right out and say it but he beat around the bush first. He said well-- He had went through all the long way around. He said well, he had several of Indians--well, he said your kind brothers and sis--_____ and he mentioned my brothers and my sisters. And I said--I was thinking I don't have no brothers and sisters who ever rented up here. Then, he's getting around--he said, "well, your kind." He said, "The last lady who moved in was an Indian lady there and she never paid her rent. She paid one-month's rent then she never paid it so she ended up moving out." I don't know the details on that. And he went on and on how Mr. Carlson had had bad experiences, how he was a postmaster and how he lived in _____Ridge and somehow he had a bad experience there. Anyways, he said he just didn't like--believe that we wouldn't be very good tenants.

The Charging Party introduced no evidence that Mr. Carlson had bad experiences while living at Pine Ridge or any other bad experiences with Native Americans.

The only evidence that Mr. Carlson acted with a discriminatory intent against the Complainants because they were Native Americans is found in the statement(s) Mr. Summy is alleged to have made. However, Mr. Carlson denied telling Mr. Summy that he didn't like Native Americans or that he had had problems with them in the past and Mr. Summy, the person alleged to have made the statement, denied that he did so. Further, there is no evidence outside of this purported statement that Mr. Carlson was prejudiced against Native Americans and the evidence to the contrary is significant. It shows that Mr. Carlson had previously rented to Native Americans; the people who rented the unit immediately before the Bad Horses, were Native Americans. The evidence indicates that they moved out for nonpayment of rent, not for any dissatisfaction with Mr. Carlson. Moreover, Mr. Carlson approved the rental of the unit to the Bad Horses knowing that they were Native Americans. Finally, Mr. Carlson approved the rental of the unit to a Native American family after it was vacated by the Bad Horses.[7] Considering all of the above, one must question, as did Respondents in their Briefs, why, if either Respondent were biased against Native Americans, they would go to the length of entering into a contract with them knowing them to be Native Americans, and giving them possession of the unit only to turn around the next day and order them to leave? And, why would Respondents, having ousted them because they were Native Americans, turn around and rent the very same unit to other Native Americans? It is difficult to reconcile this conduct with a desire not to rent to Native Americans. The Charging Party's argument is rendered more implausible when it is considered that the Respondents had a legitimate basis for rejecting the Complainants application to rent: Mr. Bad Horse did not have the full amount of money required to rent the unit. It was only because Mr. Summy was willing to relax the initial requirement of deposit and first month's rent that Complainants were able to obtain a lease and move in. Thus, the preponderance of the evidence suggests that there was some other reason for Mr. Carlson's action in requiring the Complainants to move.

The preponderance of the evidence points to the fact that Respondents asked Complainants to leave because of the demand made by Ms. Madrid. The evidence points to Mr. Carlson's decision to keep a satisfied tenant over new ones who, by their conduct while moving in, had called into question their suitability as tenants for that unit,

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[7]The Charging Party assert that Respondents' subsequent decision to rent to a Native American family, the Donnells, was an effort to "cover up" their discrimination of the Bad Horses. (S Brief p. 18). They point to Mr. Bad Horse's testimony that he told Mr. Summy before he turned his keys in on October 13, 1990 that Mr. Carlson could get sued for discrimination for his actions. They argue that this statement put Respondents on notice that their action "could be perceived as discrimination generally and was considered discriminatory by Mr. Bad Horse". Mr. Summy denied that Mr. Bad Horse made any claim of discrimination before he filed his complaint. Further, Mr. Bad Horse made no mention of this to Mr. Burke when he met with him (TR. 244). And the evidence that Mr. and Mrs. Bad Horse agreed to move out without protest, and waited nearly ten weeks to file the complaint of discrimination doing so only after prompting by Mr. Bad Horse's supervisor, does not provide strong support for the likelihood that he raised the issue. Moreover, the "cover up" theory does not explain why Respondents rented to Native Americans or a family with children *before* the Bad Horses. Considering the evidence as a whole, I find that there is insufficient evidence to credit the Charging Party's theory of a "cover up".

as the motivation for his actions, not dislike for Native Americans. I find that the preponderance of the evidence does not support the Complainants' claim.

B. The claim that Respondents discriminated against the Complainants on the basis of their being a family with a child under the age of 18:

The complaint filed on December 28, 1990, by the Bad Horses did not include the charge of familial status. The familial status charge was filed on January 22, 1991. (TR. 119). Mr. Bad Horse testified that he filed this charge because one reason Mr. Summy gave for requiring them to vacate Respondent's property showed discrimination based on family size.

Mr. Bad Horse testified that Mr. Summy informed him *after* he was evicted that the reason Mr. Carlson required them to leave the leased premises was because they had a child. (TR. 118). According to Mr. Summy, Mr. Carlson felt the unit was too small for his family. In Mr. Bad Horse's opinion the unit was more than enough room for them. (TR. 97). Mr. Bad Horse admitted that he did not file a complaint on this basis in December 1990, although he was aware that discrimination on that basis was a violation under the law. He testified that in January, he spoke with Mr. Burke at Human Relations about what Mr. Summy had said and then decided to add the familial status count. (TR. 125, 146.)

In contradiction to Mr. Bad Horse, Mr. Burke testified that Mr. Bad Horse made no statements in his interview on December 28, 1990, which would have supported the familial status discrimination count. (TR. 244).[8] According to Mr. Burke, the charge was added based on his suggestion to Mr. Bad Horse after he received Mr. Carlson's response of January 8, 1991, to the complaint of discrimination based on national origin. In his response Mr. Carlson gave as the reason for asking the Bad Horses to leave was that "he was upset that there was a couple with a child". . . and that "the place was too small for a family", (GX 11). Mr. Burke then contacted Mr. Bad Horse and suggested that he add the familial status count. (Tr. 234-235). According to him, it was the letter from Mr. Carlson that raised the issue. (Tr. 246.)

Mrs. Bad Horse' testimony at the hearing was contradictory on this issue. At one point she stated that she heard Mr. Summy say nothing about their having too many people in the family. (TR. 206). Later, she stated she overheard Mr. Summy say the place "maybe should have been rented to two single people instead of a family". (TR. 210). Further, she admitted she had not mentioned hearing such a statement in a previous statement she'd given. (TR. 222; RSX-1).

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[8]The transcription of the tape recorded conversation between Mr. Burke and Mr. Bad Horse confirms Mr. Burke's account. It shows no mention by Mr. Bad Horse of any statements to the effect that he was told they had to move due to family size.

Mr. Summy denied that he told Mr. Bad Horse that they were asked to leave because they had a child. He testified, however, that he may have told Mr. Bad Horse that the unit might be too small for their family because at that time he had information that there were four of them already. (TR.180, 477).

Ms. Colleen Donnell testified that she and her husband George and their two boys who were 6 and 13 years old in 1990, rented the unit at 1311-1/2 South Duluth beginning October 20, 1990, (TR. 164).[9] They continued to rent from Mr. Carlson for one and a half years without problems. (TR. 180). She testified that her family moved from the upstairs apartment to the downstairs unit when it became available.[10]

The preponderance of the evidence does not support finding that Respondents discriminated against Complainants because they were a family with a child under the age of 18

[9]Two lease agreements, one dated October 20, 1990, (GX-10) and another dated October 28, 1990, (RCX-1) were introduced as evidence of rental of the unit at 1311-1/2 South Duluth Avenue by the Donnells. However, the testimony of the Donnells set the date of the agreement at October 20, 1990. (TR. 164). Although there is conflicting evidence as to when the Donnells moved to Mr. Carlson's property (see GX-11), the weight of the evidence supports finding that the Donnells moved into the unit at 1311-1/2 in October, 1990.

[10]Brenda Madrid and her friend moved out of 1311 South Duluth Avenue in early November 1990. The Donnells then moved into that unit, which was a larger unit.

There is no credible evidence that Mr. Summy told the Bad Horses they had to move out of the apartment because they had a child. Mr. Bad Horse's testimony that he told Mr. Burke of this statement is not credible in light of Mr. Burke's testimony to the contrary and the transcription of their conversation. Mr. Burke testified that the Bad Horses never told him of Mr. Summy's statement or provided him with information which would have supported a familial status violation.[11] Mrs. Bad Horse at first admitted that she did not hear such a statement and her subsequent testimony to the contrary is found not to be credible. Further, both Respondents knew that there were three people in Mr. Bad Horses' family when they rented the unit to them on the day before. They were asked to leave only after Ms. Madrid complained to Mr. Carlson about there being four of them and more to be expected. But for the complaints that were lodged with Mr. Carlson by Ms. Madrid, there is reason to believe that this family of three would have been allowed to reside in the unit indefinitely. The Respondents' action in renting the unit to a family of four within weeks thereafter suggests the same. Thus, the Charging Party has failed to prove that Respondents discriminated against the Complainants based upon their being a couple with a child in violation of 42 U.S.C.A.
§ 3604 (a) and (b).

Statement of Preference

The Secretary has charged that Respondent Carlson had a stated preference for renting the unit in question to a single person or, at most, to a couple or two single persons and that he instructed Mr. Summy to act according to his preference. In doing so, Mr. Carlson "published, made and/or caused to be made notices or statements indicating a limitation based on familial status and injured Complainants in violation of 42 U.S.C.A. § 3604 (c).

In this regard, both Respondent Carlson's letter of January 8, 1991 and Respondent Summy's letter of February 1991 and their hearing testimony support the existence of a policy preferring renting to singles or to a couple. Although Mr. Carlson's statements have not been consistent on this point, in his January 8, 1991 letter to the Sioux Falls Human Relations Commission he stated that his

> "instructions to Mr. Summy was to rent the apartment to a single person or at the most a married couple/two single persons.

[11] Although Mr. Carlson letter of January 8, 1991, indicates that he asked the Complainants to leave because they had a child, it also shows that he had agreed to rent to the three Complainants, although reluctantly, and had allowed them to move in. It was only after he received the call from Ms. Madrid which gave him reason to believe that there were at least four of them, instead of the three agreed to, and that they had done damage to the property (GX-11), that he decided he wanted them to leave. In light of the evidence that the Bad Horses made no independent report that Mr. Summy made the statement in question, and Mr. Summy's denial that he did so, I am not persuaded that this direct statement of discrimination was made.

> I have rented the apartment to families with 1 child on a couple of previous occasions and without exception the family moved out as soon as possible because in their words, "The apartment is to (sic) small for a family". (G-X-11).

At the hearing, Mr. Carlson testified that he preferred rental to no more than two persons for the reason he previously had stated (the unit was too small for more than two), but it did not matter whether the two persons were two single adult individuals or a parent and a child. (TR. 280). Thus, the preponderance of the evidence supports finding that Mr. Carlson had stated a preference for renting the unit to no more than two persons. However, it does not necessarily support finding that Mr. Carlson had a policy against renting to a parent and a child. In that regard, it is not clear that the statements made indicated a limitation based on familial status. Thus, the question is raised as to whether the limitation on two persons, regardless of age or relationship, was a reasonable one based on the size and construction of the unit. I need not reach that question in this case, however, in that I find the Charging Party has not met their burden of showing that the policy was applied to the injury of the Bad Horses. Mr. Summy testified that he made an exception in the case of the Bad Horses and agreed to rent the unit to them, even though they were a family of three instead of two. Mr. Carlson agreed to their lease. The Bad Horses moved into the unit. As discussed above, they were asked to leave for reasons other than the fact that they were a husband and a wife with a child under the age of 18 living with them. Applying the same rationale as

discussed above, had Respondents really desired not to rent to the Bad Horses because they were a family they could have rejected Mr. Bad Horse's offer on October 3, 1990, especially since he lacked qualification due to insufficient money to pay the deposit and first month's rent.

C. The claim that bias by Ms. Madrid against Native Americans should be imputed to the Respondents:

The most troublesome claim made by the Charging Party is that Ms. Madrid's complaints against the Bad Horses were motivated by bias against Native Americans and thus bias should be imputed to Respondents.[12] This is the only theory of discrimination

[12]I agree with the Charging Party that if the evidence established that Respondents required the Bad Horses to move because the neighbor, Ms. Madrid, did not want Native Americans to live on the property, it would show a discriminatory motivation on Respondents' part. (*Tolliver v. Amici, 800 F. 2d 149, 150-151 (7th Cir. 1986; Cato v. Jilek, 779 F. Supp. 937 (N.D. Ill. 1991).* However, such a case is not made on the evidence presented.

that makes sense considering that Respondents had agreed to rent to the Complainants, knowing them to be a Native American family, and allowed them to move in before turning around and requiring them to vacate the unit. The thrust of the argument is that Respondents were aware that Ms. Madrid was biased against Native Americans and so they should have found her complaints against the Bad Horses "highly suspect". And, by acting on her complaint, without affording Complainant an opportunity to rebut the allegations made by her about them, they engaged in discriminatory conduct (RS Brief Fn 4). After considering all the evidence, I am not persuaded that the Complainants have carried their burden of showing 1) that Ms. Madrid complained to Mr. Carlson and demanded that he require the Bad Horses to move because of bias against Native Americans; 2) that if so, Respondents knew, or had reason to believe, that this was her motivation; and 3) that Respondents took the actions she demanded for no other reason. Thus, I do not find discrimination on this basis.

There is testimony from Mr. Summy to the effect that Ms. Madrid made statements indicating a bias against Native Americans. According to his testimony, she said to him at one time that "she had trouble with these kind of people" (meaning Native Americans) and had moved to Sioux Falls expecting never to be bothered by them (TR. 298).

Although Mr. Summy testified that Ms. Madrid made statements to him which indicated bias against Native Americans, he also testified that his response to her indicated that he respected the rights of all people. (TR. 300). This counters the argument that he held a bias himself.[13] Further, there is no evidence in the record that Mr. Summy believed that Ms. Madrid's complaints lacked basis in fact or that she was acting with an ulterior motive. Indeed, his testimony supports finding that there was some basis for her complaints regarding her concern for the number of people who would live in the unit. Mr. Summy observed an additional child (a boy) at the Bad Horse home when he went in the early morning hours of October 4, 1990. Moreover, it appears that Ms. Madrid could have been genuinely concerned about not having adequate hot water for her unit. The testimony of Mr. and Mrs. Bad Horse themselves provides corroboration that she heard there would be many people, up to 10, moving into the apartment and that her complaining went to her concern about that problem.[14]

As to Mr. Carlson, there is no evidence that he knew, or had reason to know, that Ms. Madrid was biased against Native Americans. According to him, she had never before complained to him about a tenant. He had previously rented to Native Americans while Ms. Madrid was a tenant without complaint from her. There is no evidence that Mr. Summy told Mr. Carlson about her bias. Based on Mr. Carlson's account of the conversation he had with Ms. Madrid on October 3, 1990, she gave specific and objective reasons for her complaints against the Bad Horses which had nothing to do with their race or national origin. Moreover, as indicated above, Mr. Carlson testified that some of Ms. Madrid's observations were confirmed by Mr. Summy. This was not denied by Mr. Summy. Thus, at the time that Mr. Carlson made his decision to require the Bad Horses to move, there is no evidence that he was aware of, or had any reason to suspect, that Ms. Madrid had any reasons other than concern for the upkeep of the property, and the number of people who would live in the upstairs unit as it affected the adequacy of her hot water supply.

Conclusion and Order

Respondents testimony showed that they had previously entered into agreements to rent to Native Americans and to families with children. Indeed, in the case of the Bad Horses, Mr. Summy agreed to rent to them and persuaded Mr. Carlson to do so, knowing they were a Native American family and knowing they were a couple with a 5-year old child. Respondents agreed to rent to this Native American family *even though they had*

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[13] As previously indicated, Mr. Summy was very friendly to the Bad Horses in his interactions with them. He even invited them into his home.

[14] Mrs. Bad Horse testified that she thought the man was "kidding" when he made the statements. However, Ms. Madrid's complaints that there would not be enough hot water for all of them suggest that she did not think the man to be kidding, but took it seriously. The testimony of Mr. and Mrs. Bad Horse shows that neither spoke up to say that the hired helper's statements were not true. (TR. 223-225).

a legitimate basis for declining to rent to them were they so inclined. By Mr. Bad Horse's own admission he did not have the full deposit and first month's rent required to qualify to rent the unit. He was able to rent the unit only because Mr. Summy relaxed the requirement and agreed to an arrangement which allowed him to make a partial payment. Further, the evidence shows that Mr. Carlson required the Complainants to move only because of concerns which developed during their move into the property which were not related to the fact that they were Native Americans or a family with a child. I do not credit the statements that Mr. Carlson requested that they move out because he did not like their "kind" or because they were a family with a child. Thus, the preponderance of the evidence does not support Complainants' charge that Mr. Summy or Mr. Carlson discriminated against them either on the basis of their being Native American or on the basis of being a family with a child.

The Complainants have failed to establish by a preponderance of the evidence that Mr. Carlson discriminated against them on the basis of having a policy that preferred renting the unit to two persons at the most. The evidence does establish that Mr. Carlson had a stated preference for renting to a couple or two single individuals (regardless of relationship or age). However, I find that the preference was not acted upon in this case, and *did not work to the detriment of* the Bad Horses. Thus, the evidence does not support finding that Mr. Carlson applied a preference in renting the unit *which resulted in injury* to the Complainants. When Mr. Carlson approved the agreement to rent submitted to him by Mr. Summy he was aware that the Complainants were a family of 3 - two adults and a child under 18 years. He rented to them anyway. He asked them to leave only after a problem developed with an existing tenant and after uncertainty was created as to how many persons would reside in the Bad Horses' unit. There is ample reason to conclude that had the friction not developed between the neighbor, Ms. Madrid and the Bad Horses, Mr. Carlson would not have initiated any action whatsoever to interfere with the Complainants' enjoyment of the property.

Although there is evidence that the Ms. Madrid may have been biased against Native Americans, Complainants have not shown by a preponderance of the evidence

that her bias was the basis for her complaints, or that Respondents knew, or should have known, that such was the case. It is uncontradicted that statements were made in her presence that could reasonably have caused her great alarm regarding the adequacy of her hot water supply (that up to 10 people might be moving into the upstairs unit). Under the circumstances Respondents could reasonably believe there was merit to the neighbor's complaints. Mr. Carlson may be criticized for the way he handled the matter, (i.e. for not talking directly to the Bad Horses to get their side of the story before deciding what action was appropriate). However, considering all the circumstances, including the forcefulness of Ms. Madrid's complaint, Mr. Carlson's concern for the number of people who would live in his unit, and the rapid pace at which the events were unfolding with the need for him to act quickly, it is not surprising that he would want to retain a "very good tenant" as opposed to taking a chance on a new one. Thus, I conclude that the Charging Party has not persuasively shown that the reason given by Respondents for asking the

Bad Horses to move out was merely pretextual. The preponderance of the evidence does not support finding that Respondents acted out of a bias against Native Americans or out of a desire not to rent to families with children. Accordingly, the Charge of Discrimination is hereby ORDERED dismissed.

/s/

CONSTANCE T. O'BRYANT
Administrative Law Judge