UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Ashley Pierce, Monique Castro Pierce and Gary Grabarczyk, Charging Party, v. Florence Gunderson and Milan Gunderson, Respondents.

HUDALJ 05-98-0298-8
HUDALJ 05-98-0715-8

Decided: January 3, 2001

Konrad J. Rayford, Esquire
For the Charging Party

Rod W. Rogahn, Esquire
For the Respondents

Before: William C. Cregar
Administrative Law Judge

INITIAL DECISION AND ORDER
ON ATTORNEY FEES AND COSTS

On August 14, 2000, I issued an Initial Determination on Remand and Order ("Initial Decision on Remand") dismissing the charge of discrimination brought by the Secretary of Housing and Urban Development ("Secretary of HUD") based on the Charging Party's failure to establish a *prima facie* case. Respondents, Florence Gunderson and her son, Milan, seek attorney fees and costs. Because the Charging Party failed to prove that the agency position was "substantially justified" under the Equal Access to Justice Act (EAJA), I award fees to Respondents.

Introduction

On August 25, 1999, I granted Respondents' Motion for Summary Judgment on the basis that the Charging Party failed to establish a *prima facie* case of discrimination. Because the applicable municipal code prohibits Respondents from renting to tenants with home businesses, Complainants, who run a home business, were not eligible to rent Respondents' apartment. *See* Initial Determination and Order (Sep. 28, 1999) ("Initial Decision") which sets forth the rationale for granting the summary judgment motion.

HUD's Secretarial Designee granted the Charging Party's petition to set aside the Initial Decision and to remand the case for full administrative proceedings. *See* Order of Jack C. Melito (Oct. 28, 1999) ("Designee's Remand Order"). Accordingly, a hearing was held on April 4 and 5, and May 2, 2000.[1] During that proceeding, Respondents twice moved to dismiss the case based on the Charging Party's failure to establish a *prima facie* case. After consideration of the record, including the parties' post-hearing briefs, on August 14, 2000, I granted Respondents' motion and dismissed the charge of discrimination by issuance of Initial Decision on Remand, which became final September 14, 2000. *See* 24 C.F.R. §§ 180.680 (b)(2).

On October 13, 2000, Respondents submitted an Application for Costs and Attorney Fees ("Respondents' Application") in accordance with 24 C.F.R. § 180.705. The Charging Party filed a Reply to Respondents' Application ("Charging Party's Reply") on November 8, 2000. Finally, Respondents filed a Response to the Charging Party's Reply which included net worth exhibits ("Respondents' Reply") on November 22, 2000.[2]

Discussion

1. Respondents have met Equal Access to Justice Act basic eligibility requirements for fees and costs.

In Fair Housing Act cases, HUD may be liable for a respondent's reasonable attorney fees and costs to the extent provided under the Equal Access to Justice Act,

[1]The abbreviation "tr." followed by a number represents pages from the transcript of the hearing. Because no court reporter was available to transcribe the May 2, 2000, portion of the hearing, a tape was made of the testimony that day. This tape is referred to as "tape of May 2, 2000, hearing."

[2]At the time Respondents submitted their Reply, Ms. Gunderson was ailing, and accordingly, her statement was originally submitted without her signature. Her signed, notarized affidavit was received on December 4, 2000.

5 U.S.C. § 504, and HUD's EAJA regulations. *See* 42 U.S.C. § 3612(p); 24 C.F.R. §180.705. Provided that a respondent is a "prevailing party" and is "eligible" to receive an award of fees and costs, HUD is responsible for reasonable attorney fees and costs unless its position was "substantially justified" or "special circumstances make an award unjust." 5 U.S.C. § 504(a); 42 U.S.C. § 3612(p); 24 C.F.R. § 14.105.

There is no dispute that Respondents are a prevailing party. The charge of discrimination brought against them was dismissed. They are eligible for a fee award because their net worth, at the time the case was initiated, did not exceed $2,000,000. *See* 5 U.S.C. § 504(b)(1)(B); 24 C.F.R. § 14.120(b)(1).[3]

2. The Charging Party's position was not substantially justified.

The Charging Party has the burden of proving that its position was substantially justified. *See, e.g., Wheat v. Heckler,* 763 F.2d 1025 (8th Cir. 1985); *Citizens Council v. Brinegar,* 741 F.2d 584 (3d Cir. 1984). HUD must demonstrate that its position is "justified in the substance or in the main -- that is, justified to a degree that could satisfy the reasonable person." *Pierce v. Underwood,* 487 U.S. 552, 565 (1988). The Government's position includes not only its litigation stance, but the Department's underlying actions that formed the basis for the case. *See* 24 C.F.R. § 14.125(a); H.R. Rep. No. 120, 99th Cong., 1st Sess., pt.1, at 12 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 141.

"Substantially justified" means "reasonable in law and fact." 24 C.F.R. § 14.125(a); *see, e.g., United States v. Hallmark Construction, Co.,* 200 F.3d 1076, 1079-80 (7th Cir. 2000). But for a local ordinance, the Charging Party's position may have been otherwise substantially justified. However, its position that the ordinance did not prevent Complainants' occupancy of Respondents' apartment is patently unreasonable. Accordingly, the Charging Party was not substantially justified in proceeding with this case.

[3]In addition, HUD regulations set forth additional conditions for eligibility (*see* 24 C.F.R. §§ 140.120(a); 14.200 - .215), none of which requires comment.

The Charging Party was unable to establish a *prima facie* case of discrimination. To do so under the circumstances of this case, the Charging Party had to prove that: (1) Complainants were members of a protected class; (2) they were *qualified* to rent Ms. Gunderson's apartment; (3) they applied to rent the apartment; and (4) Respondents rejected the Complainants as tenants. *See, e.g., Soules v. HUD*, 967 F.2d 817, 822 (2d Cir. 1992); *HUD v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990); *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1979). By failing to establish the second element, the Charging Party was unable to carry its initial burden. *See, e.g., HUD v. Ramapo Towers Owners Corp.*, 2A Fair Housing-Fair Lending (Aspen) ¶25,122, 26,037 (HUDALJ Oct. 7, 1996).

"[Q]ualified" means that a housing applicant must meet the "legitimate, objective requirements of the landlord." *Smith v. Anchor Building Corp.*, 536 F.2d 231, 233-35 (8th Cir. 1976). Complainants were not qualified to rent the apartment because they operated a home business which was prohibited under the local ordinance.[4] *See* City of Delafield, Wisconsin, Municipal Code §§ 17.24 and 17.38 (1997) ("the Code, §§ 17.24, 17.38"); *see also* Respondents' Memorandum in Support of Respondents' Motion for Summary Judgment (Aug. 13, 1999), Exhibits 4 and 5 (affidavits of G. William Chapman, City Attorney, Delafield, Wisconsin, and of Marilyn Czubkowski, City Clerk, Delafield, Wisconsin).[5]

Public policy considerations do not bar the award of attorney fees. The Charging Party, citing *Minor v. United States*, 797 F.2d 738 (9th Cir. 1986) and *United States v. University Oaks Civic Club*, 653 F. Supp. 1469 (S.D. Tex. 1987), contends that public policy considerations prevent an award so as not to discourage vigorous prosecution of Fair Housing Act cases. The argument is not persuasive. In *Minor* the court found "the government. . . substantially justified in seeking judicial resolution of the important, and

[4]The ordinance prohibiting residential businesses provides an exception for a "home occupation," defined as one for "gain or support that is conducted entirely within the principal building whose primary use is as a *single-family or duplex* residence." City of Delafield, Wisconsin, Municipal Code § 17.24 (1997) (emphasis added). Such a business is permitted in single-family or duplex residential buildings, but is not permitted in a four-unit residential dwelling, which is the subject of these proceedings. The purpose of the Code's prohibition is to address concerns over excessive signage, limited parking, noise, and security in residential areas. Initial Decision on Remand, at 4-5.

[5]To counter these sworn statements that the ordinance prohibits businesses in four-unit dwellings, HUD relied on an affidavit drafted by the HUD investigator. The affidavit was signed by Scott Botcher, the City Administrator at the time of Complainants' rental inquiries, who opined that "it sounds like [a home business] would be allowed" within a four-unit building "if there were no employees and no client traffic." Joint Hearing Exhibit No. 5. The affidavit further states that "as long as the business doesn't use more than 25 percent of the space of the unit, and as long as it doesn't create a nuisance to the neighbors, there shouldn't be a problem." *Id.* However, he testified at hearing that he was not focused on the size of the unit at the time he signed the affidavit. In other words, he assumed that the hypothetical posed to him involved single-family or duplex housing. *See* tape of May 2, 2000, hearing. The record also demonstrates that the HUD investigator was aware of the Code's provisions during the investigatory stage of these proceedings. *See, e.g.*, tr. at 339-41.

doubtful, question of tax law" in what it characterized as a "test case." 797 F.2d at 738. In *University Oaks,*[6] the court refused to award defendant fees against the Government finding that the facts were "novel" and the case presented "unique. . . questions."

[6]In *University Oaks*, a Fair Housing case, the United States Department of Justice brought suit for injunctive and declaratory relief against an integrated residential subdivision that had a document, dating back to 1939, which contained racially restrictive covenants. The document, which was recorded in the county deed records office, was set to lapse in 1970, had the subdivision not voted to extend it. However, in addition to extending the document, the homeowners' declaration also explicitly disclaimed the racial restrictions.

653 F. Supp. at 1477. More importantly, the court implicitly recognized the Government's legal position by noting that there was "no published case law. . . to dissuade the theory propounded [by the Government, and that the] case does not dispose of the Government's approach in its entirety." *Id.* at 1478. Neither case is similar to this one. This proceeding is not a test case. To the contrary, published case law sets forth the requirement for a *prima facie* case in disparate treatment cases, and the Code undermined the Charging Party's *prima facie* case from the outset of these proceedings.

3. Respondents are entitled to $27, 143.80 in fees and costs.

Respondents are entitled to reasonable fees and costs as supported by the record. *See* 24 C.F.R. §§ 14.105, 14.130; *Hensley v. Eckerhart,* 461 U.S. 424, 433-34 (1983). Respondents seek $27,895.30 in fees and costs. The Charging Party disputes fees of $770 claimed by Respondents for the time period prior to issuance of the charge, *i.e.* prior to inception of an "adversary adjudication"as required by EAJA. 5 U.S.C. §504(b)(1)(c)). Respondents do not disagree. Accordingly, this amount will not be awarded. *See id.*; *Rowell v. Sullivan*, 813 F. Supp. 78, 81 (D. D.C. 1993).

Respondents are entitled to the following substantiated, reasonable fees and costs: $1,598.15 ($684.80 + $913.35) in costs for hearing and deposition transcript and reporting services; $22.15 for postal expenses; and $200 in costs paid to a private investigation firm. The total costs awarded are $1,820.30.

Under EAJA, Respondents are entitled to an hourly rate of $125 for services provided by the lead attorney.[7] *See* 5 U.S.C. § 504 (b)(1)(A). In addition, they request an hourly fee of $75 for his associate. Respondents are entitled to an award of $25,323.50 for reasonable attorney fees (as set forth in the appendix below) and $1,820.30 in costs, for a total award of $27,143.80.

[7]Although HUD regulations quote a $75 hourly fee (24 C.F.R. § 14.130(a)) and have not yet been changed to conform to the statute, EAJA provides that an agency may *increase* the $125 hourly rate, not decrease it, provided that "the cost of living or a special factor, such as the limited availability of qualified attorneys" justifies a higher rate. 5 U.S.C. § 504 (b)(1)(A).

Order

It is hereby ORDERED that:

1. Respondents' Application is granted in part and denied in part.

2. The Charging Party shall pay $27,143.80 in fees and costs to the applicant.

3. Within thirty (30) days of the date that this decision becomes final, the applicant shall comply with 24 C.F.R. § 14.345 to seek payment of the award.

4. This Order is entered pursuant to 42 U.S.C. § 3612(p) and 24 C.F.R. § 14.330, and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary of the United States Department of Housing and Urban Development within that time. *See* 24 C.F.R. §§ 14.335, 14.340, 180.680(b).

/s/

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William C. Cregar
Administrative Law Judge

Appendix

Dates	Hours at $75 Rate	Hours at $125 Rate	Total
6/99-7/99		42.1 for $5262.50	$5263.50[8]
7/99-8/99		26.4[9] for $3300	$3300
10/99		15.2 for $1900	$1900
12/99-2/00		6.1 for $762.50	$762.50
3/24-3/31/00	8.5 for $637.50	23.7 for $2962.50	$3600
3/31/00		4.5 for $562.50	$562.50
4/3-4/5/00	16.3 for $1222.50	19.5 for $2437.50	$3660
4/10-4/26/00	2.8 for $210	.2 for $25	$235
4/27-4/28/00	1.2 for $90	.3 for $37.50	$127.5
5/1-5/2/00	10.2 for $765	6.8 for $850	$1615
5/00-6/00	23.9 for $1792.50	6.4 for $800	$2592.50[10]
10/00	13.4 for $1005	1.2 for $150	$1155[11]
11/00		4.4 for $550	$550

[8]Respondents miscalculated and sought an extra $60, or a total of $5,322.50. *See* Respondents' Application, Exhibit B-1, 1.

[9]Respondents incorrectly requested 27.4 hours; this included one hour that was carried over from a previous balance. *See* Respondents' Application, Exhibit B-1, 2.

[10]Respondents added incorrectly and requested only $2,492.50. *See* Respondents' Application, Exhibit B-1, 10.

[11]The last two entries for October and November of 2000 are for work performed for the EAJA proceeding. These fees are appropriate. *See, e.g., Bond v. Stanton,* 630 F.2d 1231, 1235 (7th Cir. 1980), *appeal after remand,* 655 F.2d 766, *cert. denied,* 454 U.S. 1063 (1981).