STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EMIL NUNEZ AND CELESTINA NUNEZ,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No. 02-4807
	)	
LES MONTELLIER APARTMENTS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on May 21, 2003, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioners: Emil Nunez, pro se
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For Respondent: Christopher Barkas, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent unlawfully discriminated against Petitioners by refusing to rent them an apartment on the basis of familial status.

PRELIMINARY STATEMENT

In a Housing Discrimination Complaint apparently filed with the U.S. Department of Housing and Urban Development in or around July 2002 and subsequently investigated by the Florida Commission on Human Relations ("FCHR"), Petitioners Emil and Celestina Nunez (Emil's daughter) alleged that Carmen DeJesus and Dan Goldman, as agents of Les Montellier Apartments, had unlawfully discriminated against them on the basis of familial status by refusing to rent a one-bedroom apartment to Petitioners and Mrs. Nunez (Emil's wife), the latter being an unnamed cocomplainant. The FCHR investigated Petitioners' claim and, on September 3, 2002, issued a notice setting forth its determination that reasonable cause did not exist to believe that a discriminatory housing practice had occurred. Thereafter, Petitioner filed a Petition for Relief against Carmen DeJesus, Dan Goldman, and Les Montellier Apartments,[1] which the FCHR transmitted to the Division of Administrative Hearings on December 12, 2002.

At the final hearing on May 21, 2003, Emil Nunez testified as Petitioners' sole witness and proffered no exhibits. In its case, Respondent called Carmen DeJesus and Lawrence Sorkin to testify. Respondent also offered several exhibits, but none was received in evidence.

The final hearing transcript was originally filed on

July 25, 2003, but it was flawed. A revised (and improved) transcript was filed on August 22, 2003. Thereafter, Respondent timely submitted a Proposed Recommended Order. Petitioners did not file any post-hearing papers.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2002 Florida Statutes.

FINDINGS OF FACT

The Material Historical Facts

1. In May 2002, Petitioner Emil Nunez ("Nunez") saw an advertisement in the newspaper announcing that a one-bedroom apartment was available for rent at a complex in Hialeah, Florida known as Les Montellier Apartments. Nunez thought that the apartment might be suitable for his wife and their daughter Celestina, who was then four years old, so he called for additional information and to make arrangements to see the property.

2. On May 14, 2002, Nunez and his family visited Les Montellier Apartments. There, they met Carmen DeJesus, the property manager. Ms. DeJesus quickly learned that Nunez was interested in renting a one-bedroom apartment for his family of three. Ms. DeJesus informed Nunez that the owners of Les Montellier Apartments had established an occupancy policy of two persons per bedroom, which was strictly enforced. Therefore, she explained, Nunez and his family would not be allowed to rent

a one-bedroom apartment. They could, she said, rent a two-bedroom apartment, but none was available at the time.

The Occupancy Policy

3. The occupancy policy for Les Montellier Apartments had been made formal in December 1999, after the U.S. Department of Housing and Urban Development ("HUD") adopted a policy on occupancy standards that recognized, as presumptively reasonable, a limit of two persons to a bedroom. Once this policy was put into effect at Les Montellier Apartments, it was followed without exception.

4. As originally built, Les Montellier Apartments comprised nothing but one-bedroom units. In the 1960s, however, the property was renovated, and some two-bedroom units were created, together with some studio apartments. As a result of the renovations, a greater number of residents could live in the building, putting heavier demands on the waste disposal facilities, plumbing, and other building systems. The occupancy policy was established for the reasonable and nondiscriminatory purpose of preventing overcrowding.

5. The undersigned is not persuaded that, more likely than not, the occupancy policy at Les Montellier Apartments was designed or used to exclude families with children or otherwise to discriminate unlawfully. To the contrary, as of May 2002, many families with children resided at this property.

Ultimate Factual Determinations

6. The occupancy policy in effect at Les Montellier Apartments in May 2002 was reasonable, legitimate, and nondiscriminatory; the undersigned is not persuaded, and therefore does not find, that the occupancy policy likely was used as a pretext for unlawful discrimination against families with children.

7. The undersigned is not persuaded by the greater weight of the evidence, and therefore does not find, that the owners or operators of Les Montellier Apartments, or any agents of either group (which owners, operators, and agents will hereafter be referred to collectively as the "Landlord"), unlawfully discriminated against the Nunez family on the basis of their familial status or any other unlawful criterion.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

9. Under Florida's Fair Housing Act ("Act"), Sections 760.20 through 760.37, Florida Statutes, it is unlawful to discriminate in the sale or rental of housing. Among other prohibited practices:

> (1) It is unlawful to refuse to sell or rent after the making of a bona fide offer, to refuse to negotiate for the sale or

> rental of, or otherwise to make unavailable or deny a dwelling to any person because of race, color, national origin, sex, handicap, familial status, or religion.
>
> (2) It is unlawful to discriminate 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, color, national origin, sex, handicap, familial status, or religion.
>
> * * *
>
> (4) It is unlawful to represent to any person because of race, color, national origin, sex, handicap, familial status, or religion that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

§ 760.23, FLA. STAT. (emphasis added).

10. Specific exceptions to the Act's prohibitions include the following:

> (5) Nothing in ss. 760.20-760.37:
>
> * * *
>
> (b) Limits the applicability of any reasonable local restriction regarding the maximum number of occupants permitted to occupy a dwelling.

§ 760.29(5)(b). It is not clear, however, that this exception is applicable in this instance, because the term "local restriction" might reasonably be construed to mean local governmental restrictions on occupancy, under which interpretation the statutory exclusion in question would not

encompass private occupancy policies of the sort encountered here. Because it is not necessary to construe Section 760.29(5)(b), Florida Statutes, to resolve the present dispute, no opinion is expressed at this time regarding the reach of this particular exclusion.

11. The undersigned considers instructive HUD's policy on occupancy standards, which was announced in December 1998, when the federal agency adopted the guidelines set forth in a Memorandum of General Counsel Frank Keating to Regional Counsel dated March 20, 1991. See Notice of Statement of Policy, 63 Fed. Reg. 70,982, 1998 WL 886476 (1998)(republication); 63 Fed. Reg. 70,256, 1998 WL 878502 (1998)(original publication). In relevant part, this policy provides as follows:

> [T]he Department believes that an occupancy policy of two persons in a bedroom, as a general rule, is reasonable under the Fair Housing Act. The Department of Justice has advised us that this is the general policy it has incorporated in consent decrees and proposed orders, and such a general policy also is consistent with the guidance provided to housing providers in the [Public Housing Occupancy Handbook]. However, the reasonableness of any occupancy policy is rebuttable[;] . . . the Department will [not] determine compliance with the Fair Housing Act based solely on the number of people permitted in each bedroom.
>
> * * *
>
> Thus, in reviewing occupancy cases, HUD will consider the size and number of bedrooms and other special circumstances.

The following principles and hypothetical examples should assist you in determining whether the size of the bedrooms or special circumstances would make an occupancy policy unreasonable.

Size of bedrooms and unit

Consider two theoretical situations in which a housing provider refused to permit a family of five to rent a two-bedroom dwelling based on a "two people per bedroom" policy. In the first, the complainants are a family of five who applied to rent an apartment with two large bedrooms and spacious living areas. In the second, the complainants are a family of five who applied to rent a mobile home space on which they planned to live in a small two-bedroom mobile home. Depending on the other facts, issuance of a charge might be warranted in the first situation, but not in the second.

The size of the bedrooms also can be a factor suggesting that a determination of no reasonable cause is appropriate. For example, if a mobile home is advertised as a "two-bedroom" home, but one bedroom is extremely small, depending on all the facts, it could be reasonable for the park manager to limit occupancy of the home of two people.

Age of children

The following hypotheticals involving two housing providers who refused to permit three people to share a bedroom illustrate this principle. In the first, the complainants are two adult parents who applied to rent a one-bedroom apartment with their infant child, and both the bedroom and the apartment were large. In the second, the complainants are a family of two adult parents and one teenager who applied to rent a one-bedroom apartment. Depending on the other facts, issuance of a charge might be

warranted in the first hypothetical, but not in the second.

Configuration of unit

The following imaginary situations illustrate special circumstances involving unit configuration. Two condominium associations each reject a purchase by a family of two adults and three children based on a rule limiting sales to buyers who satisfy a "two people per bedroom" occupancy policy. The first association manages a building in which the family of the five sought to purchase a unit consisting of two bedrooms plus a den or study. The second manages a building in which the family of five sought to purchase a two-bedroom unit which did not have a study or den. Depending on the other facts, a charge might be warranted in the first situation, but not in the second.

Other physical limitations of housing

In addition to physical considerations such as the size of each bedroom and the overall size and configuration of the dwelling, the Department will consider limiting factors identified by housing providers, such as the capacity of the septic, sewer, or other building systems.

State and local law

If a dwelling is governed by State or local governmental occupancy requirements, and the housing provider's occupancy policies reflect those requirements, HUD would consider the governmental requirements as a special circumstance tending to indicate that the housing provider's occupancy policies are reasonable.

Other relevant factors

Other relevant factors supporting a

> reasonable cause recommendation based on the conclusion that the occupancy policies are pretextual would include evidence that the housing provider has: (1) made discriminatory statements; (2) adopted discriminatory rules governing the use of common facilities; (3) taken other steps to discourage families with children from living in its housing; or (4) enforced its occupancy policies only against families with children. For example, the fact that a development was previously marketed as an "adults only" development would militate in favor of issuing a charge. This is an especially strong factor if there is other evidence suggesting that the occupancy policies are a pretext for excluding families with children.
>
> An occupancy policy which limits the number of children per unit is less likely to be reasonable than one which limits the number of people per unit.
>
> Special circumstances also may be found where the housing provider limits the total number of dwellings he or she is willing to rent to families with children. For example, assume a landlord owns a building of two-bedroom units, in which a policy of four people per unit is reasonable. If the landlord adopts a four person per unit policy, but refuses to rent to a family of two adults and two children because twenty of the thirty units already are occupied by families with children, a reasonable cause recommendation would be warranted.

See 63 Fed. Reg. 70,256-57.

12. In cases involving a claim of rental housing discrimination on the basis of familial status, such as this one, the complainant has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. A

prima facie showing of rental housing discrimination can be made by establishing that the complainant applied to rent an available unit for which he or she was qualified, the application was rejected, and, at the time of such rejection, the complainant was a member of a class protected by the Act. See Soules v. U.S. Dept. of Housing and Urban Development, 967 F.2d 817, 822 (2d Cir. 1992).[2] Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA), aff'd, 679 So. 2d 1183 (Fla. 1996)(citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)). If, however, the complainant sufficiently establishes a prima facie case, the burden then shifts to the respondent to articulate some legitimate, nondiscriminatory reason for its action.

13. Once the respondent "responds to the [complainant]'s proof by offering evidence of the reason for the [decision that aggrieved the complainant], the fact finder must then decide whether the [challenged decision] was discriminatory" without regard to the rebuttable presumption of discrimination that arises from a prima facie showing, which presumption drops from the case. U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 714-15, 103 S.Ct. 1478, 1481-82 (1983). That is to say, where "the [respondent] has done everything that would be required of him if the [complainant] had properly made out a

prima facie case, whether the [complainant] really did so is no longer relevant." Id. at 715, 103 S.Ct. at 1482.

14. If the respondent carries the burden of rebutting the complainant's prima facie case, then the complainant must establish by a preponderance of the evidence that the reason asserted by the respondent is, in fact, merely a pretext for discrimination. See Massaro v. Mainlands Section 1 & 2 Civic Ass'n, Inc., 3 F.3d 1472, 1476 n.6 (11th Cir. 1993), cert. denied, 513 U.S. 808, 115 S.Ct. 56, 130 L.Ed.2d 15 (1994)("Fair housing discrimination cases are subject to the three-part test articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)."); Secretary, U.S. Dept. of Housing and Urban Development, on Behalf of Herron v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990)("We agree with the ALJ that the three-part burden of proof test developed in *McDonnell Douglas* [for claims brought under Title VII of the Civil Rights Act] governs in this case [involving a claim of discrimination in violation of the federal Fair Housing Act].").

15. In the present case, because the Landlord offered evidence of legitimate, nondiscriminatory reasons for the occupancy policy at issue, the evenhanded application of which compelled the decision not to rent a one-bedroom apartment to the Nunez family, it is not necessary to decide whether Nunez actually made out a prima facie case of discrimination. The

undersigned has before him all the evidence he needs to determine whether the Landlord intentionally discriminated against the Nunez family. See Aikens, 460 U.S. at 715, 103 S.Ct. at 1482.

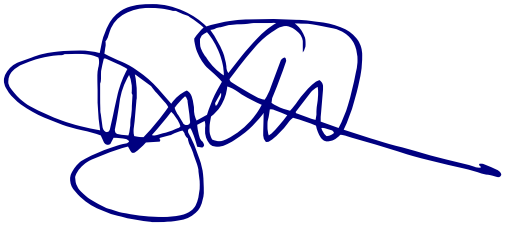
16. Under the HUD policy quoted at length above, which policy the undersigned regards as persuasive authority, the Landlord's occupancy policy of two persons to a bedroom, which was designed to prevent overcrowding, is presumptively reasonable. Thus, the Landlord satisfied its burden to articulate a legitimate, nondiscriminatory reason for declining to rent the Nunez family a one-bedroom apartment, that reason being, to repeat, the fair and impartial enforcement of a presumptively reasonable occupancy policy. Nunez, for his part, failed to present persuasive evidence, such as, e.g., evidence concerning the size of the bedroom and living areas, the configuration of the unit, or other relevant factors, which might have demonstrated the unreasonableness of the Landlord's policy or otherwise established that the stated ground for refusing to rent his family a one-bedroom apartment was merely a pretext for discrimination.

17. In short, then, for the reasons set forth in the Findings of Fact, the undersigned trier of fact is not persuaded by the greater weight of the evidence that the Landlord intentionally discriminated against the Nunez family.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the FCHR enter a final order dismissing Nunez's Petition for Relief.

DONE AND ENTERED this 26th day of September, 2003, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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ENDNOTES

[1]/ For reasons unknown, the FCHR named Les Montellier Apartments as the only party respondent, and the Division of Administrative Hearings, upon receiving the case, followed suit. Petitioners never objected to this and hence the issue is deemed waived. The record reveals that Les Montellier Apartments was a property owned, at the time of the incident giving rise to this dispute, by a partnership. (After the incident, but not as a result thereof, the owners of Les Montellier Apartments sold the property.) It is not clear that "Les Montellier Apartments" is a jural entity capable of being sued. Nevertheless, because a partner in the partnership that formerly owned Les Montellier

Apartments appeared with counsel and participated in this proceeding on behalf of the responding party without objection, the undersigned concludes that any issue regarding the identity of the proper party respondent was waived.

[2]/ Alternatively, the complainant's burden may be satisfied with direct evidence of discriminatory intent. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S.Ct. 613, 621, 83 L.Ed.2d 523 (1985)("[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination" inasmuch as "[t]he shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'").

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.