



STATE OF NEW JERSEY
 OFFICE OF THE ATTORNEY GENERAL
 DEPARTMENT OF LAW & PUBLIC SAFETY
 DIVISION ON CIVIL RIGHTS
 DCR DOCKET NO.: HG13BT-60995
 HUD NO.: 02-10-0015-8

ONYINYECHI R. UBAECHU,)	
and)	
CHINH Q. LE, ESQ., DIRECTOR,)	
NEW JERSEY DIVISION ON CIVIL RIGHTS,)	
)	
Complainants,)	
)	
v.)	FINDING OF PROBABLE CAUSE
)	
RPM DEVELOPMENT GROUP,)	
)	
Respondent.)	

Pursuant to a Verified Complaint filed on October 8, 2009, and Amendment to the Verified Complaint, the above-named Respondent has been charged with unlawful discrimination within the meaning of the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1, *et seq.*) and specifically within the meaning of N.J.S.A. 10:5-4 and 10:5-12(g), on the basis of familial status.

Chinh Q. Le (Director) is the Director of the Division on Civil Rights and, in the public interest, has intervened as a Complainant in this matter pursuant to N.J.A.C. 13:4-2.2(e).

SUMMARY OF COMPLAINT

Complainant claimed she was unlawfully discriminated against in that Respondent refused her rental of a three-bedroom apartment because of her familial status (five children under age 18). To support her claim, Complainant alleged that on or about August 17, 2009, she went to Respondent’s main office in Montclair, New Jersey and submitted an application for a four-bedroom apartment. Complainant further alleged that she was advised that there were no four-bedroom apartments available at that time. Complainant alleged that she then applied for a three-bedroom apartment. Complainant alleged that on August 24, 2009, she contacted Respondent and was advised by its representative that her application for a three-bedroom apartment was denied due to family size.

SUMMARY OF RESPONSE

Respondent denied discriminating against Complainant for any unlawful reason, including familial status. Respondent asserted that Complainant's application for a three-bedroom apartment was denied because her family was too large. Respondent further asserted it relied on its Resident Selection Policy, which allows a maximum of two persons per bedroom. Respondent asserted that said policy is consistent with the regulations of the U.S. Department of Housing and Urban Development (HUD).

BACKGROUND

Complainant is a member of the protected class in that she has five children under 18.

Chinh Q. Le (Director) is the Director of the Division on Civil Rights and, in the public interest, has intervened as a complainant in this matter pursuant to N.J.A.C. 13:4-2.2 (e).

Respondent, a developer of affordable housing, owns approximately 1300 apartments in 21 apartment complexes in Essex County.

SUMMARY OF INVESTIGATION

This investigation established sufficient evidence to support (a) a reasonable suspicion that Respondent refused Complainant rental of an apartment because of her familial status; and (b) a reasonable suspicion that Respondent's policy has a disparate negative impact on families with children. The investigation disclosed that on August 15, 2009, Complainant went to Respondent's office at 77 Park Street, Montclair, New Jersey and completed an "Application For Lease." On her application, Complainant indicated that the apartment would be for her and her husband, Robert Ubaechu, and their five children—three sons ages 8, 3, and 4 months, and two daughters ages 7 and 5. Respondent asserted that pursuant to its Resident Selection Policy, which it claims is consistent with the HUD regulations, there can be no more than two people per bedroom. Respondent determined that Complainant and her family would require a four-bedroom apartment. Respondent has only one four-bedroom apartment, and that apartment was not available. On August 19, 2009, Respondent issued Complainant a letter in which she was informed that her application was declined because her family was too large for the available units.

In support of its position that its policy of two people per bedroom was consistent with HUD regulations, Respondent referred the Division's Investigator to the Fair Housing Enforcement—Occupancy Standards Notice of Statement of Policy issued by HUD on December 18, 1998. Respondent referred to Appendix A, which was a copy of a March 20, 1991 memorandum issued by HUD's then General Counsel, Frank Keating, addressing occupancy standards. The memorandum states in part:

Specifically, [HUD] believes that an occupancy policy of two person in a bedroom, as a general rule, is reasonable under the Fair Housing Act. . . . However, the reasonableness of any occupancy policy is rebuttable, and neither [a previous memorandum] nor this memorandum implies that [HUD] will determine compliance with the Fair Housing Act based solely on the number of people permitted in each bedroom. (Emphasis added)

During the investigation, it was determined that Respondent had three-bedroom apartments available for rental at three complexes; Baker Village, which crosses into both Newark and East Orange, and Springfield Commons and Telephone Heights, which are both in Newark. During the investigation it was established that the complexes were not owned or subsidized by HUD. Further, although HUD set a *guideline* of two persons per bedroom, the statement makes clear that a determination of reasonableness of an occupancy policy would not be based solely on the number of people permitted in each bedroom. In this case, the Division's investigation suggests that Respondent's available three-bedroom apartments are sufficiently spacious and would reasonably accommodate a family of two adults, four children under the age of 12, and one infant of four months old under applicable governmental occupancy codes.

According to Respondent, the three-bedroom apartment at Springfield Commons has 1300 sq. ft. The apartment floor plan indicated that the three bedrooms have 190 sq.ft., 138 sq. ft. and 132 sq. ft. respectively. The living/dining area is 286 sq. ft. During the investigation, it was established that Complainant and her family could have lived in a three-bedroom apartment at Springfield Commons and been in compliance with Newark's Occupancy Standards and Room Size Requirements. Title 18 Article 9 of Newark's municipal code stated in pertinent part:

18:3-1.70. Dwelling Units: Floor Area.

Every dwelling unit shall be occupied by persons composing not more than one (1) family and two (2) other persons. Every such unit shall provide, except as hereinafter set forth, habitable room floor area of one hundred fifty (150) square feet for one (1) person, two hundred fifty (250) square feet for four (4) persons, and seventy five (75) square feet for each additional person. Babies less than one (1) year of age shall not be included.

18:3-1.73 Sleeping Rooms: Floor Area

Every room used for sleeping purposes shall have a minimum floor area of seventy-five (75) square feet for the first person, fifty (50)

square feet for each additional twelve (12) years of age and over, and thirty-five (35) square feet for each additional person under twelve (12) years but over one (1) year of age. Babies one (1) year and under shall not be counted as additional occupants.

As stated above, Complainant's family consisted of her and husband, and their five children; three sons ages 8, 3, and 4 months, and two daughters ages 7 and 5. Even if Respondent counted the four-month old boy as an additional occupant, he could have shared either of the two smaller bedrooms with his brothers and been in compliance with the local ordinance for occupancy.

During the investigation, Respondent asserted, through a letter from its attorney, that it is within its rights to have more restrictive standards for its properties, so long as they are non-discriminatory and uniformly applied. The letter stated in part:

It is [Respondent's] belief, based on experience in managing properties, that if occupancy exceeds 2 persons per bedroom, overcrowding occurs. If an apartment is too crowded for the tenants to live comfortably, let alone, entertain guests, inevitably people end up congregating in hallways, stairwells, entryways, and other public areas of the property. Vandalism and damage can occur, and an unsafe and uncomfortable condition is created for all residents of the property.

ANALYSIS

At the conclusion of the investigation, the Division is required to make a determination whether "probable cause" exists to credit a complainant's allegation of discrimination. Probable cause has been described under the New Jersey Law Against Discrimination (LAD) as a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and that the matter should proceed to hearing. Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert.denied, 111 S.Ct. 799. A finding of probable cause is not an adjudication on the merits but, rather, an "initial culling-out process" whereby the Division makes a preliminary determination of whether further Division action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div. 1978); see also Frank v. Ivy Club, supra, 228 N.J. Super. at 56. In making this decision, the Division must consider whether, after applying the applicable legal standard, sufficient evidence exists to support a colorable claim of discrimination under the LAD.

The LAD prohibits any person, including the owner or other person having the right of ownership or possession of any real property, to refuse or discriminate against any person because of, among other things, race, national origin, gender, or familial status in the terms, conditions or

privileges of any sale, rental or lease, or in the furnishing of facilities or services in connection therewith. N.J.S.A. 10:5-12(g). The prohibitions against familial status discrimination are intended to ensure that families with children are not denied the opportunity to obtain available housing.

To address public health concerns, governmental occupancy codes may limit the number of occupants “in reasonable relation” to habitable floor area per occupant and available sleeping and bathroom facilities. See Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 253-54 (1971); see also State v. Baker, 81 N.J. 99, 110 (1979). Occupancy codes intended to cure antisocial behavior are, however, invalid. See Glassboro v. Vallorosi, 117 N.J. 421, 433 (1990). Governmental occupancy codes were taken into account by Congress when the Fair Housing Act was amended to include the prohibition against discrimination based on familial status. Congress exempted reasonable governmental restrictions regarding maximum number of occupants from the provisions of the Fair Housing Act. See 42 U.S.C.S. § 3607(b)(1).¹ Congress provided for this exception to allay concerns among some landlords that the familial status provisions would require a landlord to permit overcrowding in its units. Although private landlord occupancy policies are not prohibited, such policies are not provided the same deference as governmental codes. Pfaff v. U.S. Dept. of Housing, 88 F.3d 739, 746 (9th Cir. 1996). According to HUD policy and the HUD Memorandum Respondent has cited, where a local occupancy code governs a dwelling, the code is presumptively considered a reasonable restriction.

The United States Supreme Court has described as a “prototypical maximum occupancy restriction” an occupancy limit that requires that a bedroom for two people be at least 70 square feet, with an increase by an additional 50 square feet for each person in excess of two. City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 735-36 (1995). As cited above, the Newark occupancy code requires a minimum of 125 square feet for two occupants over the age of 12 sharing a bedroom, and a minimum of 105 square feet for two occupants sharing a bedroom where one is under the age of twelve. A child under the age of one is not considered an additional occupant. The New Jersey State Housing Code and State occupancy standards governing multiple dwellings reflect a similar limitation. A bedroom for one occupant must be at least 70 square feet. For each additional occupant, the bedroom space must be at least 50 square feet per occupant, except that a child under the age of two is not to be considered an additional occupant. See N.J.A.C. 5:28-1.11; N.J.A.C. 5:10-22.3.

The three-bedroom apartment at Springfield Commons available at the time of Complainant’s application is a larger dwelling for Complainant and her family than is required by the governing municipal and state occupancy codes, even counting Complainant’s four-month old son as an occupant. Further, Respondent has not sufficiently offered or substantiated a legitimate,

¹Although the Division is not bound by federal precedent when interpreting the LAD, New Jersey courts have consistently “looked to federal laws as a key source of interpretive authority” in construing the LAD. Grigoletti v. Ortho Pharmaceutical Corp., 118 N.J. 89, 97 (1990).

nondiscriminatory purpose for a two person per bedroom policy that does not take into account the habitable floor area of its apartments. Respondent claims its policy is necessary to avoid problems of overcrowding such as congregating in the halls and vandalism, but it fails to take into account that Complainant's family would not be deemed to be "overcrowded" in the apartment sought under applicable governmental occupancy requirements when considering the size of apartment. The HUD guidance referenced by Respondent makes clear that when reviewing a landlord's private occupancy limit, compliance with the Fair Housing Act would not be determined based solely on the number of people permitted in a bedroom and that the size of the bedrooms is a factor to be considered. Since Respondent's policy fails to consider the size of the unit or the bedrooms, or the applicable governmental occupancy restrictions, the policy could operate to unreasonably limit or exclude housing opportunities for families with children.

FINDING OF PROBABLE CAUSE

It is, therefore, determined and found that Probable Cause exists to credit the allegations of the complaint.

Date

Chinh Q. Le, Esq., Director
New Jersey Division on Civil Rights