

**STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC
SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. HB52WR-61415**

Ricardo Moran,)
)
 Complainant,)
)
 v.)
)
 Tower Management Services,)
 L.P.,)
)
 Respondent.)

**Administrative Action
FINDING OF PROBABLE CAUSE**

On April 22, 2010, Ricardo Moran (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR), alleging that Tower Management Services, L.P. (Respondent), refused to rent him an available apartment because of his disability and reliance on a Section 8 Housing Choice Voucher, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On December 31, 2016, DCR issued a Finding of No Probable Cause. Upon remand from an appeal of that decision and reconsideration, DCR finds as follows.

SUMMARY OF INVESTIGATION

The Section 8 Housing Choice Voucher program (Section 8) is funded by the United States Department of Housing and Urban Development (HUD) to provide assistance to very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private housing market. Under the program, participants receive housing choice vouchers and then find their own housing to rent in the private market. Housing choice vouchers are administered locally by Public Housing Agencies (PHAs). The PHA sets a “payment standard” for gross rent (rent plus utilities), depending on the number of bedrooms in the unit and the Fair Market Rents (FMR) established annually by HUD. The payment standard is the “maximum monthly assistance payment for a family assisted in the voucher program (before deducting the total tenant payment by the family).” 24 C.F.R. 982.4, 24 C.F.R. 982.503.

A family that is issued a housing voucher is responsible for finding a suitable unit to rent. According to the statute and regulations that govern Section 8, if the gross rent on the unit is less than the payment standard, the family generally pays 30 percent of its adjusted monthly income for rent. If the rent is more than the payment standard, the family can pay up to forty percent of its adjusted monthly income toward rent. The portion of the rent paid by the family is called the “family share.” 42 U.S.C. 1437f(o)(1)(E); 42 U.S.C. 1437f(o)(3); 24 C.F.R. 982.1; 24 C.F.R. 982.508, 24 C.F.R. 982.4. The Section 8 voucher pays the remainder of the rent. Specifically, the PHA enters into a contract with the property owner that is separate from the tenant, pursuant to which the PHA agrees to pay an amount that equals the gross rent minus the family share, only up

to the payment standard discussed above, directly to the owner. 42 U.S.C. 1437f(c); 24 C.F.R. 982.1(b)(2).

Respondent manages a 237-unit apartment complex in Bergenfield, New Jersey, known as Ivy Lane Apartments (Ivy Lane). Complainant, [REDACTED], visited Ivy Lane to inquire about a one-bedroom apartment listed for rent at \$995 per month. Respondent's rental agent, Mary Kate Malrooney, greeted Complainant and provided a "guest card." The guest card requests that potential applicants indicate the amount of their annual income, within a range. Complainant completed a guest card and indicated that his annual income was the lowest income range listed on the guest card, \$25,000 to \$30,000 per year. There is no dispute that Malrooney informed Complainant at the time of his visit that Respondent had a minimum income requirement of \$33,000 per year for a one-bedroom apartment, and Complainant then left Ivy Lane without completing a rental application.

Complainant alleged that Respondent's minimum income requirement of \$33,000 per year excluded him from relying on a Section 8 voucher, and thus constituted unlawful "source of income" discrimination under the LAD.

Respondent denied Complainant's allegations of discrimination in their entirety, stating in part:

In calculating a prospective tenant's income, Respondent considers any and all lawful income that a prospective tenant receives, including but not limited to alimony, child support, food stamps, tips, housing vouchers, rent subsidies, Social Security Income benefits, unemployment benefits, overtime pay and salary. Essentially, there is no exclusion on income when Respondent is evaluating a prospective tenant. Respondent then evaluates whether the sum of all these sources of income meets the respective minimum income requirement for the unit for which the prospective tenant is applying . . .

Of note, if a tenant who does not receive Section 8 assistance applies for an apartment unit, is approved and signs a lease, but thereafter begins to receive Section 8 assistance, then they are not required to meet Respondent's minimum income requirement . . .

During the investigation, Complainant told DCR that at the time he visited Ivy Lane, his total income consisted of \$9,000 per year (or \$750 per month) in Supplemental Security Income (SSI) benefits. After the remand in this case, Complainant provided DCR with documentation indicating that the amount of his SSI benefits at the time of his visit to Ivy Lane was actually \$965.00 per month, or \$11,580 per year. Assuming Complainant would have been required to pay thirty percent of his SSI benefits per month to gross rent, for a total of \$289.50, and the Section 8 voucher would have covered the remaining rent of \$705.50 per month, the total value of the Section 8 voucher per year would have been \$8,466. Adding that \$8,466 to the value of Complainant's SSI benefits, Complainant's annual income fell well short of Tower's required minimum of \$33,000 per year.

Based on the information uncovered during the investigation, Respondent applied its minimum income requirement to all applicants, regardless of their sources of income. Respondent identified thirteen Section 8 recipients residing at Ivy Lane at the time Complainant inquired about an apartment. Of those thirteen tenants, eight received Section 8 only after living at Ivy Lane, and where thus not required to meet the minimum income requirement as per Respondent's policy listed above. Five had rental subsidies when they applied and were thus required to meet the minimum income requirement. A review of their applications and lease agreements showed that four of the five tenants had various sources of income that, when added to the value of their rent subsidies, put them over Respondent's minimum income requirement. Respondent made an exception to the minimum income requirement for the fifth family, who were displaced by Hurricane Katrina.

ANALYSIS

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2(a). "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." N.J.A.C. 13:4-10.2(b). If DCR determines that probable cause exists, then the complaint will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). However, if DCR finds there is no probable cause, then that determination is deemed to be a final agency order subject to review by the Appellate Division of the Superior Court of New Jersey. N.J.A.C. 13:4-10.2(e); R. 2:2-3(a)(2).

A finding of probable cause is not an adjudication on the merits. Instead, it is merely an initial "culling-out process" in which the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 498 U.S. 1073. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." *Ibid.*

The LAD prohibits refusal to rent real property because of a person's source of lawful income or the lawful source of any payment to be made for rent. N.J.S.A. 10:5-12(g)(4). "Source of lawful income" includes a housing voucher provided by a state or federal agency, including Section 8 Housing Choice Vouchers. See Franklin Tower One, LLC v. N.M., 157 N.J. 602, 618-23 (1999) (holding that a landlord may not deny a prospective tenant housing because the tenant proposed to use a Section 8 voucher). The LAD's inclusion of "source of lawful income" is intended to prevent landlords "from refusing to rent to tenants who receive rental subsidies through the Section 8 program or through other government programs designed to assist low income persons to obtain housing." See Bell v. Tower Management, No. A-3165-08, 2010 WL 2346651, *2 (App. Div. April 26, 2010) (finding plaintiff's claim that defendant's minimum income policy was discriminatory to be a viable cause of action under N.J.S.A. 10:5-12(g)(4)).

Minimum income requirements have a disparate impact on Section 8 recipients because Section 8 recipients generally must have very low incomes in order to qualify for the program to

begin with. Specifically, in order to qualify for Section 8, a family's income may not exceed 50% of the median income for the county or metropolitan area in which the family chooses to live. See https://www.hud.gov/topics/housing_choice_voucher_program_section_8. And 75 percent of Section 8 vouchers must go to applicants whose incomes do not exceed 30 percent of the area median income. Id. Many families thus qualify for section 8 specifically because they have extremely low incomes, and therefore would not meet minimum income requirements.

When a housing provider's facially neutral policy (a minimum income requirement) has a disproportionate impact on members of a protected class (those with a Section 8 housing voucher), and the challenged policy caused the complainant's harm (the refusal to rent an apartment), the burden shifts to the housing provider to demonstrate that the practice serves a legitimate non-discriminatory business interest, and that no alternative policy or practice could be adopted that would serve the housing provider's legitimate business interest with less of a discriminatory impact against members of a protected class. See Gerety v. Atlantic City Hilton Casino Resort, 184 N.J. 391, 398 (2005) (stating that disparate impact claims are cognizable under the LAD and address a facially neutral practice that affects a protected group more harshly than others and cannot be justified by legitimate business necessity); see also Mount Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly, 658 F.3d 375, 381-82 (3rd Cir. 2011) (finding plaintiffs had presented a prima facie case that township's redevelopment plan would have a disparate impact on minority residents in violation of fair housing laws and township was required to show that there were no less discriminatory alternatives to meet the plan's purpose of alleviating blight); Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2525-26 (2015) (holding that disparate impact claims are cognizable under the federal Fair Housing Act).¹

Here, Respondent has not met this burden. Respondent has not demonstrated that its minimum income requirement of \$33,000 per year for a one bedroom apartment serves a legitimate non-discriminatory business interest as applied to applicants with Section 8 housing vouchers, where the applicant only pays a small portion of the monthly rent. And it has not demonstrated that no alternative policy could be adopted that would serve Respondent's legitimate business interest with less of a discriminatory impact on applicants with Section 8 housing vouchers. In fact, Respondent has not even attempted to do so. And none is immediately obvious. For those without a Section 8 housing voucher, a minimum income requirement serves to ensure that a tenant does not pay too large of a percentage of her monthly income to rent, and thus is able to consistently pay rent while meeting her other basic needs. But for Section 8 housing voucher recipients, the federal government has already made that determination. The Section 8 program itself determines what percentage of monthly income a voucher recipient will pay to rent, and requires that voucher recipients pay an absolute maximum of 40% of their monthly income to rent, in order to ensure the voucher recipient will be able to consistently pay her portion of the rent while meeting her other basic needs. 42 U.S.C. 1437f(o)(1)(E); 42 U.S.C. 1437f(o)(3); 24 C.F.R. 982.1; 24 C.F.R. 982.508, 24 C.F.R. 982.4. That is the purpose of the statutory and regulatory requirements that a tenant generally pay 30%, and no more than 40%, of her adjusted monthly income to rent. Id. If a Section 8 voucher recipient attempted to pay more than 40% of her monthly income to rent in

¹ N.J.S.A. 10:5-9.2 provides that the LAD is to be construed as substantially equivalent to the Fair Housing Act (42 U.S.C. 3601 to 3631).

order to rent an apartment that was substantially above the local PHA's "payment standard," the PHA would refuse to allow it. Thus, the Section 8 program itself is set up to ensure that a recipient will consistently be able to pay her portion of the rent while meeting her other basic needs.

Several courts have recognized as much. See, e.g., Commission on Human Rights v. Sullivan, 939 A.2d 541, 557 (Ct. 2008) (finding landlord's minimum income requirement was not a legitimate, nondiscriminatory basis for refusing to rent to Section 8 families where it was not based on the share of the rent the tenant would actually be required to personally pay). And a New Jersey court has regarded the exemption of Section 8 recipients from a minimum income requirement as compliant with the LAD. See Pasquince v. Brighton Arms, 378 N.J. Super. 588, 592 (App. Div. 2005).

Here, the Section 8 voucher ensured that Complainant would not pay more than 40 percent of his adjusted monthly income for rent. That means Complainant would have been responsible for no more than \$386 per month in rent. Respondent did not even attempt to prove that any legitimate, non-discriminatory business reason required it to apply its \$33,000/year minimum income requirement to someone who would have been responsible for a maximum of \$386 of the \$995 monthly rent. Indeed, Respondent told DCR that certain of its tenants obtained Section 8 after becoming tenants and were not at that point required to meet the minimum income requirement. That indicates that no legitimate, nondiscriminatory business reason required Respondent to apply its minimum income requirement to those paying with Section 8 vouchers, who would only be personally responsible for a small portion of the monthly rent.

Including the total amount the federal government would have paid in rent on Complainant's behalf as part of the calculation of "annual income" does not address the problem. Any such calculation still fails to acknowledge that, as opposed to other sources of income, the entire value of a federal rent subsidy is 100% dedicated to payment of rent. It also fails to acknowledge that Complainant's personal contribution to rent would be much less than a tenant without a Section 8 voucher (a maximum of \$386 instead of \$995 per month). In other words, the application of the minimum income requirement in this way still worked to exclude an applicant who, by virtue of renting the apartment with a Section 8 voucher, the federal government had certified was able to pay, because he did not meet a requirement logically applied only to those responsible for the entire rent.

Respondent's minimum income requirement had no relationship to what Complainant would be required to pay in monthly rent, and no relationship to Complainant's ability to pay that portion of the rent. Respondent gave no other reason for application of the policy to Complainant or other Section 8 recipients. Thus, even when uniformly applied to all prospective tenants, minimum income policies may unreasonably exclude voucher holders like Complainant, and consequently many low-income and disabled persons who rely on rental assistance programs. See Bell, 2010 WL 2346651 at *2; see also Pasquince, 378 N.J. Super. at 592.

At a hearing, the parties will have an opportunity to present further evidence of their respective versions of events or in support of their legal positions. At this stage of the process, the Director finds that the circumstances of this case support a "reasonable ground of suspicion" to warrant a cautious person in the belief that the matter should "proceed to the next step on the road

to an adjudication on the merits” of Complainant’s claim for unlawful discrimination based on source of lawful income. 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, 498 U.S. 1073 (1991).

Therefore, the Director finds PROBABLE CAUSE to support Complainant’s allegations of discrimination based on source of lawful income.

Complainant also alleged that Respondent discriminated against him based on disability, but the investigation revealed no persuasive evidence to support this allegation. The claim of disability discrimination will therefore be dismissed with a finding of NO PROBABLE CAUSE.



Rachel Wainer Apter, Director
New Jersey Division on Civil Rights

DATE: June 18, 2019