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 Clayton, Jerri, Justin and Bradly Zilisch, Charging Party, v. Lois Ludwig, Respondent.	HUDALJ 05-93-1324-1 Decided: April 1, 1997

Lois Ludwig, *pro se*

Bonnie Rivera-Claudio, Esq.
For the Secretary

Before: WILLIAM C. CREGAR
Administrative Law Judge

INITIAL DECISION AND ORDER

This matter arose as a result of a complaint filed by Clayton and Jerri Zilisch ("Complainants") alleging discrimination based on familial status in violation of the Fair Housing Act, as amended, 42 U.S.C. § 3601, *et seq.* ("the Act"). On September 19, 1996, 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 Lois Ludwig ("Respondent") alleging that she had engaged in discriminatory housing practices in violation of 42 U.S.C. § 3604(a), and 24 C.F.R. §§ 100.50 and 100.60.

A hearing was held in Appleton, Wisconsin, on December 10, 1996. Post-hearing briefs were due on January 27, 1997. I granted the Charging Party's request for an extension of time until February 3, 1997. Both parties timely filed their briefs. Respondent submitted photographs and other documents along with her brief. Because it was not served with a copy, the Charging Party moved to strike Respondent's brief or, in the alternative, to exclude the new evidence. Respondent opposed the motion. I grant the Charging Party's motion to exclude the new evidence. Because these documents were not admitted as exhibits during the hearing, they are not a part of the record, and I have not considered them in rendering this decision. However, I deny the Charging Party's motion to exclude Respondent's post-hearing brief. Counsel for the Charging Party obtained a copy from the Chief Docket Clerk of the Office of Administrative Law Judges. Accordingly, the Charging Party has not been prejudiced.

The Charging Party submitted a corrected copy of its brief on February 7, 1997. The corrections are not substantive and, accordingly, do not prejudice Respondent. Therefore, I have accepted the corrected brief as the Charging Party's post-hearing brief. This case is now ripe for decision.

Statement of Facts

1. Respondent, Lois Ludwig, is the nonresident owner and manager of a four-unit apartment building located at 936 Gay Drive, Neenah, Wisconsin. She purchased the building around 1985. In January of 1993 she rented a second floor apartment to Complainants Clayton and Jerri Zilisch, a married couple with a four year old son, Justin. At this time Ms. Zilisch was pregnant with her second son, Bradly, who was born a month later. Rather than sign a lease, they agreed on a month-to-month tenancy. Before renting to the Zilisches, Ms. Ludwig met with them, provided a copy of the tenant rules and emphasized that the building was quiet and that they should comport themselves accordingly. The Zilisches moved in in early February 1993. Tr. 43-45 , 61, 105, 114, 155, 175; Charge and Answer ¶¶ 3-5.[1]

2. The other tenants in the building are Ann Walz, Marcella Kondy, Thelma Mietzel, and a Mr. Gunderson. Ms. Walz, Ms. Kondy, and Ms. Mietzel had lived there prior to Ms. Ludwig's purchase of the building in 1985. Jerry Alferi was the maintenance man. He usually worked at the building approximately three hours per

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[1]*The following abbreviations are used in this decision: "Tr." followed by a number for the hearing transcript and page; "C.P. Ex." for the Charging Party's exhibit; and "Charge" and "Answer" followed by a paragraph number for the Amended Charge of Discrimination (October 17, 1996) and Respondent's Answer (undated; received by facsimile October 30, 1996).*

week. Tr. 90, 98, 102-03, 148, 165, 175.

3. Mr. Zilisch, a machine operator, worked either of two shifts - 4:00 a.m. to noon, or noon to 8:00 p.m. When he worked the night shift, he slept most of the following day. When he worked the day shift, Ms. Zilisch was home alone with Justin and her newborn, Bradly, who was often awake and required feedings every three or four hours. Ms. Zilisch spent most of her time tending to Bradly. Justin was allowed to play by himself, both outside and inside the building. If Justin was outside, Ms. Zilisch would check on him every ten minutes or so by looking out a window or from her vantage point on the balcony. If she did not see him, she would call to him. As a result, most of the time Justin was unsupervised. Tr. 48, 53, 56, 59, 63, 92, 105-07, 119, 142, 149, 153, 166, 168, 176.

4. An unsupervised four year old, Justin engaged in a pattern of behavior that disturbed other tenants and neighbors. I have grouped his actions first by those particularly affected, and second by those affected generally.

a. Ms. Mietzel:

i. Seeking candy or cookies, on four or five occasions, Justin rang Ms. Mietzel's doorbell and, on one occasion, he kicked her door. After she refused his demand for sweets, he shoved his way past her, approached the coffee table, grabbed a handful of candy, and then sprayed her with a water pistol as he ran out. Tr. 177, 185-86.

ii. On one occasion Ms. Mietzel and her friend were bringing in groceries. On the return trip to the car they saw Justin rummaging through the remaining bags and tossing items out onto the parking lot. He told Ms. Mietzel that he was looking for candy or cookies. Ms. Mietzel responded, "if you don't get out of this car you're going to get something besides a cookie." She insisted that he collect and replace the items. On another occasion Ms. Mietzel's nephew, Walter Roeck, was carrying groceries into her apartment. Upon returning to the car, he found Justin sifting through groceries in search of cookies. Justin ran off with the booty. Tr. 186, 190-92.

iii. Justin, clad in pajamas, was often outside as early as 8:00 a.m. On one such occasion, he rang Ms. Mietzel's doorbell, requesting that she open the garage so that he could get his tricycle. Ms. Mietzel inquired why he hadn't asked his mother. Upon his reply that she was asleep and did not want him disturbing her, Ms. Mietzel declined to open the garage door. Tr. 141, 175.

iv. On one occasion Ms. Zilisch and Ms. Mietzel were conversing in the doorway of Ms. Mietzel's apartment. Justin grabbed Ms. Mietzel's outgoing mail

from the mailbox. Ms. Zilisch took the mail from him and explained that he could not have it because it did not belong to her. Despite his mother's attempt to restrain him, Justin then ran into Ms. Mietzel's apartment, lodging himself between the couch and a wall. Ms. Mietzel was able to coax him out with candy. Tr. 178.

b. Construction workers:

i. Ms. Ludwig hired a siding contractor to work on the building. The workers erected scaffolds, used a ladder, and placed siding material near their work area. Justin would play near the men and under the scaffolding. He also climbed up on the scaffolding and the ladder. On one occasion, Ms. Kondy, who was inside the building at the time, saw Justin on the ladder. She knocked on her window to alert the workers to get him down from the ladder. Tr. 141, 150-1, 170, 176, 180, 192-93.

ii. The siding contractor's van contained pieces of wood, tin, and equipment. Justin climbed in and began to jump up and down. Ms. Walz cautioned him to stop. Tr. 150-51.

iii. After Justin had picked up a sharp piece of siding, Ms. Mietzel was unable to persuade him to drop it. She notified Ms. Zilisch who came downstairs and attempted to get Justin to hand it over. He refused, whereupon Ms. Zilisch left him and returned to her upstairs apartment. Justin then cut himself, screamed, and bled on the front steps and inside the building. Upon hearing his screams, Ms. Zilisch ran downstairs to attend to him. Tr. 168, 181.

iv. Ms. Zilisch set up a plastic wading pool near where the contractors were working. She handed the hose over to Justin and returned to her apartment. Justin sprayed water on the picnic table, benches, and workers, missing nearby electric wires and tools. The workers feared that he would electrocute himself. Ms. Mietzel grabbed the hose from him. Tr. 152, 176-77.

v. The siding workers complained to Mr. Alferi that Justin was climbing on their scaffolding and that they, too often, had to be on the lookout for him. Tr. 93-94, 101.

c. Ms. Ludwig:

i. Justin and his next door friend, Ricky, emptied Ms. Ludwig's trash bags of lawn clippings, spreading them over the lawn. Justin played with Mr. Alferi's maintenance tools and lawn mowing equipment in the garage where gas and oil

were also stored. He played in the next door neighbors' garages which also contained tools and equipment. Tr. 92, 100-01, 154, 197.

ii. On one occasion, Justin held onto Ms. Ludwig's car bumper as she was backing out of the driveway. She was unable to persuade him to let go. Tr. 170, 197.

d. Miscellaneous tenants:

i. While inside his apartment, Justin made noise as he ran, jumped, and banged objects. In the hallway, he ran up and down, jumped, and pounded the walls. Tr. 161, 167.

ii. Justin would spray adults with a water pistol. He would also hang on to the car bumpers of the other tenants as he had done in the case of Ms. Ludwig. Tr. 144, 148, 162-63, 177, 191.

e. Miscellaneous neighbors:

i. Justin and one of his friends threw large stones at two boys across the street. At one time, Justin pushed a two-year old girl off her tricycle and took it away from her. Tr. 166, 179.

ii. A next door neighbor removed Justin from a wading pool in that neighbor's yard. Subsequently, when the neighbor attempted to wash his car, he was interrupted by Justin who rode his tricycle into the front and back bumpers. As the neighbor yelled at him, Justin circled the car twice on his tricycle. Unable to convince Justin to leave his property, he summoned Ms. Mietzel to collect the youngster. She responded that Justin didn't "belong to [her]." Nevertheless she attempted, but failed, to get Justin away from the car. The neighbor finally gave up and washed his car inside his garage. Tr. 166-67, 178-79.

iii. Justin would ride his tricycle in the path of cars, moving only reluctantly in response to an adult's order. Tr. 148-49.

f. Miscellaneous flora and fauna:

i. Justin rode his tricycle over flower beds and the grass. Tr. 109, 149; *see also* tr. 193.

ii. A mother duck had located her nest in bushes against the house next door to 936 Gay Drive. Justin shoved the mother duck off of her nest and broke her eggs by throwing them on the ground. From inside her apartment, Ms. Mietzel heard the mother duck squawking. Tr. 142, 179.

5. On several occasions, Ms. Mietzel reported Justin's behavior to Ms. Zilisch who usually either denied that he had engaged in the misconduct or excused his conduct due to his age. She stated "Well, he's only a little boy and he doesn't know any better"; and "I can't go upstairs and spank him, he won't know what I'm spanking him for." Ms. Mietzel requested that Ms. Zilisch "watch him a little bit." Tr. 187-88.

6. All of the tenants, except Mr. Gunderson, complained to Mr. Alferi that Justin ran up and down the hallways, repeatedly rang doorbells, snatched mail, and climbed atop cars. They also complained of loud noise and yelling from the Zilisch apartment. Tr. 98. Mr. Alferi informed Ms. Ludwig about the tenants' complaints. Ms. Ludwig also received complaints from Ms. Mietzel. Tr. 91, 93, 98, 200.

7. In May of 1993, Ms. Ludwig was at 936 Gay Drive when she heard Ms. Zilisch yelling at Justin. Tr. 195-96. Ms. Ludwig asked Ms. Mietzel how often she heard this type of screaming, to which she replied "how many days in a week?" Because the yelling could be heard all over the building, on May 26, 1993, Ms. Ludwig wrote to Ms. Zilisch telling her that she had been receiving complaints about extreme noisiness from the apartment and that if the problem continued, she would have no choice but to ask them to move. Ms. Zilisch sent a letter of apology to the tenants. Tr. 46, 110, 195-96. C.P. Ex. 5.

8. In June of 1993, Ms. Walz, Ms. Mietzel, and Ms. Kondy became exasperated with Justin's behavior and lack of supervision. They invited Ms. Ludwig to a tenants' meeting on June 25, 1993, to report Justin's behavior and its impact on their tenancies. After hearing the complaints, Ms. Ludwig went to the Zilisch apartment. Mr. Zilisch was sleeping at the time. Ms. Ludwig escorted Ms. Zilisch to the meeting where she was informed of the complaints about Justin's behavior. Ms. Zilisch stated that she was unable to control her son and that she tried to curb his behavior, but to no avail.[2]

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[2] *Ms. Zilicsh denies making this statement at the meeting. I credit the testimony of Ms. Ludwig, Ms. Mietzel, and Ms. Walz that Ms. Zilisch made this statement. Compare tr. 158, 183-84, 197 with 117-18, 120. Ms. Zilisch did not deny making a similar comment to Ms. Mietzel. See finding of fact no. 5. In addition, I found Ms. Ludwig, Ms. Walz, and Ms. Mietzel to be credible. Their testimony was precise, consistent, and corroborated by Respondent's other witnesses. By contrast, Ms. Zilisch's testimony was inconsistent, self serving, and exaggerated. For example, Ms. Zilisch stated that she could see Justin from "every window" in her apartment. However, on cross examination, she admitted that she could not see him out of the west side of the apartment. Compare tr. 106 with 118-19. Indeed, she allowed her non-swimmer son to play near*

Ms. Ludwig replied that it would "be best" if she and her family moved. Tr. 47, 111, 155, 158, 168, 172, 183-84, 187, 196-97.

10. Ms. Zilisch returned to her apartment, woke her husband, and told him that they had been evicted. He went to the meeting where he was told about the tenants' complaints and Ms. Ludwig's request that they vacate. He and Ms. Ludwig discussed his security deposit and she told him that they had until the end of July to move.[3] Angered by what transpired at the meeting, he announced that they would leave within four days. Within three days, the Zilisches moved to another apartment. Tr. 47-50, 58,198.

11. On or about September 10, 1993, the Zilisches filed a discrimination complaint against Ms. Ludwig. Tr. 60, Charge.

Discussion

The Fair Housing Act prohibits making a dwelling "unavailable . . . to any person because of. . . familial status." 42 U.S.C. § 3604(a). "Familial status" is defined as "one or more individuals (who have not attained the age of 18 years) being domiciled with. . . a parent." 42 U.S.C. § 3602(k). The Charging Party has the burden of proving, by a preponderance of the evidence, that Respondent's action discriminated against Complainants because of their familial status. The Charging Party may prove discrimination either by direct or indirect evidence.

Absent direct evidence, the Charging Party may prove Respondent's discriminatory intent indirectly by establishing a *prima facie* case of familial status discrimination. *See HUD v. Blackwell,* 908 F.2d 864, 870 (11th Cir. 1990); *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1451 (4th Cir.), *cert. denied,* 498 U.S. 983 (1990). Next the burden of production shifts to Respondent to articulate a nondiscriminatory reason for her actions. HUD may then prove that the asserted reason is pretextual. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *see also Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981). However, pretext alone

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a pond, that was out of either parent's view. Her statement that she did not leave Justin alone with the water hose is inconsistent with her admission that "if I had to run upstairs to answer the phone or something, I figured he'd be all right just for that minute." Tr. 119. Finally, she denied that tenants had ever complained to her about Justin's behavior, but admitted that "Mrs. Mietzel might have brought up...little things that Justin [had done, such as] riding on the grass or running over the flowers..." Tr. 109.

[3]During the hearing, Mr. Zilisch testified that at the tenants' meeting, Ms. Ludwig told him that she wanted to turn her property into "a place for older folks." Tr. 60. Ms. Ludwig's denied making the statement, and the three tenants corroborated her denial. Tr. 155, 168, 182, 195. I credit Ms. Ludwig and the tenants. *See supra* note 2.

does not necessarily prove discrimination. The Charging Party still maintains the burden to demonstrate that an asserted reason, even though pretextual, evidences an intent to discriminate. *See St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993).

I. The Charging Party failed to establish an indirect case of discrimination.

Elements of a *prima facie* case "are not fixed;" they vary depending on the circumstances of each individual case. *Pinchback,* 689 F. Supp. 541, 549 (D.Md. 1988). Under the circumstances of this case, the Charging Party has established a *prima facie* case by proving that (1) Complainants are members of a protected class, i.e., a family with children under the age of 18, and (2) that Respondent "evicted" Complainants by making the apartment unavailable. Respondent has rebutted this *prima facie* case by articulating a legitimate, nondiscriminatory reason for asking the Zilisches to move, i.e., that Justin was unsupervised and that his unsupervised misbehavior justified the Zilisches' "eviction." The Charging Party has failed to demonstrate that this reason is pretextual.

First, the record clearly establishes that, for much of the day, Justin was often unsupervised. Ms. Zilisch was preoccupied with her newborn. Mr. Zilisch, depending on his work schedule, was either working or napping during the day. Accordingly, when Justin was playing outside the Zilisches' supervision was limited to Ms. Zilisch's looking out her window every 10 minutes or so.

Second, the record is replete with episodes of Justin's unsupervised misbehavior, as credibly reported by the following witnesses: Ms. Walz, Ms. Mietzel, Ms. Kondy, Mr. Alferi, Ms. Mietzel's nephew, and Ms. Ludwig, herself. Not only did these witness have personal experience with Justin's behavior, but in Mr. Alferi's and Ms. Mietzel's cases, they also received additional complaints from others. The siding contractors complained to Mr. Alferi that they had to be on the lookout for Justin too much; the next door neighbor, who was trying to wash his car, summoned Ms. Mietzel to take Justin home. Their testimony was consistent, precise and corroborated by Carol Denis, a disinterested witness.[4] The record reveals that over a five month period, Justin's actions inconvenienced the other tenants and interfered with the quiet enjoym ent of their tenancies, interfered with the construction worker's activities, and annoyed and hindered

[4]Ms. Denis is a former neighbor, having resided next door to Respondent's property. She testified that Justin was outside by himself as early as 7:30 a.m. that he played in the midst of the siding workers' supplies, and that he pestered the ducks. On one occasion she admonished Justin. She commented that "we all were very aware of him." Tr. 141-142, 145, 146.

several neighbors. Ms. Walz testified that his behavior and lack of supervision was "working on the nerves." Ms. Kondy complained of the noises within the building. Justin interfered with Ms. Mietzel's peace and quiet by rummaging through her groceries, kicking her door, and ringing her doorbell in his quest for sweets. She also complained personally to Ms. Ludwig about Justin's noise making. Moreover, the Zilisches' failure to supervise their son placed others in the bothersome position of supervising someone else's four year old. Indeed, Ms. Mietzel interceded prior to Justin slicing his finger on a piece of siding and when the threat of electrocution was imminent. The workers also worried that Justin was going to electrocute himself, and they also complained to Mr. Alferi that they too often had to be on the lookout for him. Others had to admonish Justin on occasion or ask other tenants to admonish him.

Ms. Mietzel's attempts to rectify the situation by speaking with Ms. Zilisch were met with denials of her son's misbehavior or a concession of inability to manage the situation. By June 25th the point was reached where three of the tenants had had enough. At the tenant's meeting Ms. Zilisch admitted that she was unable to resolve the problem. Ms. Ludwig could either allow the situation to continue and risk losing her other tenants, or she could ask the Zilisches to move. She was within her rights to choose the latter. While the Act protects families with children from discrimination, it does not afford them a license to act unreasonably and irresponsibly.

II. The Charging Party's Contentions

The Charging Party has identified record evidence which it claims either directly proves that Ms. Ludwig discriminated against the Zilisches or demonstrates that Justin's behavior was not the actual reason for their "eviction." I reject these contentions.

Respondent provided the HUD investigator with three letters from tenants Kondy, Walz, and Mietzel. C.P. Ex. 1; Tr. 203. The Charging Party alleges that these letters are direct evidence of discrimination. All three letters catalogued Justin's behavior and lack of supervision. Ms. Kondy's letter also states that when she moved into her apartment, "it was a Rule of House that only tenants without children were accepted." C.P. Ex. 1. Ms. Walz's letter also asserts that "[i]n spite of the fact that the. . .complex had been rented to older citizens since it was built, Lois Ludwig. . .decided to try a younger couple [with children]." *Id.* The Charging Party argues that the statements are direct evidence of discrimination because they demonstrate that Respondent acted in response to her tenants' discriminatory intent. *See* Charging Party's Brief at 28. I disagree.

The statements are not direct evidence of the tenants' familial status discrimination; rather, they are a recitation of the apparent rental history prior to

Ms. Ludwig's ownership. These three tenants were residents prior to Ms. Ludwig's purchase of the property. While some or all of these tenants may have wished for a return to the *status quo ante*, such statements cannot be imputed to Ms. Ludwig without some evidence that she adopted them. *Indeed as evidenced by her rental to the Zilisches, Ms. Ludwig neither instituted nor continued any "house rule" concerning children.* Moreover, the thrust of the letters was that the tenants wanted the Zilisches evicted because of Justin's unsupervised misbehavior, not because Complainants had children. The letters provide a litany of complaints, including "disturbances daily," "screaming," "slamming of doors," water pistol attacks, bicycle races, chasing of pedestrians, *etc.* C.P. Ex. 1. The record demonstrates that Respondent asked the Zilisches to leave based on legitimate complaints of disruptions and clamor, not because of any desire to reimpose a former "house rule" or merely because the Zilisches had children.

The Charging Party also contends that a discriminatory statement purportedly made by Respondent to a "tester" after the Zilisches were "evicted" demonstrates that Ms. Ludwig must have intended to discriminate at the June 25th meeting. Again I disagree. On July 8, 1993, Paul Zilles of the Northeast Wisconsin Fair Housing Council, Appleton, Wisconsin, made a telephone inquiry to someone he believed to be Ms. Ludwig. The number that he called was furnished by the Zilisches. He testified that a child answered the phone and, after Mr. Zilles inquired about the vacant apartment, the child said, "I'll get my mom." He further testified that an unidentified woman picked up the telephone and gave him directions to the apartment. When Mr. Zilles asked about the size of the apartment, the woman volunteered that she had three elderly tenants, that it was a quiet building, and that she could not allow anyone with children to move in. She explained that she had just rented to a family that had been nothing but trouble because of noise and that the elderly tenants wanted her to try to find a tenant without any children. Mr. Zilles testified that when he mentioned that he had two children, the unidentified woman responded that "it probably [would not] work out." Tr. 78, 81-82; C.P. Ex. 4.

There are several problems with this "test." First the statement is *post hoc*. By itself, a test of an apartment's *availability* following an eviction does not compel an inference of a landlord's mindset prior to that eviction. Second, the record does not establish whether Mr. Zilles spoke with Ms. Ludwig or an imposter. There is no evidence that the telephone number Mr. Zilles called was in fact Ms. Ludwig's. Moreover, there is no evidence that any child resided with Ms. Ludwig or was present at her residence to receive a phone call on July 8, 1993. I credit Ms. Ludwig's testimony that she answers her own telephone and that she did not recall any phone conversation with Mr. Zilles. Tr. 200-01.

Finally, the Charging Party cites Ms. Ludwig's failure to conduct an independent

investigation prior to terminating the Zilisch's tenancy to determine whether Justin actually misbehaved. Under the Act, a landlord need not independently investigate alleged tenant misconduct prior to evicting a tenant, although if it does not do so, it runs the risk that the tenant's claims are untrue. Here, the facts supporting the termination are demonstrably true. In any event, Ms. Ludwig has established that she only acted after receiving complaints sufficient to warrant asking the Zilisches to leave. By this time she

had heard complaints from the tenants through Mr. Alferi, Ms. Mietzel personally, from all three tenants at the tenants' meeting, and had experienced some of Justin's antics herself.

Conclusion and Order

The Charging Party has failed to prove by a preponderance of the evidence that Respondent engaged in a discriminatory housing practice in violation of the Fair Housing Act. Accordingly, it is

ORDERED, that the charge of discrimination is *dismissed.*

This **ORDER** is entered pursuant to 42 U.S.C. § 3612(g)(3) of the Fair Housing Act and the regulations codified at 24 C.F.R.§ 180.670 and will become final upon the expiration of thirty (30) days or the affirmance, in whole or in part, by the Secretary within that time.

WILLIAM C. CREGAR
Administrative Law Judge