

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)
REDACTED, and their)
minor child,)
Charging Party,)
v.)
The Village at Three Fountains, LLC,)
Bender Midwest Properties, Inc.,)
Lindsey Drewes, and Julie Westhoff,)
Respondents)

HUD ALJ No.
FHEO No. 08-18-6809-8

CHARGE OF DISCRIMINATION

I. JURISDICTION

On October 16, 2017, Complainants **REDACTED** (“Complainants”) filed a verified complaint with the United States Department of Housing and Urban Development (“HUD” or the “Department”). Complainants allege that Respondents violated subsections 804(a) and 804(b) of the Fair Housing Act, 42 U.S.C. §§ 3601-19 (“the Act”), by discriminating against them and their minor child based on familial status.

The Act authorizes the Secretary of HUD to issue a Charge of Discrimination on behalf of aggrieved persons following an investigation and a determination that reasonable cause exists to believe that a discriminatory housing practice has occurred. 42 U.S.C. § 3610(g)(1) and (2). The Secretary has delegated to the General Counsel, who has redelegated to the Regional Counsel, the authority to issue such a Charge following a determination of reasonable cause by the Assistant Secretary for Fair Housing and Equal Opportunity or his or her designee. 24 C.F.R. §§ 103.400 and 103.405; 76 Fed. Reg. 42463, 42465 (July 18, 2011).

By a Determination of Reasonable Cause and No Reasonable Cause issued contemporaneously with this Charge of Discrimination, the Regional Director of the Office of Fair Housing and Equal Opportunity for Region VIII has determined that reasonable cause

exists to believe that a discriminatory housing practice has occurred and has authorized and directed the issuance of this Charge. 42 U.S.C. § 3610(g)(2).

II. SUMMARY OF FINDINGS IN SUPPORT OF THIS CHARGE

Based on HUD's investigation of the allegations contained in the aforementioned amended complaint and the Determination of Reasonable Cause and No Reasonable Cause, Respondents are hereby charged with violating the Act as follows:

A. Legal Authority

1. It is unlawful to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or to otherwise make unavailable or deny, a dwelling to any person because of familial status. 42 U.S.C. § 3604(a); 24 C.F.R. § 100.50(b)(1), (3); 24 C.F.R. § 100.60(a).
2. It is unlawful to discriminate against any person in the terms, conditions, or privileges of the rental of a dwelling, or in the provision of services or facilities in connection therewith, because of familial status. 42 U.S.C. § 3604(b); 24 C.F.R. § 100.50(b)(2); 24 C.F.R. § 100.65(a); 24 C.F.R. § 100.70(b).
3. Under the Act, an occupancy policy may not be used to exclude families with children or to limit unreasonably the ability of families with children to obtain housing. An occupancy policy of two persons per bedroom is presumptively reasonable, but this presumption is rebuttable by considering the following factors: (1) the size of the bedrooms and the unit; (2) the age of the children; (3) the configuration of the unit; (4) any physical limitations of the housing; (5) state and local law; and (6) any other relevant factors. 63 Fed. Reg. 70,256, 70,256-57 (Dec. 18, 1998) ("Keating Memorandum"); *see also* Departments of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276, § 589(a), 112 Stat. 2461, 2651 (1998) (requiring that the "Keating Memorandum" shall be the policy of the [Department] with respect to complaints of discrimination under the [Act] on the basis of familial status which involve an occupancy standard established by a housing provider").

B. Parties and Subject Property

4. Complainant **REDACTED** are married and the parents of a minor child. At the time of the alleged discrimination, the minor child was less than one year old. At all relevant times, Complainants and their minor child lived together. Complainants and their minor child are aggrieved persons as defined by the Act. 42 U.S.C. § 3602(i).
5. The Village at Three Fountains ("Subject Property") is a multifamily apartment complex comprised of seven, three-story buildings, containing a total of 182 apartment dwellings, all one- and two-bedroom units. The Subject Property is a "dwelling" within the meaning of the Act. 42 U.S.C. § 3602(b); 24 C.F.R. § 100.20.
6. The 70 one-bedroom residential unit layout sizes and distribution are as follows: 49 units at 742 square feet; 14 units at 750 square feet; and 7 units at approximately 900-920 square feet.

7. The Village at Three Fountains, LLC (“Respondent Owner”) is an active South Dakota limited liability company, and at all times relevant to this Charge owned the Subject Property.
8. From on or about November 1, 2016 until November 1, 2017, Complainants resided at the Subject Property.
9. Bender Midwest Properties, Inc. (“Respondent Bender”) is an active South Dakota corporation and provided property management services for the Subject Property at all times relevant to this charge.
10. Respondent Bender employed Lindsey Drewes (“Respondent Drewes”) and Julie Westhoff (“Respondent Westhoff”) as property managers at all times relevant to this charge.

C. Factual Allegations

11. Respondent Bender enforces an occupancy policy at the Subject Property that allows for no more than two people in a one-bedroom unit ("Policy").
12. The City of Sioux Falls, South Dakota adopted the International Property Maintenance Code, 2015 edition, (“IPMC”), effective April 30, 2016, with some amendments, into the City of Sioux Falls Code of Ordinances (“Code”). In relevant part, the IPMC and the Code contain the following provisions:

404.5.1 Sleeping Area. The minimum occupancy area required by Table 404.5 shall not be included as a sleeping area in determining the minimum occupancy area for sleeping purposes. Sleeping areas shall comply with Section 404.4.

Table 404.5 Minimum Area Requirements

MINIMUM AREA IN SQUARE FEET

SPACE	1-2 occupants	3-5 occupants
Living room	120	120
Dining room	No Requirement	80
Bedrooms	Shall comply with Section 404.4.1	Shall comply with Section 404.4.1

404.4 Bedroom and living room requirements. Every bedroom and living room shall comply with the requirements of Sections 404.4.1 through 404.4.5.

404.4.4 Prohibited Occupancy. Kitchens and nonhabitable spaces shall not be used for sleeping purposes.

404.5.2 Combined spaces. Combined living room and dining room spaces shall comply with the requirements of Table 404.5 if the total area is equal to that required for separate rooms and if the space is located so as to function as a combination living room/dining room.

13. Sioux Falls amended the Code at IPCM Section 404.4.1 regarding the requirements for the minimum areas for living rooms and bedrooms. The amended section of the Code is as follows:

404.4.1 Room Area. Every living room shall contain not less than 120 square feet (11.2m²) and every bedroom shall contain not less than 70 square feet (6.5 m²). Bedrooms 100 square feet (9.33m²) or less are allowed two occupants and every bedroom occupied by more than two persons shall contain not less than 50 additional square feet (4.6 m²) of floor area for each occupant thereof.

14. On October 25, 2016, Complainants and Respondents executed a rental lease agreement for a one-bedroom unit (“Subject Dwelling Unit”) at the Subject Dwelling. Complainants had no children at the time of lease execution and were the only two individuals listed as authorized occupants. The rental agreement covered a one-year term running from November 1, 2016 through October 31, 2017, with a monthly rent of \$875.

15. The Subject Dwelling Unit contains approximately 900 square feet. The living room and bedroom are 311.7 square feet and 141.7 square feet, respectively. The remaining area contains a bathroom, walk-in-closet, laundry area, and kitchen area.

16. In or around January 2017, **REDACTED** became aware she was pregnant.

17. On March 17, 2017, Complainant **REDACTED** emailed Respondent Drewes the following inquiry:

“Hi Lindsey!

I was wondering how long two people can live in a one bedroom apartment with an infant? Is there a certain age, or just when the lease ends?

Thanks!”

18. On March 17, 2017, Respondent Drewes replied:

“I will check, **REDACTED**. It does not say specifically in the lease, but it is a city ordinance/housing standard. I have to look more into it and get back to you on that.”

19. On September 21, 2017, Respondent Drewes sent an email to Complainants regarding a tour of a two-bedroom apartment at the Subject Property. Respondent Drewes stated:

“**REDACTED**,

Just following up on the tour of the 2 bedroom. Since there are 3 occupants in your current apartment, you have now exceeded the occupancy limit for a 1 bedroom apartment. You are now required to move to a 2 bedroom apartment. Please let us know what you [sic] plans are. Thank you.”

20. Following Respondents’ receipt of Complainants’ response, Respondent Westhoff called Complainant **REDACTED** to discuss the matter further. Respondent Westhoff reiterated Respondents’ occupancy policy during the phone call and informed Complainant

REDACTED of Respondents' intent to forego renewing Complainants' existing lease. Respondent Westhoff also communicated Complainants' two remaining options: lease and move into a two-bedroom unit at the Subject Property, or submit a notice to vacate and move-out at the end of the current lease term.

21. On September 29, 2017, Complainants submitted to Respondents their written notice to vacate, which stated the date they ultimately vacated the Subject Dwelling Unit: November 1, 2017.

22. Complainants subsequently moved to another Sioux Falls apartment complex located approximately 10 miles from the Subject Property.

23. Respondents' Policy limits the ability of families with children to obtain housing. Based on data from the 2012-2016 American Community Survey Public Use Microdata Sample, in the Sioux Falls metropolitan area, 90.7% of income-qualified renter households with children have three or more persons. By comparison, 15.2% of income-qualified renter households without children have three or more persons. This difference is statistically significant at very high confidence levels (greater than 99.99%). Based on these data, a policy that denies housing to income-qualified renter households of three or more in the Sioux Falls metropolitan area denies housing to households with children at a rate six times higher than households without children. As used in this paragraph and the one that follows, "income-qualified" refers to households paying a gross monthly rent (i.e., rent plus utilities) of \$875 or more; "the Sioux Falls metropolitan area" and "Sioux Falls City" refer to approximations of those geographies based on Public Use Microdata Areas.

24. Based on data from the 2012-2016 American Community Survey Public Use Microdata Sample, in Sioux Falls City, 94.4% of income-qualified renter households with children have three or more persons. By comparison, 17.6% of income-qualified renter households without children have three or more persons. This difference is statistically significant at very high confidence levels (greater than 99.99%). Based on these data, a policy that denies housing to income-qualified renter households of three or more in Sioux Falls City denies housing to households with children at a rate five times higher than households without children.

25. Respondents' occupancy policy is unreasonable as applied to Complainants. The overall size of the unit is large, measuring approximately 900 square feet and representing the largest 1-bedroom layout available at the Subject Property.

26. The Code in Sioux Falls is less stringent than Respondents' policy, such that the Code would explicitly permit Complainants' family to occupy the Subject Dwelling Unit. Under the Code, living rooms are compliant with Section 404.4 so long as they contain at least 120 square feet of floor space. Any square footage in the living room beyond the 120 square foot minimum for 3-5 occupants can be included as a sleeping area for the purpose of determining the minimum occupancy area for sleeping in the overall unit. Additionally, a combined living and dining room may also serve as a sleeping area (for three to five occupants) provided that the room is at least 200 square feet.

27. The Subject Dwelling Unit contains a combined living room with approximately 312 square feet, which exceeds the requirement that it be at least 200 square feet to serve as an additional sleeping area under the Code. Complainants could have therefore continued to reside at the Subject Dwelling Unit without violating the Code.

28. In addition to meeting the occupancy standards under the Code, the fact that the third occupant was a newborn child is additional evidence that Complainants could have reasonably continued to reside at the Subject Dwelling Unit.

29. As a result of Respondents' discriminatory conduct, Complainants and their child suffered actual damages, including lost housing opportunity, emotional distress, and out of pocket expenses.

D. Legal Allegations

30. As described above, Respondents discriminated against Complainants by denying or otherwise making a dwelling unavailable because of familial status. 42 U.S.C. § 3604(a); 24 C.F.R. § 100.50(b)(1), (3); 24 C.F.R. § 100.60(a).

31. As described above, Respondents discriminated against Complainants in the terms, conditions, or privileges of the rental of a dwelling because of familial status. 42 U.S.C. § 3604(b); 24 C.F.R. § 100.50(b)(2); 24 C.F.R. § 100.65(a); 24 C.F.R. § 100.70(b).

III. CONCLUSION

WHEREFORE, the Secretary of the United States Department of Housing and Urban Development, through the Office of the General Counsel, and pursuant to 42 U.S.C. § 3610(g)(2)(A), hereby charges Respondents with engaging in discriminatory housing practices in violation of 42 U.S.C. § 3604(a) and (b) of the Act, and prays that an order be issued that:

1. Declares that the discriminatory housing practices of Respondents, as set forth above, violate the Fair Housing Act, 42 U.S.C. §§ 3601-19;
2. Enjoins Respondents and their agents, employees, successors, and all other persons in active concert or participation with them, from discriminating because of familial status in any aspect of the sale, rental, use, or enjoyment of a dwelling pursuant to 42 U.S.C. § 3612(g)(3);
3. Requires Respondents and their agents and employees to attend, at Respondents' cost, training that addresses the Fair Housing Act's prohibitions against familial status discrimination;
4. Awards such damages pursuant to 42 U.S.C. § 3612(g)(3) as will fully compensate Complainants and their minor child for damages caused by Respondents' discriminatory conduct;
5. Awards the maximum civil penalty against each Respondent for each violation of the Act, pursuant to 42 U.S.C. § 3612(g)(3) and 24 C.F.R. § 180.671; and
6. Awards such additional relief as may be appropriate under 42 U.S.C. §3612(g)(3).

Respectfully submitted on this 9th day of August 2018.

Matthew Mussetter
Regional Counsel

Nicole Allard
Associate Regional Counsel

Colin Ratterman
Trial Attorney
U.S. Department of Housing
and Urban Development
Region VIII Office of Counsel
1670 Broadway, 25th Floor
Denver, CO 80202
Office: (303) 672-5374
Email: colin.j.ratterman@hud.gov

Jesse Loper
Trial Attorney
U.S. Department of Housing
and Urban Development
Region VIII Office of Counsel
1670 Broadway, 25th Floor
Denver, CO 80202
Office: (303) 672-5019
Email: jesse.k.loper@hud.gov