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 Candace Woodside and Yvette Green, Charging Party, v. John Kutney and Regina Kutney, Respondents.	HUDALJ 05-92-0364-1 HUDALJ 05-92-0365-1 Decided: November 23, 1994

John Kutney, *Pro Se*[1]

Michael Kalven, Esq.
For the Charging Party

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

INITIAL DECISION

Statement of the Case

On March 9, 1994, The Secretary, United States Department of Housing and Urban Development ("HUD"), issued a Determination of Reasonable Cause and Charge of Discrimination on behalf of Candace Woodside and Yvette Green ("Charge"), pursuant to the Fair Housing Act, as amended, 42 U.S.C. §§ 3601 *et seq.* ("Act")[2]. The Charge was based on Complaints filed by Ms. Woodside and Ms. Green. The Charge alleges that Respondents John Kutney and Regina Kutney violated § 3604(a), (b), (c) and (d) of the Act by discriminating, with respect to renting an apartment, against Ms. Woodside and

[1]Without objection Mr. Kutney also appeared on behalf of his wife, Regina Kutney.

[2]All citations to the Act will be to the United States Code section and not to the Public Law citation.

Ms. Green because of their familial status. Respondents filed an Answer ("Answer") denying they had violated the Act.

A hearing was held on June 29 and 30, 1994, in Cincinnati, Ohio. Briefs filed by HUD were received on September 27, 1994. Respondents filed no briefs.

I make the following findings and draw the following conclusions based on this record, my observation of the witnesses and their demeanor, and my evaluation of the evidence.

Findings of Fact

A. The Respondents and the Buildings

1. John Kutney and Regina Kutney are husband and wife and have owned adjacent apartment buildings located at 404 Springfield Pike and 4 Worthington Avenue, Wyoming, Ohio ("the Buildings"), a suburb of Cincinnati, Ohio, since November 1, 1985. Charge ¶ 8; Answer ¶ 8; Tr. 12, 218-219.[3]

2. Each building contains four apartments, two upstairs and two downstairs. The apartments all have two bedrooms and have essentially the same layout, with the upstairs units being slightly larger. Units number 1, 4, 5, and 8 are located on the first floor and units number 2, 3, 6, and 7 are located on the second floor. Tr. 218-219.

3. The Buildings are located in Wyoming, an exclusive suburb of Cincinnati, Ohio, with a good school system. They are a desirable place to live. Tr. 47, 65, 136.

4. It is difficult to find rental property in Wyoming, and two bedroom apartments do not become available very often, especially in the price range of the Buildings. Tr. 59-60.

5. Many landlords advertise vacancies by putting signs out on the property. Renters, therefore, drive around looking for such rental signs, recording the phone number, and then calling about the vacancy. Tr. 136.

6. Mr. Kutney is primarily responsible for renting the apartments in the Buildings.

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[3] Reference to the Hearing Transcript will be noted as "Tr." followed by the page number; reference to HUD's exhibits will be noted as "G. Ex." followed by the exhibit letter; and Respondents' exhibits will be noted as "Resp. Ex." followed by the exhibit number.

During the initial telephone conversation with a prospective tenant, Mr. Kutney would enquire as to where the applicant worked, where the applicant lived, why the applicant wished to move, who would be sharing the apartment, if there were any children and how old any child was. Tr. 31-35, 96-97 139. Mr. Kutney made appointments to show the vacant apartments to applicants. It was based on the conversation at the apartment that Mr. Kutney decided whether to rent to an applicant. Tr. 222.

7. During the nine years he owned the Buildings, Mr. Kutney never refused to rent an apartment to an applicant he had interviewed. Tr. 222.

8. When Mr. Kutney spoke to Ms. Green on the telephone, it was his policy to accept a security deposit to hold an apartment after he had personally shown the apartment and interviewed the applicant. Tr. 221-222. It was basically a system of first come, first served. Tr. 222-223.

B. Complainant Yvette Green

9. Ms. Green is the mother of a son who was born in October 1990. In April of 1991 she was having marital problems and was in the process of getting a divorce. Tr. 30, 114-117. Upon returning from maternity leave in April of 1991 she was anxious to find a new place to live. Tr. 119.

10. Ms. Green had grown up in Wyoming, Ohio, and had lived there for her entire life. It was where she had friends and community support and where her ex-husband lived, and therefore she could get help with child care. Accordingly, she wanted to stay in the Wyoming, Ohio, community. Tr. 32, 45, 62.

11. In April of 1991, Ms. Green saw a vacancy sign at the Buildings. She had been attracted to the Buildings and had walked by them dozens of times. She went home and called the telephone number that appeared on the vacancy sign. Tr. 30-31.

12. Ms. Green spoke to Mr. Kutney on the telephone. She asked if an apartment was available. He asked where she worked. She replied that she worked for the postal service and again asked if an apartment was available. He responded that the apartments were very expensive. Ms. Green stated that was okay and Mr. Kutney asked where she lived. She responded that she lived in Wyoming. Mr. Kutney asked how many people would be living in the apartment and Ms. Green responded she would be living in it with her five and a half month old child. She asked him to tell her about any available apartment. He responded that the price was $500 and that right now there was a second floor apartment available, but there was not going to be a first floor apartment available

until June. Ms. Green stated that was okay, that she had lived in Wyoming her entire life and that she had waited for this apartment to become available. She asked if she could see the apartment. Mr. Kutney responded that he did not have a first floor apartment and that he had a second floor apartment. Ms. Green responded that did not matter. She asked if she could see the second floor apartment and put a deposit on the first floor apartment. She said she would rent it sight unseen. He said it is first come first serve, but he had to see her first and then make his decision. Ms. Green said okay and asked Mr. Kutney if he could call her back. He said "yes" and she gave him her telephone number. Tr. 31-32, 33-35.

13. Mr. Kutney did not call Ms. Green back, so she called him again and left a message on his telephone answering machine. Again, he did not call her back. Tr. 35.

14. Ms. Green felt she had been discriminated against and she went to work and complained about the perceived discrimination. She went to Housing Opportunities Made Equal ("HOME"). Tr. 39, 80. HOME is a non-profit fair housing agency that is about 31 years old. Tr. 79.

C. Testing

15. HOME, based on Ms. Green's complaint of April 25, 1991, and following its ordinary procedures, conducted tests on the apartment at the Buildings. G. Ex. F; Tr. 80-82.

16. Tester Lou Marti, using an alias of Ann Walker, called the Buildings' rental number on April 25, 1991, and spoke to a women, Ms. Kutney. Ms. Kutney stated the apartment was in the second building, had two bedrooms and rented for $500 per month, including heat and hot water. She stated that the second floor apartment would be ready at the end of April and another at the end of May. She said her husband showed the apartment and Ms. Marti should call back that evening to make arrangements. G. Ex. B; Tr. 95-96.

17. Ms. Marti called back that evening and spoke to Mr. Kutney. Ms. Marti stated that Ms. Kutney had told Ms. Marti about the apartment and she asked when Mr. Kutney would be showing it. Mr. Kutney asked Ms. Marti her name, she gave her testing alias. He asked how many people would be living in the apartment and Ms. Marti stated she and her 12 year old daughter would live there. Mr. Kutney then asked where the child went to school, where they currently lived, why they were moving and where Ms. Marti worked. Mr. Kutney said he would call back on the next Monday to make arrangements

to see the apartment. G. Ex.B; Tr. 96-97. Mr. Kutney did not call, so Ms. Marti called back the next Monday and Mr. Kutney told Ms. Marti to come over and see the apartment that evening. Tr. 98.

18. Ms. Marti went to the Buildings on Monday evening. There were a total of about eight people there to see the apartment. Mr. Kutney indicated that both apartments would be available at the end of May. Mr. Kutney showed the group a first floor apartment, that was currently rented, as a model. Mr. Kutney walked the group through each room of the apartment. The group then assembled outside and Mr. Kutney asked if there were any questions. A number of questions were asked, but no one stated they wanted the apartment. No rental applications were distributed, because Mr. Kutney does not use written applications. Mr. Kutney stated that anyone there could rent the apartment because he could tell by looking that they were all good people. Mr. Kutney said they should all go home and sleep on it and call him back if they were interested. At least one of the apartments that was becoming available was a second floor unit.
Tr. 98-108.

19. HOME Tester Laura Pennycuff telephoned the Kutneys on June 4, 1991, and left a message on the answering machine. She used the alias Laura Smith. She called again on June 5 and 6, 1991, and left messages on the answering machine and received no return calls. Mr. Kutney called Ms. Pennycuff on June 6, 1991. Mr. Kutney said he had an apartment on the first floor available because the person who was supposed to take it disappeared. Mr. Kutney asked Ms. Pennycuff how much she was paying for rent and why she wanted to move. Ms. Pennycuff volunteered she would have a year and a half old niece living with her for extended periods. He said he understood and that was no problem. He told her the rent for the two bed room apartment was $500, including heat and hot water. He said he could hold the apartment for her for two weeks, as she had requested, but he stated he wanted to meet her. They made an appointment to meet at the Buildings at 10:30 a.m. on Monday, June 10, 1991. Ms. Pennycuff called back on that Monday and broke the appointment. G. Ex. C.

20. Unit #5, a first floor apartment, was rented effective June 15, 1991 and unit # 7, a second floor apartment, was rented by a lease signed on May 29, 1991, and effective July 1, 1991. G. Ex. E-3; Tr. 224.

D. Candace Woodside

21. Candace Woodside is the mother of a daughter born on September 1, 1988. Ms. Woodside has a B.S. degree from Xavier University in medical technology and was employed at the Covington Branch of St. Elizabeth Medical Center in August 1991.

Tr. 133-134.

22. Ms. Woodside who had been living in Florida, moved back to her native Wyoming in order to live with and care for her mother who was ill. Tr. 134-136.

23. In August 1991, Ms. Woodside's mother was recovering and Ms. Woodside decided to look for an apartment of her own. Ms. Woodside wanted to stay in Wyoming. Her child was scheduled to start school in 1993. She wanted to get settled so her child could attend the Wyoming school system. Tr. 135-136.

24. At he beginning of every month, and two or three time a week, thereafter, Ms. Woodside drove around looking for rental property. When she saw a vacancy she wrote down the telephone number and called. Tr. 136-137.

25. In September 1991, after seeing a vacancy at the Buildings, Ms. Woodside telephoned the number printed on the sign and spoke to Mr. Kutney. Mr. Kutney asked Ms. Woodside if she was married, had any children, how old the child was, where Ms. Woodside worked, where she lived, and why she wanted to move. Ms. Woodside answered the questions, including the age of her child. She gave Mr. Kutney her telephone number and he said he would call her back. He did not call her back, so she called him again the beginning of October. Tr. 139.

26. In the beginning of October of 1991, the vacancy sign still being up, Ms. Woodside again called Mr. Kutney. Ms. Woodside reminded Mr. Kutney that she had called him in September, but that he must have lost her number. He again asked her the same questions he had asked her during the September conversation and she answered them. He again took her telephone number and said he would call her the next day. He did not call her the next day. Tr. 139-140.

27. Mr. Kutney called Ms. Woodside on November 4, 1991. He asked her if she was still interested in an apartment. She said she was, and he again asked her the same questions he had asked during their previous phone conversations, which she again answered. They set up an appointment for Ms. Woodside to view the apartment on the next day. Tr. 141.

28. Ms. Woodside, her mother and daughter met Mr. Kutney at the Buildings at 11:30 a.m. on November 5, 1991. The Woodside group and Mr. Kutney went up the steps to a second floor apartment. As they walked up the stairs Ms. Woodside said a first floor apartment would be fine. Mr. Kutney asked why and she replied she would not have to carry groceries so far, but that the second floor was fine. The Woodside group

and Mr. Kutney inspected the entire apartment. There was minimal conversation about the apartment. Mr. Kutney stated the rent was $525 per month, including heat. Mr. Kutney said the current tenant was due to vacate and Ms. Woodside could have the apartment the first of December or the first of January, which ever suited Ms. Woodside. Mr. Kutney said the second floor apartment was safer for a single woman. Ms. Woodside said she really liked the apartment, but she did not want to make an impulsive decision and she would call him that evening. Mr. Kutney stated she could notify him by the next day and that he really wanted to rent it the next day. She said she appreciated that, but would let him know that evening. Tr. 141-144, 148. Mr. Kutney told her the apartment was already promised. To console her he told her that a second floor apartment was not as good for small children as a first floor apartment. Tr. 267.

29. After taking her child to day care on November 5, 1991, Ms. Woodside called Mr. Kutney to ask about the laundry facilities. Ms. Kutney answered the phone and told Ms. Woodside she had to speak to Mr. Kutney. Ms. Kutney took Ms. Woodside's phone number for home and work. Mr. Kutney did not call her back. Ms. Woodside called a few more times and left messages on the Kutneys' answering machine that night. The next day, November 6, 1991, Ms. Woodside called from work, at about 10:00 a.m., and left a message on the answering machine that she wanted to talk to Ms. Kutney, that she wanted to rent the apartment, and that she had some questions. She continued calling every hour till 8:00 p.m. when Mr. Kutney answered. He asked what her questions were. When she responded that it was about the laundry facilities, he replied that it did not matter since it was already rented. Ms. Woodside was very upset and was crying and her memory of the conversation was "a little murky." Tr. 145-147. Mr. Kutney told her there is nothing he could do, he did not have another apartment, and that he had reservations about putting children on the second floor because of the hard wood floors. Tr. 268, 180.[4]

30. During early October 1991, Ms. Kathrine Bykovny, after seeing a vacancy sign, inspected unit #8, a first floor apartment at the Buildings. Ms. Bykovny had a twelve year old daughter. When she was unable to rent that apartment she called on the phone and stated she wanted any apartment available. She asked that she be kept in mind. Tr. 323-327, 333.

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[4]In this regard I credit Mr. Kutney's version of this telephone conversation, and not Ms. Woodside's. I discredit her testimony in so far as she testified Mr. Kutney said he would not rent her the apartment because she had a daughter and because the downstairs tenant worked nights. Mr. Kutney's version of the conversation is more consistent with the surrounding facts and Ms. Bykovny, the person to whom the apartment had been rented. Ms. Bykovny had already paid a security deposit and had a twelve year old daughter. Ms. Woodside stated her memory of the conversation is murky. Also credited is the testimony of the HUD investigator. Tr. 180.

31. Mr. Kutney called Ms. Bykovny during either late October or early November, 1991, no later than a day or so before November 5, 1991, and told her he had an

apartment available. She came over and gave him a deposit on unit #6 on November 5, 1991, at about 5:00 p.m., after she had finished work. Tr. 327-328, G. Ex. G.

32. Mr. Kutney told the HUD investigator, during a telephone conversation that he had advised Ms. Woodside that the unit was rented and that he, Mr. Kutney, had told Ms. Woodside that he had reservations about renting an apartment on the second floor to someone with a small child because there were hard wood floors. Mr. Kutney also advised the HUD investigator that he normally likes to keep children under ten on the first floor. Tr. 180.

33. From the time they owned the Buildings until the Complaints were filed in this matter the Kutneys rented apartments on the second floor to the following families which had children under 11: The Schumakers had an infant and children of 8 and 10 in unit #2, from 1990 to 1993; Dr. Barlowe had three children under 11 years of age, they were 1, 3, and 5 years old, in unit #7 in 1988. R. Ex. 2, 3.

34. Mr. Kutney had a policy, in renting his apartments on a first come, first served basis. Tr. 22, 34, 55.

Discussion and Conclusions

I. Legal Framework

Section 3604(a) of the Act makes it 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 otherwise make unavailable or deny to any person because of . . . familial status . . . .

Section 3604(b) of the Act makes it 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 . . . familial status . . . .

Section 3604(c) of the Act makes it unlawful:

> To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with preference, limitation, or discrimination based on . . . familial status . . . an intention to make any such preference, limitation, or discrimination.

Section 3604(d) of the Act makes it unlawful:

> To represent to any person because of . . . familial status . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact available.

Section 3602(k) of the Act defines familial status as "one or more individuals (who have not attained the age of 18 years) being domiciled with--

> (1) a parent or another person having legal custody of such individual or individuals; or
>
> (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.

II. Yvette Green

HUD argues Mr. Kutney violated §3604(a) of the Act by allegedly refusing to negotiate with and denying Ms. Green the opportunity to rent a second floor apartment because she had an infant child. HUD further alleges that § 3604(c) of the Act was violated by statements allegedly made by Mr. Kutney to Ms. Green.

I disagree with HUD's characterization and interpretation of the April telephone conversation between Ms. Green and Ms. Kutney. After asking Ms. Green a number of questions and receiving a lot of information, including the fact that Ms. Green had a five and a half month old child, Mr. Kutney told Ms. Green that an apartment was available on the second floor and a first floor apartment would be available in June. Ms. Green asked to see the apartment and Mr. Kutney stated that he had a second floor apartment but that the first floor apartment was not available. Ms. Green asked if she could see the second floor unit and put a deposit on the first floor unit. She said she would rent it sight unseen. Mr. Kutney said it was first come, first served, but he would have to see her first and then make his decision. Ms. Green said okay and then asked if Mr. Kutney could call her back. He said he could and she gave him her phone number.

III. Candace Woodside

The record does not establish that Mr. Kutney refused to rent unit 6 to Ms. Woodside because she had a young child. Although Ms. Bykovny had said she wanted the apartment, Ms. Woodside could have accepted the apartment when she saw it on November 5, 1991. Ms. Woodside was not sure and later called with some questions. By the time Ms. Woodside called to accept the unit, Ms. Bykovny, had already delivered a check for her deposit on the unit. In this regard, I note Ms. Bykovny had a twelve year old daughter when she rented the apartment. Prior to Ms. Woodside seeing unit 6, Ms. Bykovny had told Mr. Kutney, during a telephone conversation, that she wanted to rent unit 6 and would bring a security deposit. Ms. Bykovny had already seen a different unit, which had been rented, and had told the Kutneys that she wanted the next available unit. Mr. Kutney continued to show the vacant apartment, in this case to Ms. Woodside, until he had a security check in hand.

The record establishes that the only reason Mr. Kutney did not rent unit 6 to Ms. Woodside was, that he had already received a deposit from Ms. Bykovny prior to the time Ms. Woodside was ready to accept the apartment. Mr. Kutney was merely following his policy of first come, first served. Ms. Woodside did not accept the apartment or give Mr. Kutney a security deposit before he had received such a deposit from Ms. Bykovny.

During the showing of the apartment to Ms. Woodside, Mr. Kutney mentioned that Ms. Bykovny, had been promised the apartment. Ms. Woodside first mentioned that a first floor unit might be more desirable. When Ms. Woodside did not accept the apartment, knowing Ms. Bykovny wanted it, he consoled Ms. Woodside by saying a second floor apartment was not as good for a small child as a first floor apartment. Again this statement, in context, was not made to deny Ms. Woodside the apartment or even to "steer" her to a first floor unit, but rather to console her since she was unable to make up her mind. In this regard I note that during their telephone conversation the next day, Mr. Kutney stated that the apartment had already been rented, and again, that he had reservations about renting a second floor apartment to someone with small children because of the hard wood floors. This statement was a statement about Mr. Kutney's reservation, but was not an expression that he would not rent such an apartment to a family with small children, or even that he preferred not to rent a second floor apartment to a family with young children.

In light of all of the above, I conclude that the record herein does not establish that

Mr. Kutney violated § 3604(a), (b), (c), and (d) of the Act with respect to his dealings with Ms. Woodside.

Mr. Kutney's statement to the HUD investigator that he normally likes to keep children under ten on the first floor, does not constitute a violation of the Act unless it is proven that such a policy was actually applied or put into effect. The record herein fails to establish that Mr. Kutney actually followed such a policy.

During the hearing, I excluded certain testimony of the HUD investigator concerning information obtained from Mr. Kutney during a conversation that involved both investigation and conciliation. Tr. 197-204. In its brief HUD argues that it is appropriate for the investigator to both investigate a case and attempt to conciliate it. Brief pages 40-43. I take no issue with HUD on that point. My ruling, and I affirm it, is that it is not permissible to admit into evidence any admissions obtained during settlement discussions.

Order

Having concluded that the record herein fails to establish that Respondents violated the Act, it is hereby **ORDERED** that the Determination of Reasonable Cause and Charge of Discrimination in this matter is **DISMISSED.**

This Order is entered pursuant to 42 U.S.C. § 3612(g)(3) and the regulations codified at 24 C.F.R. § 104.910, 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.

SAMUEL A. CHAITOVITZ
Administrative Law Judge