

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  
Ashley Pierce, Monique Castro Pierce  
and Gary Grabarczyk,

Charging Party,

v.

HUDALJ 05-98-0298-8  
HUDALJ 05-98-0715-8

Florence Gunderson and  
Milan Gunderson,

Respondents.

**INITIAL DETERMINATION AND ORDER**

**Introduction**

This case arises under the Fair Housing Amendments Act of 1988. 42 U.S.C. §§ 3601-3619. After an investigation, the Department of Housing and Urban Development issued a Finding of Reasonable Cause and a Charge of Discrimination on May 13, 1999. Respondents filed their Answer on June 10, 1999. On August 5, 1999, Respondents filed a Motion for Summary Judgment. After considering the Motion, the Charging Party's Response, and Respondents' Reply to the Response, I granted the Motion to be followed by an Initial Determination and Order, cancelled the scheduled hearing, and stayed all pending proceedings. This document constitutes that Initial Determination and Order.

**Statement of Facts**

The following relevant facts are undisputed:

Respondent Florence Gunderson owns a four-family residential rental unit at 1653

Kettle Cove Court in Delafield, Wisconsin, managed by her son, Milan. On October 22, 1997 Complainant Monique Castro Pierce called Mr. Gunderson regarding an ad for one of the four rental units. During the call Ms. Gunderson stated that she had a computer resume business and inquired if there would be a problem with conducting the business in the rental unit. As she described the business, she and her husband wrote resumes, brochures, and newsletters at her home. Ms. Pierce stated that she, her husband, and one other person, would be living there. They agreed to meet the next day at 11:00a.m. to view the apartment. Gunderson Aff. ¶¶ 1,3,4, Ex 2; M. Pierce Dep. At pp. 41,44,45, 52, 59, Ex. 6.

The next day Ms. Pierce, her husband Ashley, and Gary Grabarczyk arrived at the agreed time. After they viewed the unit, Mr. Pierce expressed an interest in renting. Mr. Gunderson stated that he had to “check out” a few things and would call them back at 5:30 that afternoon. At 4:30 that afternoon, Mr. Pierce called Mr. Gunderson who told him that he would not rent to them because the City of Delafield did not allow home based businesses in four-unit dwellings; that his insurance rates would likely increase, and that he thought the unit may be rented to another party. Gunderson Aff. ¶¶ 9, 10, Ex. 2; M. Pierce Dep. At pp.85-87, Ex. 6; A. Pierce Dep. At 85-87, Ex. 7.

The applicable section of the City of Delafield Municipal Code (the Code) defines “Home Occupation” as follows:

Section 1724. An occupation for gain or support that is conducted entirely within the principal building whose primary use is as a *single-family or duplex residence*, is incidental to the principal use of the premises as a residence, does not exceed 25 percent of the total floor area of the principal structure, does not require a sign larger than 2 square feet, and does not involve the employment of any individual not living on the premiss. A home occupation shall not include the use of any machinery, tools, or other appliances that create a nuisance to the surrounding residential area by reason of noise, vibration, dust, smoke, or odor.

Emphasis added.

Section 17.38(6) of the Code provides that home occupations are permitted accessory uses under the following circumstances:

Home occupations, provided that such occupation is incidental to the use of the premises for residential purposes and does not effect any substantial change in the character of the premises or of the neighborhood, that no article is sold or offered for sale on the premises, except such as is produced by such occupation, and that not more than one person is employed other than a member of the immediate family living on the premises. Not more than 25% of the total floor area of a dwelling unit shall be occupied by a home occupation.

On January 28, 1998, Complainants filed complaints with the Department of Housing and Urban Development alleging discrimination in violation of the Fair Housing Amendments Act, 42 U.S.C. §§ 3604(a) and (d) based on race. Monique Castro Pierce is black. Ashley Pierce and Gary Grabarczyk are white. Respondents are white.

### **Discussion**

The Charge of Discrimination alleges that Respondents unlawfully refused to rent or negotiate with Complainants because of Ms. Pierce's race and color (Section 3604(a)) and represented to them that a dwelling was unavailable when in fact it was (Section 3604(d)).

A Motion for Summary Judgment will be granted if there is no genuine issue of material fact and the Respondents are entitled to judgment as a matter of law. (Citations)

Absent direct evidence,<sup>1</sup> the Charging Party may fulfill its burden by indirect evidence. First, the Charging Party must establish a *prima facie* case of housing 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 Respondents to articulate a nondiscriminatory reason for their 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 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*, 113 S.Ct. 2742; 125 L.Ed. 2d 407 (1993). Because the Charging Party failed to establish a *prima facie* case of discrimination, it was unable to prove that Respondents violated the Act.

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 must prove the following to establish a *prima facie* case: (1) Complainants are members of a protected class; (2) they were *qualified* to rent Ms. Gunderson's apartment; (3) they applied to rent the apartment; and (4) Respondents rejected the Complainants as tenants. See, e.g., *Soules v. HUD*, 967 F.2d 817, 822 (2d Cir. 1992); *Blackwell*, 908 F.2d at 870; *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1979). By failing to a material fact necessary to establish the second element, the Charging Party did not carry its initial burden. *Ramapo (citation)*. Therefore, it is unable to prove that Respondents violated the Act and

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<sup>1</sup>*Black's Law Dictionary* defines direct evidence as evidence that "proves [the] existence of [the] fact in issue without inference or presumption." *Id.* at 413-14 (spec. 5th ed. 1979).

Respondents are entitled to judgment as a matter of law.

The Charging Party failed to demonstrate that the conduct of Ms. Pierce's computer resume writing business could be lawfully conducted in Respondent's four unit dwelling. The exception for "home occupations" is limited to single family and duplex dwellings. I conclude that this exception was intended to allow prevent business traffic in units small enough that little or no interference with the primary residential use of the dwellings would result from the business use. Larger buildings with more than two units could accommodate more businesses with a resulting increase in traffic.

Ms. Pierce could not conduct her business on the premises. Therefore she is not qualified to rent the property, and the Charging Party has failed to establish a prima facie case.

\_\_\_\_\_/s/\_\_\_\_\_  
WILLIAM C. CREGAR  
Administrative Law Judge

Dated: August 25, 1999

