



Maine Human Rights Commission
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INVESTIGATOR'S REPORT
MHRC No. H13-0148
HUD No. 01-13-0274-8

DATE ISSUED: June 19, 2013

[REDACTED]

v.

[REDACTED]

I. Complainant's Complaint:

Complainant [REDACTED] (hereinafter "[REDACTED]" or "Complainant") alleged that Respondent [REDACTED] (hereinafter "[REDACTED]" or "Respondent") discriminated against a tester on the basis of race and color by denying her an equal opportunity to view an apartment. [REDACTED] also alleged that [REDACTED] uses a rental application form that asks unlawful questions based on sexual orientation and familial status.

II. Respondent's Answer:

Respondent denied any discrimination based on race and color. Respondent stated that if required, he can remove questions about relationship and age from the application form.

III. Jurisdictional Data:

- 1) Date of alleged discrimination: January 25, 2013.
- 2) Date complaint filed with the Maine Human Rights Commission: March 21, 2013.
- 3) Respondent owns and manages one building with two rental units and is subject to the Maine Human Rights Act and the federal Fair Housing Act as well as state and federal housing regulations.
- 4) Respondent is not represented by counsel. Complainant is represented by [REDACTED], Esq.
- 5) Investigative methods used: A thorough review of the written materials provided by the parties. This preliminary investigation is believed to be sufficient to enable the Commissioners to make a finding of "reasonable grounds" or "no reasonable grounds."

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IV. Development of Facts:

- 1) The parties and issues in this case are as follows:
 - a) Complainant [REDACTED] is a legal services organization that provides statewide civil legal services. [REDACTED] has a grant from the U.S. Department of Housing and Urban Development ("HUD") to conduct a fair housing testing program. Under the testing program, [REDACTED] sends trained testers to inquire about housing units and compares how testers are treated in order to determine if discrimination has occurred.
 - b) At the time of these events, one of the two units owned by Respondent [REDACTED] was available for rent. The apartment was advertised on Craigslist on or around January 23, 2013, as a two bedroom apartment for \$700. [REDACTED] sent three testers to inquire about the apartment.
 - c) [REDACTED] alleged that [REDACTED] discriminated against an African-American on the basis of race and color by denying her an equal opportunity to view an apartment. [REDACTED] denied this allegation.
 - d) [REDACTED] also alleged that [REDACTED] uses a rental application form that asks unlawful questions based on sexual orientation and familial status. [REDACTED] did not dispute that the application asks questions about the relationship(s) between proposed occupants, and the ages of proposed occupants. [REDACTED] indicated that if required, he can remove those questions from the form.
- 2) Complainant provides the following about the tests:
 - a) Testers are trained to report objectively about their observations. Testers are told that they may report their feelings when they have a strong emotional response during a test if they explain what caused them to feel that way.
 - b) C.K., an African-American woman, reported the following:
 - i) C.K. called on Thursday, January 24, 2013 at or around 2:21 P.M. and spoke to [REDACTED]. She made an appointment to see the apartment on Friday, January 25 at 5:00 PM. She asked about the rent and which utilities were included. Respondent answered her questions, and for her phone number in case he needed to reschedule. Respondent asked how many people would be living in the apartment. She told him there would be two people. C.K. and [REDACTED] exchanged names. C.K. reported to [REDACTED] (but not on her tester report form) that her conversation was with [REDACTED] was pleasant.
 - ii) C.K. arrived at the apartment on January 25, 2013 at or around 4:55 PM. When she arrived, she saw [REDACTED] looking out of the second floor apartment. She went up to the apartment.
 - iii) C.K.'s tester report, completed after she conducted the test, reads as follows:

"The landlord seemed very racist, he didn't walk me around to point the rooms out or anything. He just had this attitude look on his face. He was looking at me funny, I don't [know] if it was my skin color or my sex. I felt very uncomfortable, and left out as soon as

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I looked around. I asked him for an application because he didn't offer me one. He didn't say much of anything but 'Hi' and that was when I walked in the apartment. [When] I left I said thanks and he didn't say anything."

- iv) C.K.'s tester report indicates that she asked [REDACTED] two questions when she called to schedule an appointment to see the apartment (rent, utility costs) and that she volunteered no information when she viewed the apartment.
 - v) C.K. reported to [REDACTED] that [REDACTED] made her uncomfortable by frowning; that she remarked to [REDACTED] that the apartment looked nice but [REDACTED] did not reply; and that [REDACTED] gave her an application when she asked for one.
 - vi) This was the first test that C.K. conducted for [REDACTED]. She has since been assigned to two other tests. In all three tests, she served as the "protected tester," meaning, the test was conducted to determine if race discrimination had occurred.
- c) J.H., a white woman, reported the following:
- i) J.H. called [REDACTED] on Monday, January 28, 2013 at or around 2:08 PM and left a message. She called back a second time and the phone was answered. She asked questions about the apartment and her questions were answered. She made an appointment to see the apartment on Thursday, January 31, 2013 at 4:30 PM.
 - ii) J.H. arrived at the unit on January 31, 2013 at or around 4:25 PM. Respondent was waiting outside the apartment in his truck. He got out of the truck while J.H. was parking. He took her up to the apartment and walked her through, showing her the kitchen, the pantry, and one of the bedrooms. J.H. looked at the bathroom and the bedroom by herself. J.H. asked if the building was kid friendly and he responded by saying there were no young children in the building. J.H. also asked about bed bugs and he responded.
 - iii) J.H. asked for an application and was given one.
 - iv) J.H.'s tester report indicates that she asked [REDACTED] seven questions when she called about the apartment (rent, security deposit, size of unit, neighborhood, utility costs, utility type, and location). When she viewed the apartment, she volunteered her name, her address, the number, age and sex of her children (8 year old daughter), her place of employment and reason for moving (relocating for job).
 - v) J.H.'s tester report reads, in part:

"As I was driving up and parking, he got out of his truck. He looked over and I asked, 'Are you [REDACTED] He said, 'Yes.' We both walked upstairs, him first then [me]. We walked into the apartment, went into the kitchen first then the washroom/pantry . . . then a bedroom and bathroom and other bedroom then the living room. I was a very brief visit. I asked for an application and where or how I could get it back to him. . . . I thanked him for showing me

the apartment and would be calling him to give him my application. He stayed in the apartment when I left.”

d) R.W., a white man, reported the following:

i) R.W. called [REDACTED] on Friday, February 8, 2013¹ at or around 4:46 PM. R.W. was told by Respondent that the apartment was already rented and that he had no others available.

ii) R.W.'s tester report reads, in part:

“Called landlord @ 4:46, landlord answers ‘This is [REDACTED] I introduced myself as [R.W.] and asked how he was doing. He told me he was doing fine, and I stated that I was calling about the 2 BR listed on craigslist. He informed me that the apt was already rented, and when I asked if he had any others, stated that this was his only one and did not have any more apts. Was not able to get any more information.”

iii) R.W. reported to [REDACTED] that [REDACTED] tone of voice was “friendly but gruff” and polite.

e) [REDACTED] alleged that [REDACTED] engaged in race and color discrimination by denying C.K. an equal opportunity to view the apartment. [REDACTED] alleged that the discrimination consisted of [REDACTED] speaking pleasantly with C.K. on the phone, but changing his attitude after seeing that she is an African-American with dark skin; at that point, he did not show her around the apartment and did not respond to her attempts to make conversation.

f) [REDACTED] alleges that two white testers were treated more favorably than C.K. in that [REDACTED] briefly showed J.H. part of the apartment and answered all of her questions about the building, and [REDACTED] used a pleasant tone of voice when speaking with R.W. by telephone.

2) [REDACTED] provided the following:

a) The only thing that C.K. was picking up on is his normal personality. He is not the friendliest person nor does he engage in small talk. He is not a conversationalist. He does not typically engage in small talk with people. He doesn't engage in conversations with many people.

b) He had just gotten out of work when C.K. came to view the apartment. It was a long day.

c) He has been told many times that he "frowns at people." It wasn't personal.

d) He was suspicious of C.K. and what her real intent was because she did not act like she was sincere about her intentions. It was just a gut reaction. C.K. may have been picking up on his suspicion that she was not sincere about being interested in renting the apartment.

¹ The complaint of discrimination states, incorrectly, that R.W. contacted [REDACTED] on Friday, *January* 8, 2013.

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- e) The apartment is not that large that it warrants "showing around." It is obvious where the rooms are and what they are for. He does not have a set routine about what he says and does during a showing. He is not a professional property manager. He doesn't show apartments often enough to have a routine.
- f) He doesn't discriminate against people. It is not his nature to judge people for their color, race, or sexual orientation. He has friends and acquaintances that are African-American, gay, Chinese and Mexican. People are people regardless of their color. He has rented to gay women and they were great tenants. Although he has never rented to an African American in the past, he would not hesitate to rent to an African American at all.
- g) The first floor tenant in the subject property is Mexican. She lives there with her two boys and her mother.

V. Analysis:

- 1) The Maine Human Rights Act provides that the Commission or its delegated investigator "shall conduct such preliminary investigation as it determines necessary to determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S. § 4612(1)(B). The Commission interprets the "reasonable grounds" standard to mean that there is at least an even chance of Complainant prevailing in a civil action.
- 2) The Maine Human Rights Act, 5 M.R.S. § 4581-A(1), provides, in part, that it is unlawful housing discrimination for any owner to:
 - A. Make or cause to be made any written or oral inquiry concerning the . . . sexual orientation [or] . . . familial status of any prospective occupant or tenant of the housing accommodation; or . . .
 -
 - D. Discriminate against any person because of race or color . . . in the price, terms, conditions or privileges of the . . . rental or lease of any housing accommodations or in the furnishing of facilities or services in connection with any housing accommodations. . .
- 3) Here, Complainant alleges that Respondent discriminated against a tester, C.K., on the basis of race and color by denying her an equal opportunity to view an apartment. Complainant also alleged that Respondent uses a rental application form that asks unlawful questions based on sexual orientation and familial status. Respondent denied any discrimination based on race and color and stated that if required, he can remove questions about relationship and age from the application form.

Unlawful Housing Inquiries

- 4) The Commission publishes a Housing Applicant Inquiry Guide ("Guide") to help housing providers comply with 5 M.R.S. § 4581-A(1)(A). The Guide provides examples of unlawful inquiries about, among other things, the ages of persons in household and the relationship between household members.

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- 5) The rationale for prohibiting the question about age is that answering the question will inform the housing provider about the applicant's familial status, that is, whether he or she has one or more minor children.
- 6) The rationale for prohibiting the question about relationships is that answering the question may inform the housing provider about the applicant's sexual orientation. For example, two adult men seeking housing together may be, or may be perceived as, gay.
- 7) Respondent here did not identify any business need to ask applicants for the ages and relationship between occupants. Since Respondent has not business need for this information, the questions about age of, and relationship between, occupants violate 5 M.R.S. § 4581-A(1)(A).

Discrimination in the Terms and Conditions of Rental

- 8) Because the race/color discrimination claim does not involve direct evidence, Complainant establishes a prima-facie case of unlawful housing discrimination with respect to the price, terms, conditions, or privileges of the rental or lease of a housing accommodation by showing (1) that its tester applicant is a member of a protected class, (2) that its tester applicant was not offered the same terms, conditions or privileges of rental of a dwelling or not provided the same services or facilities in connection therewith made available to others, and (3) under circumstances giving rise to a reasonable inference of prohibited discrimination. *See Khalil v. Farash Corp.*, 260 F. Supp. 2d 582, 588 (W.D.N.Y. 2003).
- 9) Once Complainant has established a prima-facie case, the burden of production, but not of persuasion, shifts to Respondent to articulate a legitimate, nondiscriminatory reason its action. *See United States v. Grishman*, 818 F. Supp. at 23; *HUD v. Blackwell*, 908 F.2d at 870; *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 15, 824 A.2d 48, 54. After Respondent has articulated a nondiscriminatory reason, Complainant must (to prevail) demonstrate that the nondiscriminatory reason is pretextual or irrelevant and that unlawful discrimination brought about the adverse housing action. *See id.* Complainant's burden may be met either by the strength of Complainant's evidence of unlawful discriminatory motive or by proof that Respondent's proffered reason should be rejected. *See Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16; *City of Auburn*, 408 A.2d at 1262, 1267-68. Thus, Complainant can meet her overall burden at this stage by showing that (1) the circumstances underlying the articulated reason are untrue, or (2) even if true, those circumstances were not the actual cause of the decision. *Cookson v. Brewer School Department*, 2009 ME 57, ¶ 16.
- 10) In order to prevail, Complainant must show that the tester applicant would not have suffered the adverse action but for membership in the protected class, although protected-class status need not be the only reason for the decision. *See Maine Human Rights Comm'n v. City of Auburn*, 408 A.2d 1253, 1268 (Me. 1979).
- 11) Complainant here did not establish a prima-facie case of discrimination because C.K., the African-American tester applicant, was not treated differently than J.H. or R.W. in the price, terms,

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conditions, or privileges of the rental of a dwelling, nor was C.K. denied any services or facilities that were afforded to J.H. or R.W., with reasoning as follows:

- a) Respondent [REDACTED] offered to show the apartment to both C.K. and J.H. when they called about the unit. He showed the apartment to C.K. on January 25, 2013, one day after she called; he showed the apartment to J.H. on January 31, 2013, three days after she called. [REDACTED] did not offer to show the apartment to R.W. when he called on February 8, 2013 because it had already been rented.
 - b) During the first telephone contact between C.K. and [REDACTED] C.K. asked two questions. When J.H. called [REDACTED] she asked him seven questions. [REDACTED] answered all questions asked of him by both testers.
 - c) [REDACTED] provided both C.K. and J.H. with the opportunity to look around the apartment at the showing.
 - d) [REDACTED] answered all questions asked about the apartment rental asked by both C.K. and J.H. during the showing.
 - e) [REDACTED] provided both C.K. and J.H. with rental application forms when they asked for one.
 - f) In short, C.K., who is African-American, was not deprived of anything of consequence that was provided to J.H., a similarly situated white applicant.
- 2) As proof that C.K. was "denied an equal opportunity to view the apartment," Complainant relies on the following:
- a) Complainant argues that Respondent [REDACTED] spoke to C.K. pleasantly by telephone but at the showing, after seeing that she is African-American, he did not "show her around" the apartment and did not respond to her attempts to "make conversation." However, as noted above, [REDACTED] *did* show C.K. the apartment by letting her in and letting her look around.
 - b) It is unreasonable to expect a housing provider to treat each applicant in exactly the same manner – to ask and answer questions in the identical manner, to show each applicant exactly the same things about a rental unit, to use the same tone of voice, and to smile and frown in equal proportions with every person.
 - c) This is especially true when the applicants do not behave in exactly the same manner. They did not view the apartment on the same day and they asked different questions during the initial telephone call and at the showing.
 - d) Complainant also relies on C.K.'s subjective impression that [REDACTED] "seemed very racist." She reported that he had "this attitude look on his face" and that he was "looking at me funny." Although C.K. referred to [REDACTED] as a "racist," she also stated that she did not know if he was reacting to her race or sex.

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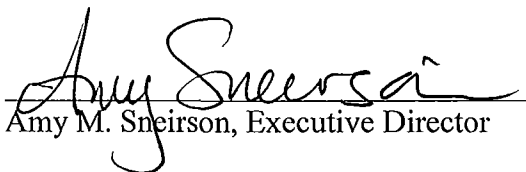
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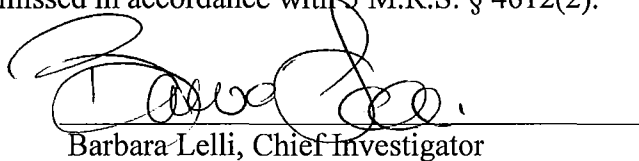
- e) After C.K. concluded her test, Complainant sent J.H., a white female tester, to view the apartment as an applicant. Complainant apparently concluded that since J.H. did not have a negative subjective response to [REDACTED] that sex discrimination was not an issue.
 - h) Complainant did not send a second African-American tester to apply for the apartment to rule out the possibility that [REDACTED] was reacting or responding to factors other than C.K.'s race. Respondent here indicates that [REDACTED] had just gotten out of work when C.K. came to view the apartment; his frown and perceived negative attitude could be a response to his job. Respondent also indicates that [REDACTED] is "not the friendliest person" and that he does not engage in small talk. That may have made C.K. feel funny but not have bothered another African-American tester. It should be noted that this was C.K.'s first assignment as a tester, and she may have been hyper-vigilant.
 - f) Complainant could have made further effort to determine if Respondent was engaging in race discrimination by having C.K. and J.H. apply for the apartment at the same time, and assigning C.K. a stronger objective application than J.H. (e.g., a better job and income, better rent references, better credit.) Then, if [REDACTED] offered the apartment to J.H. and not C.K., there would be a basis for proving that race discrimination had occurred.
- 3) Since Complainant did not demonstrate that C.K. was not offered the same terms, conditions or privileges of rental of a dwelling or not provided the same services or facilities in connection therewith made available J.H., housing discrimination based on race or color is unfounded.

VI. Recommendation:

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

1. There are **Reasonable Grounds** to believe that Respondent [REDACTED] uses a rental application form that asks unlawful questions based on familial status and sexual orientation;
2. Conciliation should be attempted to resolve that portion of the complaint in accordance with 5 M.R.S. § 4612(3).
3. There are **No Reasonable Grounds** to believe that Respondent [REDACTED] discriminates on the basis of race or color against applicants for rental housing;
4. That portion of the complaint should be dismissed in accordance with 5 M.R.S. § 4612(2).


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Barbara Lelli, Chief Investigator