Some (Edited) Cases on Discrimination Testers

Here are three cases illustrating the use of discrimination testers in real-world litigation contexts. If this is hard to read, you can download a pdf version instead.

United States v. Balistrieri, 981 F.2d 916

1992-11-24

MANION, Circuit Judge.

The United States sued Joseph Balistrieri, owner of the Shorecrest Apartments in Milwaukee, and Angelina Hurdelbrink, his rental agent, alleging that Balistrieri and Hurdelbrink committed discriminatory rental practices in violation of the Fair Housing Act, 42 U.S.C. §§ 3601-19. A jury found for the government and awarded damages to several aggrieved individuals and to a Milwaukee fair housing organization, the Metropolitan Milwaukee Fair Housing Council (MMFHC). The district court subsequently imposed an injunction on Balistrieri and imposed civil penalties on him and Hurdelbrink. Balistrieri and Hur-delbrink appeal, raising a plethora of issues regarding liability, damages, and the propriety of injunctive relief; the government cross-appeals the district court's decisions not to allow it to seek damages for two other people and to remove the issue of punitive damages from the jury. We affirm in part and reverse in part,

I.

"Testing" is a method used by organizations such as the MMFHC to ferret out discriminatory housing practices. In conducting a test, the MMFHC sends two people posing as customers, one white and one black, to a realtor, home, or apartment complex. The two people would be as close to identical in distinguishing characteristics other than race — for example, age and marital status — as possible. The two would inquire about the identical type of housing. Differences in response to the two testers — for example, quoting higher prices to a black, or giving the two testers different stories about the availability of an apartment — could indicate discrimination.

The MMFHC decided to perform a test at the Shorecrest Apartments. The test was not prompted by any complaints about discrimination but rather was intended to provide a new tester the opportunity to conduct a test. Carla Herbig, the new tester, who is black, went to the Shorecrest at about 5:30 p.m. on April 25, 1989, and met with Hurdelbrink. After Herbig told Hur-delbrink she was interested in a one-bedroom apartment for May or June, Hurdel-brink showed her apartment 321 and told her the rent was $500 per month. Hurdel-brink did not show Herbig any other facilities in the building.

The next day, Kate Lonsdorf, who is white, visited the Shorecrest. Like Herbig,

Lonsdorf told Hurdelbrink she was interested in a one-bedroom apartment for May or June. Hurdelbrink showed Lonsdorf the same apartment she showed Herbig, but told her the rent was $480 per month. Hurdelbrink also showed Lonsdorf the building's storage and laundry facilities and told Lonsdorf about the building's restaurant.

After reviewing the results of this test, Carla Wertheim, MMFHC's. associate director, suspected discrimination and decided that more tests would be appropriate. Thus, on April 29, Kim Davis, who is black, visited the Shorecrest and told Hurdelbrink she wanted a two-bedroom apartment. Hurdelbrink responded that no two-bedroom apartments were available. However, Hurdelbrink did show Davis a three-bedroom apartment and told her the rent was $850 per month. Hurdelbrink also told Davis that she might have some two-bedroom apartments after June, for which the rent would be $850 per month.

About one hour after Davis left, Lynn Connolly, a white tester, arrived at the Shorecrest. Connolly, like Davis, told Hur-delbrink that she was looking for a two-bedroom apartment. Hurdelbrink told Connolly that no two-bedroom apartments were currently available. However, Hur-delbrink did show Connolly an office that was to be converted into a two-bedroom apartment that would be available June 1 for $700 per month. Hurdelbrink also showed Connolly a vacant three-bedroom apartment and told Connolly that the apartment could be converted to a two-bedroom apartment which would rent for $875 per month. When Connolly asked about an application, Hurdelbrink gave her one.

On May 5, Carol Cunningham, who is white, met with Hurdelbrink at the Shore-crest and told Hurdelbrink she was interested in a one- or two-bedroom unit. Hur-delbrink showed Cunningham a two-bedroom unit on the eighth floor with a quoted rent of $850 per month, a one-bedroom apartment on the second floor with a quoted rent of $475 per month, and a one-bedroom apartment (with no rent quoted) on the third floor, apartment 321. Hurdel-brink also told Cunningham that two other one-bedroom apartments were available.

The next day, Sheryl Sims-Daniels, who is black, visited the Shorecrest. She told Hurdelbrink she was interested in one- and two-bedroom apartments. Hurdelbrink showed Sims-Daniels apartment 801, a two-bedroom, and told her the rent was $875 per month. Hurdelbrink also showed her apartment 321 and told her the rent was $525 per month. Hurdelbrink did not show Sims-Daniels any other apartments. When Sims-Daniels asked to fill out an application, Hurdelbrink told her she could not because of uncertainty about any apartments being available at the time.

MMFHC conducted two more tests. For the fourth test, Barry Zalben, who is white, met with Hurdelbrink at the Shorecrest on May 11, 1989, and asked about one- and two-bedroom apartments. Hurdelbrink showed him apartment 801, a two-bedroom apartment, and told him the rent was $875 per month. Hurdelbrink also showed Zal-ben two one-bedroom apartments; apartment 615, for which she told him the rent was $500 per month, and apartment 308, for

which she told him the rent was $475 per month. Hurdelbrink told Zalben that all three apartments would be available sometime between June 1 and June 4. Hurdelbrink called Zalben on May 17, but he did not return her call.

Greg Thompson, who is black, spoke with Hurdelbrink at the Shorecrest about one hour after Zalben. Thompson asked to see one- and two-bedroom apartments and told Hurdelbrink that he would like to move in as soon as possible. Hurdelbrink only showed Thompson apartment 615 and told him the monthly rent was $525. Hurdel-brink brought him up to apartment 801 but did not take him inside; she told him the rent was $875 per month. Hurdelbrink told Thompson that both apartments would be available in July. But a white man named Walter Cain (who was not a tester) ended up renting apartment 615 on May 20, paying $500 per month rent. Thompson asked to fill out an application, but Hurdel-brink told him he could not do so until he put down a deposit.

On the final test, Carl Hubbard, who is black, met Hurdelbrink at the Shorecrest on June 5. Hubbard asked to see one- and two-bedroom apartments; Hurdelbrink, claiming that she could not show him any two-bedroom apartments, showed him only one one-bedroom apartment. She told Thompson the rent for that apartment was $525 per month. She did not say when the apartment would be available, told Thompson his name could be placed on a waiting list, and told him also that he could fill out an application only when he was ready to rent. Hurdelbrink asked Hubbard several times about his "creditworthiness" although Hubbard assured her that his credit was fine.

Ed Valent, a white tester, met with Hur-delbrink at the Shorecrest about two hours after Hubbard. Valent told Hurdelbrink that he was interested in one- and two-bedroom apartments, and Hurdelbrink showed him apartment 204, which she told him would be available on June 15 for a rent of $475 per month. She had previously told him over the phone about two other two-bedroom apartments that would become available later. At the Shorecrest, Hurdelbrink told Valent that he could move into a one-bedroom apartment and then move into a two-bedroom apartment when one became available. When Valent asked for an application, Hurdelbrink gave him one.

Besides,the testers, two other witnesses testified about their experiences attempting to rent at the Shorecrest during the spring of 1989. Marva Pattillo, who is black, met with Hurdelbrink at the Shore-crest on May 6 and asked about a two-bedroom apartment. Hurdelbrink showed Pattillo an eighth-floor apartment with a lake view. Pattillo told Hurdelbrink she loved the apartment and was "definitely interested" in it, and asked Hurdelbrink what the rent was. Hurdelbrink said she did not know the rent offhand but would find out. Hurdelbrink called Pattillo several days later and told her the rent was $850 per month. When Pattillo returned to the Shorecrest on May 13 to see the apartment again, she told Hurdelbrink that she liked it and would-need only a day or two to make her plans final. On May 15, Pattillo called Hurdelbrink to say that she would take the apartment. Hurdelbrink was not in, so Pattillo left a message. Over the next week to ten days, Pattillo called Hurdelbrink often at both the Shorecrest and at

home, and left numerous messages at the Shorecrest. But Pattillo's effort was in vain; when she finally reached Hurdelbrink, Hurdelbrink told her the apartment had been rented. Hurdelbrink did show Pattillo another available apartment. But that apartment was smaller, in a state of some disrepair, and did not have as good a view. Pattillo eventually moved into an apartment in another building.

Maureen Wahl, who is white, was also looking for an apartment at about the same time Pattillo was. Wahl first, visited the Shorecrest in mid-April. Hurdelbrink showed her some apartments, but she did not like what she saw. Wahl left Hurdelbrink her card and told Hurdelbrink to call when something else became available. Hurdelbrink called about a week later to say a larger apartment was available. Wahl met Hurdelbrink at the Shorecrest during the first week of May and looked at apartment 801, a large apartment with a "spectacular" (in Wahl's words) view of Lake Michigan.

Wahl liked the apartment immediately. She told Hurdelbrink she would take it, but did not fill out an application or leave a deposit.

Hurdelbrink called Wahl about two weeks later to tell Wahl that other people were interested in apartment 801, and to ask Wahl if she was sure she wanted the apartment. Wahl said she did want the apartment. Sometime later, she followed up those words by mailing a check for July rent to Hurdelbrink. The record does not say exactly when Wahl sent the check; however, the check was dated May 29, so it is fair to infer that Wahl sent it near that date, which was after Hurdelbrink had told Pattillo the apartment had been rented. Wahl did not fill out an application or credit check form although the defendants testified that a completed application and successful credit check were part of their standard operating procedure before renting an apartment. Wahl did not sign a lease until August and did not move into the apartment until September.

The jury found that Hurdelbrink and Bal-istrieri had violated the Fair Housing Act by intentionally engaging in a pattern or practice of discrimination. Although none of the testers suffered any monetary loss, the jury awarded each tester $2,000 as compensation for the emotional distress they said they suffered upon finding out they had been discriminated against. The jury also awarded $5,000 to the MMFHC. The jury awarded no damages to Pattillo because the court had ruled before trial that the government could not seek damages for Pattillo or Kim Williams, another black person against whom the government alleged the defendants had discriminated. In fact, the court barred the government from presenting any evidence regarding Williams at all.

After a post-trial hearing before the court, the court enjoined Balistrieri from further discriminatory rental practices and ordered him to prepare a plan to establish nondiscriminatory rental procedures and ensure that all Shorecrest employees understood their obligations under the Fair Housing Act. The court did not enter an injunction against Hurdelbrink because by the time of the hearing she had resigned her position at the Shorecrest. The court did, however, impose civil penalties of $100 against Hurdelbrink and $2,500 against Balistrieri.

II.

The Fair Housing Act prohibits various forms of discrimination in the sale or rental of housing. Specifically, 42 U.S.C. § 3604 makes it unlawful

(a) 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, a dwelling to any person because of race. . . .

(b) 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 race. . . .

(c) To represent to any person because of race . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

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Having determined that, we move on to the defendants' next argument, which is that the evidence was insufficient to support the jury's finding that they engaged in a pattern or practice of Housing Act violations. They first argue that because none of the testers were actually seeking apartments, there was no Fair Housing Act violation. That is incorrect. In Havens Realty Corp. v. Coleman, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982), the Supreme Court held that falsely informing testers that apartments are unavailable violates § 3604(d), which makes it illegal to misinform "any person" about the availability of housing. Id. at 373, 102 S.Ct. at 1121; see also Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir.1990). Unlike § 3604(a), § 3604(d) does not require a bona fide offer; instead, § 3604(d) creates an enforceable right to truthful information for any person, not just bona fide apartment seekers. Havens, 455 U.S. at 373-74, 102 S.Ct. at 1121. This logic also extends to § 3604(b), which prohibits discrimination against "any person" in the terms or conditions of rentals and, like § 3604(d), does not require a bona fide offer. Therefore, offering black testers apartments at higher rental rates than those offered to white testers discriminates in the terms of rentals and violates the Act.

The defendants also argue that even if the Act did not require that the testers be bona fide applicants, the evidence was insufficient to show that they treated the black testers less favorably than the white testers. We disagree. Five sets of testers testified in this case. In each test, the black person was treated less favorably: he or she was either shown fewer apartments, quoted higher rents, or quoted later dates of availability; in some cases, all those occurred on the same test. Moreover, based on the testimony of Pattillo and Wahl, the jury could reasonably infer that Hurdelbrink made special efforts to rent to Wahl, a white person — going so far as to dispense with the usual requirements of a completed application and a credit check — to avoid renting to Pattillo, who was black. Thus the evidence showed that (at least in those cases) Hurdelbrink consistently treated the black apartment seekers somewhat less favorably than the white

apartment seekers. Based on this evidence, the jury could conclude Hurdelbrink's treatment of the black testers violated the Fair Housing Act's prohibitions against racial discrimination in the terms or conditions for housing rental and against racially-motivated misrepresentations about housing availability.

The government, however, had to prove more than the fact that the defendants discriminated against several people. Section 3614(a) empowers the Attorney General to sue if he has cause to believe that a "pattern or practice" of violations exists. Proof of isolated or sporadic acts of discrimination does not suffice to prove a pattern or practice. Rather, the government must present evidence from which the fact-finder can reasonably conclude " 'that . . . discrimination was the [defendants'] standard operating procedure — the regular rather than the unusual practice.' " King v. General Electric Co., 960 F.2d 617, 623 (7th Cir.1992); United States v. DiMucci, 879 F.2d 1488, 1497 n. 11 (7th Cir.1989) (both quoting International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336, 97 S.Ct. 1843, 1855, 52 L.Ed.2d 396 (1977)).

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Was the evidence here sufficient for the jury to conclude reasonably that discrimination was the defendants' "regular practice"? Based on similar evidence, we upheld a finding of a pattern of discrimination in DiMucci. In that case, the government proved six incidents in which black apartment seekers or testers were treated less favorably than their white counterparts. See 879 F.2d at 1492 & nn. 6-7. We held this showing was sufficient to establish a pattern or practice, commenting that "courts have granted relief based on fewer incidents than these." Id. at 1499 (citing United States v. Pelzer Realty Co., 484 F.2d 438 (5th Cir.1973)). As in DiMucci, the government here has shown that over a relatively brief period (a little more than a month) five black testers and Marva Pattil-lo visited the Shorecrest. In each case, the blacks were treated less favorably than their white counterparts, all being offered less favorable terms and, except in one instance, being shown fewer apartments. As in DiMucci, a jury could reasonably infer that this was more than "isolated or 'accidental' or sporadic." Teamsters, 431 U.S. at 336, 97 S.Ct. at 1855.

King, which was decided after this case was briefed, could be read to indicate that the evidence here was not sufficient to support a finding of a pattern of discrimination. In King, we held that evidence of age discrimination against eleven employees at a GE plant in 1983 and 1984, and six employees in 1985, was not sufficient to show that a pattern of discrimination existed at GE during those periods. See 960 F.2d at 619, 626-627. However, a finding of pattern is a factual finding, and each case must stand on its own facts. Eleven instances of discrimination over two years, or six over one year at a large factory may very well be sporadic; but a jury may reasonably infer that when a defendant who in six chances over the course of little more than a month consistently discriminates, the discrimination is more than a sporadic occurrence. Moreover, King did not cite DiMucci, much less purport to overrule it. DiMucci, which is therefore still good law, requires the conclusion that the evidence in this case was sufficient to

support a finding of a pattern of discrimination.

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[n. 1] Although Pattillo did not remember the number of the eighth-floor apartment she viewed, the government states that it was apartment 801. The defendants do not argue that Pattillo and Wahl did not view the same apartment, and the description of what Pattillo and Wahl saw— a large apartment on the eighth floor with a very good view of the lake — supports the inference that both viewed the same apartment.

United States v. Garden Homes Management, Corp., 156 F. Supp. 2d 413

2001-08-10

OPINION & ORDER

LIFLAND, District Judge.

Defendants Garden Homes Management Corp., Westbound Homes, Inc., Redstone Garden Apartments, Inc., Joseph Wilf and Cathy Rosenstein move for summary judgment dismissing this housing discrimination action. They argue that summary judgment is appropriate because plaintiff, the United States of America ("the Government"), has not presented sufficient, proof to establish that they engaged in a "pattern or practice" of discriminatory conduct. The Government disagrees and submits that the results of its fair housing tests, coupled with substantial independent evidence, show that defendants discriminated against prospective tenants on the basis of race and familial status. Defendant Wilf also seeks summary judgment. He contends that he cannot be held liable for the alleged misconduct of his rental agent. Once again, the Government disagrees. For the following reasons, Defendants' motion is denied in its entirety.

I. BACKGROUND

A. The Parties

This housing discrimination action involves three apartment complexes located in Parsippany, New Jersey: Lakeview Garden Apartments, Redstone Garden Apartments and Westgate Garden Apartments (collectively "the Subject Properties"). (Final Pretrial Order at § 3, p. 5.)

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The first complex, Lakeview Garden Apartments, is a 214-unit property that contains two bedroom apartments. (Id.) JHW Associates, a partnership, owns the Lakeview complex. Defendant Wilf is a partner at JHW Associates. (Id. at p. 6.) The second, Redstone Garden Apartments, comprises 92 units, some of which are two bedrooms. (Id. at p. 5.) Defendant Redstone Garden Apartments, Inc. owns the Redstone complex. (Id.) The final complex, Westgate Garden Apartments, has 152 units. Like the others, it offers two bedroom apartments. (Id.) Defendant Westbound Homes, Inc. owns the Westgate property. Defendant Wilf is an officer of Westbound Homes.

Defendant Garden Homes Management Corp. manages the Lakeview, Redstone, and Westgate complexes. (Id. at p. 6.) It is responsible for establishing rental policies, supervising staff, maintaining vacancy information, evaluating rental applications, and keeping tenant files for each property. (Id.) During 1998, Defendant Wilf served as an officer of Garden Homes. (Id.)

Defendant Rosenstein, an employee of JHW Associates, serves as the rental

agent for the Subject Properties. (Id. at p. 5.) In this capacity, she disseminates vacancy information and shows apartments to interested parties; provides rental applications and information about how to complete them; and verifies answers that applicants furnish. (Id.) The Subject Properties have one rental office, which is located at the Lakeview complex. (Id.)

B. The Fair Housing Tests

In April 1998, the United States Department of Justice, in tandem with the Northern New Jersey Fair Housing Council, began investigating the Subject Properties. The inquiry spanned one month and consisted of three fair housing tests. (Id. at p. 6.) These tests, along with subsequent investigation, allegedly revealed racial discrimination as well as discrimination against applicants with small children.

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All of the tests occurred in roughly the same way. (Defendants' Statement of Material Facts at 24.) On each occasion, an African-American tester inquired about the availability of a two bedroom apartment at the Subject Properties, only to be informed that such units were not available. Within twenty-four hours, a white tester arrived and made the same inquiry. The white tester was told that a two bedroom apartment was available-or would likely become available—and was encouraged to apply. The specific details of each test are as follows.

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1. The April 1998 Test

On April 8, 1998, an African-American female tester went to the rental office and asked whether any two bedroom units were available. Defendant Rosenstein replied that "I hate to tell you. The two bedrooms are at a premium. At a premium. I must have 20 people ahead of the line." (Decl. of Eric I. Halperin at Ex. A, p. 2. ln. 13-15.)

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She further explained that "two bedrooms are very hard in Parsippa-ny. That's my only problem. I have none at this time." (Id. p. 4, ln. 7-9.) She agreed to place the tester on a waiting list, but cautioned that "if you had little children, we would have to only consider you for the first floor." (Id. at p. 3, ln. 8-10.)

A white tester visited the rental office the next morning. She also met with Defendant Rosenstein, who informed her that "the only thing I have, to be very honest with you, is a 2 bedroom here and they're very hard to come by." (Id. at Ex. B., p. 3, ln. 4-6.) Defendant Rosenstein then engaged in sales talk to persuade the tester to take the apartment. (See, e.g., id. at p. 4, ln. 8-11.)

2. The May 6, 1998 Test

On May 6, 1998, an African-American female tester visited the rental office. She inquired about two-bedroom units for June 1, 1998. Defendant Rosenstein

announced that "right now two bedrooms are at a premium ... I don't think there's one complex here in Parsippany that has a two bedroom. That's how bad it is." (Id. at Ex. C. p. 2, ln.11-16.) Defendant Rosenstein promised to put the tester on a waiting list, but warned her that the list had at least twenty names on it already. (Id. at p. 2, In. 18-24.) The tester then asked for a rental application, but Defendant Rosen-stein refused to provide one, declaring that it was not her policy to distribute applications. (Id. at. p. 11, In. 1-7.)

Several hours later, a white tester went to the rental office and asked about a two bedroom for June 1, 1998. Defendant Ro-senstein said that she would probably have a unit available for that date and, if not, that one would be vacant for June 15. (Id. at Ex. D., p. 3, In. 1-7; p. 9, In. 12-22; p. 10, In. 5-7.) She then showed the tester the apartment–which was the same unit offered to the white tester involved in the April 1998 test~and gave the tester a rental application. (Id. at. p. 18, In. 5-9.) In addition, Defendant Rosenstein questioned the tester closely about her family composition to verify that the tester did not have children. (Id. at p. 1, In. 15-19.)

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3. The May 8, 1998 Test

The Government's final test occurred on May 8, 1998. On that date, an African-American male tester went to the rental office and asked for a two bedroom apartment. Defendant Rosenstein immediately retorted that "you are going to have one heck of a time ... It's impossible for a two bedroom. Impossible. They're very, very, very hard to come by. I hate to tell you. I can take yoür name, but I have to tell you there's a long list." (Id. at Ex. E, p. 2, In. 12 18.) She then directed him to other apartment complexes in the area.

A white tester arrived at the rental office less than two hours later. He asked for a two bedroom apartment in mid-June, but was told that it would be difficult to find a vacancy. (Id. at Ex. F, p. 2, In. 14-22.) Defendant Rosenstein then showed the tester an apartment that might be available for that date-the same apartment that she showed to each of the prior white testers-but informed him that two other individuals were interested and that they had priority. (See, e.g., id. at p. 12, In. 18-20.) She suggested that the tester could have the apartment if the other individuals did not take it and told him what he needed to do to obtain a lease. (Id. at p. 6, In. 9-13.) Defendant Rosenstein also gave the tester a rental application. (Id. at In. 19-21.) On May 13, 1998, Defendant Rosen-stein called the tester to find out if he was still interested in the apartment. (Id. at Ex. G, p. 2, In. 17-24.)

C. The Government's Subsequent Investigation

The Government developed evidence in addition to the results of its fair housing tests.

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The investigation identified Steven Jackson as a racial discrimination victim. Mr. Jackson, an African-American, avers that he went to the rental office in early January 1999 seeking a two-bedroom. (Id. at Ex. H, 3.) Defendant Rosenstein allegedly told him that she did not have anything available. (Id. at 4.) However, after receiving notice of the Government's intention to file this suit, (Id. at Ex. K), Defendant Rosenstein contacted Mr. Jackson and offered him an apartment, (Id. at Ex. H, 6).

In addition to Mr. Jackson, the Government located Patricia Dacres, an African American mother of one. (Id. at Ex. I, 2-4.) Ms. Dacres declares that she went to the rental office in April 1999 looking for a two bedroom for herself, her husband, and her infant son. (Id.) She walked through an available second floor apartment and subsequently obtained, an application. After she disclosed that she had a young child, Defendant Rosenstein tried to dissuade her from taking the unit. (Id. at 8-9.) Ms. Dacres then left the rental office and completed the application. She returned several days later, at which time Defendant Rosenstein "attempted to discourage [her] from renting the second floor apartment that [she] was applying for. [Defendant Rosenstein] stated, that children should be on the first floor. [Defendant Rosenstein] said, in fact it's illegal to rent to children on the second floor and that she had no first floor apartment available." (Id. at 10.) Garden Homes ultimately denied Ms. Dacres' tenancy application. (Id. at 14.)

The Government also identified witnesses who will testify that Defendants adhered to a policy of discrimination against families with small children. For example, Rodney Lynch, a current first-floor resident of the Lakeview complex, asserts that Defendant Rosenstein told him that he could not rent a second-floor unit because he had children. (Id. at Ex. S, 7.) Jacquelyn Footman, a former first-floor Lakeview tenant, allegedly experienced similar treatment. (Id. at Ex. U, 5.) Finally, and most significantly, Defendant Rosenstein herself expressed a preference for keeping families with small children off the upper floors of the Subject Properties. During her deposition she testified that she followed this policy and that her supervisor knew as much. (Id. at Ex. J, p. 122, In. 17 to p. 123, In. 22.) However, she reiterated that her policy was not ironclad and that she never refused to rent apartments because of the presence of children.

D. Procedural History

Based on its fair housing tests and subsequent investigation, the Government filed suit on June 21, 1999. It accuses Defendants of violating the Fair Housing Act by committing racial and familial status discrimination. It seeks a combination of legal and equitable relief to remedy these alleged wrongs.

Defendants submit that the record contains insufficient evidence that they followed a pattern or practice of discrimination on any basis. Because the establishment of a pattern or practice is a predicate for liability under the Fan-Housing Act, they argue that the Government cannot prevail as a matter of law. Accordingly, Defendants move for summary judgment.

Defendant Wilf also pursues summary judgment. He contends that he cannot

be held accountable for the illicit acts of his rental agent and that dismissal is warranted as to him.

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III. DISCUSSION

A. Pattern or Practice of Discrimination

The Fair Housing Act prohibits various forms of discrimination in the rental housing market. Specifically, the Act makes it unlawful:

(a) 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, a dwelling to any person because or race, color, religion, sex, familial status, or national origin.

(b) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is. not available for inspection, sale, or rental when such dwelling is in fact so available.

42 U.S.C. § 3604(a)-(d). The Act also empowers the Government to enforce these bans. It does not confer unlimited authority however. Rather, the Government may bring a civil action against "any person or group of persons ... engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this [Act] ... " 42 U.S.C. § 3614(a). The existence of a pattern or practice of discrimination is a predicate to the Government's ability to maintain a Fair Housing Act suit. See United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 122-23 (5th Cir.1973), cert. denied, 414 U.S. 826, 94 S.Ct. 131, 38 L.Ed.2d 59 (1973) (noting that the Government has standing to sue when a pattern or practice exists).

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To establish a pattern or practice, the Government must do more than submit proof of discrimination. It must show "by a preponderance of the evidence that ... discrimination was the company's standard operating procedure... the regular rather than the unusual practice." Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 336, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Isolated, accidental, or sporadic instances of discrimination are insufficient. Id.

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While Defendants' misconduct must be more than isolated to rise to the level of an actionable pattern or practice, there is no threshold number of incidents that must occur before the Government may initiate litigation. See Bob Lawrence Realty, 474 F.2d at 123-24. Indeed, " 'the number of [violations] ... is not determinative ... no mathematical formula is workable, nor was any intended. Each case must turn on its own facts.' " Id. at 124 (quoting United States v. West Peachtree Tenth Corp., 437 F.2d 221, 227 (5th Cir.1971)). Whether the evidence presented demonstrates a pattern or practice is ordinarily a question

of fact for the jury. See United States v. Balistrieri, 981 F.2d 916, 930 (7th Cir.1992).

1. Pattern or Practice of Racial Discrimination

A jury viewing the record could reasonably conclude that Defendants routinely discriminated. In Balistrieri, the Seventh Circuit affirmed a jury's determination that the defendants engaged in a pattern of discrimination. The evidence in that case is strikingly similar to the evidence now before the Court. There, a local housing organization tested the defendants' apartment building five times in just over one month. During the tests, black and white testers asked to see one or two bedroom apartments. They received different responses based on their race. Their testimony showed that the building's rental agent (1) quoted black testers higher rents than their white counterparts; (2) neglected to show black testers available apartments but took white testers on complete tours; and (3) provided rental applications to white testers while refusing to give them to black testers. Balistrieri, 981 F.2d at 924-25, 929. In addition, two non-tester witnesses came forward and testified. The first, a black individual, recounted the trouble she had trying to rent from defendants. The second, a white individual, testified about how defendants facilitated her application. Id. at 925-26. The Seventh Circuit agreed that these incidents established a pattern. The Court was particularly impressed with the chronology of events, stating that "a jury may reasonably infer that when a defendant who in six chances over the course of little more than a month consistently discriminates, the discrimination is more than a sporadic occurrence." Id. at 930.

Like Balistrieri, the investigation in this case occurred over a relatively brief period. In the span of one month, the Government tested the Subject Properties three times. Defendant Rosenstein treated black testers differently than white testers on each occasion. She told black testers that two bedroom units were unavailable, when it appears that at least one such unit was vacant. Within hours after each black tester departed, she informed a white tester that a two bedroom was available or would likely become so. In addition, Defendant Rosenstein encouraged white testers and showed them vacant apartments. In one instance, she even followed up to verify a white tester's interest. In marked contrast, she generally discouraged black testers, suggested that two bedroom units were impossible to locate, and instructed them to put their names on a fictitious waiting list if they desired to pursue a unit.

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Defendant Rosenstein also refused to supply rental applications to interested black testers, but gave applications to white testers.

The Government's evidence creates a genuine issue of fact for the jury. See Balistrieri, 981 F.2d at 930. While, in the abstract, three fair housing tests might not necessarily reflect Defendants' rental practices, the tests at issue are particularly probative. They all occurred within one month and yielded virtually identical results. The timing and uniform results of these tests give rise to a permissible

inference that racial discrimination is not a sporadic event but, instead, is part of the way that Defendants do business. Id. The statements of Ms. Dacres and Mr. Jackson, viewed in the light most favorable to the Government, buttress this conclusion. Ms. Dacres, an African American, avers that Defendants denied her rental application and Mr. Jackson, who is also African American, relates that he secured an apartment only after the Government filed this suit. Their experiences, which occurred after the Government's testing ended, arguably show that Defendants' discriminatory practices are pervasive, not an aberration limited to a discrete period of time. Because these inferences and conclusions are permissible, there exists a genuine issue as to whether Defendants consistently discriminated. Therefore, summary judgment must be denied.

Defendants attempt to resist this outcome on several grounds. First, they argue that the Government has presented only three instances of misconduct. (Defendants' Br. in Support of Motion for Summary Judgment at p. 15.) In their view, this is the "bare minimum" number of acts needed to establish a pattern or practice. (Id. at. p. 16.) Defendants are incorrect on both points. In addition to its three fair housing tests, the Government identified two additional witnesses — Ms. Dacres and Mr. Jackson — who will testify about Defendants' rental practices. Thus, the record contains evidence of at least five incidents of racial discrimination. More importantly, Defendants' focus on the number of incidents is misplaced. The Fair Housing Act does not obligate the Government to prove a minimum number of violations to establish a pattern or practice of discrimination. See Bob Lawrence Realty, 474 F.2d at 124; cf. DiMucci, 879 F.2d at 1499 (recognizing a pattern of discrimination where "defendants refused on occasion to rent to black bona fide apartment seekers, gave black and white testers differing information on the availability of apartments, and treated black testers significantly differently from white testers") (emphasis supplied); United States v. Big D Enterpr., Inc., 184 F.3d 924, 931 (8th Cir.1999), cert. denied, 529 U.S. 1018, 120 S.Ct. 1419, 146 L.Ed.2d 311 (2000) (finding that discrimination against three individuals was sufficient).

Second, Defendants argue that a pattern or practice does not exist because tests at a fourth property revealed no discrimination. Defendant Garden Homes either owns or manages a Connecticut apartment complex known as Aspen Woods. Almost a year after it filed this suit, the Government began investigating Aspen Woods for national origin discrimination. Defendants contend that the Aspen Woods investigation resulted in a no-discrimination finding, which shows that discrimination does not pervade their business practices.

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Assuming that the purported results of the Aspen Woods investigation are relevant and admissible, that evidence does not compel summary judgment for Defendants. Whether a pattern or practice exists is a question of fact for the jury. See Balistrieri, 981 F.2d at 930. At best, the Aspen Woods evidence contradicts the rest of the Government's proofs and creates a factual dispute. The jury, not this Court, must resolve that dispute by evaluating the Aspen Woods evidence,

determining whether it is credible, weighing it against all the evidence presented, and ultimately deciding if it defeats the Government's case. Id.

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Third, Defendants proffer statistics to counter the existence of a pattern or practice. These statistics purportedly show that the percentage of African Americans living in the Subject Properties exceeds the percentage of African Americans living in Morris County, New Jersey or Parsippa-ny, where the Subject Properties are located. These figures are not determinative for several reasons. The most glaring is that they are faulty. At least two of the individuals that Defendants counted as African Ameriean-for purposes of calculating the percentage of African American tenants-are in fact white. (Halperin Decl. at Ex. Q, 6-8.) This error skews Defendants' calculations.

Moreover, while statistical proof is relevant in housing discrimination actions, it does not carry dispositive weight. See United States v. Housing Authority of the City of Chickasaw, 504 F.Supp. 716, 729 (S.D.Ala.1980). Defendants' figures must be weighed along with all the other evidence presented to determine if a pattern or practice exists. The jury is responsible for conducting that weighing process. See Balistrieri, 981 F.2d at 930.

Finally, the mere presence of black tenants at the Subject Properties does not preclude the Government from establishing a pattern or practice of racial discrimination. In an analogous context, the Third Circuit announced that "we need not find that [the defendant] always discriminated to find that it engaged in such a pattern or practice." Lansdowne Swim Club, 894 F.2d at 89. This statement recognizes that a defendant might on occasion make exceptions to its discriminatory norm, but that such exceptions do not bar liability. The Third Circuit's holding precludes summary judgment in this case. It is possible that Defendants took in a small number of African American tenants to disguise their discriminatory practices. Cf. Davis v. Mansards, 597 F.Supp. 334, 345 (N.D.Ind.1984) (finding a pattern even though defendants rented to blacks "in significant numbers," because defendants sought "to control the complex's black population by discouraging all negro applicants, allowing a few of the most promising apartment seekers to apply, and finally choosing to rent to those black applicants who pass some secret test unrelated to apartment availability"). Or Defendants may have adopted discriminatory practices to prevent the minority population from growing. Or, as Defendants now argue, the Subject Properties may house black tenants because Defendants do not routinely discriminate. Each of these explanations is plausible. It is the jury's task to decide which one, if any, fits the facts of this case. See Balistrieri, 981 F.2d at 930.

For all of these reasons, there exists a genuine issue of fact as to whether Defendants engaged in a pattern and practice of violating 42 U.S.C. § 3604. Thus, summary judgment must be denied.

2. Pattern or Practice of Familial Status Discrimination

. . .

Defendants challenge this conclusion for several reasons. Their primary argument is that the Subject Properties contain a high percentage of tenants with children, and that a large number of these families live in second floor residences. As previously noted, statistical evidence is not dispositive. See Chickasaw, 504 F.Supp. at 729. It must be weighed along with all the other proofs to determine whether a pattern exists. See Balistrieri, 981 F.2d at 930. Moreover, the mere fact that in the past Defendants rented second floor units to families with children does not preclude the jury from finding that Defendants now adhere to a contrary pattern or practice. See Lansdowne Swim Club, 894 F.2d at 89; Davis, 597 F.Supp. at 345.

Defendants also question some of the Government's evidence. Specifically, they maintain that Ms. Dacres' rental application was denied for credit reasons, not because she is African American or has a small child. However, they submit no evidence to support this claim. Even if they had, their contention merely creates a factual dispute that must be resolved at trial. See Balistrieri, 981 F.2d at 930. Given the evidence supporting the Government's case, a jury would be entitled to reject Defendants' credit denial explanation. See United States v. Reddoch, 467 F.2d 897, 899 (5th Cir.1972) (affirming conclusion that credit check was employed as a ruse to cover up racially motivated denials). Moreover, a jury could accept Defendants' credit denial justification and still find that Defendants discriminated against Ms. Da-cres because discrimination does not have to be the sole reason for Defendants' conduct. See Selden v. United States Dep't of Housing & Urban Development, 785 F.2d 152, 161 (6th Cir.1986). As long as the Government shows that "familial status was a motivating factor (though not necessarily the sole motivating factor) in the allegedly violative [denial]," Branella, 972 F.Supp. at 298 (emphasis original), then Ms. Dacres' experience would support the existence of a pattern or practice. Therefore, Defendants' credit denial argument does not require dismissal.

Greater New Orleans Fair Housing Action Center, Inc. v. Hotard, 275 F. Supp. 3d 776

2017-08-07

SECTION "R" (3)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SARAH S. VANCE, UNITED STATES DISTRICT JUDGE

1. INTRODUCTION

This case arises from allegations of' housing discrimination at an apartment building located at 3839 Ulloa Street, in New Orleans, Louisiana. The building is owned and operated by Defendants Jim Hotard and 3839 Ulloa Street, LLC.

Plaintiff Greater New Orleans Fair Housing Action Center, Inc., filed this lawsuit on April 23, 2015, asserting a claim under the Fair Housing Act (FHA), 42 U.S.C. § 3601, et seq. Plaintiff seeks declaratory and injunctive relief, damages, attorneys' fees, and costs.

Plaintiffs complaint alleged that defendant Hotard treated potential renters for his property differently on the basis of their race. More specifically, plaintiff alleges that Hotard refused to respond to email inquiries regarding his property from African-American testers but responded promptly to email inquiries from white testers. Further, plaintiff alleges that Hotard responded less favorably to phone inquiries from African-American testers than he did to phone inquiries from white testers.

On July 17, 2017, the Court held a bench trial. The Court has jurisdiction over plaintiffs FHA claim under 28 U.S.C. §§ 1331, 1343(a)(3), and 42 U.S.C. § 3613. After hearing live testimony and reviewing all the evidence, the Court rules as follows.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

. . .

The Greater New Orleans Fair Housing Action Center (GNOFHAC)-is a private section 501(c)(3) nonprofit organization that works to end housing discrimination and segregation in Louisiana.

The organization focuses on four areas: enforcement (ie., bringing claims on behalf of individuals who have experienced housing discrimination), policy advocacy, education and outreach, and homeownership protection.

One of the ways that GNOFHAC identifies housing discrimination is through testing. Testing is an investigative tool commonly used by fair housing organiza-

tions to determine if landlords and others offering housing are discriminating or engaging in differential treatment.

GNOFHAC's Investigations Coordinator Michelle Morgan testified that GNOFHAC gives paired testers "profiles" that include assigned' information on the tester's income, education, work history, and other information relevant to housing. The testers are equally qualified for the housing, and similar in all relevant characteristics except for the characteristic subject to testing. For example, if testing for racial discrimination, the testers' profiles will match except for race. The testers record their interactions with landlords through audio-recording devices, and also provide written reports of their encounters.

GNOFHAC provides their testers with a training manual, in-class training exercises, and mock encounters. Morgan testified that the testers are not told in advance what they are testing for, as to not bias or compromise the test. The testers are compensated for their work.

B. The Tests, and GNOFHAC's Response

Morgan testified that in March of 2013, a Craigslist advertisement for two available units at Hotard's Ulloa Street property came to her attention. Morgan was not sure how she came across the ad, and suggested that either a staff member referred it to her, or she came across it during her own search of new advertisements.

Morgan testified that the ad stuck out to her because it said "no Section 8" on it, and Morgan believed this was coded language suggesting that the units were not available to African * Americans.

As the advertisement-solicited email responses, Morgan decided to conduct an email test. Morgan reached out to Jesse Chanin and Denise Frazier, two previous testers with multiple years of experience conducting tests for GNOFHAC.

Jesse used the name "Jessy," and Denise used the name "Trynesse," which Morgan testified is an identifiably African-American name.

On March 11, 2013, the testers sent similarly worded emails to Hotard, both indicating an interest in the apartment and requestr ing further information to set up a viewing. Hotard responded to Jessy with his phone number, but did not respond to Trynesse.

Based on the lack of response, Morgan decided to set up a second test to be conducted that same day. This time, instead of using actual testers, Morgan decided to create fake email addresses and email Hotard herself. Morgan used the names "Jahmal" and "Marzy," and when asked why she used those names, Morgan asserted that Jahmal is "identifíably African American." As with the first test, the emails sent to Hotard were similarly worded and both sought a time to view the apartment. Hotard responded to Marzy and offered to show her the apartment, but Hotard did not respond to Jahmal's email.

Morgan then decided to set up a third email test. For the third test, conducted on March 13, 2013, Morgan used the names "Demaria" and "Elizabeth." Morgan testified that she felt "Demaria" was "identifíably African American" and that "Elizabeth" was "neutral." As with the first two tests, Hotard responded to Elizabeth's email but did not respond to Demaria's.

On March 26, 2013, Hotard placed another ad for the same units on Craigslist, but this ad requested phone inquiries instead of emails. Morgan testified that she wanted to continue testing, but because the advertisement changed to phone inquiries, Morgan switched to phone tests.

For her first phone test, Morgan reached out to Herschel Williams and Alex Owen, two testers with experience testing for GNOFHAC. Morgan gave Herschel and Alex their testing profiles, and a contact number to call Hotard. Herschel and Alex recorded their phone calls to Hotard, and the recordings were played for the Court.

On March 27, 2013, Herschel called Hotard's number listed on the ad. He reached Hotard's voicemail, which listed another number to contact if interested in apartment vacancies. After leaving a voicemail, Herschel proceeded to call that second number, and left a voicemail there as well. While Herschel was on the phone, Hotard called him back, but did not leave a message. Herschel then tried Hotard again on both March 27 and 28, leaving multiple voicemails, and also texted him. Hotard never called Herschel back.

Also on March 28, Alex called Hotard and left a voicemail. Hotard called Alex back shortly thereafter, and the two briefly discussed the apartment and set up a time for Alex to view the apartment on April 1. Alex viewed the apartment with Hotard on April 1, and on April 4, Hotard called Alex again to see if he was still interested in the apartment.

Morgan then set up the fifth and final test, to be conducted over April 4 and 5. Morgan picked Jahmal Clark and Matt Robinson for this test, two individuals with previous testing experience. On April 4, Jahmal called Hotard on both numbers and left messages on both. Shortly after, Hotard called Jahmal back, and the two discussed the unit and a possible visit. Jahmal asked if he could see the apartment on the following day (April 5), and Hotard told him he would be out of town. Hotard also said he was very busy that weekend, but that Monday would be a "great day." Hotard told Jahmal to call back Monday morning to set up the viewing.

That following day at 2:50 p.m., the same day Hotard told Jahmal he would be out of town, Matt called Hotard. Hotard answered, and when Matt asked to see the apartment, Hotard told him to come by that day at 3:30 p.m. Matt then met Hotard at the apartment building and viewed the unit. On that following Monday, Jahmal called Hotard back and left a voicemail, but Hotard never called Jahmal back.

Following this fifth test, Morgan felt that GNOFHAC had enough evidence to

initiate a complaint.

. . .

The Court finds Hotard's testimony that he did not know the race of the testers that contacted him to be credible, especially because it is uncontested that he never saw any of the African-American testers. Plaintiff seeks a finding from the Court that Hotard knew the race of the African-American email testers based solely on their names, and knew the race of the phone testers based solely on their voices. But even assuming that awareness of a name and voice alone could establish one's knowledge of another's race, the Court finds that plaintiff has failed to show that Hotard knew the tester's races based on their names and voices in this case. Plaintiff provides no expert testimony to support its contention, even though expert testimony is typically used to prove linguistic profiling or that race is identifiable by a person's name. See, e.g., U.S. E.E.O.C. v. Target Corp., 460 F.3d 946, 961-62 (7th Cir. 2006) (noting that EEOC "presented expert testimony indicating that some people can determine a speaker's race based on his or her voice or name"); United States v. Bostic, 713 F.2d 401, 404 (8th Cir. 1983) (noting that witness's testimony that he identified defendant's race based on defendant's voice should be viewed with "circumspection" because the witness was not a linguistic expert); United States v. Housing Authority of City of Chickasaw, 504 F.Supp. 716, 725-26 (S.D. Ala. 1980) (finding study not reliable because no evidence established qualifications of pollsters to. identify race of person on the basis of person's voice); see also Michael Erard, Language Matters, 5 J. L. & Soc. Challenges 225, 225 (2003) (discussing use of linguistic profiling expert testimony in housing discrimination cases); Dawn L. Smalls, Linguistic Profiling and the Law, 15 Stan. L. & Pol'y Rev. 579, 586-87 (2004) (same); Audrey J. Lee, Unconscious Bias Theory in Employment Discrimination Litigation, 40 Harv. C.R.C.L. L. Rev. 481, 493-500 (2005) (discussing role of expert testimony in discrimination cases based on implicit bias towards names and voices).

Further, other courts in similar discrimination cases have cast doubts on these evidentiary arguments. See Bafford v. Township Apartments Assocs., No. 06-657, 2007 WL 4247763, at *5 (M.D. Fla. Nov. 30, 2007) (stating that plaintiffs "speculation" that defendant's real estate broker knew plaintiffs race based solely on their telephone conversations was "insufficient to impute knowledge of his race to" the real estate broker); see also Wharton v. Knefel, 562 F.2d 550, 552 n.9 (8th Cir. 1977) (noting that district court expressed that "there isn't a way in the world that this Court at least could ascertain by his voice what his race was"); City of Chickasaw, 504 F.Supp. 716, 725-26 (S.D. Ala. 1980).

The Court also finds Hotard's testimony that an individual's name would not affect his decision to respond to an email or return a call to be credible. It is undisputed that the vast majority of Hotard's units have been rented to African-Americans, and Hotard's and Golson's testimony make clear that Hotard has, in more than one instance, gone out of his way to accommodate potential African-American tenants and work with them to fill out the necessary paperwork

so that they can move into his units.

. . .

[note 107] Direct evidence as relevant here would be evidence "which, if believed, proves" that race was a motivating factor in Hotard's decision "without inference or presumption." See, e.g., Jones v. Robinson Property Group, L.P., 427 F.3d 987, 992 (5th Cir. 2005) (citations omitted).