

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
Bobbie Burris,

Charging Party,

and

Bobbie Burris,

Complainant/Intervenor,

v.

Jess Aylett, Barbara Aylett, and
William Justin Memmott,

Respondents.

HUDALJ 08-90-0283-1

Decided: May 24, 1993

Andre G. Pineda, Esquire
For the Secretary

Kevin S. Reed, Esquire
Kerry Alan Scanlon, Esquire
For the Complainant

Larry S. Jenkins, Esquire
For the Respondents

Before: PAUL G. STREB
Administrative Law Judge

INITIAL DECISION AND ORDER

STATEMENT OF THE CASE

On September 12, 1990, Bobbie Burris filed a complaint alleging that she had been discriminated against on the basis of race and color while attempting to rent a home. The complaint was filed and processed pursuant to the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* ("Fair Housing Act" or "Act"). The Department of Housing and Urban Development ("HUD" or "the Government") investigated the complaint, and after deciding that there was reasonable cause to believe that discriminatory acts had taken place, issued a charge against Jess and Barbara Aylett on September 30, 1992. The charge was subsequently amended to add allegations and to add William Justin Memmott as a Respondent. On November 24, 1992, the Complainant's motion to intervene as a party was granted. A hearing was held in Salt Lake City, Utah on January 27, 1993. The record closed on March 30, 1993, upon the receipt of briefs from all parties.¹

ANALYSIS, FINDINGS AND

CONCLUSIONS

Background

Jess and Barbara Aylett are married and reside in Sandy, Utah. Tr. 332-33.² William Justin Memmott is the 21-year-old son of Ms. Aylett. He is in the Air Force and resides in Monterey, California, but he resided with the Ayletts in August 1990. Tr. 217-18. The Ayletts and Mr. Memmott are White persons. In March 1989, Mr. Aylett executed a quitclaim deed granting to Mr. Memmott a duplex ("the duplex") located at 2384 South 1480 West, West Valley City, Utah. Ex. R-8. Mr. Aylett holds the mortgage on the duplex and manages it as a rental property. Tr. 256, 263-64, 311.

Bobbie Burris, who is a Black woman, resides in Salt Lake City, Utah. In August 1990, she was seeking to rent a home in West Valley City. On or about August 22, 1990, she noticed a "for rent" sign affixed to the duplex. Tr. 56-59. After receiving a tour of the duplex from a tenant, Ms. Burris called Mr. Aylett and expressed her interest in renting it. During their discussion of matters concerning the rental of the duplex, she told him that she was in a rent-subsidy program, and that he would have to sign some documents required by the program. Mr. Aylett told her that she should drop the documents off at his home, and that he would complete them. Tr. 59-60, 258. He did not mention this matter to his wife. Tr. 259.

¹ Subsequently, Complainant requested an opportunity to submit a reply brief and Respondents objected. Upon consideration of the motion and response, it is ordered that the motion is denied.

² The following abbreviations are used in this decision: "Tr." for "Hearing Transcript"; "Ex. G" for "Government's Exhibit"; "Ex. R" for "Respondents' Exhibit."

Following this conversation, Ms. Burris drove to the Aylett home with her 21-year-old daughter, Stormie Manzanares. Ms. Burris explained to Ms. Aylett that she wanted to rent the duplex, and that she had brought rent-subsidy documents for Mr. Aylett to complete. Mr. Aylett was not at home, and Ms. Burris expressed a need to have the documents completed quickly so she could return them to the local housing authority. Consequently, Ms. Aylett invited Ms. Burris into the house and completed the documents for her. Tr. 61-67, 334-37. During their pleasant one-hour visit, Ms. Aylett and Ms. Burris realized that they had gone to high school together 20 years ago, and they reminisced about school and their classmates. Tr. 78. Ms. Manzanares was present during part of the conversation, but she returned to the car after a while and was not present when her mother left the house. Tr. 79. Mr. Memmott was present during part of the conversation, including the time when Ms. Burris departed. Tr. 110.

After her visit with Ms. Aylett, Ms. Burris delivered the completed documents to the local housing authority and arranged for an inspection of the duplex, which was conducted on September 6, 1990. Tr. 84, 90-91. Because numerous repairs were needed, the duplex failed the inspection. Ms. Burris notified Mr. Aylett and asked him to make the repairs. Tr. 85-88. Subsequently, Joe Trujillo, a light-skinned person whose race was not identified, applied to rent the duplex. Mr. Aylett accepted Mr. Trujillo's offer to rent the duplex with a reduced deposit in return for cleaning it and making some repairs. Tr. 83-92, 182-87. On September 9, 1990, when Ms. Burris called Mr. Aylett to ask him about the status of the repairs, he told her that he had rented the duplex to someone else. Tr. 83, 92.

Allegations In The Charge

The charge alleges that, as Ms. Burris was leaving the Aylett home on August 22, Ms. Aylett told her that, "My husband will never rent to a Black person." The charge alleges further that Ms. Aylett also told Ms. Burris that, despite her race and color, Ms. Aylett would recommend her as a tenant to her husband.

The Government contends that Ms. Aylett's statement that her husband would never rent to a Black person constitutes a violation of 42 U.S.C. § 3604(c), which prohibits, among other things, the making of statements concerning the rental of a dwelling that indicate any preference, limitation, or discrimination based on race or color. The Government contends that Ms. Aylett's statement that she would recommend Ms. Burris despite her race shows that Ms. Burris, because of her race and color, needed a special recommendation from Ms. Aylett to rent the duplex. The Government contends that the need for such a recommendation violates 42 U.S.C. § 3604(b), which prohibits, among other things, discrimination on the basis of race and color in the terms and conditions of rental.³

³ Complainant contends that Respondents also discriminated against her on the basis of race and color in violation of 42 U.S.C. § 3604(a) by refusing to rent the duplex to her. I have not considered that allegation because it was not included in the charge.

Analysis Of The Allegations

The Government bears the burden to prove the allegations in the charge by a preponderance of the evidence. See *United States v. Balistreri*, 981 F.2d 916, 930 (7th Cir. 1992). Upon consideration of the entire record, I conclude that the Government has not met its burden to prove the allegations. The preponderance of the evidence does not show that Ms. Aylett made the alleged statements, or that she even had reason to make them.⁴

In brief, the evidence concerning the alleged statements is as follows. According to Ms. Burris, Ms. Aylett made the alleged discriminatory statements to her "out of the blue" while they stood at the door immediately prior to her departure. Ms. Burris testified that Ms. Aylett told her that, "My husband would never rent to Black people," but that she "would talk to him" and "make things okay." Tr. 80, 126. Her testimony was supported in part by Ms. Manzanares, who testified that, when her mother returned to the car, she said Ms. Aylett had stated that her husband would not rent to Black persons.⁵ Tr. 138. Ms. Aylett denied making the statements. Tr. 339. Her testimony was supported by Mr. Memmott. Tr. 223.

I found Mr. Memmott to be the most credible witness. He was the only eyewitness to the conversation. He was present at the door, standing only three feet away, when Ms. Aylett allegedly made the statements. Tr. 136-37, 223. He could hear everything that was being said by Ms. Burris and Ms. Aylett. Tr. 223. Ms. Burris acknowledged that he had witnessed the alleged discriminatory remarks. Tr. 110; Ex. G-10, 11. However, Mr. Memmott was certain that his mother did not say that her husband would never rent to a Black person. Tr. 223-25. He testified that, if Ms. Aylett had made the statement, he would have confronted her about it because of his strong views against discrimination. Tr. 224-25.

Although the Government contends that Mr. Memmott is not credible, I disagree. The inconsistencies in his testimony pointed out by the Government are not sufficiently serious to impair his credibility. Based on my observation of his demeanor, I found him to be very frank and sincere. Despite the fact that he is a Respondent and Ms. Aylett's

⁴ In view of these conclusions, it is unnecessary to address the Government's arguments that Mr. Aylett is liable for his wife's actions because she was his agent, and that Mr. Memmott is liable because he owns the duplex.

⁵ Respondent objected to the admissibility of Ms. Manzanares' testimony on the ground that it was hearsay. Complainant argued that the testimony constituted a present sense impression and was thus admissible as a hearsay exception. I reserved judgment on the issue, and the parties addressed it in their briefs. Upon consideration of the arguments, I find that the testimony constitutes a present sense impression under Rule 803(1) of the Federal Rules Of Evidence. Therefore, the objection is overruled.

son, I found his testimony to be very convincing. Thus, I place great weight on his eyewitness testimony that Ms. Aylett did not make the alleged statement.

I also found Ms. Aylett's denial that she made the statements to be credible. Although the Government contends that Ms. Aylett is not believable, I disagree. Based on my observation of Ms. Aylett's demeanor, I found her testimony to be very sincere. The inconsistencies in her testimony pointed out by the Government are not sufficiently serious to impair her credibility.

Although there was nothing in the demeanor of Ms. Burris and Ms. Manzanares that reflected adversely on their credibility, I did not find their demeanor to be superior to that of Mr. Memmott and Ms. Aylett. While I disagree with Respondents' assertion that Ms. Manzanares' testimony was impaired by inconsistencies in her testimony, she was neither an eyewitness nor an independent one. Tr. 149-50; Ex. R-10 at 123. In sum, the testimony of Ms. Burris and Ms. Manzanares is simply not more believable than that of Ms. Aylett and Mr. Memmott.

The Government contends that Ms. Aylett's making of the alleged statements is evidenced by the fact that the Ayletts were biased against Black persons and that they exhibited that bias toward Ms. Burris. However, the preponderance of the evidence does not show that such bias existed, or that Ms. Aylett had any reason to believe that her husband would never rent to Black persons.

First, the Ayletts denied that Mr. Aylett told his wife that he would never rent to Black persons or that they needed special recommendations. Tr. 261-62, 341. Although the Government contends that Mr. Aylett is not credible, I disagree. The inconsistencies in his testimony pointed out by the Government are minor. Furthermore, based on my observation of his demeanor, I found him to be very believable.

Moreover, prior to Ms. Burris' attempt to rent the duplex, Mr. Aylett had rented several other rental properties that he manages for the family to at least two Black couples and one Black single mother. Tr. 264-67; 343-45. For a time, the Ayletts lived in one-half of a duplex while a Black couple lived in the other half. Tr. 264, 344. Mr. Aylett has also rented the properties to two White women who had Black men living with them. Tr. 196-97, 264-67, 343-44.

Complainant argues that Ms. Aylett believed that, based on bad experiences when renting to those Black tenants, her husband had decided not to rent to Black persons again. Complainant asserts in this regard that Ms. Aylett "admitted" that her husband had not "been around Blacks much," and that they had had "some trouble with some Blacks who were from 'back East' -- they were different, from the ghettos." This argument is not persuasive. First, a statement that Mr. Aylett had not "been around Blacks much" hardly constitutes an admission of racial bias. Although there had been problems with two Black tenants -- one was behind on his rent once and another caused minor damage to an apartment -- those problems did not cause Mr. Aylett to stop renting

to Black persons. It was not unusual for him to have such problems with tenants of any race; although he had evicted 10 tenants for causing problems, he did not evict any Black tenants. Although Mr. Aylett has not rented to other Black persons, that is because, except for Ms. Burris, no others have applied. Tr. 265-68, 345; Ex. G-33 at 141-42, 160-61; Ex. G-24.

Moreover, Mr. Aylett has employed Black persons in his construction business. Tr. 275. Also, he employs several natives of Tonga, a South Pacific island; some of them have darker skin than Ms. Burris. Tr. 276-77. Mr. Aylett has helped his Tongan workers in many ways, has socialized with them, and has frequently invited them into his home. Tr. 277-81.

The Complainant contends that because of her race and color, the Ayletts denied her the opportunity to place a deposit to hold the duplex until a lease was signed, they failed to give her an application, and they did not make the necessary repairs. I disagree. Mr. Aylett told Ms. Burris and other applicants the amount of the rent and the deposit. Although Mr. Aylett did not specifically advise Ms. Burris that she should place a deposit to hold the unit, there is no clear evidence that he gave such specific advice to other applicants. In any event, it is undisputed that he was unaware of her race when he discussed matters concerning the deposit with her. Tr. 60, 77-78, 108, 194-96, 272-74, 257-58, 285-86.

Although, unlike other applicants, Ms. Burris was not given an application, that did not adversely affect the processing of her request to rent the duplex. Mr. Aylett told her to bring the rent subsidy documents to his home "to start her application going." Tr. 258. Ms. Aylett quickly completed the documents for her, and Mr. Aylett did not delay the inspection. Thus, the absence of an application had no significance.

There was no evidence that Mr. Aylett delayed making the numerous repairs required by the housing authority because of Ms. Burris' race. He was not prompt at making repairs for a White tenant, Shauna Vincent. Tr. 193. Moreover, within three days after the duplex had failed the inspection, Mr. Trujillo offered to rent it with a reduced deposit in return for cleaning it and making some repairs. Tr. 182-87.

Furthermore, when Ms. Aylett allegedly made the discriminatory statements, she did not know what her husband had told Ms. Burris concerning a deposit or an application, and the need for repairs had not even been discovered. Tr. 259. Thus, any actions by Mr. Aylett in those matters could not have led his wife to believe at the time that she allegedly made the statements that he would never rent to Black persons.

Complainant contends that Mr. Aylett's bias against Black persons is demonstrated by his membership for 38 years in the Mormon Church, which did not allow Black persons to be priests until 1979. Tr. 302-03. Even without Mr. Aylett's testimony that that policy did not affect the manner in which he treated Black persons, I find this argument to be totally meritless. Tr. 303-04.

There was no evidence that Ms. Aylett is biased against Black persons. Moreover, her actions during Ms. Burris' visit were inconsistent with the notion that she made the alleged discriminatory statements. Ms. Aylett had never before completed rent-subsidy documents for a prospective tenant, and Ms. Burris did not ask her to complete the documents. However, Ms. Aylett invited Ms. Burris into her home and offered to complete the documents before she recognized her as a former classmate. Ms. Aylett devoted 30 minutes to that task before Ms. Burris informed her that they had been classmates. Tr. 78, 108, 335; Ex. R-10 at 52. It is difficult to believe that Ms. Aylett would have taken those actions if she believed that her husband would not rent the duplex to a Black person. It would have been more consistent with such a belief for her to have simply taken the documents from Ms. Burris and told her that she would give them to her husband. Such action would not have raised a suspicion of racial bias.

Furthermore, Ms. Aylett's conduct following the visit is inconsistent with the notion that she made the alleged statements. She told Mr. Aylett when he arrived home that Ms. Burris had stopped by, that they had gone to high school together, that she had completed the subsidized housing documents, that Ms. Burris likely would make a good tenant, and that she was Black. Tr. 260-61, 346. Mr. Aylett's response was a simple, "okay." Tr. 346. Ms. Aylett's remarks can hardly be characterized as a recommendation to make an exception from a policy of never renting to Black persons.

Subsequently, Ms. Aylett assumed that the duplex had been rented to Ms. Burris, and she told Mr. Trujillo when he first inquired about the duplex that it had been rented. Tr. 186, 347. If Ms. Aylett believed that her husband would never rent to a Black person, it is not likely that she would have turned away a prospective tenant based on an assumption that her brief conversation with Mr. Aylett had secured the duplex for Ms. Burris. Based on the analysis of the above matters, it is clear that Ms. Aylett had no reason to make the alleged statements.

Complainant also argues that Ms. Aylett's making of the discriminatory statements is shown by the fact that Ms. Burris developed psychological problems as a result of this matter. I disagree. Although Ms. Burris has been diagnosed as having such problems, the cause of the problems was not clearly identified as Ms. Aylett's alleged statements. Rather, the problems resulted mainly from Ms. Burris' inability to rent the duplex, which she believed was racially motivated, and which resulted in her moving into unsatisfactory housing. Tr. 123; Ex. G-35 at 21-24, 26, 31-32, 120, 124-25, 134-35, 144. In any event, the diagnosis of psychological problems was based on Ms. Burris' perception of the events, and I have found that the preponderance of the evidence does not support her allegations. Ex. G-35 at 134-35.

ORDER

It is hereby ORDERED that all charges against Respondents are DISMISSED. This Order is entered pursuant to 42 U.S.C. § 3612(g)(3) and 24 C.F.R. § 104.910; it will become final upon the expiration of 30 days or the affirmance, in whole or in part, by the Secretary within that time.

/s/

PAUL G. STREB
Administrative Law Judge

