

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building, Third Floor
Des Moines, Iowa 50319

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|------------------------------|---|--------------------------|
| Justin DeBord, |) | |
| Complainant, |) | |
| |) | DIA No. 11ICRC001 |
| and |) | |
| |) | |
| Iowa Civil Rights Commission |) | |
| |) | |
| v. |) | |
| |) | PROPOSED DECISION |
| Clair and Lou Ann Otto, |) | |
| Respondent. |) | |

This case came on for hearing at the Lucas State Office Building on April 24, 2012. Assistant Attorney General Teresa Baustian represented the Iowa Civil Rights Commission (the commission). The commission called Janis Buswell, Chris Daisy, and Justin DeBord as witnesses. Respondent Clair Otto represented himself. Mr. Otto testified, and he also called Emigdio Lopez-Sanders as a witness. The administrative record consists of the statement of charges, complaint, and the notices and other procedural documents in the file.

FINDINGS OF FACT

Clair and Lou Ann Otto are a married couple who live in Carroll, Iowa. Mr. Otto has rented out residential housing for the past 50 years. Ms. Otto was not actively involved in this case, and was named as a respondent solely because she is a part-owner of the subject-residence at issue. (Otto testimony; Complaint).

As of January of 2011, Justin DeBord and his fiancé, Jeff Stone, were living with Mr. DeBord's sister and her husband and three children in Glidden, Iowa. The home was crowded with seven people living there, so Mr. DeBord and Mr. Stone decided to look for other housing. At the same time, Mr. DeBord's mother, Janis Buswell, was looking to move from Lake City to Carroll to reduce the amount of night-time driving to and from her job in Carroll. They decided to look for housing that could accommodate the three of them, while accommodating Ms. Buswell's grandchildren when they visit and stay overnight. (Buswell, DeBord testimony).

Mr. DeBord and Ms. Buswell reviewed newspaper ads and saw a duplex that might fit their needs. Mr. Otto owned the duplex. They scheduled an appointment with Mr. Otto to look at the duplex. Mr. DeBord and Mr. Stone arrived first and met Mr. Otto at the duplex. They introduced themselves as friends, but did not further explain their relationship. Ms. Buswell arrived after Mr. Otto had begun to show the duplex. Ms. Buswell, Mr. DeBord, and Mr. Stone liked the duplex and indicated their interest to rent it. Mr. Otto took references and sought income information. Mr. Otto did not indicate there any problem or issues at that time. Ms. Buswell and Mr. DeBord testified that they felt they were going to be able to rent the duplex. (Buswell, DeBord testimony).

On or around the following day, Mr. Otto stopped by Ms. Buswell's employment (a Carroll hotel) to ask questions about her income. Ms. Buswell was working two jobs at the time and did not believe income was an obstacle to renting the duplex. She answered Mr. Otto's questions and he left. Mr. Otto gave her no reason to believe they would not be able to rent the duplex. (Buswell testimony).

Mr. Otto also called Chris Daisy, who was the Mr. DeBord's brother-in-law at the time.¹ Mr. DeBord had listed Mr. Daisy as his current landlord. Mr. Daisy testified that Mr. Otto wanted to know why Mr. DeBord was looking for a residence. Mr. Daisy responded that their house was small and crowded, so Mr. DeBord and Mr. Stone wanted to move out to allow more room for the family. There was no discussion of the relationship between Mr. DeBord and Mr. Stone during that conversation. Mr. Daisy thought the conversation was positive and Mr. Otto would be renting the duplex to them. (Daisy testimony).

Mr. Daisy testified that Mr. Otto contacted him on several other occasions. On one call, he asked why the two men and Ms. Buswell wanted to move in together. In another, he asked why Mr. DeBord and Mr. Stone were "so friendly" together. During one of the conversations, Mr. Otto offered to rent the duplex to Mr. Daisy instead of the other three. (Daisy testimony).

Mr. Daisy testified that Mr. Otto called a subsequent time and asked to meet him in person. Mr. Otto drove to Mr. Daisy's place of employment for the conversation. Mr. Otto asked about the financials, and Mr. Daisy responded that Ms. Buswell had two jobs and Mr. Stone received disability. Mr. Daisy testified that Mr. Otto was concerned that Mr. DeBord and Mr. Stone were "too friendly." Mr. Otto also asked how long they had lived together. Mr. Daisy felt that the conversation was leading up to the nature of their relationship, so he said that they were gay. Mr. Otto asked if they were married, and Mr. Daisy replied that they were planning on getting married later that year. Mr. Otto said

¹ Mr. Daisy and Mr. DeBord's sister have since divorced.

that he would not be renting the duplex to them, although he would rent it to Ms. Buswell alone. Mr. Otto said that he does not want “that” in his building or neighborhood. Mr. Daisy encouraged Mr. Otto to let them know his decision. (Daisy testimony).

Mr. Daisy reported his conversation to Ms. Buswell and Mr. DeBord. Ms. Buswell called Mr. Otto. She testified that Mr. Otto said that he would rent the place to her, but she should not have to pay to provide a residence for her son and Mr. Stone. Mr. Otto also offered to rent a smaller unit to Ms. Buswell. (Buswell testimony).

Mr. Otto testified that he only had two conversations with Mr. Daisy, but other than that, their testimony did not vary greatly. Mr. Otto testified that he did not know that Mr. DeBord was gay until Mr. Daisy told him that Mr. DeBord and Mr. Stone were involved in a relationship. Mr. Otto testified repeatedly that he never made a statement about Mr. DeBord being gay – my impression of his testimony is that he felt it he did not make a statement that Mr. DeBord was gay, he could not be found to have committed a violation. Still, prior to Mr. Daisy telling Mr. Otto that Mr. DeBord was gay, Mr. Otto had not made a decision to deny rental of the duplex. (Otto testimony).

Mr. Otto testified at hearing that he denied renting the duplex because he does not rent to a group of three people when two are unrelated and they share one restroom. He acknowledged that he has rented to two unmarried/unrelated people who share one restroom – he said that was “totally different” although he did not explain why. He acknowledged that he has rented to three or more people who are related and share one restroom. He was not able to offer any understandable explanation for the standard he uses, other than it sets “a bad example for him as a landlord.” Mr. Otto denied discriminating against homosexuals, claiming that he was willing to rent a one bedroom apartment to Mr. DeBord as long as there were not two men and one woman living in the apartment. Mr. Otto also testified that he rented an apartment to two people he suspected to be homosexual, but he was never directly told their sexual preference. (Otto testimony).

Mr. DeBord’s group found housing in a mobile home in Glidden. The cost of the housing is about the same. The rent is \$400 per month, and he pays gas of \$65 per month and electric between \$150 to \$200 per month. The cost of Mr. Otto’s property was \$600 to \$650 per month, with all utilities included. The location was not as convenient for Ms. Buswell, as she had to drive to Carroll for work. (DeBord testimony).

Mr. DeBord was angry with being denied housing from Mr. Otto. He has received prior negative responses regarding his sexual orientation, so he hesitates to provide that information unless directly asked. He feels his orientation should not matter. Mr.

DeBord claims emotional distress, but provided no corroborating evidence to make out a substantive claim for emotional distress. (DeBord testimony).

CONCLUSIONS OF LAW

Statutory framework: The commission has the responsibility to receive, investigate, mediate, and finally determine the merits of complaints alleging unfair or discriminatory practices.² Any person claiming to be aggrieved by a discriminatory or unfair practice may file a complaint with the commission.³ Complaints are reviewed by an investigator and referred to an administrative law judge to determine whether there is probable cause to support the allegations.⁴ If probable cause is found and conciliation unsuccessful, the commission may file a statement of charges and set the case for hearing before a different administrative law judge.⁵ The hearing shall be conducted in accordance with the procedural protections required by Iowa Code chapter 17A.⁶

The commission alleged that Mr. Otto committed an unfair or discriminatory practice by refusing to rent a housing accommodation to Mr. DeBord due to his sexual orientation.⁷ Disparate treatment claims may be proved by direct evidence or indirect evidence. Claims based on direct evidence are shown by a “specific link between the alleged discriminatory animus and the challenged decision[.]”⁸ Claims based on indirect evidence are evaluated under a three-step analysis.⁹ The three steps are:

First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination.

Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate nondiscriminatory reason for [the defendant's action].

2 Iowa Code section 216.5(2).

3 Iowa Code section 216.15(1).

4 Iowa Code section 216.15(3).

5 Iowa Code section 216.15(6).

6 Iowa Code section 216.15(8).

7 Iowa Code section 216.8(1)(a).

8 *Gallaher v. Magner*, 619 F.3d 823, 831 (8th Cir. 2010).

9 *See Gallaher*, 619 F.3d at 831 (applying the three-step *McDonnell-Douglas* test to a federal Fair Housing Act case); *see also Kiray v. Hy-Vee*, 716 N.W.2d 193, 202 (Iowa App. 2006) (applying *McDonnell-Douglas* in a public accommodations context).

Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.¹⁰

The commission can prove a prima facie case of discrimination in a housing context by showing: a) complainant was a member of a protected class; b) respondent was aware of complainant's membership in that class; c) complainant was willing and qualified to continue renting the apartment; and d) respondent refused to rent the apartment.¹¹

The commission did not expressly state whether it sought to prove disparate impact through direct or indirect evidence, so I will consider its claim under both methods. However, due to direct evidence introduced in this case, I find discrimination is shown by either test.

Direct evidence of discrimination: There is no dispute with the following facts: Mr. Otto offered a duplex for rent. He put an advertisement in the paper. Mr. DeBord and his mother saw the advertisement and asked to see the duplex. Mr. DeBord, Mr. Stone, and Ms. Buswell saw the duplex and provided references and financial information. At the time Mr. Otto showed the duplex, it remained open to rent. Mr. DeBord, Mr. Stone, and Ms. Buswell expressed their intent to jointly rent the duplex. There were no negative references or financial grounds to deny the application.

At the time Mr. Otto showed the duplex, he did not know that Mr. DeBord was gay, and he did not know Mr. DeBord and Mr. Stone were engaged to marry. It was clear he was open to renting the apartment to them at the time and for at least a few days thereafter. He contacted Ms. Buswell at work to confirm income information. There would be no reason for him to do that if he was not interested in renting the apartment to them. He also followed up by calling Mr. Daisy, who was a reference for Mr. DeBord. Once again, his call to a reference indicates his openness to renting the apartment to the group.

The prospective rental agreement broke down as Mr. Otto called Mr. Daisy on multiple occasions to ask about the nature of the relationship between Mr. DeBord and Mr. Stone. While they differ on the number of calls, I find Mr. Daisy's testimony more persuasive on the number of contacts. Mr. Otto inquired on multiple occasions why Mr. DeBord and Mr. Stone were so "friendly," and asked how long they had lived together. Mr. Otto even drove out to Mr. Daisy's employment so he could talk to him in person. Mr. Daisy felt the conversation was leading up to the ultimate question, so he told Mr. Otto that they were gay and engaged to marry. Mr. Otto told Mr. Daisy at the end of that conversation

¹⁰ *Kiray*, 716 N.W.2d at 202.

¹¹ *Radecki v. Joura*, 114 F.3d 115, 116 (8th Cir. 1997).

that he would not rent to them. He said he did not want “that” in his building, which Mr. Daisy interpreted as two gay men. It was clear that the duplex remained open, as Mr. Otto offered it to Mr. Daisy at one point during their conversations, and continued to hold it open to Ms. Buswell if she wanted to rent it alone. Ms. Buswell also confirmed through her testimony that Mr. Otto would rent the duplex to her alone, but not if her son and fiancé lived there.

The course of conduct shows that Mr. Otto developed a suspicion that Mr. DeBord and Mr. Stone had a sexual relationship, and he sought out information from Mr. Daisy until he confirmed what he suspected. Once he learned the nature of their relationship, he made the decision not to rent the duplex to them, even though the duplex was still open and there were no financial or other grounds not to do so. The evidence, through the chain of events and Mr. Otto’s statements, constitutes direct evidence proving that his decision denying rental was based on the sexual orientation of Mr. DeBord and Mr. Stone.

Mr. Otto’s justification to deny renting the duplex does not make sense and is not supported by his own actions. Mr. Otto testified that he does not rent to three people when they share one restroom and two are not related. Mr. Otto knew that three people intended to rent the duplex from the time he showed it. He knew Mr. DeBord and Ms. Buswell were directly related, but Mr. Stone was not. Still, he showed the apartment, checked financial information, and contacted Ms. Buswell and Mr. Daisy to ask questions. If he had a policy that he would not rent to three people if two were not related, there would have been no reason to show the apartment and follow through with the other conversations and checks. Moreover, Mr. Otto admittedly rented to unmarried people and to households of three or more people. Mr. Otto’s justification does not hold water, in light of the evidence in the record and his prior practice.

Indirect evidence of discrimination: The same result holds true if the indirect evidence test is used. The commission clearly made out a prima facie case of discrimination based on the four element test set out above, for reasons discussed in the section discussing direct evidence. Mr. Otto did not articulate a legitimate nondiscriminatory reason for denying rental of the duplex. Accordingly, the commission has also met its burden of proof under this test.

Remedy: The Iowa Civil Rights Act provides for a number of remedies if a violation is shown. Remedies include: 1) rental of the real estate in question, 2) actual damages, 3) and an order to cease and desist from the discriminatory or unfair practice and to take affirmative action to carry out the purposes of the statute.¹²

12 Iowa code section 216.15(9)(a)(4),(8), 216.15(8)(b).

In this case, the commission asked for actual damages in the form of the increased cost of the residence that was subsequently acquired and emotional distress. However, there was no persuasive evidence presented to support either claim. Mr. DeBord provided some vague testimony as to the costs of rent and utility bills, but no reliable evidence to specific actual expenses. I cannot determine on this record that the commission has proven a claim for damages for additional residential costs.

Similarly, the weight of the evidence does not support a claim for emotional distress. The Iowa Supreme Court has held that a claim for emotional distress can be made in a civil rights context without a showing of physical injury, severe distress, or outrageous conduct (which would be required if claimed in other tort actions).¹³ For example, in *Hy-Vee*, the court found that the complainant was upset, suffered anxiety, headaches, and that her anxiety exacerbated a medical condition of psoriasis. Based on these facts, the court affirmed an award of \$10,000 in emotional distress. In the present case, there is no comparable evidence. Mr. DeBord testified that he was mad, but there was no evidence of any other emotional harm. I understand his frustration, but unsupported testimony of anger, standing alone, does not constitute a showing of emotional distress.

The only remaining claim for remedy is a cease and desist order. A cease and desist order must be entered based on the finding of a violation of the law. However, in doing so, I think it important to give some allowance to Mr. Otto. I don't think Mr. Otto is a bad man. With the exception of his failure to rent in this case, there is no evidence to show that, in 50 years of being a landlord, he was an unreasonable or unfair to his tenants. However, he was personally challenged with the concept of renting to a gay couple. This is not unique in our society, as we routinely see heated debate on gay rights issues. In fact, the Iowa Civil Rights Act was only amended in 2007 to add sexual orientation to the list of grounds that discrimination is not allowed, so the law itself remains relatively new.¹⁴ The law is the law, but individual perspectives on the law, particularly when held for a long period of time, do not always change overnight. I cannot condone Mr. Otto's conduct in this instance, but I also do not condemn him as a person. He committed a violation of the statute that he needs to recognize and remedy for the future. I expect he will comply with this order and not commit any future violations.

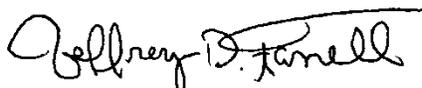
13 *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 525 (Iowa 1990).

14 2007 Iowa Acts ch. 191, section 7.

ORDER

Respondent Clair Otto committed a violation of Iowa Code section 216.8(1) by refusing to rent a housing accommodation to Justin DeBord due to his sexual orientation. Mr. Otto is hereby ordered to cease and desist from all discriminatory and unfair practices in the future, including, but not to the exclusion of, discrimination against persons based on their sexual orientation. This cease and desist order likewise applies to Lou Ann Otto by virtue of her co-ownership of the subject property.

Issued on May 31, 2012.



Jeffrey D. Farrell
Administrative Law Judge

cc: AGO – Teresa Baustian
Respondents – Clair and Lou Ann Otto
Complainant - Justin DeBord

NOTICE

Any adversely affected party may appeal this decision to the Iowa Civil Rights Commission within 30 days of the date of the decision.¹⁵ Any appeal must be in writing, signed, contain a certificate of service upon the other parties, and identify the following:

- a. The parties initiating the appeal;
- b. The proposed decision or order appealed from;
- c. The specific findings or conclusions to which exception is taken and any other exceptions to the decision or order;
- d. The relief sought;
- e. The grounds for relief.

Additionally, the commission itself may initiate its own review of a proposed decision on its own motion at any time within 60 days of the date of the decision.

¹⁵ 161 IAC 4.23.