

***** MPT 1 STARTS HERE *****

Memorandum

To: Elise Tan
From: Examinee
Date: February 25, 2025
Re: Peter Larkin - Defense of housing discrimination claim

Intro:

Although Larkin is likely not liable for discrimination under the three-part burden-shifting test in *McMann* because his discrimination against Turner on the basis of his marital status was not pretextual, Larkin is likely liable for discrimination under the three-part disparate impact test because his three person policy is likely not the least restrictive means for achieving his substantial and important goal of keeping young adults from overcrowding his apartment to reduce housing costs.

Peter Larkin's ownership of 7 buildings, one of which contains 20 units makes him subject to the Fair Housing Act (FHA) prohibition on discrimination based on family status.

A landlord is not allowed to discriminate on the basis of familial status in the sale or rental of housing. (FHA 3604). Family status includes discrimination of one or more individuals on the basis of their minor children. (FHA 3602). The prohibition on discrimination based on family status applies to landlords with rooms in units or dwellings intended to be occupied by more than four families. (FHA, 42 USC 3603). In this case, Peter Larkin has seven residential buildings, one of which includes 20 units, and therefore, he may not discriminate on the basis of family status in the sale or rental of housing because has units intended to be occupied by more than 20 families.

An issue is whether Peter discriminated against a tenant through his responses to Martin Turner's inquiry into his apartment that may be ambiguous.

In cases where a landlord potentially engages in discrimination based on specific acts that are ambiguous to whether the landlord discriminated based on family status, the court applies the three-part burden-shifting test set forth in *McDonnell Douglas Corp. v. Green*. (*Karns*, 15th Cir. 2006, *Baker*, Dist of Frank. 1996). In the first part of the test, Turner has the burden to establish by a preponderance of the evidence that he has a prima facie case of discrimination by Larkin. Then, in the second part of the test, Larkin must rebut the presumption by articulating a legitimate nondiscriminatory reason for the refusal to rent. Third, the burden shifts back to Turner to show by a preponderance of the evidence that the evidence of the nondiscriminatory reasons were merely a pretext for discrimination.

For the first part of the three-part burden-shifting test, Turner has a prima facie case of discrimination by Larkin through the four elements below.

To establish a prima facie case, Turner must show: 1) that they are a member of a protected class, 2) that they have applied for and were qualified to rent the dwelling, 3) that they were denied housing or the landlord refused to negotiate with them, and 4) that the dwelling remained available. (*Karns*, *McDonnell*).

1. Turner can show he is a member of a protected class.

An individual is a member of a protected class if they have minor children. (FHA 3602, *Karns*, *Baker*). Turner has 3 minor children. Therefore, Turner is a member of a protected class.

2. Turner likely can show he was qualified to rent the dwelling.

An individual is qualified to rent the dwelling if they can afford the monthly payments through meeting such factors as minimum credit score, rental and eviction history, minimum monthly

income, landlord and professional references, and criminal background. *Karns*. In this case, Turner has stated that he can "easily" afford the apartment on his income, and has a good credit score and rental history. Unless facts surface that contradict his statements to HUD on the administrative complaint form, he likely was qualified to rent the dwelling.

3. Turner can show the landlord refused to negotiate with him.

An individual refuses to negotiate with a prospective tenant when they end the inquiry and never get back with the prospective tenant. *Karns*. Turner's inquiry into the apartment ended when Larkin indicated he would "get back" to him. However, Larkin never got back to Turner. Therefore, Larkin refused to negotiate with him.

4. Turner can show the apartment remained available.

The apartment was still listed as available on Craigslist over the next two months. Therefore, the apartment was still available.

Turner therefore likely has a prima facie case against Larkin because Turner can likely establish each element of the prima facie case indicated above. This means that Turner has met his burden, and now the burden shifts to Larkin to articulate a non-discriminatory reason for refusing to rent to tanner.

In the second part of the three-part burden-shifting test, Larkin can articulate a non-discriminatory reason for refusing to rent to Turner.

A non-discriminatory reason includes a preference to rent to married couples, as marital status is not among protected classifications. *Karns*, *FHA 3604(a)*.

In this case, Larkin has found that "married couples pay their rent on time and are less likely to flake out on [him]". Therefore, he "really prefer[s] to rent to married couples". Accordingly, Larkin can articulate a non-discriminatory reason for his refusal, financial stability and a preference for marital couples, and the burden shifts back to Turner to establish by a preponderance of the evidence that the reason is a pretext.

In the third part of the three-part burden shifting test, Turner likely cannot establish that the reason for refusing to rent to Turner is a pretext.

Not renting to someone on the basis of their marital status due to concerns about their finances may be a pretext when the only information that the landlord knows about the potential tenant is that they are a single parent with minor children. Especially when that same landlord is willing to rent to people who are single. *Karns*.

In this case, like in *Dickson*, where Dickson, the landlord, only knew that Karns was a single mother with minor children, and didn't know anything about Karns's finances and refused to rent to Karns based on that limited information, Larkin also refused to rent to Turner after only finding out that Turner was a single parent with minor children, and without learning anything about Turner's finances.

However, unlike in *Karns*, where the landlord was willing to rent to Karns when the landlord believed she was single without kids, despite not being willing to rent to Karns when the landlord believe she was single with kids, Larkin does not want to rent to people who are single because he does not believe they are as stable, regardless of whether they have kids or not. This is due to Larkin having a single guy with a good income leave and left town once without paying his rent. Therefore, he believes that married people are more likely to have one person able to pay the rent because they can both work rather than a single person who may have a good job but lose it. Furthermore, unlike in *Karns*, there is no evidence to suggest that Larkin would have rented to Turner if he believe Turner was single without kids. Due to his bad experience with single renters in the past, his preference for married couples is likely not pretextual. It is more than just the ability to pay and financial income, but also about the advantage of having two income earners and increased stability that married people offer compared to single individuals or unmarried couples.

Therefore, Turner will likely struggle to establish by a preponderance of the evidence that

Larkin's discrimination against him on the basis of marital status was pretextual, and Larkin will not be found in violation of the FHA on the basis of the three-part burden-shifting test.

An issue is whether Turner could show Larkin discriminated against him under the three-part disparate impact test.

When landlords have a facially neutral occupant policy (has a maximum occupancy based on square footage and not based on a protected class under the FHA), the three-part disparate impact analysis may determine whether the policy is nonetheless discriminatory. *Baker*.

In this case, Larkin's policy is to not rent to more than 3 people in his 500 square foot apartment. Therefore, the policy is facially neutral because it is not based on a protected class under the FHA, and the disparate impact test applies.

The three part test requires Turner to show 1) the policy will have a predictably discriminatory effect, the burden then 2) shifts to Larkin to show the policy has a non-discriminatory reason, and finally shifts back to Turner to show 3) that the policy is overbroad or that there is a less restrictive means to achieve Larkin's non-discriminatory reason.

1. Turner can show that the policy will have a predictably discriminatory effect.

A policy that restricts the amount of people in an apartment has a predictably discriminatory effect on families with children because minor children frequently share bedrooms, and families with minor children tend to have larger households than families without. *Baker*.

In this case, the policy of 3 people in the 2 bedroom apartment has a discriminatory effect because it makes it harder for Turner to rent the apartment and have his minor children share bedrooms.

2. Larkin can show that the policy has a non-discriminatory reason.

A non-discriminatory reason may include large groups of young adults overpopulating units in an attempt to reduce their rental payments. *Baker*. In this case, Larkin also has a similar policy to that found in *Baker* by trying to reduce a lot of younger people crowding into apartments to keep housing costs down. In *Baker*, the court found this to be a substantial, legitimate, nondiscriminatory interest served by the practice.

3. Turner will not be able to show that the policy is overbroad, but he will be able to establish that the policy is not the least restrictive means.

A occupancy limit is overbroad if it is far more stringent than the requirements of the municipal code. In *Baker*, the court noted 15th circuit precedents where the landlord's limit was overbroad when it restricted the occupancy to half of the municipal code (a landlord's policy of two where the municipal code allowed four, and similarly a landlord's policy of four where the municipal code allowed eight).

In this case, the municipal code for 500 sq ft. apartments allows four occupants, whereas Larkin's policy allows three. (CMHC 15). Because the apartment is only 50 sq ft. bigger than the size the municipal code restricts to three people, and because the occupancy limit of Larkin's is only one less than the municipal code allows and not half, Larkin's policy is likely not overbroad. (CMHC 15).

An occupancy limit is not the least restrictive means if the goals could be enforced based on other factors than a strict occupancy limit. *Baker*. For example, in *Baker*, the court found that since the landlord could find out other information that would allow them to prevent cramming several young adults into a small space, but still allow families with small children to fill an apartment, that would be a less restrictive policy. *Baker*. Similarly, Larkin knew that Turner was a single parent with 3 young children and not a group of young adults who were interested in the apartment because of its proximity to state street. Therefore, Larkin could allow Turner to rent the apartment while still enforcing limits on young adults trying to reduce their housing costs. Accordingly, the policy is not the least restrictive and Larkin likely violated the FHA.

Conclusion:

Larkin is likely not liable for discrimination under the three-part burden-shifting test in *McMann* because his discrimination against Turner on the basis of his marital status was not pretextual. However, Larkin is likely liable for discrimination under the three-part disparate impact test because his three person policy is likely not the least restrictive means for achieving his goal of keeping young adults from overcrowding his apartment to reduce housing costs, even though it is not overbroad.

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MEMORANDUM

To: Elise Tan
From: Examinee
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Re: Peter Larkin--Defense of housing discrimination claim

I. Introduction

Section 3604 of the Fair Housing Act ("FHA") prohibits a landlord from (1) refusing to rent after making a bona fide offer, (2) refusing to negotiate for the rental of a dwelling, or (3) otherwise making unavailable a dwelling because of family status.

A defendant may violate the FHA through specific discriminatory actions or through a policy that has a disparate impact. *Baker*. Here, Mr. Turner will likely advance both arguments.

An ALJ's decision must be supported by substantial evidence. *Karns*.

I. FHA Discrimination

To evaluate claims for discrimination through specific actions in violation of Section 3604(a) of the Fair Housing Act ("FHA"), *Baker*, courts apply the *McDonnell Douglas* three-part burden-shifting framework, *Karns*. First, the plaintiff bears the initial burden of proving a prima facie case of housing discrimination by a preponderance of the evidence. *Karns*. Second, if the plaintiff establishes their prima facie case, then a presumption of illegality arises and the burden shifts to the defendant to articulate legitimate nondiscriminatory reasons for the challenged policies. *Id.* Third, if the defendant satisfies their burden, the plaintiff must show by a preponderance of the evidence that the defendant's nondiscriminatory reasons are "merely pretext for discrimination." *Id.*

A. Prima Facie Case

The plaintiff establish their prima facie case, the plaintiff must show: (1) they are a member of a protected class; (2) they applied for and were qualified to rent the dwelling; (3) they were denied housing or the landlord refused to negotiate with them; and (4) the dwelling remained available. *Id.* In this context, "applied for" is construed broadly and means "that the individual meets such factors as minimum credit score, rental and eviction history, minimum monthly income, landlord and professional references, and criminal background.

FHA Section 3602(a) defines "familial status" to include one more more individuals who are under the age of 18 that are domiciled with a parent. *See also Baker*. In *Karns*, the plaintiff established her prima facie case because it was undisputed that at all relevant times (1) she had two children under the age of 18 that resided with her, (2) inquired about renting an apartment and was qualified to do so, (3) she was denied housing, (4) the property manager refused to negotiate with her, and (5) the apartment remained available when the plaintiff made a second call to inquire about it.

Mr. Turner very likely establishes his prima facie case of discrimination. First, Mr. Turner has three children under the age of 18. He is therefore a member of a protected class. Second, he inquired about renting the apartment and he was qualified to do so. He is employed as a data analyst and can easily afford the rent, has a good rental history, and has good credit. Third, he was denied housing. Fourth, the apartment remained available for the next two months.

We can try to argue that he was not denied housing because Mr. Larkin simply never responded to him, rather than telling him he could not live in the apartment. This argument will fail because the FHA also prohibits refusing to negotiate or otherwise making a dwelling unavailable because of familial status.

Because Mr. Turner can establish his prima facie case of discrimination based on familial status, the burden will shift back to Mr. Larkin to articulate a legitimate, nondiscriminatory reason for denying Mr. Turner housing.

B. Legitimate Nondiscriminatory Reasons

Once the plaintiff bears their initial burden, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason. *Karns*. In *Karns*, the court concluded that the defendant asserted two nondiscriminatory reasons for her refusal to negotiate: (1) concern about the plaintiff's finances, and (2) concern about the plaintiff being unmarried. The FHA does not protect marital status. *Karns*.

Like the defendant in *Karns*, Mr. Larkin articulates a similar legitimate nondiscriminatory reason: Mr. Turner is unmarried, which causes Mr. Larkin to fear that Mr. Turner is less financially stable. Mr. Larkin prefers married couples because he prefers to have married couples with two incomes to reduce the likelihood that one person will move out in the middle of the lease or fail to pay rent. He has concluded that "married people are just more financially stable than single people." Because the FHA does not protect marital status, like in *Karns*, this is a legitimate, nondiscriminatory reason.

Because Mr. Larkin can establish a legitimate, nondiscriminatory reason for denying Mr. Turner housing, the burden will shift back to Mr. Larkin to show that the reason is pretextual.

C. Pretext

Once the defendant bears their burden, the burden shifts back to the plaintiff to show that the defendant's proffered reasons are pretextual. *Karns*. In *Karns*, the court concluded that the defendant's proffered nondiscriminatory reasons were pretextual because when the defendant declined to negotiate with the plaintiff, the only fact the defendant knew about the plaintiff was that she was an unmarried mother of two small children. Before the defendant declined to negotiate, she did not ask a single question about the plaintiff's finances and had no information about the plaintiff's income, credit history, assets, or liabilities. *Id.* The *Karns* court concluded that the defendant's refusal to rent the apartment to the plaintiff "armed with only the knowledge" that the plaintiff was a single mother of two young children indicates that defendant declined to negotiate based on familial status rather than financial status. Because the defendant agreed to show the plaintiff the apartment when she knew the plaintiff was single, the *Karns* court concluded that the defendant did not decline to negotiate because of the plaintiff's marital status.

Mr. Turner will argue that this case is like *Karns* because when Mr. Larkin declined to negotiate with Mr. Turner, the only fact he knew was that Mr. Turner was unmarried and had three children. Like the defendant in *Karns*, Mr. Larkin never asked Mr. Turner for his financial information such as his income, credit history, assets or liability. Mr. Turner will argue that Mr. Larkin's refusal to rent him the apartment "armed with only the knowledge" that he was a single father of three minor children indicates that Mr. Larkin declined to negotiate because of Mr. Turner's familial status.

Mr. Larkin should argue that in *Karns*, marital status was a pretextual reason because the defendant offered to show the plaintiff the apartment when she knew the plaintiff was single but had no kids. Mr. Larkin should argue, in contrast to *Karns*, that his reason is not pretextual because he did ultimately rent the apartment to a married couple and he turned down a group of four single people in their 20s for the same apartment two years ago. He also testified that he had no issue with Mr. Turner having younger children and that he is currently renting an apartment in the same building to a married couple with two children. He further testified that he has experience renting to a single man with good income who left town when he lost his job. These facts indicate that Mr. Larkin genuinely declined to rent the apartment to Mr. Turner because of his marital status, not because of his familial status.

While both parties have strong arguments, because Mr. Larkin was unwilling to rent to single people, regardless of their familial status, Mr. Turner will likely not be able to carry his burden of showing Mr. Larkin's reason is pretextual. Therefore, Mr. Larkin is likely to successfully defend against Mr. Turner's discrimination claim.

II. Disparate Impact

When evaluating whether a neutral policy has a disparate impact in violation of FHA Section 3604(a), courts apply a three-part disparate impact test. *Baker*. First, the plaintiff must establish

a prima facie case showing that the challenged practice caused or will predictably cause a discriminatory effect. *Id.* Second, if the plaintiff carries their burden, the burden shifts to the defendant to show that the challenged practice is necessary to achieve a substantial, legitimate, nondiscriminatory interest. *Id.* Third, if the defendant carries their burden, the burden shifts back to the plaintiff who must show that the defendant's proffered interests could be achieved by another practice that has a less discriminatory affect. *Id.*

A. Prima Facie Case

In *Baker*, the defendant had a "bedrooms plus one" policy, which provided a maximum occupancy of four people for a three-bedroom apartment. The court concluded that the plaintiffs established their prima facie case because the "bedrooms plus one" policy "clearly impact[ed] families with minor children more than it [did] the general population." *Id.* The court reasoned that minor children often share bedrooms and families with minor children tend to have larger households than families without. *Id.*

Mr. Larkin has a policy of renting that particular two-bedroom apartment to a maximum of three people. Mr. Turner will argue that here, as in *Baker*, this policy clearly impacts families with minor children more than the general population for the same reasons as in *Baker*. This is likely a winning argument.

B. Nondiscriminatory reason

In *Baker*, the court concluded that the defendant had articulated a substantial, legitimate, nondiscriminatory interest served by its practice: "avoiding renting to groups of college students." Here, Mr. Turner has articulated a substantial, legitimate, nondiscriminatory interest served by his policy: to protect the character of the neighborhood. He explained that he has had issues with young people "cramming four people into a two-bedroom apartment to keep their housing costs down." He will therefore likely carry his burden on this prong.

C. Overbreadth and less restrictive means

A plaintiff may prevail on the third prong of the disparate impact analysis either by showing the challenged policy is overbroad or by showing that the policy can be achieved with less restrictive means; the plaintiff need not show both. *Baker*.

i. Overbreadth

The Fifteenth Circuit has held that "a significant mismatch between occupancy limits set by a municipal code and those set by a landlord is evidence that the landlord's limit is overbroad." *Baker*. While there is no specific mathematical formula that applies, the Fifteenth Circuit has held that a significant mismatch would occur when a landlord limits occupancy to two people in an apartment that the applicable housing code limits to four. *Id.* In *Baker*, the court held that there was a significant mismatch--and therefore the policy was overbroad--when the landlord's limit permitted four people but the municipal code permitted eight.

Centralia Municipal Housing Code Section 15 prohibits a dwelling from being occupied by more than four people if it is between 451 and 700 square feet. Here, the bedroom is 500 square feet. Mr. Larkin should argue that there is not a significant mismatch because his policy permits three people while the municipal code permits four. He should argue that courts have held that there is a mismatch when the amount permitted by the housing code is double what the defendant permits, which is not the case here. Mr. Turner will argue that there is a significant mismatch because the housing code permits more occupants than Mr. Larkin's policy, but Mr. Larkin has a better argument on the whole. Therefore, Mr. Larkin is likely to successfully show that his policy is not overbroad.

ii. Less Restrictive Means

In *Baker*, the court concluded that the plaintiffs established that the defendant could use less restrictive means of achieving the goal of avoiding renting to large groups of college students by looking at the information in its rental application.

Here, Mr. Turner will likely argue that, like in *Baker*, there are less restrictive means of achieving Mr. Larkin's goal of preserving the character of the neighborhood. Mr. Turner will emphasize that,

like in *Baker*, Mr. Larkin seeks to prevent young people from overcrowding the apartment, and, like in *Baker*, this can be achieved by examining the rental application. Mr. Turner will argue that his goal of preserving the character of the neighborhood applies to any apartment "cramming," not just young people, but because he specifically testified about his issues with young people attracted to the neighborhood, Mr. Turner likely has the better argument. Therefore, Mr. Turner will likely prevail in showing that Mr. Larkin can use a less restrictive means. Because Mr. Turner only needs to show either overbreadth or less restrictive means to carry his burden, he will therefore carry his burden of showing disparate impact. Therefore, Mr.

III. FHA exemption

If the owner of the dwelling actually maintains and occupies one living quarter in the dwelling as his residence, FHA Section 3602(b) exempts the discrimination prohibition from applying to other rooms or units in the dwelling that have living quarters occupied or intended to be occupied by no more three other families living independently.

Here, Mr. Larkin does not live in the building, so he cannot argue that the exemption applies.

III. Conclusion

Mr. Larkin can likely successfully defend against the FHA discrimination claim, but he cannot likely successfully defend against the disparate impact claim.

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