

No. 1-13-0373

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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ROSSBELLT CASTILLO,	)	Petition for Review of an Order of
	)	the Chief Legal Counsel Designee
Petitioner-Appellant,	)	of the Illinois Department of
	)	Human Rights
v.	)	
	)	Charge No.
DEPARTMENT OF HUMAN RIGHTS, KRIS	)	2007 CH 3107
JOHNSON, and ZYGMUNT OPAROWSKI,	)	
	)	
Respondents-Appellee.	)	

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JUSTICE MASON delivered the judgment of the court.  
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

**ORDER**

- ¶ 1 *HELD:* Chief Legal Counsel's decision sustaining the Illinois Department of Human Rights' dismissal of petitioner's housing discrimination claims was not an abuse of discretion where record showed (1) no substantial evidence of familial status discrimination either directly or indirectly, and (2) no substantial evidence to support claim that property manager's statement indicated preference, limitation, or discrimination based on prospective tenant's familial status. Chief Legal Counsel did not make improper credibility determinations.
- ¶ 2 Petitioner Rossbellt Castillo appeals from a final order issued by the Chief Legal Counsel of the Illinois Department of Human Rights, sustaining the Department's dismissal of her charges

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of housing discrimination for lack of substantial evidence. Castillo filed a housing discrimination complaint alleging six charges of housing discrimination under the Illinois Human Rights Act (775 ILCS 5/3-102 (West 2006)) (the Act) after she attempted to rent an apartment in a building owned by respondent Zygmunt Oparowski and managed by respondent Kris Johnson. In her complaint, Castillo claimed discrimination based on familial status, race, color, ancestry, and disability, as well as discriminatory statements based on familial status.

¶ 3 After an investigation into Castillo's charges, the Department's investigator determined there was a lack of substantial evidence to support the allegations. Consequently, the Department dismissed petitioner's charges. Petitioner appealed the Department's lack of substantial evidence finding to the Chief Legal Counsel, who affirmed the Department's dismissal on all counts.

¶ 4 Petitioner now appeals.<sup>1</sup> We initially note that on appeal Castillo does not challenge the dismissal of the charges of discrimination based on race, color, ancestry, or disability. Our review is therefore limited to the Chief Legal Counsel's decision to dismiss Castillo's claims of familial status discrimination and discriminatory statements under sections 3-102(A) and 3-102(F) of the Act. 775 ILCS 5/3-102(A), 3-102(F) (West 2006).

¶ 5 For the reasons stated below, we affirm.

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<sup>1</sup> Castillo purports to appeal from the Department's decision. However, under the Act, the Department's decision is reviewed by the Chief Legal Counsel and this court then reviews the decision of the Chief Legal Counsel, not of the Department. *Marinelli v. Human Rights Comm'n*, 262 Ill. App. 3d 247, 253 (1994).

¶ 6

## BACKGROUND

¶ 7 On May 2, 2007, Castillo visited a three-bedroom apartment she had seen listed for rent on an advertisement on craigslist.com on the second floor of a six-flat located at 2267 N. Kedzie Ave. in Chicago. The six-flat is part of a thirteen-unit apartment building with two addresses and entrances: 2267 and 2269 N. Kedzie Ave. There are three 3-bedroom units, eight 2-bedroom units and two 2-bedroom units with a den. Castillo was greeted by the property manager, respondent Johnson.

¶ 8 According to Castillo, she was impressed with the property and desired to rent it. Johnson asked, "how many people in the family?" and Castillo responded, "five including myself, four kids, two boys and two girls." Johnson then remarked, "I don't think Ziggy (Oparowski, the property owner) will allow that many people to live in this unit." Castillo requested a rental application but Johnson stated that he would need to talk to Oparowski first and he would contact Castillo later. Castillo claimed she called Johnson several times but never received a response until a month later, when Johnson left her a voice message stating that he would call her back if another unit became available. The apartment was rented shortly after Castillo viewed it to, according to the lease, three adult tenants.

¶ 9 Castillo filed a housing discrimination complaint with the Department on June 11, 2007. Castillo alleged discriminatory refusal to rent and discriminatory statements based on her familial status in violation of sections 3-102(A) and 3-102(F) of the Act. 775 ILCS 5/3-102(A), 3-102(F) (West 2006). Castillo amended her complaint several times to add charges of refusal to rent based on her association with a disabled person (her son) her race and color (black), and ancestry (Hispanic).

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¶ 10 Johnson admitted asking Castillo how many people would be living in the apartment and indicating that the owner may have a concern with the number of prospective tenants based on the square footage of the apartment, but denied that he discriminated against Castillo based upon her familial status, her son's handicap, her race, her color or her ancestry. Johnson denied that Castillo requested an application for the apartment or offered to submit a security deposit. Oparowski denied any knowledge of Castillo's attempt to rent the unit.

¶ 11 The Department's investigators interviewed the parties and four additional witnesses who were tenants of the building. The investigators also considered exhibits submitted by the parties, including the craigslist.com advertisement; relevant portions of the Chicago Building Code; a copy of the federal housing voucher Castillo planned to use to pay the rent; a sketch of the dimensions of the sleeping rooms in the apartment; and lists of tenant information for the building and other apartment buildings owned by Oparowski. It is undisputed that Castillo has four children under the age of 18 who would be living with her and that respondents are aware of her familial status.

¶ 12 The investigators found that Castillo held a Housing Choice Voucher through the Chicago Housing Authority ("CHA") that entitled her to rent a three-bedroom unit with a maximum gross allowable rent of \$1,512. The advertisement for the unit indicated that the monthly rental was \$1,475. Castillo was therefore found to be qualified, ready, willing and able to rent at the time of the alleged act of discrimination. Whether Castillo requested a rental application is disputed, but the investigation found that Castillo did not allege that she offered to provide or that Johnson refused to accept the CHA Housing Voucher "moving papers".

¶ 13 The investigation also found that Oparowski has rented to families with children in the past and continues to do so. A tenant list dated Nov. 8, 2007, lists tenants residing at the property and

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other properties owned by Oparowski and shows families with children residing at the properties. The Department's investigation found that the comments attributed to Johnson did not meet the definition of a discriminatory statement, as Johnson's statement to Castillo that he did not think Oparowski "would allow that many people to live in the unit," standing alone, did not indicate that families without children were preferred.

¶ 14 The investigation report recommended a finding of lack of substantial evidence for each charge of discrimination: discriminatory refusal to rent and discriminatory statements based on familial status. The report found there was no evidence that Castillo was denied an opportunity to rent because of unlawful discrimination based on any of the protected classes alleged (race, color, ancestry, familial status and disability of her son). The report also determined there was insufficient evidence to support the discriminatory statements charge.

¶ 15 On January 20, 2012, the Department dismissed the charges for lack of substantial evidence. Castillo filed a request for review before the Chief Legal Counsel pursuant to section 7A-102 (D)(2)(a) of the Act. 775 ILCS 5/7A-102(D)(2)(a) (West 2006). She argued that the Department's investigation showed there was substantial evidence to support her discrimination charges both by direct evidence of discrimination and under the indirect, burden-shifting test for discrimination.

¶ 16 The Chief Legal Counsel made his final decision sustaining the Department's dismissal of the charges in January 2013. The Chief Legal Counsel concluded that the investigation did not reveal respondents refused to rent to Castillo based on her familial status, her race, her color, her ancestry, or her association with her disabled son. The Chief Legal Counsel found Castillo failed to make out a *prima facie* case of discrimination based on familial status, race, color, national

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origin, or disability, in that she failed to establish that "respondents treated a similarly situated person more favorably under similar circumstances." The Chief Legal Counsel noted the investigation revealed that respondent has historically rented to families with children, to persons of color and to persons of Hispanic ancestry. Finally, the Chief Legal Counsel concluded that the investigation did not reveal that Johnson made a discriminatory statement based on Castillo's familial status because expressing a concern as to the number of people would not suggest to an ordinary listener that families with children were not preferred.

¶ 17

#### ANALYSIS

¶ 18 Castillo argues that (1) the Chief Legal Counsel's dismissal of her claims of familial status discrimination for lack of substantial evidence is against the manifest weight of the evidence; (2) the Chief Legal Counsel erred in failing to view the evidence either as direct proof of discrimination, through direct or circumstantial evidence, or as indirect proof of discrimination, through the inferential burden-shifting method known as the *McDonnell Douglas* test (*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)); and (3) the Chief Legal Counsel erred by improperly resolving a question of fact.

¶ 19 We first address our standard of review. Under the Act, upon the filing of a discrimination charge, the Department "conduct[s] a full investigation of the allegations set forth in the charge" and completes a written report. 775 ILCS 5/7A-102(C)(1) and 7A-102 (D) (West 2006). Upon review of the report, the Department determines whether there is substantial evidence that the alleged discrimination was committed. 775 ILCS 5/7A-102(D)(2) (West 2006). "Substantial evidence is evidence which a reasonable mind accepts as sufficient to support a particular

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conclusion and which consists of more than a mere scintilla but may be somewhat less than a preponderance." *Id.*

¶ 20 If the Department dismisses the charge for lack of substantial evidence, the dismissal is reviewable by the Chief Legal Counsel.<sup>2</sup> 775 ILCS 5/7-101.1(A) (West 2006). The determination of the Chief Legal Counsel sustaining or reversing the Department's dismissal of charges is subject to judicial review in the appellate court. *Id.* and 775 ILCS 5/8-111(A)(1) (West 2006). See also *Kalush v. Dep't of Human Rights Chief Legal Counsel*, 298 Ill. App. 3d 980, 988-89 (1998) ("any final order entered by the Chief Legal Counsel under [section 7-101.1] is appealable in accordance with paragraph (A)(1) of Section 8-111(A)(1)"; "any complainant or respondent may apply for and obtain judicial review of any final order entered under this Act by filing a petition for review in the Appellate Court," citing 775 ILCS 5/7-101.1(A) (West 1996) and 775 ILCS 5/8-111(A)(1) (West 1996)).

¶ 21 When the Chief Legal Counsel reviews the Department's dismissal of charges, it may in its discretion conduct an evidentiary hearing into the charges. 775 ILCS 5/7-101.1(B) (West 2006). The Chief Legal Counsel's findings of fact are sustained upon review unless the court determines the findings are against the manifest weight of the evidence. 775 ILCS 5/8-111(A)(2) (West 2006).

¶ 22 Contrary to Castillo's position, however, in the absence of an evidentiary hearing, no "findings of fact" made by the Chief Legal counsel are subject to review. *Parham v. Macomb*

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<sup>2</sup> For charges filed on or after January 1, 1996, but before January 1, 2008, such as the charges at issue here, review of the Department's dismissal is conducted by the Chief Legal Counsel rather than the Commission. Prior to 1996, the Commission was vested with the authority to review the Department's decision to dismiss a discrimination charge for lack of substantial evidence. Compare 775 ILCS 5/7A-102(D)(3) (West 2010), with 775 ILCS 5/7A-102(D)(2)(a) (West 1994).

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*Unit School Dist. No. 185*, 231 Ill. App. 3d 764, 772 (1992). "Investigations conducted by administrative agencies attempt to discover and produce evidence not for the purpose of adjudicating guilt or proving pending charges, but rather to serve as the basis for determining whether facts exist to justify instituting a complaint [ ][citation]." *Id.* at 772-73.

¶ 23 Our review is therefore limited to the Chief Legal Counsel's exercise of his discretion to dismiss the charges. *Id.* at 772-73 ("the scope of review is necessarily limited to determining whether the decision to dismiss the charge was an abuse of discretion.") Consequently, the standard of review is whether the Chief Legal Counsel's decision to sustain the Department's dismissal of the charges for lack of substantial evidence was arbitrary and capricious or amounted to an abuse of discretion. *Budzileni v. Dep't of Human Rights*, 392 Ill. App. 3d 422, 442 (2009); *Welch v. Hoe*, 314 Ill. App. 3d 1027, 1034 (2000); *Marinelli v. Human Rights Commission*, 262 Ill. App. 3d 247, 253 (1994). A decision is arbitrary and capricious if it contravenes the legislature's intent, fails to consider a crucial aspect of the problem, or offers an explanation that is contrary to agency expertise. *Budzileni*, 392 Ill. App. 3d at 442; *Deen v. Lustig*, 337 Ill. App. 3d 294, 302 (2003). An abuse of discretion occurs when a decision is reached without employing conscientious judgment or when the decision is clearly against logic. *Id.*

¶ 24 We will not disturb the Chief Legal Counsel's decision to sustain dismissal unless the decision was arbitrary and capricious. But to the extent that our review centers on the interpretation of a provision within the Act, it raises a question of law that we review *de novo*. *Gusciara v. Lustig*, 346 Ill. App. 3d 1012, 1017-18 (2004).

¶ 25 I. Familial status discrimination under section 3-102(A)

¶ 26 Under section 3-102(A) of the Act, it is unlawful for an owner of rental property to refuse to engage in a real estate transaction with another person because of that person's familial status. 775 ILCS 5/3-102(A) (West 2006). "Familial status" is defined as "individuals (who have not attained the age of 18 years) being domiciled" with a parent. 775 ILCS 5/3-101(E) (West 2006). In interpreting the Act and resolving the issues presented in this appeal, we may consider judicial interpretations of section 3604 of the federal Fair Housing Act (42 U.S.C. sec. 3601 *et seq.* (2006)), a provision similar in language and intent to the Act. *Turner v. Human Rights Comm'n*, 177 Ill. App. 3d 476, 487 (1988); *Atkins v. City of Chicago Comm'n on Human Relations ex rel. Lawrence*, 281 Ill.App.3d 1066, 1074 (1996).

¶ 27 Plaintiffs pursuing housing discrimination actions may, but are not required to, offer direct proof of discrimination to establish a claim. *Woolsey v. Lubberda*, 1992 U.S. Dist. LEXIS 3147 (N.D. Ill. 1992), citing *Hamilton v. Svatick*, 779 F. 2d 383, 387 (7th Cir. 1985). Plaintiffs may establish discriminatory intent by presenting evidence of prejudice: (1) directly, through direct or circumstantial evidence; or (2) indirectly, though the burden-shifting method of the *McDonnell Douglas* test. *Cavalieri-Conway v. Butterman & Assoc.*, 992 F. Supp. 995, 1002 (N.D.Ill. 1998), *aff'd*, 172 F.3d 52 (7th Cir. 1999); *Kormoczy v. U.S. Dep't of Hous. and Urban Dev.*, 53 F.3d 821, 823–824 (7<sup>th</sup> Cir.1995) ("The elements of housing discrimination follow closely the elements of a claim for employment discrimination.")

¶ 28 Under the direct method, a plaintiff establishes housing discrimination when he or she presents a "smoking gun" evidencing discriminatory intent, or proof of an acknowledgement of the defendant's discriminatory intent. *Cavalieri-Conway*, 992 F.Supp at 1003. A plaintiff may also

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submit circumstantial evidence under the direct method, which potentially emanates from two sources: (1) suspicious timing, ambiguous statements, or behavior toward or comments directed at others not in the protected group; or (2) evidence that others similarly situated to the plaintiff (other than in the protected status) received better treatment. *Id.*

¶ 29 In the absence of direct evidence of discrimination, claims of housing discrimination are evaluated under the burden-shifting framework the United States Supreme Court first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which was later adopted by the Illinois Supreme Court in *Zaderaka v. Illinois Human Rights Comm'n*, 131 Ill. 2d 172 (1989). The *McDonnell Douglas* test recognizes that direct proof of unlawful discrimination is rarely available. *Cavalier-Conway*, 992 F. Supp. at 1005, citing *United States v. Badgett*, 976 F.2d 1176, 1178 (8<sup>th</sup> Cir. 1992). Instead, under the *McDonnell Douglas* test's three-step analysis, a plaintiff first has the burden to establish a *prima facie* case of housing discrimination. See *Turner*, 177 Ill. App. 3d at 488.

¶ 30 Once a *prima facie* case is established, a presumption of discrimination arises and the burden then shifts to the respondent to rebut the presumption by articulating a legitimate reason for refusing to deal with the plaintiff. *Id.* When a nondiscriminatory justification for an allegedly discriminatory housing action has been offered, at least some level of inquiry into the defendant's intent is required under the Fair Housing Act. *Woolsey*, 1992 US Dist LEXIS 3147 at 14. After respondent articulates a nondiscriminatory reason, a plaintiff must then show the reason is a mere pretext, by evidence that a discriminatory reason more likely motivated respondent or evidence that the respondent's explanation is unworthy of belief. *Hsu v. Human Rights Comm'n.*, 180 Ill. App. 3d 949, 954 (1989).

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¶ 31 Castillo criticizes the Chief Legal Counsel's decision because it failed to articulate under what legal standard Castillo's discrimination claim was evaluated. From our review of the record, we agree that it is unclear under what method the Chief Legal Counsel reviewed the evidence in sustaining the Department's dismissal for lack of substantial evidence. For example, the Chief Legal Counsel stated that the allegation that Johnson considered Castillo's familial status (and race, color, ancestry and disability status of her son) was mere speculation which "is not sufficient to show a discriminatory animus." This statement suggests the Chief Legal Counsel considered whether there was substantial *direct* evidence to show discriminatory intent. On the other hand, the Chief Legal Counsel referred to Castillo as not having established a "*prima facie* case" and to respondent's "articulated non-discriminatory reason for not renting," suggesting an application of the burden-shifting test under the indirect method.

¶ 32 But as we discuss below, despite the lack of clarity in the record, we cannot say that the Chief Legal Counsel abused his discretion in sustaining the dismissal of Castillo's charges.

¶ 33 *Direct method*

¶ 34 The record indicates that Castillo did not present, and the investigation did not reveal, any direct or circumstantial evidence of familial status discrimination. First, there was no "smoking gun" evincing discriminatory intent, *i.e.*, there was no direct statement or other form of communication or treatment by Johnson towards Castillo that can fairly be characterized as a refusal to rent based on the fact that family members under the age of 18 would reside with her.

¶ 35 Castillo argues that the following is direct evidence of discrimination: Johnson's question about how many people there were in her family and the later statement that the owner may not allow that many people to live in the unit; her request for an application; Johnson's refusal to give

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her an application until he checked in with the owner; and Johnson's failure to return her subsequent phone calls. However, this evidence does not constitute direct evidence of discriminatory intent, *i.e.*, it is not substantial evidence of an acknowledgement by Johnson that the owner (or Johnson) refused to rent to Castillo on the basis of her familial status or an admission by Johnson that his failure to provide an application was because of Castillo's familial status. Rather, Johnson's articulated concern related to the number of people who would occupy the apartment, which is a valid concern for any landlord. The evidence also does not support the inference that Johnson's failure to return calls was motivated by discriminatory intent. The evidence shows that the unit was rented shortly after Castillo viewed it. The fact that the unit was no longer available would explain Johnson's delay in returning Castillo's calls. Further, there is evidence in the record that Johnson offered to let Castillo know when another unit became available, suggesting a willingness to rent to her in the future.

¶ 36 Second, Castillo offered no circumstantial evidence of discriminatory intent. Castillo argues that the statement by Johnson that he did not think that the owner would allow "that many people" to live in the apartment, made right after Johnson inquired as to the number of family members, came at a suspicious time. But viewed objectively, Johnson's question as to how many people would be living in the unit and his later expressed concern over the number of occupants does not tend to show discriminatory animus towards people living with children under the age of 18. The statement that the owner "would not allow that many people" is also not sufficiently ambiguous to show an intent to discriminate, and Castillo failed to adduce any evidence that would support an inference that Johnson's behavior or comments were directed at those in the protected

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group (*i.e.*, families with children). The one comment cited by Castillo is insufficient to support the inference that respondents refused to rent to her based on her familial status.

¶ 37 Castillo also argues that evidence of Johnson's statement that he did not know if the owner would allow that many people is circumstantial evidence of discriminatory intent, since Johnson, as the building's leasing agent, would be presumed to know the apartment's maximum occupancy. In other words, because Johnson was the leasing agent, Castillo posits that he must have known how many people Oparowski would permit to reside in the unit so that his representation that he needed to consult the owner was false. In addition, Castillo contends that Johnson's failure to contact her or to give her an application suggests the type of suspicious timing typical of circumstantial evidence of discrimination. But even if we could conclude on this record that Johnson refused to deal with Castillo, there is no evidence that his refusal was motivated by Castillo's familial status.

¶ 38 There is also insufficient circumstantial evidence to establish that others similarly situated to Castillo received better treatment. The record reveals that the Chief Legal Counsel relied on evidence that respondents had rented to families with children in the past and also at the time of the investigation. There is no evidence that respondents did not rent to families with children before or after Castillo filed her charges. Further, there was evidence that respondents had rented a unit to a mother with four children in the past, thus reinforcing the conclusion that Johnson's statement regarding the number of people the owner would permit was directed to that particular unit and not to families with children in general.

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¶ 39 In sum, there was no substantial evidence of housing discrimination under the direct method, as there was no direct or circumstantial evidence to support a claim of discriminatory intent.

¶ 40 *Indirect method*

¶ 41 To establish discriminatory intent using the indirect method under the *McDonnell Douglas* burden-shifting test, Castillo must first establish a *prima facie* case. To establish a *prima facie* case of housing discrimination under section 3-102(A) of the Act (775 ILCS 5/3-102(A) (West 2006)), Castillo must show: (1) she is a member of a protected class; (2) she was qualified to rent; (3) the opportunity to rent was denied to her; and (4) the opportunity was offered to others not in the protected group. See *Turner*, 177 Ill. App. 3d at 487; *Atkins*, 281 Ill.App.3d at 1074; *Hsu*, 180 Ill. App. 3d at 953; *Acorn Corrugated Box Co. v. Illinois Human Rights Comm'n*, 181 Ill.App.3d 122, 137 (1989) (elements of discrimination charge will vary depending on nature of claim and factual situation presented).

¶ 42 With regard to the fourth element, although the Chief Legal Counsel discussed whether Castillo demonstrated that respondents "treated similarly situated persons more favorably under similar circumstances," this is, in fact, not an element of a *prima facie* case. Instead, the Chief Legal Counsel should have determined whether the opportunity to rent was offered to others not in the protected group, as other courts have done in analyzing *prima facie* cases of housing discrimination. See generally *Turner*, 177 Ill. App. 3d at 488. Using the correct standard, Castillo only needed to present evidence that the apartment was offered to others not in the protected group, *i.e.*, to those who did not share Castillo's familial status. Stated differently, Castillo was only required to present evidence that the apartment was offered to adults –not to five

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adults (and not to five adults who were also black, Hispanic, associated with a disability, and with a housing voucher, as the Chief Legal Counsel suggested.) Given that the evidence showed the unit was rented to three adults, Castillo met this element of a *prima facie* case under the indirect method and we assume for purposes of our discussion that she satisfied the other elements as well.<sup>3</sup>

¶ 43 Assuming Castillo established a *prima facie* case of housing discrimination, the next prong of the burden-shifting analysis required the respondents to articulate a legitimate reason for refusing to rent to her. Respondents need only "articulate, not prove," a legitimate, nondiscriminatory reason for their decision. *Owens v. Dep't of Human Rights*, 403 Ill. App. 3d 899, 919 (2010). Once respondents advanced a facially nondiscriminatory reason for failing to rent to Castillo, she was then required to show that the reason articulated was pretextual, *i.e.*, either that a discriminatory purpose more likely motivated respondent's decision or that respondent's reason is unworthy of belief. *Hsu*, 180 Ill. App. 3d at 954. See also *Turner*, 177 Ill. App. 3d at 488–89.

¶ 44 Here, the Chief Legal Counsel stated that respondents' articulated nondiscriminatory reason for not renting to Castillo was that she "did not submit a rental application or indicate she

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<sup>3</sup> The Chief Legal Counsel's final order states that to establish a *prima facie* case, Castillo had to show that: "(1) she is a member of a protected class; (2) she was qualified to engage in the real estate transaction; (3) Respondents altered the terms, conditions or privileges of Complainant's real estate transaction; and (4) Respondents treated a similarly situated person more favorably under similar circumstances." (citing to *Turner*, 177 Ill. App. 3d 488). The third element cited by the Chief Legal Counsel, that respondents "altered the terms, conditions or privileges of the real estate transaction," refers to section 3-102(B) of the Act, which makes it unlawful to "[a]lter the terms, conditions or privileges of a real estate transaction \*\*\*." 775 ILCS 5/3-102(B) (West 2006). Castillo's charges were clearly under section 3-102(A) of the Act, as she alleged discrimination by "[r]efus[al] to engage in a real estate transaction with a person \*\*\*." As we have already discussed, the Chief Legal Counsel also applied the incorrect standard for the fourth element.

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was able to submit a security deposit." Although this reason was stated in respondent's answer to the complaint, the focus of Castillo's claim was the statement made by Johnson regarding the number of people who would occupy the apartment.

¶ 45 We agree with Castillo that if this case hinged on the determination of whether she was refused a rental application (as she claimed) or whether she simply failed to submit one (as respondents contended), issues of fact would preclude the Chief Legal Counsel from relying on that determination as a basis to uphold the dismissal of Castillo's case. *Marinelli v. Human Rights Commission*, 262 Ill. App. 3d 247 (1994). However, the proper focus here is on Johnson's statement made at the time Castillo expressed an interest in renting the unit and we will therefore address the claim in that context.

¶ 46 As we have already discussed, we do not view Johnson's statement as direct or circumstantial evidence of familial status discrimination. For the same reasons, we conclude that Johnson's statement regarding the number of people the owner would permit to occupy the unit Castillo was interested in renting constituted a nondiscriminatory reason for failing to rent to Castillo. By articulating a nondiscriminatory reason for not renting to Castillo at the time Castillo viewed the unit, the presumption of unlawful discrimination disappeared. *Zaderaka*, 131 Ill. 2d at 179. Castillo was therefore required to present evidence to show that this reason was a pretext for discrimination.

¶ 47 Castillo argues that respondents made the argument that the reason for not renting was the size of the unit (rather than the number of people occupying it), only after the complaint was filed. She claims that Johnson never mentioned the Chicago Building Code or the dimensions of the apartment being a problem, and because he did not assert these reasons until after the complaint

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was filed, they are pretextual. But when Johnson stated that there may be a limit on the number of people who could live in the unit, and that he would have to check with the owner, he was at least implicitly alluding to the size of the unit as a barrier to Castillo's tenancy. The fact that Johnson did not mention the Chicago Building Code or the unit's dimensions at the time he made the statement does not in our view render pretextual this facially nondiscriminatory reason for failing to rent to Castillo.

¶ 48 Castillo offered no evidence that the apartment was large enough for her family, which would support an inference that Johnson's statement was false or that the motive was to prevent a family with children from renting. Castillo argues that she "showed that the three-bedroom apartment was adequate for her family," but presented no evidence to substantiate this assertion. Rather, Castillo argues later in her brief that it would be impossible to determine whether her family could fit in the apartment because respondents did not provide the size of living spaces other than the bedrooms.

¶ 49 The Act provides an exemption for "[r]easonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 775 ILCS 5/3-106 (D) (West 2006). Castillo is correct in that, in enforcing the Fair Housing Act, the Department of Housing and Urban Development provides a guideline for occupancy standards where several factors are considered in determining the reasonableness of an occupancy policy, including the size of bedrooms and other living areas, the configuration of the unit, and the age of children. Department of Housing and Urban Development Fair Housing Enforcement-Occupancy Standards Notice of Statement of Policy, 63 Fed. Reg. 70256, 70257 (1998). Under this calculation, the apartment may very well have been large enough for her family. But Castillo did

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not provide evidence that tended to show that, if the owner in this case imposed a limit on the number of occupants, that restriction was not reasonable and that it was a pretext for discrimination.

¶ 50 Ultimately, landlords have a right to restrict the number of occupants in a dwelling, independent of familial status. *Norville v. Dep't of Human Rights*, 341 Ill. App. 3d 260, 263 (2003). Asking about the number of people there are in the family and expressing a concern as to the number of people potentially occupying the unit is therefore a legitimate reason for Johnson's failure to provide Castillo an application. Castillo did not present any evidence to rebut this facially legitimate reason or to support the conclusion that it was merely a pretext for discrimination against families with children. Given that respondents had rented to families with children both before and after Castillo filed her complaint, the record does not support a finding that she has met her burden under the *McDonnell Douglas* test.

¶ 51 There is simply no evidence that Johnson refused to rent to Castillo based on her familial status under the direct or indirect methods. Based on the record before us, we find that the Chief Legal Counsel did not abuse his discretion in dismissing Castillo's housing discrimination claim.

¶ 52 II. Discriminatory statement under section 3-102(F)

¶ 53 The Act also makes it unlawful to make an "oral statement \*\*\* which expresses any limitation founded upon, or indicates, directly or indirectly, an intent to engage in unlawful discrimination." 775 ILCS 5/3-102(F) (West 2006). To support a claim under this section of the Act, Castillo was required to present substantial evidence that Johnson (1) made a statement, (2) with respect to the sale or rental of a dwelling, (3) that indicated a preference, a limitation, or discrimination against her on the basis of her status as a parent living with minor children. *White*

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*v. U.S. Dep't of Housing & Dev.*, 475 F. 3d 898, 904 (7th Cir. 2007). Castillo's allegations and the investigation do not support this claim.

¶ 54 In determining whether a statement indicates impermissible discrimination, an "ordinary listener" standard is used. *White*, 475 F. 3d at 905. Under this applicable objective standard, the challenged statement must suggest to an "ordinary listener" that a person with the protected status is preferred or disfavored for the housing in question. *Id.* The "ordinary listener" is "neither the most suspicious nor the most insensitive\*\*\*." *Id.* at 906.

¶ 55 Here, Castillo's claim based on Johnson's question regarding the number of occupants requires a level of suspicion and sensitivity exceeding that of the ordinary listener. It cannot be reasonably inferred from the evidence that Johnson made a statement with respect to the rental of the apartment that indicated a preference, a limitation, or discrimination based on Castillo's familial status. Nothing Johnson said conveyed anything that would cause an "ordinary listener" to believe that Johnson would not wish to rent to Castillo because of her familial status. Even if it is true that Johnson had a "sudden change in demeanor," as Castillo characterizes it, the statement would still not suggest to an "ordinary listener" that the change in Johnson's demeanor was due to the number of children, rather than the number of tenants, regardless of whether they were adults or children.

¶ 56 Castillo's claim that the statement should be interpreted from an "ordinary person" in her position is inconsistent with clearly established law. See *White*, 475 F. 3d at 905. Rather, the oral statement is evaluated from the standpoint of an "ordinary listener," not the "ordinary listener" belonging to the protected class. Here, Johnson's inquiry regarding how many "people" would occupy the unit would not lead an "ordinary listener" to conclude that it was the fact that Castillo

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had children that was of concern. Therefore, the Chief Legal Counsel did not abuse his discretion in sustaining the Department's dismissal of her claim under section 3-102(F) of the Act.

¶ 57

### III. Credibility determinations

¶ 58 Although Castillo claims that Chief Legal Counsel's decision rested on improper credibility determinations, this contention fails when the focus –as it properly should be –is on the statement made by Johnson at the time Castillo expressed an interest in renting the unit. Crediting Castillo's version of events with respect to Johnson's statement, which respondents essentially did not dispute, supports the determination to dismiss her claim of familial status discrimination. Thus, dismissal of the claim did not rest on credibility determinations.

¶ 59

### CONCLUSION

¶ 60 For all the reasons stated above, we affirm the Chief Legal Counsel's decision to sustain the Department's dismissal of Castillo's housing discrimination claims.

¶ 61 Affirmed.