



Fair Housing & Discrimination Seminar

Matthew A. Brauer, Esq. | Sept. 15, 2020



Rutledge Manion Rabaut Terry & Thomas P.C.

HADA SEMINAR

Overview

- Brief Historical Background
- The Fair Housing Act (FHA) and Amendments
- Related Fair Housing Laws
- Recent and Proposed Changes
- Prohibited Practices and Recommendations



HADA SEMINAR

Goals

- To understand the current legal framework underlying Fair Housing and Discrimination
- To manage risk, prevent unnecessary litigation by continuing to improve policies and procedures

Ongoing Issues with Compliance

- § 40 years of legal precedence, yet HUD estimates approximately four million acts of discrimination each year

Background

- Landlords, banks, insurance companies, and other housing-affiliated entities cannot discriminate based on race, color, national origin, and religion, familial status or disability
- Discrimination issues continue to come up in many subtle ways

National Climate Leading Up to the FHA

- Minorities returned from WWII and Vietnam unable to rent or purchase a home in certain areas on account of their race or national origin
- Civil Rights Era of marches and protests for equality

FHA's Challenges in Congress

- As a bill, the FHA was regularly considered in Congress, but it repeatedly failed to get a strong majority to pass
- The bill went in and out of committee multiple times
- Assassination of MLK triggered a vote

The FHA Ultimately Passes



President Lyndon B. Johnson signed the Civil Rights Act of 1968, (which included the FHA) on April 11, 1968, barely a week after Martin Luther King, Jr. was assassinated.

The Federal Fair Housing Act (FHA) of 1968

§ 42 USC 3601-3619

§ Prohibits discrimination due to race, color, national origin, religion, (and as amended) sex, disability, and family status



The Federal Fair Housing Amendments

- § 1974 FHA amendment adds sex discrimination
- § 1988 FHA amendment prohibits discrimination for physical or mental handicap, as well as familial status



Related Fair Housing Laws

- Title VI of the Civil Rights Act of 1964
 - 42 U.S.C § 2000d-1 –Prohibits discrimination on the basis of race, color, and national origin in programs/activities receiving federal financial assistance
- Section 504 of the Rehabilitation Act of 1973
 - 29 U.S.C § 794—Prohibits discrimination based on disability in any program or activity receiving federal financial assistance
 - Applies to “recipients” of funds

Related Fair Housing Laws

- Title II of the Americans with Disabilities Act of 1990
 - 42 U.S.C. § § 12131-12165 – Prohibits discrimination based on disability in programs and activities provided or made available by public entities. HUD enforces Title II with respect to housing-related programs and activities of public entities, including public housing, housing assistance and housing referrals.
- Title III of the Americans with Disabilities Act of 1990
 - 42 U.S.C. § 12181-12189 –Prohibits discrimination based on disability in the goods, services, facilities, privileges, advantages, and accommodations of places of public accommodations owned, leased, or operated by private entities.
 - DOJ enforces this.

Who is Disabled?

- Federal nondiscrimination laws define a person with a disability to include any
 - (1) individual with a physical or mental impairment that substantially limits one or more major life activities;
 - (2) individual with a record of such impairment; or
 - (3) individual who is regarded as having such an impairment.

“Recipients” under Section 504

- § Any State or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution organization, or other entity or any person to which federal financial assistance is extended for any program or activity directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance. 24 C.F.R. § 8.3.

A Recipient Under Section 504

- § A HUD funded public housing agency, or a HUD funded non-profit developer of low-income housing is a recipient of federal financial assistance and is subject to Section 504's requirements.

Handicapping Condition Definition

- § Any person who has a physical or mental impairment that substantially limits one or more major life activity such as hearing, seeing, speaking, breathing, performing manual tasks, walking, caring for oneself, learning or working.



Reasonable Modifications/Accommodations under FHA and 504 Regs

- Must not refuse “reasonable modifications” to the dwelling or common areas, in order to fully use the housing
- Must not deny reasonable accommodations for people with disabilities

Examples of Reasonable Modifications and Accommodations

- § Assigning an accessible parking space for a person with a mobility impairment
- § Permitting a tenant to transfer to a ground-floor unit
- § Adding a grab bar to a tenant's bathroom
- § Permitting an applicant to submit a housing application via a different means (paper instead of online if not able to read on a computer)

504 Regulations cont'd

- § Under Section 504, a housing provider is required to provide and pay for the structural modification as a reasonable accommodation unless it amounts to an undue financial and administrative burden or a fundamental alteration of the program
- § If an undue burden or fundamental alteration exists, the recipient is still required to provide any other reasonable accommodation up to the point that would not result in an undue financial and administrative burden on the particular recipient and/or constitute a fundamental alteration of the program

Example

- Tenant has a stroke and now must use a wheelchair. Her apartment entrance has steps. Her federally-assisted housing provider provides a ramp as a reasonable accommodation to the tenant's disability.



Navigating the Risks of the **FAIR HOUSING ACT**



DISABILITY



RACE



SEX



COLOR



NATIONAL
ORIGIN



RELIGION



FAMILY
STATUS

What does this mean?

- § A landlord, property manager, insurance company, or housing provider cannot accept or deny an applicant for a reason associated with one of the protected classes
- § This extends beyond the leasing process to include related items such as advertising and the initial application process

Practical Tips



- Common complaint: members of one or more protected classes assert maintenance requests are not handled as quickly as for others
- Establish a clear maintenance response policy and document such requests for repairs
- Keep thorough documentation of work requests and maintenance actions

Do's and Don'ts on Applications

- Do not label/advertise properties differently for families, and do not place tenants in certain areas of housing based upon familial status
 - ü Appropriate to have applicants list any occupants under 18 on the rental application, but do not ask what their relationships are to each other

Senior Housing Exemption

- § The Housing for Older Persons Act of 1995 (HOPA) (Pub.L. 104–76, 109 Stat. 787, enacted December 28, 1995) creates an exception to FHA in order to allow for senior housing developments
- § Intended for and solely occupied by persons 62+ or 55+ and at least 80% of units occupied by at least one person who is 55+

Senior Housing Exemption cont'd

- Exempt from age-based allegations only
- No protection from liability for housing discrimination based on race, color, religion, sex, disability, or national origin

What is Prohibited?

- On account of the protected classes, you cannot:
 - Refuse to rent
 - Make housing unavailable
 - Deny a dwelling
 - Produce different terms or conditions
 - Provide different services/facilities
 - Falsely deny that housing is available for inspection

Protections Based on Familial Status

- Protection covers households where one or more minor children live with
 - Parent
 - Guardians or others with legal custody
 - Designee of parent or legal custodian
- Familial status protection also extends to pregnant women and any person in the process of securing legal custody of a minor child (including adoptive or foster parents)

Exceptions

- § No protection for people who are a direct threat to health/safety of others or who currently use illegal drugs
- § The FHA exempts some senior housing facilities and communities from liability for familial status discrimination
- § Have to prove housing is age-restricted to seniors and meet certain occupancy requirements

Direct Threat Exception

- § Housing providers need not rent to anyone who would be a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others
- § Must have documented, objective evidence
- § Mere concerns, assumptions or suspicions are not sufficient
- § Document instances of complaints/violence or threats in writing

Direct Threat Example - *Wirtz Realty Corp v Freund*, 308 Ill App 3d 866 (1999)

- § Tenants' mentally disabled son, Freund, was observed brandishing knives, threw a lit cigarette and coke can at the building's doorman and paced/yelled death threats outside of the door of another tenant



Direct Threat Example - *Wirtz Realty Corp v Freund*, 308 Ill App 3d 866 (1999) cont'd

- § Landlord brought suit to collect past due rent against tenants who had been evicted, and tenants brought counterclaim under Illinois Human Rights Act, alleging that their eviction had been result of impermissible discrimination against their mentally handicapped adult son
- § Court ruled that the conduct of son created reasonable belief that a direct threat existed, so eviction came within exception

Types of FHA Claims

§ Intentional Discrimination, but also

§ FHA recognizes two types of discriminatory-effect claims:

1. Segregative-Effect Claims

2. Disparate-Impact Claims*

*In June 2015, the Supreme Court held in *Texas Department of Housing and Community Affairs v Inclusive Communities Project* that, in addition to intentional discrimination, disparate impact claims are cognizable under the FHA

FHA Claims cont'd

- § Both give the plaintiff the initial burden of proving that the defendant's challenged practice causes a discriminatory effect
 - *See Homebuilders Ass'n of Mississippi, Inc v City of Brandon, Miss*, 640 F Supp 2d 835, (S.D. Miss. 2009) *See also* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,482 (Feb. 15, 2013) (promulgating 24 C.F.R. § 100.500).
- § Both types of claims are subject to a three-part burden-shifting analysis

Segregative Effect Claims

- § A plaintiff can demonstrate discriminatory effect in two ways: it can demonstrate that decision has a segregative effect or that it makes housing options significantly more restrictive for members of protected group than for persons outside that group. *Bonaser v City of Norcross*, 342 Fed Appx 581 (2009).
 - See also Fair Housing Act, § 801 et seq., 42 U.S.C.A. § 3601 et seq.

Segregative Effect Claims

§ Three step analysis:

1. Plaintiff must show that “a challenged practice caused or predictably will cause a discriminatory effect.” *See* 24 C.F.R. § 100.500(c).

Segregative Effect Claims Cont'd

2. If the plaintiff proves a prima facie case, the burden shifts to the defendant to prove its "challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests." See 24 C.F.R. § 100.500(c)(2).

Segregative Effect Claims Cont'd

3. If the defendant satisfies this burden, the plaintiff may still prevail by proving that the defendant's interests in "the challenged practice could be served by another practice that has a less discriminatory effect." *See* 24 C.F.R. § 100.500(c)(3).

Segregative Effect Claims Cont'd

- § Unlike disparate-impact claims, segregative-effect claims may challenge a particular action or decision of the defendant as well as an across-the-board policy.
 - Focus = community harm

- § Most segregative-effect claims have been made against municipalities accused of using their land-use powers to block integrated housing developments in predominantly white areas

Disparate Impact Discrimination

- § In 2013, the Department of Housing and Urban Development (HUD) finalized its disparate impact regulations
- § Harm = An individual belonging to one of the protected classes

Disparate Impact Discrimination cont'd

§ HUD's 2013 regulation endorsing discriminatory-effect claims under the FHA recognized that a challenged practice may have an illegal effect in either of two ways: "(1) harm to a particular group of persons by a disparate impact; and (2) harm to the community generally by creating, increasing, reinforcing, or perpetuating segregated housing patterns."

-Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. at 11469 (describing 24 C.F.R. § 100.500(a) (2016)).

Disparate Impact Discrimination Claims

- § A housing authority's policy may be considered discriminatory if it has a disproportionate "adverse impact" against any protected group when there is no legitimate, non-discriminatory business need for the policy
- § Upheld by the US Supreme Court in *Texas Dept of Housing and Community Affairs v Inclusive Communities Project, Inc.*, 135 S Ct 2507; 192 L Ed 2d 514 (2015).

Disparate Impact Discrimination Cont'd

- § “A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons protected by the Act. . . . Any facially neutral action, e.g., laws, rules, decisions, standards, policies, practices, or procedures. . . may result in a discriminatory effect.” See 24 C.F.R. 100.500(a).

Disparate Impact Discrimination Cont'd

- § Does not require evidence of active/intentional discrimination; still have to balance. . .
- § “Housing authorities and private developers [must] be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest”

Disparate Impact Discrimination Cont'd

- § A person can challenge a housing authority's systemic practices that have a "disproportionally adverse effect" on them if they belong to one of the protected classes.

Disparate Impact Discrimination Examples

- § Cannot have a policy or preference for people with full-time jobs
 - This bars disabled veterans and other people with disabilities who may not be able to work full-time, even though they can afford the apartment

- ü Ask a general question about all sources of income on applications

Disparate Impact Discrimination Cont'd

- § Focus on results when crafting policies
 - How will policy x affect residents?

HUD's Proposed Rule Change (August 2019)

§ HUD No. 19-122 aka the Revised Disparate Impact Rule

- Designed to “provide more appropriate guidance on what constitutes unlawful disparate impact to better reflect the Supreme Court’s 2015 ruling in Texas Department of Housing
- Intended to provide “a framework for establishing legal liability for facially neutral practices that have unintended discriminatory effects on classes of persons protected under the Fair Housing Act”

Enforcement and Potential Claims

- HUD/Dept of Civil Rights
 - Investigations/complaint
- Private lawsuits
- Must be filed within two years of alleged discriminatory act(s)
- DOJ lawsuit
 - *United States v You*
 - Fair Housing Centers - civil claim
 - Victim's private lawsuit

**Can involve pre-suit audio recordings



Civil Claims – Consider Early Offer of Judgment

NOW COMES Defendant _____, by and through its attorneys, _____, and hereby makes the following Offer of Judgment, pursuant to Fed. R. Civ. P. 68:

Defendant offers a judgment in Plaintiff's favor and against Defendant in its entirety in the amount of \$_____. This offer includes all damages to which Plaintiff is allowed and all prayers for relief claimed by Plaintiff, and includes costs and attorney's fees.

Recommendations

- For every policy, have a written stated purpose for why the policy is required
- Keep and maintain records of all tenant interactions
- Train housing representatives to ask general questions
- Re-evaluate housing applications and advertisements to bring all content into compliance

Questions?



Rutledge Manion Rabaut Terry & Thomas P.C.



HADA SEMINAR

189 Commerce Court / Cheshire, CT 06410-0189
800-873-0242

www.housingcenter.com



HADA SEMINAR