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Fair Housing Cases Show Breadth of Discrimination Laws

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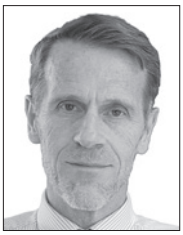

Fair housing laws in the United States proscribe discrimination based on race, religion, sex, national origin, family status, disability, sexual orientation and other grounds. Recent cases filed in New York courts by individuals, government agencies, and the civil rights organization the Fair Housing Justice Center, of which the author is a board member, show the breadth and application of these laws.

Housing discrimination harms individuals, families and communities. To those affected, it denies freedom of choice, contributes to concentrated poverty and leaves some citizens to despair that they have been relegated to an inferior status. As but one indication of how necessary fair housing laws are, consider that New York is the second most racially segregated city for Latinos and Asians and the third most segregated for African Americans.[1]

Coverage of Laws

Federal, state and city laws prohibiting discrimination, largely, but not completely, overlap. The federal Fair Housing Act proscribes discrimination based on race, religion, color, sex, national origin, familial status, and disability. The New York State Human Rights Law covers the federally protected categories, and in addition, prohibits discrimination based on sexual orientation, age, marital status, and military status. The New York City Human Rights Law includes most of the federal and state protected characteristics, and also gender identity, alienage/citizenship status, domestic partnership, lawful occupation and—most recently added—source of income.

Other localities in the New York region have enacted fair housing laws that, with some differences, mirror the federal protected characteristics. Westchester, Nassau and Suffolk counties each has a Human Rights Law.

The remedies available under these laws are broad. Generally speaking, they include injunctive relief to stop illegal conduct and take steps to prevent future discrimination, such as providing training and using affirmative advertising; monetary compensation to victims; punitive damages and civil penalties; and attorney fees.

Recent Cases

Recent reported decisions from the New York City area in cases involving privately owned housing show that there is an evolving body of case law developing across several issues.

An article in *The New York Times* real estate section in 2009 featured two single-family home co-op communities in the Throgs Neck area of the Bronx. Residents described them as not "open to just anyone," and the article mentioned that prospective buyers needed to obtain three references from current owners in order to successfully close a purchase. The co-op communities are overwhelmingly white.

After publication of the article, the Fair Housing Justice Center (FHJC) began an investigation based largely on published census data. Upon contacting the broker cited in the article, white testers posing as prospective buyers were shown houses and were informed that the reference requirement would not pose a problem because the broker would help them obtain references from current owners. The broker refused, however, to show houses to African-American testers, stating that they "wouldn't be happy there" and citing the three-reference rule as a categorical bar to a purchase because they did not know any current residents.

The center sued the broker and the co-ops in the Southern District under the Fair Housing Act and state and city laws. In a 2010 decision, *FHJC v. Silver Beach Gardens*,[2] Judge Robert Patterson ruled that the plaintiffs stated a claim for intentional racial discrimination, based on selective enforcement of the three-reference rule. Further, a disparate impact claim was stated through statistical data showing that the reference policies served to exclude African-American homebuyers from co-ops in the Bronx—where 35 percent of owner-occupied homes are owned by African-Americans—by requiring references from current residents of the two almost all-white communities.

The court also upheld the capacity of the FHJC to sue as an organizational plaintiff. Standing is important for local housing organizations such as the FHJC, which are funded in part through the Department of Housing and Urban Development to receive complaints from the public, make referrals, conduct testing to gauge whether discrimination exists, and in appropriate cases, institute litigation. The diversion of FHJC's resources in conducting an investigation, together with the frustration of its mission by defendant's activities, provided a sufficient basis for FHJC to assert standing. In a later decision, *FHJC v. Edgewater Park Owners Cooperative*,[3] Judge Patterson reaffirmed the FHJC's standing to sue and upheld the plaintiffs' claims against the other co-op community referenced in the Times article.

Another recent case illustrates that the Fair Housing Act covers all persons who engage in prohibited acts, not just owners, agents, brokers and employees. *FHJC v. Broadway Crescent Realty*[4] involved the actions of a building superintendent's wife whom plaintiffs claimed treated black testers who inquired about apartments differently from white testers. Judge Colleen McMahon, of the Southern District, rejected the argument that the wife was not covered under the Fair Housing Act because she was not an agent or employee. The allegations concerned the wife's conduct when prospective renters arrived on-site. The court held that the plaintiffs stated a claim under the Fair Housing Act by alleging that the wife required black testers to locate the superintendent, who had authority to rent apart-

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ments, on their own, but told white testers that she would summon her husband to the lobby.

A similar case involved claims by a gay male tenant who was living with HIV in a Brooklyn building. The plaintiff claimed the superintendent refused to make repairs in his apartment and that he spoke in derogatory terms of the tenant's disability and sexual orientation. In *Miller v. 270 Empire Realty*,[5] a magistrate judge ruled that the plaintiff stated a claim sufficient to survive the defendants' motion for summary judgment.

Other recent decisions have addressed the overlay between protections against disability-based discrimination and New York City's source-of-income discrimination law. Under Local Law 10 which took effect in 2008, landlords and agents may not discriminate on the basis of "lawful source of income."[6] This term includes income from "any form of federal, state, or local public assistance" and any type of housing voucher.

In *Cales v. New Castle Hill Realty*,[7] realty agents refused to show apartments to an SSI recipient who received a Fixed Income Advantage Voucher (FIAV) once they learned he received a voucher. The FHJC conducted testing in which prospective renters telephoned agents. A number of agents refused to provide assistance upon learning the caller had SSI or a FIAV. Some agents, when questioned about a particular apartment that had been advertised, stated the landlord did not "work with programs." The FHJC also studied apartments advertised on craigslist and found a number of ads that explicitly stated that "no programs" would be accepted.

The plaintiffs sued under the Fair Housing Act based on a disparate impact theory—in essence, that since all SSI and most FIAV recipients are disabled, landlords' and agents' practice of not renting to those persons will have a disproportionate impact on disabled persons. In denying a Rule (12)(b)(6) motion to dismiss by one of the defendants, Judge Deborah Batts, of the Southern District, found that the plaintiffs had stated a plausible claim for disability-based discrimination, which the defendant had not overcome by showing a non-discriminatory motive.

Worthy of note is the defendant's position that it declined to participate in government programs such as FIAV in order to avoid the associated administrative burdens. The court stated that under Local Law 10, "claiming that the terms of or burdens imposed by a voucher program are undesirable" does not absolve landlords and agents of liability.

A case with a similar fact pattern, *Short v. Manhattan Apartments and Abba Realty*,[8] involved a prospective renter living with AIDS who received a "HASA" housing subsidy from the New York City HIV/AIDS Services Administration. When he contacted two brokers after seeing listings, one informed him that certain apartments "are not available for people on programs" and are "only for people who are working people." The other broker's employees told him that none of the landlords with whom they worked accepted programs.

Visits by FHJC testers confirmed that the brokers routinely received and followed instructions from landlords not to rent to persons receiving housing program monies. In addition, one broker had a separate-track system for persons with housing assistance, insisting that they produce proof of income and other documentation before being shown apartments, while not requiring that of others.

The prospective tenant and the FHJC sued the brokers for disability and source-of-income discrimination. After a four-day bench trial, Judge Samuel Conti (a judge on senior status from the Northern District of California who was sitting in the Southern District of New York) dismissed the disability claims but upheld the claims based on the city's source-of-income law. The plaintiffs had relied on a disparate impact theory for the disability claims. Conti deemed it fatal that the plaintiffs had presented no statistical evidence showing that the defendants' facially neutral policy against renters with housing vouchers had an adverse impact on disabled persons. The court reasoned that "not all persons with government rental subsidies are disabled…[and] not all persons with a disability rely on government subsidies to pay their rent…"

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Conti, however, also determined that both brokers engaged in source-of-income discrimination by honoring landlords' directions not to rent to persons receiving housing subsidies. The court awarded compensatory damages to the individual plaintiff and the FHJC, and ordered injunctive relief including a prohibition on further discriminatory conduct, the posting of non-discrimination policies on the brokers' websites, and training for employees.

Government Actions

The U.S. Attorneys in the Southern and Eastern districts of New York have also commenced a number of enforcement actions against housing providers, often based on disability discrimination.

In 2012 the U.S. Attorney for the Southern District sued and settled with the developer and architect of a large apartment complex on the west side of Manhattan, for violating the design and construction provisions of the Fair Housing Act by failing to include required accessibility features such as doorways wide enough to permit wheelchair access and sufficient kitchen and bathroom clear floor areas.[9] The U.S. Attorney announced in April 2013, a lawsuit and settlement involving a 650-unit building in Lower Manhattan. That case was also based on the failure to make a building and apartments properly accessible to persons with disabilities.[10]

Another significant case brought by the Southern District U.S. Attorney's Office involved harassment of female tenants by the superintendent of residential buildings in Manhattan. In May 2012 the defendants agreed to a settlement requiring them to pay more than $2 million to victim tenants.[11] That office has also filed cases against residential building owners stemming from claimed racial discrimination.[12]

In 2012 the U.S. Attorney for the Eastern District commenced and later settled a case against a Long Island senior housing development that refused to grant an exception to its no-pet policy. A resident who suffered from multiple disabilities including depression and respiratory problems had requested an accommodation, claiming that her miniature schnauzer served as a "comfort animal." Without admitting wrongdoing, the defendant agreed to change its accommodation practices and to pay compensatory damages.[13]

Conclusion

The number of cases and enforcement actions that continue to be brought in the New York area unfortunately shows the persistence of housing discrimination. For New York to meet the promise of being an inclusive community, housing must be open to all without restriction. Those who enter the market in search of housing will ideally be aware of their rights under the law, and how to seek redress in the event they perceive their rights have been violated. Conversely, real estate providers should be ever vigilant that they, their employees and their agents are following the law.

1. "The Persistence of Segregation in the Metropolis: New Findings From the 2010 Census," John R. Logan and Brian J. Stults, 2011.
2. 2010 WL 3341907 (S.D.N.Y. 2010).
3. 2012 WL 762323 (S.D.N.Y. 2012).
4. 2011 WL 856095 (S.D.N.Y. 2011).
5. 2012 WL 1933798 (E.D.N.Y. 2012).
6. N.Y.C. Admin. Code §§8-107(5) and 8-102(25).
7. 2011 WL 335599 (S.D.N.Y. 2011).
8. 2012 WL 6827386 (S.D.N.Y. 2012).
9. www.justice.gov/usao/nys/pressreleases/May12/hudsoncrossing.html.
10. www.justice.gov/usao/nys/pressreleases/April13/2GoldStreetLawsuitSettlement.php.
11. www.justice.gov/usao/nys/pressreleases/May12/katzbarnasonkatzsettlement.html.
12. See www.justice.gov/usao/nys/pressreleases/October12/LoventhalLawsuit.html.
13. *United States v. Woodbury Gardens Redevelopment,* CV-12-0711, NYLJ, Nov. 13, 2012 (E.D.N.Y.).