Fair Housing Legal Update
Scott Chang, Housing Rights Center
Renee Williams/NHLP Staff, National Housing Law Project
Northern California Fair Housing Coalition
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I. RECENT DEVELOPMENTS

- U.S. Supreme Court issued its opinion in *Bank of America v. City of Miami* (summary below).
- San Mateo County continues its regional Assessment of Fair Housing, due in October 2017.
- HUD is currently accepting comments regarding regulatory reform through June 14.

II. RECENT CASES

A. Jurisdictional issues

1. Standing

Bank of Am. Corp. v. City of Miami, 197 L. Ed. 2d 678, 682, 137 S. Ct. 1296, 2017 WL 1540509 (U.S. May 1, 2017). The City of Miami brought a lawsuit against two banks claiming that the banks intentionally issued riskier mortgages on less favorable terms to African-American and Latino customers than similarly-situated white customers. The City claimed that the discriminatory housing practices adversely impacted the racial composition of the City, impaired the City's goals of promoting integration and desegregation, frustrated the City's interest in promoting fair housing and disproportionately caused foreclosures in minority communities in Miami. The City claimed that the foreclosures harmed the City by reducing property tax revenues and forcing the City to spend more on municipal services to remedy the dangerous and unsafe conditions at the properties which were foreclosed. The Supreme Court accepted certiorari to address the issue of whether the City had statutory standing under the FHA. First, the Supreme Court held that the City's economic injuries fell within the zone of interest the FHA protects. The Court noted that the FHA's use of the term "aggrieved person" reflected a congressional intent to confer standing broadly. The Court explained that the City's economic injuries fell within the FHA's zone of interest as the Court had previously interpreted the statute. Second, the Supreme Court held establishing that the City's economic injuries were foreseeable results of the banks' misconduct is not sufficient by itself to establish proximate cause. The Court explained that the proximate cause analysis asks whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits. The Court instructed the lower courts to define the contours of proximate cause under the FHA and how that standard applies to the City's claims for lost property tax revenue and increased municipal expenses.

Miami Valley Fair Hous. Ctr., Inc. v. Preferred Real Estate Invs., LLC, 2017 U.S. Dist. LEXIS 33076 (S.D. Ohio Mar. 8, 2017). Two fair housing organization conducted an investigation of design and

construction violations using "testers" and after discovering violations of the FHA filed a lawsuit. The defendant moved to dismiss the complaint, arguing that the organizations lacked standing. The district court held that Miami Valley Fair Housing Center had standing because it conducted an investigation using testers. Although the court expressed reservations about whether an organization created for the purpose of filing fair housing lawsuits suffers an injury by conducting an investigation, the court ultimately rejected the argument that the "testing" was not independent of the litigation. The court also held that fair housing organizations are not required to devote "significant" resources to establish standing. In addition, the court held that there was no reason to impose strict geographic restrictions on a fair housing organization precluding it from filing a lawsuit outside of the geographic region identified in its mission statement. The district court held that Central Ohio Fair Housing Association did not have standing because there was no evidence that it diverted resources

2. Definition of "Dwelling"

Southwest Key Programs, Inc. v. City of Escondido, 2017 U.S. Dist. LEXIS 42618 (S.D. Cal. Mar. 24, 2017). Southwest Key Programs is a non-profit organization that wished to convert a former nursing center into a custodial facility for unaccompanied minor children who were taken into custody by ICE. The City of Escondido denied a conditional use permit for the facility and Southwest Key Programs filed a lawsuit alleging fair housing violations. The City moved for summary judgment, arguing that the facility was not a "dwelling" within the meaning of the FHA. The district court held that custodial facilities where individuals who are involuntarily confined are not "dwellings." The court, however, denied the defendants' motion for summary judgment because there were factual issues about whether the children were involuntarily confined.

B. Basis for Discrimination

1. Disability

i. Failure to Provide a Reasonable Accommodation

Fair Hous. Ctr. v. Morgan Props. Mgmt. Co., LLC, 2017 U.S. Dist. LEXIS 55249 (E.D. Pa. Apr. 11, 2017). A fair housing organization brought suit against a property management company alleging disability discrimination in violation of the Fair Housing Act and state law. Specifically, the disability discrimination claims arose out of the property management company's refusal to allow persons who experience disabilities who also receive Social Security Disability Insurance (SSDI) payments to have a different rent due date. Having a due date other than the first of the month, which would depart from the property management's general requirement, would allow persons receiving SSDI to be able to use those funds to pay their rent. However, the property management company refused to allow for a different due date for persons receiving SSDI. The fair housing organization asserted that by refusing to allow alternate due dates for SSDI recipients, the management company violated the FHA by (1) making housing unavailable on the basis of disability; and (2) failing to provide a reasonable accommodation. The management company moved for judgment on the pleadings. In analyzing the claims, the court

noted that rental due date policy may deter individuals with disabilities from living at the property, and thus the fair housing organization had stated a claim under § 3604(f)(1)(A). The court also analyzed the failure to provide a reasonable accommodation claim; the court noted that upon "[c]onsidering existing circuit court authority regarding accommodations for a disabled person's financial circumstances, [the court] conclude[d] that the FHA may require accommodations for an SSDI recipient's financial circumstances." The court also held that the management company failed to allege facts that would show providing such a rental due date accommodation would be "unduly burdensome." Furthermore, the court concluded that the fair housing organization had alleged injury sufficient to assert standing. The court denied the management company's motion for judgment on the pleadings.

ii. Design and Construction Requirements

Hous. Research & Advocacy Ctr. v. WXZ Residential Grp., 2017 WL 1078956 (N.D. Ohio Mar. 22, 2017). A fair housing organization filed suit asserting Fair Housing Act (FHA) and state law claims. The organization alleged that 18 units at three of the defendant owner's properties violated the FHA's design and construction requirements, and that the owner engaged in disability discrimination by charging more for accessible units. The parties filed cross motions for partial summary judgment; the court granted in part and denied in part the owner's motion for partial summary judgment, while denying the organization's motion. First, the court concluded that the units across the three properties were *not* sufficiently independent of each other to time-bar claims about specific properties, as the limitations period did not start running "until the last unit of all of the implicated developments [was] sold." Moving to the question of whether the units at issue fell within the "carriage house exemption," the court concluded the exemption applied and thus the units were not subject to the FHA's accessibility requirements. The court rejected the fair housing organization's more narrow reading of the exemption. The court concluded that it did not owe *Chevron* deference to the HUD and DOJ policy statements that supported the organization's interpretation. Instead, the court relied upon the Fair Housing Design Manual and Keating Memo for its analysis of the carriage house exemption. Then, the court determined that the fair housing organization—in presenting evidence that the accessible units were smaller, more expensive, and did not offer the same garage-parking guarantee as the non-accessible units—could survive a summary judgment motion regarding its disparate treatment disability discrimination claim. The court also found that the fair housing organization had organizational standing to bring suit. Additionally, the court analyzed the state law claims using the above FHA analysis.

United States v. Mid-America Apt. Cmtys., Inc., 2017 U.S. Dist. LEXIS 44354, *1 (D.D.C. Mar. 27, 2017). The United States brought a pattern and practice case for violations of the design and construction provisions of the FHA. First, the district court held that the failure to meet the HUD design and construction guidelines did not raise a rebuttable presumption of design and construction provisions of the FHA. Second, the district court held that the defendants could not rely on a defense that it could modify the properties to put in place features of adaptive design after construction. Third, the district court excluded 42 of the 50 properties at issue in the case. The district court concluded that the government could not rely on evidence from buildings in which the defendant received a permit and had a bona fide belief that the permit ensured compliance with the FHA.

2. Sex and Familial Status

Smith v. Avanti, 2017 WL 1284723, ___ F. Supp. 3d ___ (D. Colo. Apr. 5, 2017). Parents brought suit on behalf of themselves and their children, alleging sex and familial status discrimination in violation of the Fair Housing Act and state law. The lawsuit arose out an owner's alleged refusal to rent to their family, which includes two female parents--one of whom is transgender--and their minor children. After the family met with the owner, the owner and one of the parents exchanged several e-mails. In those e-mails, the owner first stated that she could not rent to the family due to concerns about the couple's children making noise. A follow-up e-mail expressed the owner's desire to keep a "low profile" in the community, and in the ensuing e-mail exchange, the owner cited a concern that the couple's "unique relationship" would attract community attention. As a result, the family had to move to a less desirable rental unit. The family moved for summary judgment, which was unopposed. First, the court analyzed the Fair Housing Act claims, brought under §§ 3604(a) (refusal to rent or negotiate) and 3604(c) (discriminatory statements). First, the court concluded that the owner's e-mails constituted "statements" for the purposes of § 3604(c). The court then looked to Title VII case law, including *Price Waterhouse* to analyze the sex discrimination claim. In examining the facts, which were undisputed, the court concluded the owner "relie[d] on stereotypes of to or with whom a woman (or man) should be attracted, should marry, or should have a family," and therefore granted summary judgment on the family's sex discrimination claim under the FHA, citing sex stereotyping. However, the court made clear that it was not finding that there was sex stereotyping in violation of the FHA due to discrimination based solely on one's sexual orientation or gender identity, as the court did not feel as though those theories had not been pled. The court also granted summary judgment to the family on its familial status discrimination claims, as well as the family's claims under state law.

3. Familial Status

Fair Hous. Ctr. of the Greater Palm Beaches, Inc. v. Park Partners Residential, LLC, 2017 U.S. Dist. LEXIS 35546 (S.D. Fla. Mar. 10, 2017). A fair housing organization filed suit challenging a local ordinance in Boca Raton, FL that limited housing in a certain district to student housing. The fair housing organization conducted testing, and the tester was told that she could not rent a unit with a minor child because the housing was restricted to enrolled students. The lawsuit alleged that the ordinance violates the Fair Housing Act by discriminating against families with children. The ordinance was amended to allow for students with minor children to reside in the district, likely rendering the claims for injunctive and declaratory relief moot. However, the court still needed to consider whether the ordinance violated the FHA in order to determine whether the organization was entitled to damages. In evaluating the disparate treatment claim, the court concluded that the ordinance differentiated between students and non-students, and thus did not discriminate against children or students with children – but rather excluded anyone who was not a student (which includes persons of all ages who are not students). While the court noted that disparate impact is the more appropriate theory under which to challenge the ordinance, ultimately the court also concluded that the fair housing organization failed to articulate a prima facie case for disparate impact. Accordingly, the court granted the city's motion for summary judgment.

Fair Hous. Ctr. of Wash. v. Breier-Scheetz Props., LLC, 2017 WL 2022462 (W.D. Wash. May 12, 2017). A fair housing organization brought suit against a property management company, alleging familial status discrimination in violation of the Fair Housing Act (FHA), as well as state and local law. Specifically, the lawsuit challenged the company's policy of only renting its studio units to single (i.e. solo) occupants. The fair housing organization moved for summary judgment. In its analysis of the

organization's FHA claim, brought under a disparate impact theory, the court rejected the company's proffered justifications for the policy—including concerns about metering gas and water, as well as claiming that the studio units are simply "too small" for more than one person. The court concluded that these offered justifications were the "subjective judgments" of the company, which the court found to be insufficient to rebut the fair housing organization's prima facie case without "objective evidence" to support these judgments. The court granted the fair housing organization summary judgment regarding the company's liability under the FHA, state, and local law. The court asked for additional briefing on issues concerning appropriate relief for the fair housing organization.

4. National Origin

H.O.P.E., Inc. v. Lake Greenfield Homeowners Ass'n, 2017 WL 1493708 (N.D. Ill. Apr. 26, 2017). Individual plaintiffs and a fair housing organization (collectively, "plaintiffs") brought suit against defendant HOA and affiliated individuals (collectively, "defendants"), alleging national origin discrimination in violation of the Fair Housing Act (FHA). The individual plaintiffs, including two Hispanic family members, purchased vacant land to use to build a residence. Plaintiffs alleged that the individual plaintiffs' attempt to build on this land was frustrated by the defendants' imposition of additional requirements and refusal of requests, which were inconsistent with the way such requests and rules were handled for non-Hispanic residents. The court denied defendants' motion to dismiss, concluding that plaintiffs had satisfactorily stated three FHA claims. For the first claim, plaintiffs alleged that defendants violated 42 U.S.C. §§ 3604(a)–3604(b) by making a dwelling unavailable on the basis of race. The court established that the vacant lot owned by the individual plaintiffs constituted a "dwelling" under the FHA, but found that the defendants' actions did not constitute a "constructive eviction" as the individual plaintiffs were still in possession of the land. Thus, the first claim could not be sustained under § 3604(a). However, the court found that the first claim could be sustained under § 3604(b), finding that defendants' changing of the HOA rules fell under the statute's prohibition against discriminatory enforcement of rules. Regarding the second claim, plaintiffs alleged a violation of § 3617 of the FHA by alleging interference with the individual plaintiffs' enjoyment of their fair housing rights. The court dismissed the defendants' motion to dismiss this claim, finding that defendants' alleged imposition of different requirements sufficiently stated a claim for interference under the FHA. Plaintiffs also alleged retaliation in violation of § 3617. The court rejected defendants' argument that the court should dismiss this claim because the court concluded that by lodging complaints with the defendants and with the state fair housing agency, the plaintiffs had sufficiently alleged engagement in protected activity.

i. Immigration-Related Fair Housing Claims

de Reyes v. Waples Mobile Home Park Ltd. P'ship, 2017 U.S. Dist. LEXIS 59361, *1 (E.D. Va. Apr. 18, 2017). A mobile home park in Virginia adopted a policy requiring that applicants for housing and tenants renewing their tenancy to provide a government issued passport and proof of lawful presence in the United States. Four couples brought a lawsuit challenging the policy. The district court granted the defendants' motion for summary judgment on the plaintiffs' claim that the defendants intentionally discriminated based on national origin. The court held that the plaintiffs failed to show that they were qualified to renew their leases because they could not provide the required documentation establishing residency and therefore could not establish a prima facie case. The court noted that there was no evidence that Latino residents or applicants were treated differently from non-Latino residents or applicants, the majority of the park residents were Latino and the mobile home park employed Latinos.

The court also explained that the mobile home park had a legitimate, non-discriminatory reason for the policies including avoiding liability for harboring aliens, performing background checks and minimizing loss from eviction.

C. Practices Covered

1. Retaliation

Linkletter v. Western & Southern Financial Group, Inc., 851 F.3d 632 (6th Cir. Mar. 23, 2017). A job applicant filed suit against an insurance company alleging violations of the Fair Housing Act (FHA) and state law. The applicant alleged that the insurance company had interfered with her employment for signing a petition in support of a local women's shelter, which the insurance company was trying to force out of the company's neighborhood. The shelter sued the insurance company under the FHA-- a lawsuit that was eventually settled. In the instant case, the district court had granted the insurance company's motion to dismiss the applicant's FHA and related state law claims, finding the applicant's actions did not constitute aid or encouragement under 42 U.S.C. § 3617, and that the insurance company as an employer did not fall within the FHA's scope. On review, the Court of Appeals reversed and remanded the case. The appeals court concluded (1) the applicant's signing of the petition constituted an act of encouragement under the FHA; (2) the company's rescission of the employment agreement was an adverse employment action constituting interference with the applicant's employment; and (3) there was a sufficient nexus between the shelter's FHA rights under § 3604 and the applicant's encouragement of the shelter to exercise those rights. The court found that while § 3617 requires a nexus with rights protected under the FHA, proving an underlying FHA violation was not necessary. Additionally, the court clarified that there is no requirement under § 3617 that a defendant operate a housing facility, rejecting the lower court's conclusion on this issue. The appeals court also reversed the district court's dismissal of the applicant's state law claims on the same grounds.

2. Lending

City of Los Angeles v. Bank of Am. Corp., 2017 WL 2323441, ___ F. App'x ___ (9th Cir. May 26, 2017). The City of Los Angeles appealed a lower court decision granting summary judgment to defendant banks on Fair Housing Act and unjust enrichment claims. The City had brought suit, alleging that defendant banks' lending practices discriminated on the basis of race in violation of the FHA. Specifically, the City cited a number of policies, including (1) the banks' compensation schemes; (2) the banks' marketing that targeted low-income individuals; and (3) the banks' failure to monitor for lending disparities. While the appellate court noted that the City showed a statistical disparity based on race, for the first two above policies, the City failed to demonstrate "robust" causality sa required by the *Inclusive Communities Project* decision. The appeals court also stated that the third policy regarding the failure to monitor was not in fact a policy. Accordingly, the Ninth Circuit concluded that summary judgment "on the FHA claim was warranted because the record does not reflect that the City raised a genuine issue of material fact as to a policy or policies with a robust casual connection to the racial disparity." The Court of Appeals also affirmed summary judgment be granted to the banks on the City's unjust enrichment claim, asserting that the banks did not benefit from the City's injuries (e.g., lost tax revenue).

City of Los Angeles v. Wells Fargo., 2017 U.S. App. LEXIS 9266 (9th Cir. May 26, 2017). The City of Los Angeles appealed a lower court decision granting summary judgment to defendant Wells Fargo on Fair Housing Act and unjust enrichment claims. The City had brought suit, alleging that defendant banks' lending practices discriminated on the basis of race in violation of the FHA. Specifically, the City

cited a number of bank policies, including (1) compensation schemes; (2) the bank's marketing that targeted low-income individuals; and (3) the bank's failure to monitor for lending disparities. The appellate court found that the lower court did not err in finding that the City had not shown "a discriminatory loan within the limitations period." Additionally, for the first two above policies, the appeals court agreed that the City failed to demonstrate "robust" causality as required by the *Inclusive Communities Project* decision. The appeals court also stated that the third policy regarding the failure to monitor was not in fact a policy. Accordingly, the Ninth Circuit concluded that because "the City did not raise a genuine issue of material fact as to a policy with a robust casual connection to any racial disparity, summary judgment on the FHA claim was warranted." The Court of Appeals also affirmed summary judgment be granted to Wells Fargo on the City's unjust enrichment claim, asserting that Wells Fargo did not benefit from the City's injuries (e.g., lost tax revenue).

3. Discriminatory Rules

Fair Hous. Ctr. of the Greater Palm Beaches, Inc. v. Sonoma Bay Cmty. Homeowners Ass'n, 2017 U.S. App. LEXIS 4538, *1 (11th Cir. Fla. Mar. 15, 2017). The Fair Housing Center of the Greater Palm Beaches and several residents brought a lawsuit alleging that two homeowners associations violated the FHA by adopting discriminatory rules. The rules included a curfew rule that applied to residents under age 18 and a loitering rule that stated that all children should be in their homes after dark. The district court granted the plaintiffs' motion for partial summary judgment on the curfew and the loitering rules under both Sections 3604(b) and (c). However, at trial the verdict form stated that the language of the curfew and loitering rules violated the FHA but the jury instructions asked the jury whether it found the defendants liable for the curfew and loitering rules. The jury found in favor of the defendants. The plaintiffs moved for a new trial and appealed the denial of their request for a new trial, arguing that the court should have instructed the jury that the court already found the defendants liable for violations of the FHA and that the only issue for the jury on those claims was damages. The Eleventh Circuit held that the jury instructions taken as whole were not erroneous or prejudicial.

D. Miscellaneous

1. Survival of FHA Claims

Revock v. Cowpet Bay West Condominium Assn., 853 F.3d 96 (3d Cir. V.I. Mar. 31, 2017). Two residents of a condominium association filed a lawsuit alleging that their requests to allow them to have emotional support dogs as reasonable accommodations were denied. One of the residents died after filing the lawsuit. In a case of first impression, the Third Circuit held that the resident's lawsuit survived her death. The court held the FHA is silent about whether a FHA claim survives the death of a plaintiff and therefore federal common law applies to determine if the case survives. Under federal common law, a claim under a remedial statute such as the FHA survives the death of a plaintiff. The Third Circuit also reversed the entry of summary of judgment on the merits. The court held that the condominium association may have denied the request for reasonable accommodation by fining Plaintiffs for violating the "no dogs" rule. The court also held that there were issues of fact about whether defendants interfered with Plaintiffs' fair housing rights by failing to review Plaintiffs' requests for accommodation and posting harassing messages on a blog.

III. HUD Guidance

HUD Notice PIH-2017-08 (HA) (May 19, 2017)
Violence Against Women Reauthorization Act of 2013 Guidance

***Description*:** The notice provides guidance concerning implementation of VAWA 2013 as it relates to the public housing and Section 8 Housing Choice Voucher programs. The notice cautions that this notice is not comprehensive and should be used along with HUD's 2016 VAWA Final Rule. View the notice at: https://portal.hud.gov/hudportal/documents/huddoc?id=PIH-2017-08VAWRA2013.pdf

IV. Local Updates

San Mateo County is conducting a regional Assessment of Fair Housing that is due to HUD in October 2017. The County will soon be issuing its draft Assessment for public input and comment. Please refer to http://housing.smcgov.org/assessment-fair-housing for more information.