


Fair Housing: An Introduction to the Basics



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HOUSING JUSTICE



National Housing Law Project

Topics for Today



- Fair Housing Act
- Theories of Liability Under the FHA
 - Disparate Treatment
 - Discriminatory Effects (known as “disparate impact”)
- Discriminatory Effects Final Rule (2013)
- Obligation to Affirmatively Further Fair Housing/AFFH Proposed Rule (2013)
- California Fair Housing Laws

The Fair Housing Act



Fair Housing Act: What Does it Do?



- 42 U.S.C. § 3601 *et seq.*
- Prohibits discrimination in housing-related transactions, including the sale, rental, or financing of dwellings.
- Discrimination includes refusing to rent to someone, steering someone away to a particular type of housing or neighborhood, enacting zoning measures to exclude particular groups etc., because of membership in a protected class.

Fair Housing Act: Who Does it Protect?



- The FHA, as amended, explicitly prohibits discrimination based on:
 - Race
 - Color
 - Religion
 - Sex
 - Familial status (includes families with minor children; pregnant women)
 - National origin
 - Disability

Note: FHA and Other Historically Underserved Groups



- The FHA explicitly protects the groups on the previous slide.
- Additional groups *may* enjoy FHA protections based on a historical relationship or association with a named protected class.
- Examples:
 - LGBT individuals
 - Persons with limited English proficiency
 - Survivors of domestic violence

Fair Housing Act: Where Does it Apply?



- The FHA applies to “dwellings.”
- The FHA covers most housing, including federally-subsidized and private housing, with few specific exceptions.
- “Dwellings” are defined as “any building, structure, or portion thereof” that is “occupied as, or designed or intended for occupancy as, a residence by one or more families.” 42 U.S.C. § 3602(b).
- Examples of dwellings: houses, apartments, university student housing, farmworker housing, AIDS hospice, nursing homes, homeless shelters*
- Not dwellings: motels, jails, bed & breakfasts

Fair Housing Act: How is it Enforced?



- **Judicially**
 - Individuals (or, under certain circumstances federal government) can file a case in court. 42 U.S.C. §§ 3613, 3614
OR
- **Administratively**
 - Individuals (or HUD itself) can file a HUD complaint. 42 U.S.C. § 3610.
- Under the FHA, an individual does not have to get a “right to sue” letter from HUD; instead, that person can go to court directly and file his or her claims. *See* 42 U.S.C. § 3613.

FHA Theories of Liability



Disparate Treatment



- Treating someone differently because he or she is a member of a protected class
- Examples:
 - A landlord refuses to rent to a family because the family is African-American.
 - A landlord refuses to rent to a family with children because he considers children to be too disruptive to the other tenants.
 - A real estate agent only shows a prospective Hispanic homebuyer homes in Hispanic neighborhoods because the agent believes this is where the purchaser would feel most “comfortable.”

Disparate Treatment (cont.)



- To prove disparate treatment under the FHA, a plaintiff must provide evidence of the defendant's discriminatory intent.
 - Plaintiff can accomplish this by:
 - Providing direct evidence of discrimination or
 - Demonstrating a prima facie case of discrimination
- See generally Pacific Shores v. City of Newport Beach, 730 F.3d 1142 (9th Cir. 2013).*
- If the plaintiff shows a prima facie case, then defendant must provide legitimate, nondiscriminatory reason for the action. If defendant does so, plaintiff must then show that defendant's reason was pretextual.

Discriminatory Effects



- Does not require demonstration of discriminatory intent
- Types of claims:
 - Disparate impact
 - Perpetuation of segregation

Disparate Impact



- Arises when there is a neutral practice or policy that disproportionately impacts a protected class. Plaintiffs who allege discriminatory effects do not have to show discriminatory intent.
- Example: A city with a predominantly white population institutes a residency preference for its Section 8 Housing Choice Voucher Program waitlist because it wants to ensure that its local residents are served before others. Even if the city does not intend to exclude minority families, such a move could disproportionately exclude non-white applicants.

Perpetuation of Segregation



- Applies when a decision or action reinforces segregation
- Example: A town’s “refusal to amend the restrictive zoning ordinance to permit privately-built multi-family housing outside the [majority minority] area significantly perpetuated segregation in the Town.”
Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 938 (2d Cir. 1988).

HUD Discriminatory Effects Rule



- HUD issued the Final Rule in February 2013
- Available at: 78 Fed. Reg. 11,460-11,482
- The Final Rule aimed to formalize HUD's interpretation of discriminatory effects standard under the Fair Housing Act. The Final Rule also affirms "discriminatory effects" as a viable theory of liability under the FHA.
- In the Final Rule, HUD set out burden-shifting test for discriminatory effects liability.
- Previously, different standards for discriminatory effects liability existed among federal courts of appeals.

HUD Discriminatory Effects Rule (Cont.)



- Burden shifting test operates as follows:
 - Step 1: **Plaintiff** (complainant) has the burden of showing that a defendant's practice or action has a discriminatory effect on the plaintiff.
 - Step 2: If plaintiff accomplishes step 1, **defendant** (respondent) has the burden of providing a justification for the action or practice. In doing so, the defendant must show that the action/practice was necessary to achieve a legitimate, non-discriminatory purpose.
 - Step 3: If defendant accomplishes step 2, **plaintiff** has the burden of showing that defendant could have reached the same objective with a less discriminatory alternative.

Affirmatively Furthering Fair Housing



Obligation to Affirmatively Further Fair Housing



- The FHA requires HUD to “administer the programs and activities relating to housing and urban development **in a manner affirmatively to further**” policies outlined in the FHA. *See* 42 U.S.C. § 3608 (e)(5).
- Federal funding recipients with an AFFH obligation must be *proactive* in combatting segregation; it is not sufficient to merely prohibit discrimination.
- Funding recipients must certify that they have analyzed impediments to fair housing choice (AI) and have taken steps to address impediments.

AFFH Proposed Rule



- Issued July 2013
- 78 Fed. Reg. 43,710
- HUD's webpage on the AFFH Proposed Rule:
 - http://www.huduser.org/portal/affht_pt.html
- Proposed Rule has already undergone notice and comment process.
- Final rule will be released this year or early next year.

AFFH Proposed Rule (cont.)



- Seeks to incorporate fair housing planning into broader planning processes
- Creates a new housing analysis framework called the Assessment of Fair Housing (replaces Analysis of Impediments)
- Makes AFH's subject to HUD review
- Says that HUD will provide wide-ranging data to better inform local and regional planning

California Fair Housing Laws



California Fair Housing Laws



- Fair Employment and Housing Act (FEHA)
 - Cal. Gov. Code § 12955

- Unruh Civil Rights Act
 - Cal. Civ. Code § 51



FEHA



- Courts' analysis of FEHA tracks federal fair housing act analysis.
- However, FEHA covers more protected classes, prohibiting discrimination on the basis of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, and genetic information.

Unruh Civil Rights Act, Cal. Civ. Code § 51(b)



- Declares that all persons within California “are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments”
- Prohibits discrimination on the basis of sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation

Resources



- Provided background for today's presentation:
 - Robert G. Schwemm, *Housing Discrimination: Law and Litigation* (West)
- Additional resources:
 - John Relman, *Housing Discrimination Practice Manual* (West)
 - HUD FHEO website
 - ✦ http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp
 - California Dept. of Fair Employment & Housing website
 - ✦ www.dfeh.ca.gov

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