

A PRIMER ON
FAIR HOUSING LAW

The John Marshall Law School
Fair Housing Legal Support Center

2007

INTRODUCTION

Congress enacted the Fair Housing Act in 1968. In 1988 Congress amended the Act to include protection for persons with disabilities and families with children and to expand enforcement mechanisms. Nonetheless, despite the presence of a strong federal law and many state laws of substantial equivalency, housing discrimination continues to be one of the major social problems in the United States. Housing discrimination occurs because of the actions of individual landlords, sellers, and lenders and because of systemic practices that occur in the market place through both governmental and private action. Because so much housing discrimination occurs because of individual acts of discrimination, it is not easily remedied by a small number of class action lawsuits that seek structural change. While lawsuits dealing with systemic problems are often necessary and helpful, change is more likely to come only after the filing of an endless number of complaints at federal, state and local agencies charged with the responsibilities of enforcing fair housing laws against individual landlords, sellers, appraisers, advertising media, insurers, developers, managers, sales people, industry organizations and real estate brokers. For this reason, it is important that individual practitioners be knowledgeable about the fair housing laws so that they can represent both complainants and respondents who might be involved in these actions.

A wide variety of judicial and administrative remedies are available to persons who are victims of housing discrimination. Lawyers need to be able to advise clients as to how best to proceed in a fair housing action. Lawyers also need to be able to counsel those who develop, manage, lease or sell real estate or who provide service with respect to these transactions about what the laws requires of them.

Fair housing practice is no more complicated than any other area of the law, and lawyers should not hesitate to become involved in representing persons in fair housing actions. The availability of attorneys' fees to the prevailing party in court or at administrative agencies under the federal statutes and most state and local laws. The ability to obtain fees provides incentive for lawyers to take on cases for clients who are victims of discrimination. In many areas of the country, fair housing centers are available to assist the attorney in investigating and preparing the case.

*This Primer has been revised periodically so that it reflects the most recent developments in fair housing law and practice. It is intended to outline the broad contours of fair housing law to the attorney who is new to this area. Treatises that are more comprehensive are also available to the practitioner. We especially recommend Schwemm, **Housing Discrimination: Law and Litigation** (West Group 1990) and Relman, **Housing Discrimination Practice Manual** (West Group 1992). Both of these treatises have yearly supplements that reflect current changes in the law.*

Attorneys who need additional help in developing strategies when representing the victims of housing discrimination may also contact The John Marshall Law School Fair Housing Legal Support Center.

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I. DISCRIMINATION PROHIBITED BY FEDERAL, STATE AND LOCAL FAIR HOUSING STATUTES AND ORDINANCES

The Fair Housing Act prohibits discrimination against certain protected classes in residential dwellings. The Act further requires that all federal executive departments and agencies administer their programs and activities relating to housing and urban development in a manner affirmatively to further fair housing 42 U.S.C. section 3608(d). This duty also applies to state and local recipients of federal funds. *Otero v. New York City Housing Authority*, 354 F. Supp. 941 (S.D.N.Y.), *aff'd in part and rev'd in part*, 484 F.2d 1122 (2d Cir. 1973).

The duty to affirmatively further fair housing mandates that the HUD Secretary when administering programs has “an obligation to assess negatively those aspects of a proposed course of action that would further limit the supply of genuinely open housing and to assess positively those aspects of a proposed course of action that would increase that supply.” *Darst-Webbe Tenant Assoc. v. St. Louis Housing Authority*, 339 F.3d 702, 713 (8th Cir. 2003). And see *Dean v. Martinez* (D.Md. 2004) FH/FL para. 16,807.

A. Classes Protected

The Federal Fair Housing Act prohibits discrimination in housing because of race, color, religion, sex, national origin, familial status, or disability. Many state or local laws and ordinances prohibit discrimination based on marital status, sexual orientation [preference], source of income, military discharge or age, but these are not classifications protected under the Fair Housing Act. Nonetheless, a federal action can be brought if the discrimination is also based in part upon another classification prohibited in the Fair Housing Act. Thus, a rule that prohibits single women, but not single males or families, from renting in a building will be illegal as gender discrimination but not as marital status discrimination under federal law. *Morehead v. Lewis*, 432 F.Supp. 674 (N.D.Ill. 1977), *aff'd without opinion*, 594 F.2d 867 (7th Cir. 1979).

1. Race, Color or National Origin

The Fair Housing Act broadly prohibits discrimination based on race, color, or national origin. Color generally refers to skin tone. Consequently, discrimination against dark skinned but not light skinned Hispanics is illegal. National origin generally refers to the country of a person's ancestry.

Unlike the Fair Housing Act, relief under the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1982, is limited to cases involving racial discrimination. However, the Supreme Court has broadly construed what is meant by racial discrimination under the 1866 Civil Rights Act and held that discrimination against Arabs in *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), and against Jews in *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987), constituted racial discrimination under the 1866 Civil Rights Act. A number of cases have held that Hispanic persons can sue for racial discrimination under the 1866 Act. See *Aponte v. National Steel Service Center*, 500 F.Supp. 198 (N.D.Ill. 1980).

The Supreme Court held in 1968 that because the 1866 Civil Rights Act is grounded in the Thirteenth Amendment, it can reach private conduct. See *Jones v. Alfred Mayer*, 392 U.S. 407 (1968). The 1866 Act is a useful tool because it does not contain many of the exemptions found in the Fair Housing Act.

2. Gender

Gender discrimination is expressly illegal under the Fair Housing Act and is subject to the same degree of protection as is given to racial and other prohibited discrimination under the Act.

Gender discrimination has been interpreted to include sexual harassment. The United States Supreme Court first recognized that sexual harassment was a form of discrimination under Title VII of the 1964 Civil Rights Act, which prohibits discrimination in employment, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

Sexual harassment occurs when there is deliberate or repeated unsolicited verbal comments, gestures, or physical contact that makes for an offensive environment or when sexual favors are sought as a "quid pro quo" for housing. *Shellhamer v. Lewallen*, FH/FL ¶15,472 (W.D.Ohio 1983), *aff'd without opinion*, 770 F.2d 167 (6th Cir. 1985); *Grieger v. Sheets*, 689 F.Supp. 835 (N.D.Ill. 1988); *Krueger v. HUD*, 115 F.3d 487 (7th Cir. 1997). One instance of sexual harassment action may not be sufficiently egregious to create a hostile environment. *DiCenso v. HUD*, 96 F.3d 1004 (7th Cir. 1996). Some plaintiffs have recovered large damage awards in sexual harassment cases in recent years.

3. Religion

Religious discrimination is prohibited under the Fair Housing Act, except in housing operated by religious organizations. Section 3607(a).

In *Knutze v. Nelson*, 617 F.Supp. 977 (D.Colo. 1985), *aff'd*, 815 F.2d 1343 (10th Cir. 1987), it was held that an application form for admission to a federally financed housing project that requested information on church affiliation did not violate the Fair Housing Act because completion of the question was not a prerequisite for admission and because the information was sought for a reasonable secular purpose, namely, to allow the managers of the project to notify a tenant's clergyman in the event of death or serious illness. In *Hack v. Yale College*, 16 F. Supp. 183 (D.Conn. 1998), the Court held that the Fair Housing Act did not require a college to reasonably accommodate the religious beliefs of students who objected on religious grounds to living in co-educational residence halls. The Court noted that the duty to reasonably accommodate pertains only to persons with disabilities.

The Second Circuit Court of Appeals has held that the Fair Housing Act was violated when a village was incorporated for the purpose of enacting zoning to restrict the operation of home synagogues by Hasidic and Orthodox residents. *Le Blanc-Sternberg v. Fletcher*, 67 F.3d

412 (2nd Cir. 1995).

Religion has been raised as a defense to housing discrimination claims in a number of cases, especially where state laws prohibit discrimination based on marital status. In a leading case, the California Supreme Court held that applying that state's anti-discrimination law to a landlord who refused to rent to an unmarried couple because of religious reasons did not violate the First Amendment. *Smith v. Fair Employment & Housing Commission*, P.2d 909 (Cal. 1996), *cert. denied*, 117 S.Ct. 2531 (1997). The Court of Appeals for the Ninth Circuit dismissed a challenge to the Alaska statute on the ground that the case was not ripe because the law had not yet been enforced against the plaintiff landlords. *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134 (9th Cir. 2000).

4. Familial Status

The 1988 Amendments to the Fair Housing Act added familial status as a proscribed type of discrimination. Families are defined as one or more individuals (who have not attained the age of 18 years) who are domiciled with a parent or other person having custody of them or who are domiciled with a person designated by the parent or other person having such custody with the written permission of such parent or other person. Section 3602(K). "Families" also include pregnant women or persons in the process of adopting a minor child. The Seventh Circuit has held that persons who are evicted because of their desire to become foster parents have standing under the Act. *Gorski v. Troy*, 929 F.2d 1183 (7th Cir. 1991).

The Act states that reasonable local, state, or federal regulations on the maximum number of occupants permitted to occupy a dwelling are lawful so long as they do not discriminate against a class protected by the Act. Section 3607(b). A municipality that imposes an occupancy standard carries the burden of establishing that it is reasonable. *Fair Housing Advocates v. City of Richmond Heights*, 209 F.3d 626 (6th Cir. 2000). The Act does not refer to restrictions on the number of occupants imposed by a private landlord or property developer or manager. However, the HUD regulations indicate that HUD will accept such restrictions, but only so far as they are reasonable. 24 C.F.R. Ch. 1, Subch A, App. 1, §100.10.

There is considerable controversy about what is a "reasonable" occupancy standard under the Amendments. HUD continues to follow the so-called Keating Memo that two persons per bedroom is presumptively reasonable. The United States Supreme Court has held that a municipality cannot use the "reasonable occupancy standard" exemption to zone out a group home. *City of Edmonds v. Oxford House, Inc.*, 115 S.Ct. 1776 (1995).

The Act specifically exempts "housing for older persons" from the prohibitions against familial discrimination, but not other classes of discrimination. Section 3607(b)(2). This exemption imposes specific requirements and merely promulgating a rule that reserves the property for older persons may not result in the property being exempt. In *Seniors Civil Liberties Ass'n. v. Kemp*, 965 F.2d 1030 (11th Cir. 1992), the Court rejected a broad constitutional attack by senior citizens on the familial discrimination provisions of the Act. The senior citizens had

argued that the exemptions were vague and that the Act violated their freedom of association and of privacy and their rights to equal protection of the law and due process and that it took away their contract and property rights without just compensation.

The HUD Regulations are clear that families with children may not be segregated from other families. 24 C.F.R. §100.70 (c) (4). Nor may children be restricted from using facilities or services unless the restriction furthers reasonable health and safety concerns that are narrowly tailored to meet their objective. Nothing in the Act requires landlords to provide special facilities for children. However, a landlord may not require a special security deposit for families with children and may not refuse to rent because children are presumed to damage property. A landlord can check the rental history of all tenants.

5. Handicap

The 1988 Amendments extend the Fair Housing Act to protect disabled persons. The Act broadly defines a "handicap" in Section 3602(h) as:

- (1) a physical or mental impairment which substantially limits one or more of such person's major life activities;
- (2) a record of having such an impairment; or
- (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)).

The Amendments adopted the same definition of handicap as used in the Rehabilitation Act of 1973. 29 U.S.C. §706(8)(b). Whether the Supreme Court's restrictive ruling under the Americans with Disabilities Act, 42 U.S.C. § 12102(2), that a person whose impairment can be corrected by medication or corrective devices is not disabled is applicable under the Fair Housing Act is as yet undecided. *Sutton v. United Airlines*, 119 S.Ct. 2139 (1999); *Murphy v. United Parcel Service*, 119 S.Ct. 2133 (1999). Similarly, the Supreme Court has held that a disability must have a major impact on the person's ability to perform activities that are of "central importance to daily life" and must be permanent or long-term. *Toyota Motor Mfg. V. Williams*, 534 U.S. 184 (2002).

A requirement that singles out persons with disabilities for special treatment under the Act is illegal. In *Cason v. Rochester Housing Authority*, 748 F.Supp. 1002 (W.D.N.Y. 1990), the Court held that certain public housing regulations that required handicapped housing applicants to prove their ability to live independently violated the Fair Housing Act. The court further held that it was unlawful for the housing authority to inquire into the ability of handicapped persons to live independently absent evidence that the inability created a direct threat to health or the safety of others or would result in physical damage to property.

Section 3604(f)(9) provides that a dwelling not be made "available to an individual whose

tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damages to the property of others.” However, housing providers cannot broadly stereotype disabled persons but must make an individualized decision on whether the person poses a risk of harm or is dangerous. *Wirtz Realty Corp. v. Freund* (Ill. App. 1999) FH/FL ¶18,262; *In re J. W.*, 672 A.2d 199 (N.J.App.1996); *Bangerter v. Orem City Corp.*, 46 F.3d 1491 (10th Cir. 1995).

B. Property Covered

The Civil Rights Act of 1866 (42 U.S.C. §§1981 and 1982) is extremely broad in its coverage. Section 1981 protects the right of all persons to make and enforce contracts free from racial discrimination. Section 1982 protects the rights of citizens to inherit, purchase, lease, sell, hold, and convey real and personal property. The Act covers commercial as well as residential real estate transactions. The Act also covers both public and private discrimination. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). The Civil Rights Act of 1866 is limited, however, to cases of racial discrimination (although some forms of ethnic or national origin discrimination may count as “racial” discrimination under the Act), and Section 1982 on its face protects United States citizens and not persons generally.

The Fair Housing Act (Title VIII, of the Civil Rights Act of 1968, as amended, 42 U.S.C. §3603) applies only to "dwellings" and not to real estate in general, as does the Civil Rights Act of 1866. The Fair Housing Act defines a "dwelling" as:

- (b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

A “dwelling” may be either privately or publicly owned. The term “dwelling” has been broadly construed by the courts and can include any place where a person resides. In *United States v. Hughes Memorial Home*, 396 F. Supp. 544 (W.D.Va.1975), the court defined a “dwelling” as “a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit.” The *Hughes* definition is frequently quoted in the courts. “Dwellings” under the Act include vacation homes, residential hotels, migrant housing, dormitories, nursing homes, group homes, and homeless shelters where persons reside for extended periods of time.

The Fair Housing Act contains several exemptions. (These exemptions are not applicable to actions filed for racial discrimination under the Civil Rights Act of 1866, which again emphasizes why that earlier statute continues to be extremely important in the fight against housing discrimination.) Section 3603(b)(1) exempts from coverage certain sales or rentals by an owner of a single-family house, and section 3603(b)(2) also exempts units in an owner occupied building having no more than four families living independently of each other. These exemptions are

construed very narrowly by the courts and do not apply to any discriminatory notice, statement or advertisement with respect to a sale or rental of property otherwise exempted under 42 U.S.C. §3603(b). Section 3607(a) allows religious organizations to limit or give preference to persons of the same religion in noncommercial dwellings (so long as race is not a factor) and allows private clubs to provide noncommercial lodgings for their members.

The 1988 Amendments to the Fair Housing Act also exempt "housing for older persons" from the prohibitions against familial discrimination, but the exemption does not apply when other types of discrimination are alleged. Hence, senior facilities cannot discriminate on the basis of race, national origin, gender, religion, and especially handicap. Section 3607(b)(2) defines "housing for older persons" as housing:

- (A) provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program); or
- (B) intended for, and solely occupied by, persons 62 years of age or older; or
- (C) intended and operated for occupancy by persons 55 years of age or older and--
 - (i) at least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;
 - (ii) the housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this subparagraph; and
 - (iii) the housing facility or community complies with rules issued by the Secretary for verification of occupancy, which shall --
 - (I) provide for verification by reliable surveys and affidavits; and
 - (II) include examples of the types of policies and procedures relevant to a determination of compliance with the requirement of clause (ii). Such surveys and affidavits shall be admissible in administrative and judicial proceedings for the purposes of such verification.

Subsection (C) was changed by the Housing for Older Persons Act of 1995 to remove some of the uncertainties created by a provision in the 1988 Amendments that required the "existence of significant facilities and services specifically designed to meet the physical and social needs of older persons." The 1995 Amendments also provide for a good faith defense in an action

for monetary damages under this subsection.

The 1988 Amendments contained a grandfather clause that provided that as to categories B and C, housing will qualify as older person housing even if there were persons in the units as of the date of the enactment of the Act who did not meet the age requirements, or if there were unoccupied units, so long as new occupants are required to meet the age requirements of these sections.

State and local laws and ordinances may or may not contain similar exemptions and should be carefully considered when deciding if fair housing rights have been violated.

C. Plaintiffs and Defendants

Anyone injured by a discriminatory practice prohibited by the Fair Housing Act has standing to file a complaint under Sections 3610 and 3613. Standing under the Fair Housing Act extends as far as the Constitution permits under Article III. Thus, in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), the Supreme Court allowed white tenants in a building that excluded minorities to sue to enforce the Fair Housing Act on the ground that the management of the housing project affected "the very quality of their daily lives."

It is not clear whether the same broad standing that applies under the Fair Housing Act will apply under the 1866 Civil Rights Act. But the United States Supreme Court has upheld the standing of a white plaintiff to sue under Section 1982 in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). The white plaintiff was directly injured when he was expelled from membership in a community recreational organization because he had rented property and assigned his membership rights to an African-American. And see *Walker v. Pointer*, 304 F.Supp. 56 (N.D.Tex. 1969), which held that white tenants who were evicted because they entertained black friends could sue under Section 1982.

In *Gladstone Realtors v. Bellwood*, 441 U.S. 91 (1979), the Supreme Court interpreted the Fair Housing Act to uphold the standing of neighborhood residents and a village who sued a realtor that was alleged to have injured the stability of the village by its racial "steering" policies. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Court held that "testers" who are given false information about the availability of housing have standing, and that a fair housing organization that claims that it had "to divert resources" to fight the discrimination alleged against the defendants and that its mission to secure equal access to housing was "frustrated" by the defendants has standing as well. Some lower courts have narrowly interpreted *Havens* to hold that funds expended in litigation are not considered a "diversion of resources."

Although the United States Supreme Court upheld the standing of fair housing organizations and other advocacy groups to bring actions under the Fair Housing Act in *Havens*, it did not, nor could it dispense with the requirement that the organization allege some injury in fact caused by the defendant that can be remedied by the courts, which is the basic minimum required under the Constitution for the federal courts to exercise jurisdiction. Therefore, fair housing

organizations and others must always be clear in expressing the precise injury they have suffered as a result of the defendant's wrongful conduct. Failure to do so may result in the dismissal of the action. (Later in a motion for summary judgment the plaintiff may be required to come forward with evidence to verify the injury alleged, and, of course, at trial an injured party must be prepared to present evidence to support an award of damages.)

Anyone who has engaged in any act of discrimination prohibited by the fair housing laws can be sued. The courts have applied general principles of agency in accessing responsibility under the fair housing laws. *Meyer v. Holley*, 123 S.Ct. 824 (2003). A principal may be liable even if the agent was instructed in writing not to discriminate. *Walker v. Crigler*, 976 F.2d 900, 903-05 (4th Cir. 1992). A corporate structure without more thus will not shield its uninvolved owners from liability.

Discriminatory admissions and other statements made by an agent, in addition to his acts and conduct, are also attributable to his principal. See e.g., *Johnson v. Jerry Pals Real Estate*, 485 F.2d 528 (7th Cir. 1973); *Williamson v. Hampton Management Co.*, 339 F.Supp. 1146 (N.D.Ill. 1972). Such statements are persuasive evidence, since "most persons will not admit publicly that they entertain any bias or prejudice against members of the Negro race." *United States v. Real Estate Development Corp.*, 347 F.Supp. 776, 783 (N.D.Miss. 1972); *Isard v. Arndt*, 483 F.Supp. 261 (E.D.Wis. 1980).

Where an agent discriminates pursuant to direct instructions from his or her principal, both the principal and the agent are liable. *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119, 1120-1121 (7th Cir. 1974). "Following orders" is not a defense. The correlation of this principle is that an employee who is discharged for refusing to discriminate has a cause of action against his former employer. See 42 U.S.C. §3617; *Smith v. Stechel*, 510 F.2d 1162 (9th Cir. 1975).

Government officials can likewise be sued for acts performed in their official capacities, but their liability for damages may be limited by the doctrine of official immunity. See *Yeshiva Chofetz Chain Radim, Inc. v. Wallace*, 98 F.Supp.2d 347 (S.D.N.Y. 2000) (village building inspector and mayor found not to have absolute immunity in fair housing action). Local governmental entities can be sued. See *People Helpers, Inc. v. City of Richmond*, 789 F.Supp. 725, 733 (E.D.Va. 1992); *Smith & Lee Associates v. City of Taylor, Mich.*, 13 F.3d 920, 932 (6th Cir. 1993); 102 F.3d 781, 797-98 (6th Cir. 1996).

D. Prohibited Practices

The Fair Housing Act prohibits a number of practices.

1. Refusals to Make Housing Available

The provisions of the Fair Housing Act broadly prohibit all refusals to sell or rent. Section 3604(a) makes it unlawful "to refuse to sell or rent after the making of a bona fide offer,

or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling because of race, color, religion, sex, familial status or national origin," or because of handicap under 3604(f). It is also illegal to discriminate in the terms, conditions or privileges of sale or rental or in the provision of services and facilities (Section 3604(b)), to advertise in a discriminatory manner (Section 3604(c)), or to misrepresent the availability of a dwelling (Section 3604(d)).

Under the Fair Housing Act it is illegal to put more burdensome application procedures on blacks than on whites. *United States v. Youritan Construction Co.*, 370 F.Supp. 643 (N.D.Cal. 1973), *aff'd as modified*, 509 F.2d 623 (9th Cir. 1975); *Davis v. Mansards*, 597 F.Supp. 334, 343 (N.D.Ind. 1984). Similarly, the failure to provide the same service for black tenants as was formerly provided to white tenants may violate the law. *Concerned Tenants Ass'n. of Indian Trails Apts. v. Indian Trails Apts.*, 496 F.Supp. 522 (N.D.Ill. 1980).

It is unlawful to publish any discriminatory notice, statement of advertisement in regards to housing. This subsection applies even if the property is otherwise exempt under another provision of the statute. Discrimination is determined by the context and the actual impression it creates on the reader or listener. The use of human models in advertising to suggest to the reader that a particular race is preferred in a housing project may also violate the law. *Ragin v. New York Times Co.*, 923 F.2d 995 (2d Cir. 1991), *cert. denied*, 502 U.S. 821 (1991).

Restrictive covenants based on race have been unenforceable in the courts under Section 1982 since the landmark Supreme Court decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948).

Because it is virtually impossible to acquire property without insurance, discrimination by insurance companies in refusing to service certain neighborhoods because of a protected class or refusal to sell to a member of a protected class or on equal terms will violate 3604(a). *NAACP v. American Family Mutual Insurance Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993).

2. Refusals to Make Reasonable Accommodations and Modifications for Persons with Disabilities

The Act specifically requires a landlord or seller, when requested, to make "reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford [handicapped persons] equal opportunity to use and enjoy a dwelling." Section 3604(f)(3)(b). The failure to accommodate is an independent basis for liability under the Fair Housing Act. *Wisconsin Community Services v. City of Milwaukee*, 465 F.3d 737 (7th Cir. 2006).

The Supreme Court has held in other contexts that an accommodation is not reasonable if it imposes "undue financial or administrative burdens." *Southeastern Comm. College v. Davis*, 442 U.S. 397 (1979); *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). Examples of what have been held to be reasonable accommodations are allowing a clinically depressed person to

have a support pet despite a "no pet" policy, providing a convenient parking space for a mobility impaired person even when it requires moving that person to the head of a waiting list, and waiving a "guest" fee if a disabled person needs live-in nursing care.

Even if an accommodation would be costly or burdensome, Section 3604(f)(3)(A) states that a landlord or seller cannot refuse "to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises[.]" See *HUD v. Ocean Sands, Inc.*, FH/FL ¶25,055 (HUD ALJ 1993), where a condominium association was held to have violated the Fair Housing Act when it refused to allow a disabled resident to install a wheelchair lift and walkways and make other minor changes so that the unit would be accessible and to allow him to park a golf cart near his apartment.

The Act contemplates that most questions concerning reasonable accommodations and modifications will be resolved through good faith bargaining between the housing provider and the tenant. *Adam v. Linn-Benton Housing Authority*, 147 F.Supp.2d 1044 (D.Ore. 2001).

3. Accessible New Multi-Family Construction

The Act also requires that certain multifamily dwellings designed or constructed for first occupancy after March 31, 1991 meet defined design and construction requirements to make them accessible to handicapped persons. Section 3604(f)(3)(c). The requirements are minimal and can be met with little or no additional cost if done at the time of construction. They are carefully spelled out in **HUD's Fair Housing Design Manual**, which is available from HUD. Compliance with the manual will be considered by HUD to be compliance with the requirements of the Act.

Anyone responsible for the design or construction of multifamily housing, including architects, developers, and contractors, can be held liable for failure to comply with the Act's requirements. *Baltimore Neighborhoods Inc. v. Rommel Builders, Inc.*, 3 F.Supp.2d 661 (D.Md.1998). Condominium associations may be named as defendants if their presence is necessary to allow the common areas to be retrofitted, even if the condominium association was not in existence at the time the premises were designed or constructed. *Baltimore Neighborhoods Inc. v. Rommel Builders, Inc.*, *supra*. A builder, developer, or architect found guilty of violating the accessibility requirements of the Act can be ordered to retrofit the buildings and units to the extent possible or to establish an escrow account so owners who have already purchased units can retrofit the units in the future. *HUD (Will Grundy Center for Independent Living) v. Perland Corp.*, FH/FL ¶25,136 (HUD ALJ 3/30/98).

Other laws such as the Rehabilitation Act of 1973, 29 U.S.C. §794(a), and the Americans with Disabilities Act of 1990, 42 U.S.C. §12132, should also be consulted if the building has design defects and if it is either a public building or is publicly subsidized.

4. Panic Peddling/Blockbusting

Panic peddling and blockbusting are efforts to induce white homeowners to sell their homes--generally at a reduced price--by telling them that other whites are leaving and that the neighborhood will soon be virtually all black. These practices are illegal under Section 3604(e), and courts have rejected the argument that 3604(e) places an unconstitutional prior restraint on the right to free speech. *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir. 1973).

5. Racial Steering

Racial steering is where a real estate agent steers white persons to one community or area and minorities to another community or area. This practice is specifically prohibited under Section 3604(e) and was recognized as illegal by the Supreme Court in *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

The Seventh Circuit Court of Appeals has held the proof of a discriminatory motive is required in a steering case. *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990). A broker may show he was serving customer preferences so long as the broker was not encouraging those preferences. Thus, evidence that black testers were shown homes in certain neighborhoods and white testers in other neighborhoods will support but will not compel an inference of illegal steering.

6. Exclusionary Zoning

Zoning that operates to exclude a class protected under the law may be illegal. If the attack is grounded on the Constitution, the plaintiff will have the burden of proving purposeful discrimination as defined in the Supreme Court's opinion in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

However, the lower courts have required a lesser standard when the suit is filed under the Fair Housing Act. On remand, in the *Arlington Heights* case, the Seventh Circuit Court of Appeals held that a significant discriminatory effect could establish a violation of the Fair Housing Act. 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978). In a leading case, *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988), the Court held that exclusionary zoning could violate the Fair Housing Act either by a showing that it had a disparate impact on a protected class or by showing that it perpetuated segregation in the community. Although the Supreme Court has never squarely ruled on the issue, virtually every federal court of appeals has applied some aspect of the impact test to exclusionary zoning.

The "Not In My Back Yard" (NIMBY) factor is an unfortunate reality. With the adoption of the 1988 amendments, group homes for the disabled received protection under the Fair Housing Act. Although one court of appeals has held that zoning against the disabled is to be reviewed according to the more deferential rational basis standard used in equal protection cases, *Familystyle of St. Paul v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991), the Act itself does not distinguish between the disabled and other classes protected by the Act, and the same standard of review

should be applied to all classes under the Fair Housing Act. In *Familystyle*, the Court of Appeals upheld an ordinance that required the dispersal of group homes, but other courts have held that such laws unfairly single out group homes for persons with disabilities and unlawfully impose special restrictions on them not applicable to other housing in the community. *Larkin v. Michigan*, 89 F.3d 289 (6th Cir. 1996).

Whether a municipality must reasonably accommodate disabled persons under Section 3604(f)(3)(B) when enforcing otherwise neutral zoning restrictions was left open by the Supreme Court in *City of Edmonds v. Oxford Housing, Inc.*, 115 S.Ct. 1776 (1995). Lower courts have ruled that they must do so. For instance, in *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096 (3rd Cir. 1996), the Court of Appeals held that communities cannot isolate or exclude group homes through unnecessary zoning restrictions. In *Smith Lee v. Taylor*, 102 F.3d 781 (6th Cir. 1996), the Court held that as a reasonable accommodation a city must allow an occupancy of nine, rather than six under the city code, because nine residents were necessary to allow the home to operate profitably and the additional three persons would not fundamentally alter the neighborhood. However, in *Bryant Woods Inn v. Howard County*, 124 F.3d 597 (4th Cir. 1997), the Court refused to allow an expansion from eight to fifteen persons because it was not shown to be necessary nor reasonable.

7. Racial Maintenance Policies

There is no question that once a defendant has been found guilty of discrimination the defendant can be required affirmatively to recruit minorities and, as a temporary measure, to establish a goal for minority-group occupants in order to achieve a proper racial or minority balance. See *Jaimes v. Lucas Metropolitan Housing Authority*, 833 F.2d 1203 (6th Cir. 1987). *Cf. Swan v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). In *Young v. Pierce*, 685 F.Supp. 975 (E.D.Tex. 1982), the Court ordered HUD to implement an affirmative action tenant assignment program, including elective transfers of applicants and tenants from traditional projects to other forms of housing, to rectify the effects of past discriminatory housing practices.

However, in *Walker v. HUD*, 169 F.3d 973 (5th Cir. 1999), the Fifth Circuit Court of Appeals held that it was unconstitutional for a District Court to require the Dallas Housing Authority as a remedy for past discriminatory practices to develop family public housing in predominantly white areas of the city. The Court ruled that the race-conscious order was not narrowly tailored to remedy the effects of past discrimination and segregation. While acknowledging that there was a compelling justification to end segregation in public housing in the city, the Court was not convinced that a racial standard was the only way to ensure that desegregation was accomplished.

Whether a landlord or a municipality that has never been found guilty of discrimination may impose a minority-group occupancy goal in order to maintain a racially balanced community is less clear. *Cf. Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Adarand Construction, Inc. v. Peña*, 115 S.Ct. 2097 (1995). The justification for racial occupancy quotas is based on the so-called "tipping point" phenomenon. Studies generally indicate that depending

upon the situation, when a certain number of blacks move into a previously all-white area, whites will flee and the area will become all-black. These studies indicate that tipping points generally fall in the range of 25 percent to 60 percent black. See Bell, RACE, RACISM AND AMERICAN LAW §8.10.2 (1980). The argument therefore is that if a racially integrated neighborhood is a good end, landlords or municipalities should be allowed to establish either formal or informal "quotas" or take other measures to prevent tipping or maintain a proper racial balance. See Goodwin, THE OAK PARK STRATEGY (1979). Cf. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977).

In *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1140 (2d Cir. 1973), the Court stated that it would uphold a plan to reserve certain apartments to a certain racial group if it could be shown that the action was "essential to promote a racially balanced community and to avoid concentrated racial pockets that will result in a segregated community." However, in *United States v. Starrett City Associates*, 840 F.2d 1096 (2d Cir.), cert. denied, 488 U.S. 946 (1988), and *United States v. Charlottesville Redevelopment and Housing Authority*, 718 F.Supp. 461 (W.D.Va. 1989), the Courts held that a "quota" system designed to achieve racial integration was illegal. The Court in *Starrett* distinguished *Otero* because *Starrett City* imposed a permanent quota whereas *Otero* involved only the initial rental of units in a new building and therefore had a less discriminatory impact.

In *South Suburban Housing Center v. Board of Realtors*, 935 F.2d 868, 884 (7th Cir. 1991), cert. denied, 112 S.Ct. 971 (1992), the Court of Appeals upheld a plan to promote a racial balance through special efforts to interest white buyers in property in a suburban community that had a large black population. The plan included directions to realtors to advertise and distribute information so as to attract potential white buyers to the community. The Court upheld the plan on the ground that the record contained no cases of particular adversely affected black home-buyers or statistical evidence that would indicate intentional invidious discrimination.

8. Financial and Brokerage Service Discrimination

Section 3605 provides that it is unlawful to discriminate in the making of loans or in providing other financial assistance in residential real estate transactions.

Any type of discrimination in the lending of money for home mortgages is illegal under the Fair Housing Act. Predatory practices that single out a protected class are thus illegal. *Honorable v. Easy Life Realty*, 100 F.Supp.2d 885 (N.D.Ill. 2000); *Hargraves v. Capital City Mortgage*, 140 F.Supp.2d 7 (D.D.C. 2000); *Taylor v. McGlawn & McGlawn*, (Penn. Human Rights Commission Oct. 26, 2004), aff'd in part, rev'd in part, 2006 WL 73413 (Comm.Ct.Pa. Jan.13, 2006).

Discrimination may also take the form of a refusal to take or process an individual loan application or it may be in the form of "redlining," a practice where loans or mortgages are refused based upon the character of the neighborhood. *Laufman v. Oakley Bldg. & Loan Co.*, 408 F.Supp. 489 (S.D.Ohio 1976).

Redlining cases are often very difficult to prove because the courts recognize that lenders must be free to consider legitimate business interests by making investments that are economically sound. *Cartwright v. American Savings & Loan Ass'n.*, 880 F.2d 912 (7th Cir. 1989). However, the Justice Department has brought a number of mortgage lending cases that have resulted in comprehensive consent decrees. E.g., *United States v. Decatur Federal*, FH/FL ¶19,377 (N.D. Ga. 1992) (settlement worth more than \$1 million); *United States v. Chevy Chase*, FH/FL ¶19,385 (D.D.C. 1994) (settlement worth more than \$11 million); *United States v. Long Beach Mortgage*, FH/FL ¶19,392 (C.D.Cal. 1996) (settlement worth more than \$4 million). Also, individuals are beginning to be successful in claiming discrimination because they were denied mortgages. *Stevenson v. Town Mortgage*, FH/FL ¶11.2 (E.D.Mich. 1995) (\$130,000 jury award); *Alexander v. Kaye Co.*, FH/FL ¶12.2 (Ga. Superior Ct. 1994) (settlement for interest relief of \$20 Million).

Other statutes may be relevant in mortgage lending cases also. For instance, the Equal Credit Opportunity Act (ECOA) (1974), 15 U.S.C. § 1691 et seq., prohibits discrimination in any credit transaction on the basis of race, color, religion, national origin, sex, marital status, age, receipt of public income or due to the exercise of rights protected by the Act.

A number of cases have now interpreted Section 3604(a) to hold that discriminatory insurance practices violate the Fair Housing Act. *NAACP v. American Family Insurance Co.*, 978 F.2d 287 (7th Cir. 1992), *cert denied*, 113 S.Ct. 2335 (1993) (The case was subsequently settled for \$16 million); *Nationwide Ins. v. Cisneros*, 52 F.3d 1351 (6th Cir. 1995). The impact of law suits against insurance companies for discriminatory practices can be dramatic. In 1998, following a two-week trial, a jury awarded \$500,000 in actual damages and \$100 million in punitive damages against the Nationwide Insurance Company for using a race-based marketing strategy to avoid doing business in predominantly African-American neighborhoods in Richmond, Virginia. The case was subsequently settled for \$17.5 million. FH/FL ¶6.1 (June 1, 2000).

Section 3605 also prohibits discrimination in the making of appraisals. Appraisers cannot use race or other prohibited factors in making an appraisal.

Section 3606 makes it unlawful to discriminate against anyone by denying access to or membership in a multiple listing service or real estate broker's organization.

9. Threats or Retaliation

Section 3617 makes it illegal to interfere, threaten, or coerce persons in the exercise of their fair housing rights. This includes actions by neighbors as well as housing providers who attempt to discourage protected classes from moving into a neighborhood. It also includes acts of retaliation by housing providers against persons who have asserted their rights, regardless whether their original complaint was successful.

Section 2617 can raise First Amendment concerns when the activities complained of

involve petitioning the government or the filing of law suits. A federal appeals court in California has held HUD investigators liable for unreasonably pursuing an investigation into the activities of a neighborhood group that had filed a lawsuit in state court and petitioned a local government to stop a group home from moving into the neighborhood. *White v. Lee*, 337 F.3d 214 (9th Cir. 2000).

II. ALTERNATIVE PROCEDURES UNDER FAIR HOUSING LAWS

Perhaps no area of the law accords a complainant a greater choice of procedures to remedy discrimination than fair housing law. Many states and local governments provide remedies. Federal remedies range from HUD conciliation efforts to federal court litigation. The attorney representing a complainant must be familiar with the choice of remedies and be able to advise the client what remedy is best to pursue under the particular circumstances.

A. State and Local Remedies

Many states and local governments have their own fair housing provisions. Some of these provisions may protect against forms of discrimination not covered by the federal acts. A complainant should always examine the state and local procedures available and make an informed decision as to whether there are advantages to filing directly at the state or local level.

Even if a complainant does not file a state or local charge, a complaint may be referred to a local agency by the United States Department of Housing and Urban Development (HUD). If the complainant has filed a complaint with HUD, HUD will refer the complaint to a state or local agency where the discriminatory practice occurred if the agency has been certified by HUD. Section 3610(f)(1). Certification is given to a state or local agency if the rights, procedures, and remedies are substantially equivalent to those created by the federal Act and if the state makes judicial review available. Section 3610(f)(3). Referral to a state or local agency stays HUD proceedings unless the certified agency fails to act promptly. Section 3610(f)(2).

B. Complaints to HUD

An individual can file a complaint with HUD within one year after the discriminatory practice occurred. The HUD Secretary may also initiate its own complaints. Section 3610(a)(1)(A)(i). HUD then has the duty of providing notice to both the aggrieved party and the respondent. Section 3610(a)(1)(B)(iii). HUD investigators must complete an investigation within 100 days or give reasons in writing why they have failed to do so. Section 3610(a)(B)(iv) and (C). Few HUD investigations are completed in the 100-day period, and the courts have generally held that the requirement is not jurisdictional.

During the investigatory period, HUD must attempt to conciliate the complaint. Section 3610(b). If no conciliation agreement is reached, HUD must prepare a final report at the end of the investigation. Section 3610(b)(5). This report and the information derived from the investigation can be requested by either the complainant or the respondent, but anything said or done in the course of conciliation may not be used in a subsequent proceeding. Section 3610(d).

If no conciliation agreement is reached and if the HUD Secretary determines "reasonable cause," the Secretary must issue a charge. Section 3610(g)(2). If it is determined that there is no "reasonable cause," the charge is dismissed. Section 3610(g)(3).

The advantages of proceeding with the HUD complaint are that the agency will investigate the matter for the complainant and conciliation may result in a binding settlement that will save the aggrieved party from having to proceed through other administrative or judicial procedures. There are, however, disadvantages to the HUD procedures. The investigations are often slow and the complainant has very little control over the quality of the investigation or of the final report.

C. Enforcement by the Justice Department

Temporary Relief

At the request of the HUD Secretary, Justice Department attorneys may file a civil action and seek a temporary restraining order, preliminary injunction or permanent injunction pending the outcome of the HUD investigation. After the HUD charge is filed and the aggrieved party elects for the Justice Department to file a case based on the charge, Department attorneys may seek temporary restraining orders and preliminary and permanent injunctive relief or actual or punitive damages on behalf of the aggrieved party. Section 3614(d). They can also seek a civil penalty against a respondent. Section 3614(d)(1)(C).

Federal Court Action - On Behalf of Complainant

Under the 1988 Amendments to the Fair Housing Act, upon receipt of notice that a HUD charge has been filed, an aggrieved party has 20 days to elect to have the Justice Department file suit on the aggrieved party's behalf in the name of the United States. The Justice Department may also initiate a complaint seeking relief for the aggrieved party. Section 3612(a). The advantage is that the aggrieved party gets a federal trial with free government representation, a jury if requested, and an opportunity for punitive damages. Such representation may possibly give the aggrieved party a heightened status before the federal court. Although the attorney for the aggrieved party may intervene in an election case, the disadvantage is that the government lawyer has mixed loyalties--to the individual and to the government--and the government lawyer may be less sensitive to the client's needs than would be a private lawyer retained by the complainant. However, the Act does allow the aggrieved party to intervene in any suit filed by the Justice Department. Section 3614(e).

Federal Action--Pattern or Practice--Case of Particular Importance

The Justice Department has authority to commence civil actions in federal court in "pattern and practice" cases and cases of particular importance. Section 3614(a). The Justice Department may also go to court when requested by the HUD Secretary for appropriate relief when there has been a breach of a conciliation agreement. Section 3614(b)(2).

D. Trial Before an Administrative Law Judge

After HUD has issued a charge pursuant to Section 3610(g), the aggrieved person may

elect to have the Justice Department file suit or the respondent may elect to have the matter heard in the federal court. If neither party elects to go to federal court, the matter will proceed to trial before an administrative law judge (ALJ). Section 3612(b).

The HUD attorneys will prosecute the case before the HUD ALJ; however, an aggrieved party may intervene as a party. Section 3612(c). Each party may seek representation by private counsel, may present evidence, and may cross-examine witnesses. *Id.* Expedited discovery is permitted. Section 3612(d)(1).

The trial must be held within 120 days following the issuance of the charge unless this is impractical. Section 3612(g)(1). The ALJ may award the aggrieved party actual damages and injunctive relief and also impose civil penalties. Section 3612(g)(3).

The HUD Secretary can review the ALJ's decision, Section 3612(h), and a party aggrieved by a final order can seek judicial review in a court of appeals. Section 3612(i). The HUD Secretary or any party may seek judicial enforcement of a final order when necessary. Section 3612(j) and (m).

The advantage of proceeding before an ALJ is that the time limits imposed by the Act insure that proceedings will be expedited. Also, the ALJs have developed an expertise in fair housing law and practice and their decisions are of a very high quality and are often cited as precedents by the courts. The disadvantages are that parties have less time to prepare a case. Also while civil penalties can be awarded, an ALJ may not award punitive damages. Many lawyers and litigants are unfamiliar with the administrative law process and have elected to go to court rather than proceed before an ALJ. Lawyers should carefully evaluate their options. If they do, more may elect to proceed along the ALJ route.

E. Private Suits in Federal or State Court

An aggrieved party may by-pass the administrative route and file an action directly in federal or state court. The advantages of such a course of action are clear. The aggrieved party and his counsel are in charge. They control discovery and can seek whatever judicial relief is available – interim or permanent. In the end, the judicial process may save time because it is not necessary to wait until HUD completes its investigation. It will also afford the parties a jury trial when the plaintiff seeks damages. Furthermore, the 1988 Amendments removed the cap on the amount of punitive damages that can be recovered in a private civil action. Section 3613(c)(1). The disadvantages are all those that are commonly associated with resort to the judicial process. In addition, HUD ALJs have developed an expertise in fair housing law that may not be possessed by some district court judges.

An aggrieved party has two years following a discriminatory practice to file a civil action in state or federal court. Section 3613(a)(1)(A). A civil action may be filed even though a complaint was filed with HUD under Section 3610(a); however, a civil action may not be filed after HUD has issued a charge and an ALJ has commenced a hearing on the charge. Section

3613(a)(2) and (3). The court may appoint an attorney to represent the plaintiff or the defendant. Section 3613(b)(1). The Attorney General may intervene in the civil action if the Attorney General certifies that the case is of general public importance. Section 3613(e).

The advantage of pursuing a HUD complaint along with the civil suit is that the party has the advantage of the HUD investigation, which may provide useful discovery. However, if the HUD ALJ hearing starts it precludes filing a federal suit thereafter, and a final decision by the ALJ may have res judicata or collateral estoppel effects that will preclude further litigation in the federal court. The commencement of trial in the federal court means that the HUD administrative procedure will be stopped.

A private plaintiff may file suit in federal court to enforce a HUD conciliation agreement. Section 3613(a)(1)(A).

A private civil action may also be filed under the 1866 Civil Rights Act. *Jones v. Alfred H. Mayer*, 392 U.S. 409 (1968), makes clear that Section 1982 is different from and independent of the Fair Housing Act. A plaintiff can recover compensatory and punitive damages as well as injunctive and declaratory relief under the 1866 Act. Furthermore, the 1866 Act does not contain the limitations on who can be sued that are found in the Fair Housing Act. However, the 1866 Act applies only to racial discrimination, and only citizens can enforce Section 1982, although Section 1981 is not limited to suits by citizens. Also, to sue under the 1866 Act, the plaintiff must establish that the defendant's acts were "purposeful." *General Building Contractor's Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375 (1982); *Hamilton v. Svatik*, 779 F.2d 383 (7th Cir. 1985).

The 1866 Act does not contain its own statute of limitations and, therefore, the courts will impose the same limitations as applied to personal injury actions under state law. *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); *Wilson v. Garcia*, 471 U.S. 261 (1985). Thus, depending on state law a plaintiff may have more or less time to file suit under the 1866 Act than the plaintiff has to file a fair housing action.

III. PLEADINGS, REQUESTS FOR EMERGENCY RELIEF, DISCOVERY, AND PROOF OF A PRIMA FACIE CASE

If an aggrieved party elects to pursue a private action in federal court, practice and procedure are governed by the Federal Rules of Civil Procedure. Simple, precise pleadings and prompt action are the watchwords of a fair housing case. In the federal court, notice pleading is all that is required. That means a plain statement of the cause of action. The request for a temporary restraining order and the motion for a preliminary injunction can be made in a simple motion with appropriate supporting affidavits. The request should be allowed if properly presented. If the request for a preliminary injunction is not granted, counsel should be prepared to appeal.

A. Pleadings

The complaint states that the action arises under 42 U.S.C. Section 1982 and/or 42 U.S.C. Section 3604 (or the appropriate section or sections of the Fair Housing Act) and the basis of jurisdiction is 28 U.S.C. Section 1343(4), Section 2201 and/or 42 U.S.C. Section 3613. The complaint names all of the parties and identifies their status and, as appropriate, their race, religion, color, sex, national origin, family status or handicap. It provides the date of occurrence and a representation that plaintiffs are or were ready, willing and able to purchase or rent on the terms and conditions offered to others and a demand for monetary damages. Where appropriate, the plaintiff should allege irreparable damage and request injunctive relief.

At the time of preparation of the complaint in cases where injunctive relief is sought, affidavits of the victim of discrimination should be prepared together with the motion for temporary restraining order and preliminary injunction. A notice of motion, certificate of service, and draft order are completed, and if necessary under local court rules, a short memorandum of law is prepared.

B. Emergency Relief

The key to emergency relief in the federal court is Rule 65 of the Federal Rules of Civil Procedure. Rule 65(b) relates to temporary restraining orders and preliminary injunctions. 42 U.S.C. Section 3613(c) provides for, among other things, the entry of such relief without bond. The district court has broad power to issue injunctive relief.

A temporary restraining order may be issued without actual notice to the defendant and without a hearing. As a practical matter, an effort to give notice of a hearing or a motion for temporary restraining order either by delivering a notice or by telephonic communication is advisable. It may be requested or required by the court. In most instances, the attorney will be required to make a representation that an effort was made to give notice. If the court is not satisfied, the matter may be put over to allow for notice and more time may be lost.

When a temporary restraining order is issued without notice, its duration will be limited to ten days. It is designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction. When actual notice of the hearing for a temporary restraining order is given, the procedure is similar to that for a preliminary injunction, and if there is an adversary hearing, the temporary order may be treated as a preliminary injunction.

Speed is the key to success. Typically a motion for a temporary restraining order may be filed and served on one day and heard the next day at the court's motion call. Defendant's typical response will be to request additional time. Such a request should be resisted and plaintiff should press for entry of an order under 42 U.S.C. Section 3613. Even if opposing counsel gives his word to hold the unit available pending the hearing, the defendant is not an officer of the court and may not be bound by statements of counsel and a bona fide third party is not bound unless a court order is entered.

In the event that the defendant is willing to give the unit at the time of the hearing or

before, the plaintiff should not hesitate to take it. The delivery of the unit does not moot the case nor waive any rights of the plaintiff to damages. *Cash v. Swifton*, 434 F.2d 569 (6th Cir. 1970).

The plaintiff may proceed with a preliminary hearing or seek to consolidate the preliminary hearing with a trial on the merits. However, the plaintiff need not make an election and accept the findings at the preliminary hearing without adequate preparation for trial and discovery. *Pughsley v. 3750 Lake Shore Drive Cooperative*, 463 F.2d 1955 (7th Cir. 1972).

C. Expedited Hearing

The Fair Housing Act formerly provided for an expedited hearing, but this provision was repealed in 1984 through the passage of an omnibus bill amending 28 U.S.C. Section 1657. Section 1657 requires a federal court to expedite civil actions if "good cause" is shown. "Good cause" may be shown in cases involving constitutional and statutory rights.

Where it is necessary under Section 3613 to preserve the plaintiff's ability to rent or buy the property in question through a temporary restraining order or preliminary injunction, Section 1657 provides for expedition of the matter. If the ability to expedite a temporary restraining order or preliminary injunction proceeding is then coupled with the right to consolidate that proceeding with the trial on the merits under Rule 65(a)(2) of the Federal Rules of Civil Procedure, the plaintiff will have effectuated an expedition of the proceedings through the back door. See *Crumble v. Blumthal*, 549 F.2d 462 (7th Cir. 1977); *Williamson v. Hampton Management Co.*, 339 F.Supp. 1146 (N.D.Ill. 1972).

D. Emergency Appeals

If the district judge denies a motion for a preliminary injunction, an emergency appeal can be taken under 28 U.S.C. Section 1292(2)(1).

If a stay is desired while an appeal is pending, a motion must be made first in the district court under Rule 8 of the Federal Rules of Appellate Procedure. Plaintiff's counsel should also order a short record to be filed in the Court of Appeals. A short record will normally consist of the complaint and other relevant pleadings and motions, the order appealed from, and the notice of appeal. The appellant should also request the court of appeals pursuant to Rule 2 of the Federal Rules of Appellate Procedure to waive its formal rules so as to expedite matters.

E. Discovery

The Federal Rules of Civil Procedure govern discovery in a fair housing case filed in federal court.

In most cases discovery should be sought of the defendant's practices and procedures, the ownership of the property, the nature of any principal-agent relationship, any past complaints of

discrimination, statistical information about the composition of the building or the cliental of the defendant, the names and addresses of other applicants, and when punitive damages are sought, the net worth of the defendants. The plaintiff should also request production of all documents that may bear upon the unlawful acts, including sample leases or contracts, logs of phone calls or appointments, and notices or advertisements.

F. Prima Facie Case

In the typical housing discrimination case, the plaintiff has the burden of showing that there was discrimination based upon one of the factors prohibited by the statute. In some cases the discrimination is overt, as when a landlord says he will not allow children to use the recreational facilities. However, most often, plaintiffs are forced to prove discrimination from the circumstances. The court may use a prima facie case formula to test the facts. The question of what is sufficient proof to constitute a prima facie case becomes crucial in the typical "disparate treatment" case where members of one group are treated differently from members of another group.

Courts have held that a plaintiff may establish a prima facie case under the Fair Housing Act by showing:

- a. that the plaintiff is a member of a protected group, e.g., racial minority;
- b. that the plaintiff applied for and was qualified to rent or buy a certain property;
- c. that the plaintiff was rejected; and
- d. that the housing opportunity remained available thereafter.

Phillips v. Hunter Trails Community Association, 685 F.2d 184, 190 (7th Cir. 1982). Once the plaintiff establishes a prima facie case the burden then shifts to the defendant to articulate some non-discriminatory reason for refusing the plaintiff. The plaintiff may then show that this reason is a sham or pretext for discrimination. A court may infer discrimination from the falsity of the defendant's explanation. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (2000).

The maxims that in cases of racial discrimination "statistics often tell much and courts listen" and "nothing is as emphatic as zero" have been applied in Fair Housing cases. *Williams v. Matthews Co.*, 499 F.2d 819, 827 (8th Cir. 1974); *Newbern v. Lake Lorelei, Inc.*, 308 F.Supp. 407, 411 (S.D.Ohio 1968). Thus proof of a landlord's rejection of the plaintiff, coupled with a disproportionately low number of minorities in the defendant's building or complex, should establish a prima facie case of discrimination as a matter of law, thereby shifting the burden to the defendant of justifying the refusal to deal. *Williams v. Matthews Co.*, *supra* at 826-827.

Courts have held that under the Fair Housing Act, a plaintiff need show only that race or other protected status played some part in the refusal to rent. In *Smith v. Sol D. Adler*

Realty Co., 436 F.2d 344, 349-350 (7th Cir. 1970), the Court of Appeals held that "race is an impermissible factor in an apartment rental decision and ... it cannot be brushed aside because it was neither the sole reason for discrimination nor the total factor of discrimination." In the Equal Employment area, the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), held that in a mixed motive case the burden shifts to the defendant to show a non-discriminatory reason for the decision. Congress overturned *Price Waterhouse* in 1991, but did not mention the Fair Housing Act. Some HUD ALJ opinions adopt the *Price Waterhouse* reasoning in Fair Housing cases, rather than adhering to *Smith v. Sol D. Adler*. See *HUD v. Denton* FH/FL ¶25,014 (HUD ALJ 1991) and ¶25,024 (HUD ALJ 1992).

The plaintiff in a suit filed under the Fair Housing Act is not required to prove that the defendant acted with the specific intent of violating the plaintiff's rights; it may be enough to establish a prima facie case if the defendant's practices or policies had the effect or impact of denying housing opportunities to a minority home-seeker in a discriminatory manner or perpetuated segregation. *Williams v. Matthews Co.*, 499 F.2d 819, 828 (8th Cir. 1974); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988). However, the impact test is not available if the proof consists of a mere incidence of discrimination rather than proof of a discriminatory policy or practice. See *Simms v. First Gibraltar Bank*, 83 F.3d 1546 (5th Cir. 1996).

Impact is generally shown by statistics. However, the statistics must be fine tuned. See *Mountain Side Mobile Estates v. HUD*, 56 F.3d 1243 (10th Cir. 1995). Once a discriminatory impact is established, the burden shifts to the defendant to articulate that the policy or practice is required by business necessity. The courts are not in agreement about the standard to establish business necessity in a fair housing case. In the Equal Employment area, the Supreme Court held in *Wards Cove v. Atonio*, 490 U.S. 642 (1989), that a court should not substitute its judgment for that of the employer as to what alternative is best in determining business necessity. Congress overturned this ruling in 1991 in Equal Employment cases without referring to the Fair Housing Act. The HUD Secretary has taken the position that the defendant must show a compelling reason for the policy or practice that has a discriminatory impact. The 10th Circuit Court of Appeals has held that the defendant need only show a manifest relationship between the policy and the practice and the housing in question. *Mountain Side Mobile Estates v. HUD*, 56 F.3d 1243 (10th Cir. 1995). In *Pfaff v. HUD*, 88 F.3d 739 (9th Cir. 1996), the Court of Appeals held in an occupancy standard case that the reasonableness standard should be applied and not one of business necessity to rebut a showing of discriminatory effect.

The Seventh Circuit Court of Appeals in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978), articulated a four factor test to determine if a policy or practice has the effect of perpetuating segregation under the Fair Housing Act:

- a. The strength of the plaintiff's showing of discriminatory effect;
- b. Evidence of the defendant's discriminatory intent (even though the evidence would

be insufficient to establish a case of intentional discrimination);

- c. The defendant's interest in taking the challenged action;
- d. Whether the plaintiff seeks to compel the defendant affirmatively to provide housing or merely to refrain from interfering with others who wish to do so.

In a racial steering case, *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990), the Court of Appeals for the Seventh Circuit discussed the relationship between proof of a discriminatory impact and a discriminatory motive in disparate treatment cases. Analogizing to Title VII employment discrimination cases, the Court held that proof of intentional discrimination was an important element in determining if the plaintiff is to ultimately prevail in a fair housing disparate treatment case. The Court did not disturb the traditional standard for determining a prima facie case in a fair housing case and acknowledged that "effect is probative of intent ... so that an unexplained discriminatory effect may itself support an inference of discriminatory intent[.]" 895 F.2d at 1533. Similarly, in *NAACP v. American Family Insurance Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2335 (1993), the Court of Appeals cautioned that impact alone may not be sufficient to prove a case of insurance redlining. Once a plaintiff shows a discriminatory impact, the defendant must show some business necessity for the restriction although the burden to prove discrimination remains with the plaintiff at all times.

Proof of "purposeful" discrimination is required for violations of the 1866 Civil Rights Act, *General Building Contractors Ass'n. v. Pennsylvania*, 458 U.S. 375 (1982), as well as suits alleging a violation of the equal protection clause of the Fourteenth Amendment. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). However, "purposeful" discrimination can sometimes be established by a "clear pattern unexplainable on grounds other than race." *Arlington Heights*, 429 U.S. at 266. The Supreme Court also indicated in *Arlington Heights* that in an equal protection case, proof that a decision was motivated in part by racial discrimination may not necessarily enable the plaintiff to obtain relief if the defendant can show that the same decision would have resulted without the discrimination. 429 U.S. at 270 n. 21.

IV. REMEDIES AND ATTORNEY'S FEES

Section 3613(c) provides for broad remedies when a civil suit is filed to enforce the Fair Housing Act. A court may award the plaintiff actual and punitive damages and, when appropriate, "any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate)." Under the 1866 Civil Rights Act, a court may "use any available remedy to make good the wrong done." *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969).

A. Injunctive Relief

A court can order a seller or landlord to sell or lease housing or comparable housing when available. *Smith v. Sol D. Adler Realty Co.*, 436 F.2d 344, 350 (7th Cir. 1970).

In cases where a pattern and practice has been proved, the defendant may be required affirmatively to recruit minorities and, as a temporary measure, to establish a goal for minority-group occupants in order to achieve a proper racial or minority balance. *Jaimes v. Lucas Metropolitan Housing Authority*, 833 F.2d 1203 (6th Cir. 1987). In *Young v. Pierce*, 685 F.Supp. 975 (E.D.Tex. 1982), HUD was required to implement an affirmative action plan, including tenant assignments and elective transfers, to remedy past discrimination. In *HUD (Will Grundy Center for Independent Living v. Perland Corp.)*, FH/FL ¶25,136 (HUD ALJ 1998), a HUD ALJ ordered a developer who failed to comply with the accessibility provisions for new multi-family housing to retrofit the buildings and units not yet sold and to establish an escrow account so that owners who already had purchased units could retrofit their units in the future if they desire.

Other affirmative remedies might include posting fair housing signs in real estate offices, requiring real estate salesmen to be trained in their obligations under the fair housing laws, or requiring firms to undergo periodic audits or inspections. The by-word in civil rights cases is that the remedy should fit the violation.

B. Actual and Punitive Damages

The purpose of compensatory damages is to place the plaintiff in the same position as if there had been no injury. *Lee v. Southern Home Sites Corp.*, 429 F.2d 290 (5th Cir. 1970).

One element of compensation is the actual out-of-pocket financial loss suffered by a home-seeker as a direct result of the discriminatory treatment by the defendant. The “proper measure of damages is a comparison between what would have been obtained but for the discrimination . . . and a reasonably comparable dwelling.” *Morgan v. Secretary*, 985 F.2d 1451, 1458 (10th Cir. 1993). In cases where the housing sought has special amenities, location, or other characteristics that cannot be duplicated and are lost to the complainant, HUD ALJs have awarded damages for loss of housing opportunity. See *HUD v. Kelly*, FH/FL ¶25,034 (HUD ALJ 1992); *HUD v. Lashley*, FH/FL ¶25,039 (HUD ALJ 1992). With rare exceptions, such losses will not be substantial in private rental discrimination cases, where, for example, the time and transportation expenses required to find another home and the differences in rents or costs and convenience to work may well be de minimis. But see *Woods-Drake v. Lundy*, 667 F.2d 1198 (5th Cir. 1982); *Miller v. Apartments and Homes of New Jersey, Inc.*, 646 F.2d 101 (3d Cir. 1981).

Courts have recognized that actual damages assessable against a discriminating defendant should include not only the plaintiff's direct financial losses but also compensation for the humiliation and mental anguish suffered. E.g., *Seaton v. Sky Realty Co.*, 491 F.2d 634 (7th Cir. 1974); *Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548 (9th Cir. 1980); *HUD v. Blackwell*, 908 F.2d 864 (11th Cir. 1990).

However, the record must provide a sound basis for an award for humiliation and mental

anguish. *Phillips v. Hunters Trails Comm. Ass'n.*, 685 F.2d 184 (7th Cir. 1982); *Douglas v. Metro Rental Services*, 827 F.2d 252 (7th Cir. 1987). Damages for humiliation will largely depend upon the effectiveness of the testimony of the victim of the discrimination. *HUD v. Blackwell*, 908 F.2d 864 (11th Cir. 1990). Expert testimony, while it may be useful in some cases, is not required. *Human Rights Commission v. LaBrie*, FH/FL ¶18,173 (Vt. 1995); *Johnson v. Hale*, 940 F.2d 1192 (9th Cir. 1991); *Krueger v. Cuomo*, 115 F.3d 487 (7th Cir. 1997); The victim must be carefully prepared to testify because victims of discrimination frequently mask their hurt when they are in public. In appropriate cases, counsel may want to consider using the expert testimony of a sociologist or psychologist to establish the trauma suffered by victims of discrimination. Expert testimony may be especially important to buttress a claim of damages to a professional tester, who might be assumed by laymen to have suffered no actual damage.

If a fair housing organization has been joined as a plaintiff in the suit, it can receive damages because the discrimination frustrated its counseling and referral services, drained its resources and hindered its mission. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Davis v. Mansards*, 597 F.Supp. 334, 343 (N.D.Ind. 1984). The fair housing organization will have to produce evidence of its costs and expert testimony on the operations of fair housing organizations to provide the basis for a substantial award. *Chicago v. Matchmaker Real Estate*, 982 F.2d 1086 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2961 (1993). Similarly, community residents and municipalities that sue for damages due to blockbusting, steering, or other similar activities will have to introduce expert testimony on the social and economic damage to communities caused by discrimination. *Gladstone Realtors v. Bellwood*, 441 U.S. 91 (1979); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

The 1988 Amendments to the Fair Housing Act removed the cap in private civil suits which formerly existed for the awarding of punitive damages. The Act does not articulate what the standards are for awarding punitive damages. In *Smith v. Wade*, 461 U.S. 30 (1983), the Supreme Court held in an action filed under 42 U.S.C. Section 1983 that punitive damages could be awarded upon a finding of reckless or callous disregard of or indifference to the plaintiff's rights. In *Kolstad v. American Dental Ass'n.*, 119 S.Ct. 2118 (1999), the Supreme Court held in an employment discrimination suit under Title VII that the standard is not the "egregious" conduct of the defendant, but whether the defendant acted with knowledge that the action violated the law or with reckless indifference to the plaintiff's rights. This standard has been applied under the Fair Housing Act. *Badami v. Terry Flood*, 214 F.3d 994 (8th Cir. 2000).

Traditionally damage awards in fair housing cases have been low compared to damage awards in comparable areas of tort law. This is now changing and counsel in fair housing cases should pay careful attention to developing a good record to support a large damage award. It is no longer exceptional to have an award or settlement in six figures and a number of awards and settlements have now greatly exceeded one million dollars. Courts and juries need to be educated about the real damage and trauma caused by acts of discrimination so that injured parties can be adequately compensated. Large damage awards send a message to those who discriminate that this type of conduct is no longer legally or socially acceptable and that it must cease.

C. Attorney's Fees

The prevailing party in a fair housing suit is allowed, in the court's discretion, a reasonable attorney's fee under Section 3613(c). Also, if the action is brought under the Civil Rights Acts of 1866, the prevailing party may recover an attorney's fee under the 1976 Civil Rights Attorney's Fees Act. 42 U.S.C. §1988. The Supreme Court has held that absent special circumstances, a prevailing plaintiff should be awarded attorney's fees, but that a prevailing defendant is entitled to attorney's fees only if the suit was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Hensley v. Eckerhart*, 461 U.S. 424 (1983). A considerable body of law has been developed regarding the awarding of attorney's fees under the 1976 Civil Rights Attorney's Fees Act and this law is applicable in fair housing cases. The attorney seeking fees should review cases in the jurisdiction regarding such petitions. Provided good time records have been maintained, a full recovery of fees for time expended can be expected.

D. Civil Penalties

Civil penalties can be imposed upon a respondent in a HUD ALJ proceeding or in a federal action prosecuted by the United States Department of Justice. 42 U.S.C. §§3612(g) and 3614(d). In assessing a civil penalty, the judge will look to the following five factors:

- a. Whether the respondent has previously been adjudged to have committed unlawful housing discrimination;
- b. Respondent's financial resources;
- c. The degree of respondent's culpability;
- d. The nature and circumstance of the violation;
- e. The goal of deterrence.

See *HUD v. Colclasure*, FH/FL ¶25,134 (HUD ALJ 1998).

CONCLUSION

This Primer on Fair Housing Law provides the keys to further access to Fair Housing Law. Your John Marshall Law School Fair Housing Legal Support Center stands ready to assist you in further study and in particular cases with pleadings, briefs and assistance in planning and preparing cases.

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