

Types Of Proof Of Discrimination Under The Fair Housing Act

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In the previous two articles in the *Apartment News*, an analysis of the different types of discrimination claims was provided. In this article, the types of proof will be discussed in both intentional discrimination and those cases alleging that the conduct by the management company had a discriminatory affect.

While it is difficult to discuss all of the types of sources of proof and witnesses that might be relevant in a fair housing case, there are some categories of proof, which are generally utilized in order to establish a claim of discrimination. First "testers" have been utilized in fair housing cases for quite some time. Generally, in a case involving alleged racial discrimination, a white tester will attempt to determine if a landlord will treat him more favorably than a similarity situated black applicant who also sought the residence. A number of courts have commented that such evidence constitutes a critical element of proof in fair housing cases. Even if the tester may be employed by a fair housing organization, a number of courts have commented that this affiliation should not impair his credibility as a witness.

Another source of evidence against a landlord can come from incriminating statements made by the defendant and any of their agents. A statement made by the defendant concerning its discriminatory practices will be admissible in a fair housing case and any such statements made by the defendant's agent will be attributed to the principle. Consequently, a leasing agent's statement which could be construed as a discriminatory statement can be held against his/her employer. This statement could be made either to a plaintiff, a tester, to an employee or resident of the apartment complex or to some other disinterested third party. Evidence of such statements is difficult to overcome and usually show the unlawful discriminatory motive. Also, evidence pertaining to the defendant's business practices can come from the defendant or its employees and can be used to establish that the defendant's complex is being operated on some type of discriminatory basis. Many times former employees are located and may provide testimony against their former employer.

Agency investigations and findings may also be used by a plaintiff in a fair housing case. If investigators for HUD and/or state or local agencies have been involved in the investigations, they may be allowed in court to testify what they were told about the alleged discrimination by the defendant and its employees. In a HUD investigation, while evidence develops during the course of a conciliation of a HUD complaint cannot be utilized in court, the final HUD investigation and investigative report may be a source of admissible evidence if the matter proceeds to a contested trial. This can be very damaging evidence as the report may include conclusions and/or opinions concerning the merits of the fair housing complaint.

Even evidence of other specific incidents where the defendant has allegedly discriminated against individuals other than the complaining party may be used in court to establish that the defendant intentionally discriminated against this plaintiff. Generally, evidence of such other incidents are not considered legally relevant and cannot be considered in evidence in a case but in fair housing cases such evidence has been utilized to establish discrimination.

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The plaintiff or complaining party, complainant, may also bring forward statistical evidence to attempt to establish the defendant's discriminatory conduct. Some courts have even permitted an inference to be drawn of illegal racial discrimination if the defendant had not sold or rented to a black individual previously. Potentially, the courts have adopted a "minority under representation"

approach to statistical evidence of discrimination. If the percentage of minorities in the defendant's apartment complex is substantially lower than the percentage of qualified minorities in the local market place, courts have considered this to be "a telltale sign of purposeful discrimination." Consequently, the racial mix of those who have made application to live at the complex is not the primary focus but the actual results received in the racial mix at the apartment complex.

Another source of evidence has been so called "expert witnesses" which can include demographers, sociologists, economists and others whose special knowledge may be helpful in establishing the background of the plaintiff's claim.

The final source of proof in fair housing cases which deserve some discussion is proof of the defendant's failure to comply with fair housing regulations. An example would be those apartment complexes which receive certain types of federal financial assistance and consequently are required to display a fair housing poster in their offices, to have a marketing plan for advertising of non-discrimination but fail to carry out these requirements. In one case, a section eight landlord's failure to comply with these affirmative duties was referenced by the court as evidence of its racial discrimination in violation of the fair housing statutes.

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