

Mixed Motive Cases: Intentional Discrimination Under The Fair Housing Act?

The Adler court found: "Race is an impermissible factor in an apartment rental decision and that it cannot be brushed aside because it was neither the sole reason for discrimination nor the total factor of discrimination. We find no acceptable place in the law for partial racial discrimination."

In last month's Apartment News article, we examined the intentional discrimination cases known as "pretext" cases whereby the plaintiff alleges that the defendant/landlord intentionally discriminated based upon some prohibited form of discrimination. In this article we will discuss the cases in which evidence establishes both legitimate and illegitimate considerations which motivated the defendant in their decision making process. The issue in these "mixed motive" cases becomes whether the Fair Housing Act prohibits housing decisions based only in part on a prohibited motive. The United States Supreme Court has recognized a distinction between these types of intentional discrimination cases in employment discrimination claims, so the precedent developed under that body of law must be examined to analyze this type of discrimination claim.

It is apparent that housing decisions are often made for a variety of reasons. A landlord may reject a hispanic applicant because the landlord may prefer not to rent to hispanics and because he legitimately has a question about the hispanic applicant's ability to pay rent. In such a mixed motive case, the applicability of the Fair Housing Act depends on die court's interpretation as to whether a prohibited consideration is the sole or decisive reason that the landlord rejected the applicant or whether liability can be established merely because the unlawful consideration was one of the factors motivating the landlord's decision. While the Supreme Court has yet to specifically address this issue in the context of the Fair Housing Act, a number of lower federal courts have addressed this issue. One of the early cases came in 1970 in a case entitled *Smith Y. SO Q. Adler Realty Company* where the Court of Appeals ruled against a landlord who possessed a valid, non-racial excuse for rejecting the applicant, but who "did not want to rent to her because she was colored."

Almost all or the appellate decisions after this decision held that race need be only one of the factors considered by the defendant/landlord to establish a violation of the Fair Housing Act. These decisions have found that the applicant need not how that the defendant/landlord was motivated solely by unlawful considerations.

An employment discrimination case in 1989 heard by the United States Supreme Court (*Price Waterhouse v. Hopkins*) concerned the standard for "mixed motive" cases in the employment discrimination arena. The court took the opinion that the statute was "meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." Consequently, the plaintiff's burden of proof is satisfied if the evidence shows that the employer relied on any lawful consideration in making its decision. However, the court went on to state the employer should not be liable if it can be established that if it had not taken the illegal consideration into account it it would have made the same decision. The burden shifts the employer to establish this defense. This shifting of the burden of proof is the key difference between these "mixed motive" cases and the "pretext" cases discussed in last month's article.

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The question then becomes does the *Price Waterhouse* decision apply to fair housing cases? While the answer cannot be definitive because the U.S. Supreme Court has not addressed this issue, it appears that the answer is in the affirmative. Most of the decisions that have addressed this issue have been by lower federal courts which have adopted the *Price Waterhouse* approach. In conclusion, a plaintiff alleging fair housing violation in a "mixed motive" case will be able to shift the burden of persuasion to the defendant/landlord by showing that the challenged housing decision was motivated in part by an unlawful consideration. Liability will then be imposed upon the defendant/landlord unless it can prove by a preponderance of the evidence that it would have taken the same action even in the absence of this illegitimate consideration. If the defendant/landlord can establish this by evidence in court, there would be no liability under the Fair Housing Act.

By Scott M. Clark, Esq.

3008 N. 44th Street, Phoenix, AZ 85018
602.957.7877

sclark@scottclarklaw.com

<http://www.scottclarklaw.com>

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