

The State of Fair Housing

In its most recent report on the state of fair housing, the United States Department of Housing and Urban Development (HUD) has concluded that housing discrimination – while not as blatant as it was when the Fair Housing Act was amended in 1988 – is still alive and well in the United States.

HUD, of course, oversees enforcement of the federal fair housing act, which prohibits discrimination because of an individual's race, color, religion, sex, national origin, familial status and disability. Its most recent statistics show that for reporting year 2009 (the most recent data available), HUD and its certified state and local governmental agencies continued to take in record numbers of fair housing complaints, and that an increasingly large percentage of them resulted either in settlements or determinations that "there was reasonable cause to believe that discrimination had occurred."

Although part of this trend has resulted from HUD's more aggressive recent approach to investigations and enforcement, not all of this can be attributed to those causes. A four-year picture of fair housing enforcement shows a steady upward trend in many areas, signifying both a more sophisticated approach to fair housing enforcement by the investigating agencies and an increased public awareness of fair housing rights.

Trends in Fair Housing Complaints

For the last four years, claims of race discrimination and disability discrimination have represented more than two-thirds of the complaints that HUD and its state and local agencies receive. While 2009 showed a significant reduction in race-based allegations (from 37% to 31% in the last four years), this has been offset by a steady stream of disability-based complaints and an increase in familial status claims. In all three areas, people are less likely to complain about a refusal to rent than they are about the terms and conditions of their tenancies.

For this reason, HUD's attention has been increasingly on such issues as a failure to make reasonable accommodations, restrictive rules and regulations, harassment, and differential treatment in things such as deposits, rule enforcement and provision of services. Harassment has also figured prominently in sex discrimination claims, which began showing a steep increase about five years ago, and now remains steady at ten percent of all complaints filed with HUD.

Another significant increase in complaints has been the result of advertising, notices and statements reflecting a bias in the conditions of rental. Properties

that once listed their vacancies only in newspaper advertisements now advertise on Craigslist or by means of other Internet-based forums, including websites. These provide an astonishing opportunity for potential discrimination complaints. Discriminatory provisions that were once screened out by careful editors are now carelessly published in cyberspace. In addition, HUD has taken a more proactive approach to advertisements, concluding that “advertising” is not limited to what is written but also includes discriminatory statements – or other statements indicating a preference or bias - that come out of the mouths of leasing agents, maintenance supervisors, and others with the power to affect the living conditions of residents.

Fair Housing Enforcement

The Fair Housing Act establishes two enforcement mechanisms: “aggrieved persons” can either file an administrative complaint with HUD or one of its state or local governmental partners and have the complaint investigated; or they can go directly to court to enforce fair housing rights. If they choose the former option and HUD concludes that it is more likely than not that discrimination occurred, HUD or the state/local partner will either “charge” a case and take it before an administrative law judge, or will file a lawsuit on behalf of the person aggrieved. Complainants also have the opportunity to opt out of the administrative law judge procedure and go directly to state or federal court.

Ten years ago almost all housing discriminating complaints were investigated under either a “disparate treatment” or a “reasonable accommodation” model. Under “disparate treatment,” a complainant had to demonstrate that a person of a different group (race, national origin, etc.) was treated more favorably before HUD would conclude that discrimination had occurred.

Over the last few years, HUD’s approach to investigations has become more holistic and it is rapidly catching up with its employment counterpart, the federal Equal Employment Opportunity Commission (EEOC), in employing a full range of tools and analytical models when evaluating complaints. In addition to its usual standbys, HUD has increasingly focused – and signaled an intent to continue to focus – on alternative models such as “disparate impact,” “harassment,” and (especially for recipients of federal funding) “failure to affirmatively further fair housing.” For federally funded properties, HUD is also closely scrutinizing a property’s compliance with limited English proficiency regulations, on the grounds that a failure to comply with those regulations significantly disadvantages non-English speakers.

The last two years have also seen HUD provide significant additional funding to its non-profit partners so that they can engage in increased testing for fair housing violations. When tests reveal potentially discriminatory conduct HUD will accept tester complaints and proceed even when there is no specifically identifiable victim of the purported discrimination. Again the testers also have the

opportunity to bypass the administrative investigation and to bring lawsuits in their own name to enforce the Fair Housing Act. In the last couple years, for example, HUD-partner National Fair Housing Alliance has used testing funds to engage in systemic investigations of housing providers and mortgage lenders that ultimately resulted in multi-million dollar settlements of complaints that were never even filed administratively with HUD. In some of those cases HUD and its litigation partner, the United States Department of Justice, intervened in the litigation to pressure communities into much more comprehensive settlements than the plaintiff could have achieved acting alone.

New Issues to Watch For

In spring 2010 HUD directed its local offices and state and local partners to begin keeping statistics and developing a protocol for dealing with complaints of discrimination on the basis of sexual orientation, sexual preference, and sexual identity. Under guidance issued in July 2010 those offices were advised that when an individual attempted to complain about discrimination on these bases, the agency was to (a) carefully review the complaint to see whether it could be shoe-horned into an allegation of discrimination on a basis already covered by the Fair Housing Act; (b) if not, refer the complainant to a state or local agency that had jurisdiction over such complaints; and (c) keep statistics about the number and kind of complaints that came in on these subjects.

HUD also directed its local offices to start keeping statistics about complaints involving source of income discrimination. Traditionally source of income discrimination has referred to discrimination against persons because they receive some form of federal, state or local income or subsidy such as Veterans benefits, SSI, SSDI and Section 8 benefits.

In its report on the state of Fair Housing, HUD has indicated that it plans to ask Congress to amend the Fair Housing Act to incorporate both of these bases as additional protected classes under the law.

HUD has also indicated that it is in the process of drafting a regulation to “reaffirm the longstanding legal requirement that HUD recipients affirmatively further fair housing.” This regulation, which should be published no later than early 2011, will put the onus on federal funding recipients to demonstrate that they are affirmatively removing barriers that have traditionally resulted in segregated and unequal housing opportunities. Over the last two years, HUD has participated in three lawsuits alleging that communities failed to meet these obligations and sought to terminate federal assistance in the form of CDBG grants, HOPE VI housing, and similar monies – and require repayment of funds previously provided – unless the communities took affirmative steps to reverse past policies.

Finally there has been increasing efforts over the last two years by HUD and HUD-funded non-profits to challenge the way that properties select applicants and the effect that facially neutral rules and regulations have on members of protected groups. These claims – called disparate impact claims – focus on the effect of a rule rather than the enforcement of it. Using employment-based analytical models and statistics, these cases contend that even facially non-discriminatory rules can have the effect of excluding or discriminating against members of some protected groups, and that when that exclusion or discrimination occurs the rule itself is discriminatory even if there was no intent by the property to discriminate. Some of the situations where these claims have been made include refusal to accept money orders as payment for rent and fees; providing discounts to lessees who pay electronically; refusal to rent to persons who have certain arrest and conviction records; and refusal to accept Section 8 vouchers.

What Steps Can Properties Take to Avoid Liability?

It is clear from experience and from statistics that properties cannot always avoid fair housing complaints under all circumstances. There will always be some disgruntled resident or applicant who goes to HUD or its affiliates believing that he/she has been treated unfairly for discriminatory reasons. In FY 2009, thirty-four percent (34%) of these discrimination complaints were closed with a “no reasonable cause determination” and a quarter of them were dismissed administratively. Providing a prompt, thorough and well-founded response early on significantly increases the likelihood of a positive resolution for properties.

Even a prompt and thorough response, however, will not prevail unless the property has taken all appropriate measures to ensure that it is in full compliance with the fair housing laws. A proactive preparation must include all of the following: regular, thorough fair housing training for all employees, regardless of position; awareness of new issues as they develop; annual reviews of leases, rules, policies and procedures to ensure that they reflect full compliance with current and emerging fair housing laws and issues; and inflexible enforcement of policies, practices and procedures to ensure that fair housing is the only way that business is conducted.