

An Introduction to Fair Housing



HOUSING JUSTICE

National Housing Law Project

Topics for Today



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

The Fair Housing Act



Fair Housing Act: What Does it Do?



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

Fair Housing Act: Who Does it Protect?



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

Note: FHA and Other Historically Underserved Groups



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

Fair Housing Act: Where Does it Apply?



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

Fair Housing Act: How is it Enforced?



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

FHA Theories of Liability



Disparate Treatment



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

Disparate Treatment (cont.)



- To prove disparate treatment under the FHA, a plaintiff must provide evidence of the defendant's discriminatory intent.
- Plaintiff can accomplish this by:
 - Providing direct evidence of discrimination or
 - Demonstrating a prima facie case of discrimination

See generally Pacific Shores v. City of Newport Beach, 730 F.3d 1142 (9th Cir. 2013).
- If the plaintiff shows a prima facie case, then defendant must provide legitimate, nondiscriminatory reason for the action. If defendant does so, plaintiff must then show that defendant's reason was pretextual.

Discriminatory Effects



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

Disparate Impact



- Arises when there is a neutral practice or policy that disproportionately impacts a protected class. Plaintiffs who allege discriminatory effects do not have to show discriminatory intent.
- Theory affirmed by *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

Perpetuation of Segregation



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

HUD Discriminatory Effects Rule



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

HUD Discriminatory Effects Rule (Cont.)



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

Affirmatively Furthering Fair Housing



Obligation to Affirmatively Further Fair Housing



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

AFFH Final Rule

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- Issued in July 2015
 - Effective date: August 17, 2015
 - Federal Register: 80 Fed. Reg. 42,272 (July 16, 2015)
- Amends a series of HUD regulations to create a new fair housing analysis framework
- Two HUD AFFH websites:
 - Website for general public
 - Website aimed at HUD grantees, but still has useful information for advocates (fact sheets, FAQs, etc.)
- Implementation will be staggered.

AFFH Final Rule – Key Features

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- Stresses a balanced approach
 - Place-based AND mobility strategies
- Replaces the AI with the Assessment of Fair Housing (AFH)
 - Structured process with HUD review for all AFHs
- Incorporates fair housing planning into broader planning processes (e.g., PHA Plan, Consolidated Plan)
- Encourages (and relies upon) community participation
- Seeks more meaningful and effective fair housing planning through the provision of data
 - Includes data on education, transportation, employment, and the environment
- Encourages collaboration among HUD grantees
- Requires local AND regional thinking and data analysis

Resources



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